

**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

**REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING**

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By the Commission: Chairman Genachowski and Commissioners Copps and Clyburn issuing separate statements; Commissioner McDowell approving in part, concurring in part and issuing a statement.

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## I. INTRODUCTION

1. Today the Commission comprehensively reforms and modernizes the universal service and intercarrier compensation systems to ensure that robust, affordable voice and broadband service, both fixed and mobile, are available to Americans throughout the nation. We adopt fiscally responsible, accountable, incentive-based policies to transition these outdated systems to the Connect America Fund, ensuring fairness for consumers and addressing the communications infrastructure challenges of today and tomorrow. We use measured but firm glide paths to provide industry with certainty and sufficient time to adapt to a changed regulatory landscape, and establish a framework to distribute universal service funding in the most efficient and technologically neutral manner possible, through market-based mechanisms such as competitive bidding.

2. One of the Commission’s central missions is to make “available ... to all the people of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”<sup>1</sup> For decades, the Commission and the states have administered a complex system of explicit and implicit subsidies to support voice connectivity to our most expensive to serve, most rural, and insular communities. Networks that provide only voice service, however, are no longer adequate for the country’s communication needs.

3. Fixed and mobile broadband have become crucial to our nation’s economic growth, global competitiveness, and civic life.<sup>2</sup> Businesses need broadband to attract customers and employees, job-seekers need broadband to find jobs and training, and children need broadband to get a world-class education. Broadband also helps lower the costs and improve the quality of health care, and enables people with disabilities and Americans of all income levels to participate more fully in society. Community anchor institutions, including schools and libraries, cannot achieve their critical purposes without access to robust broadband. Broadband-enabled jobs are critical to our nation’s economic

<sup>1</sup> 47 U.S.C. § 151.

<sup>2</sup> See Federal Communications Commission, *Connecting America: The National Broadband Plan*, at xi, 3 (rel. Mar. 16, 2010) (National Broadband Plan).

recovery and long-term economic health, particularly in small towns, rural and insular areas, and Tribal lands.

4. But too many Americans today do not have access to modern networks that support broadband. Approximately 18 million Americans live in areas where there is no access to robust fixed broadband networks.<sup>3</sup> And millions of Americans live, work, or travel in areas without access to advanced mobile services. There are unserved areas in every state of the nation and its territories, and in many of these areas there is little reason to believe that Congress's desire "to ensure that all people of the United States have access to broadband capability"<sup>4</sup> will be met any time soon with current policies.

5. The universal service challenge of our time is to ensure that all Americans are served by networks that support high-speed Internet access—in addition to basic voice service—where they live, work, and travel. Consistent with that challenge, extending and accelerating fixed and mobile broadband deployment has been one of the Commission's top priorities over the past few years. We have taken a series of significant steps to better enable the private sector to deploy broadband facilities to all Americans. The Commission has provided the tools to promote both wired and wireless solutions by offering new opportunities to access and use spectrum,<sup>5</sup> removing barriers to infrastructure investment,<sup>6</sup> and developing better and more complete broadband and spectrum data.<sup>7</sup> Today's Order focuses on costly-to-serve communities where even with our actions to lower barriers to investment nationwide, private sector economics still do not add up, and therefore the immediate prospect for stand-alone private sector action is limited. We build on the Rural Utilities Service's (RUS's) Broadband Initiatives Program (BIP) and the National Telecommunications and Information Administration's (NTIA's) Broadband Technology Opportunities Program (BTOP),<sup>8</sup> through which Congress appropriated over \$7 billion in

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<sup>3</sup> See National Broadband Map, *available at* <http://www.broadbandmap.gov>. Based on data as of December 2010, there are an estimated 18.8 million Americans that lacked access to terrestrial fixed broadband services with a maximum advertised download speed of at least 3 Mbps and a maximum advertised upload speed of at least 768 kbps. For these purposes, terrestrial fixed broadband technologies include xDSL, other copper, cable modem, fiber to the end user, fixed wireless, whether licensed or unlicensed, and electric power line.

<sup>4</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 516, § 6001(k)(2)(D), (Recovery Act).

<sup>5</sup> See, e.g., *Unlicensed Operation in the TV Broadcast Bands*, ET Docket Nos. 04-186, 02-380, Second Memorandum Opinion and Order, 25 FCC Rcd 18661 (2010); *Amendment of Part 27 of the Commission's Rules To Govern the Operation of Wireless Communications Services in the 2.3 GHz Band*, WT Docket No. 07-293, IB Docket No. 95-91, GN Docket No. 90-357, RM-8610, Report and Order, 25 FCC Rcd 11710 (2010) (removing technical impediments to mobile broadband for Wireless Communications Service at 2.3 GHz, freeing up 25 MHz of spectrum).

<sup>6</sup> See *Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (rel. Apr. 7, 2011); *The FCC's Broadband Acceleration Initiative; Reducing Regulatory Barriers To Spur Broadband Buildout*, Public Notice, 2011 WL 466770 (Feb. 9, 2011) (*available at* [http://www.fcc.gov/Daily\\_Releases/Daily\\_Business/2011/db0209/DOC-304571A2.pdf](http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/DOC-304571A2.pdf)).

<sup>7</sup> See *Measuring Broadband America, A Report on Consumer Wireline Broadband Performance in the U.S.*, FCC's Office of Engineering and Technology and Consumer and Governmental Affairs Bureau, 2011 WL 3343075 (Aug. 2, 2011) (*Measuring Broadband America Report*); *Modernizing the FCC Form 477 Data Program*, WC Docket Nos. 11-10, 07-38, 08-190, 10-132, Notice of Proposed Rulemaking, 26 FCC Rcd 1508 (2011) (*Modernizing Form 477 NPRM*); Press Release, Commission Announces "Beta" Launch of Spectrum Dashboard (Mar. 17, 2010) (*available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296942A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296942A1.doc)).

grants and loans to expand broadband deployment and adoption in unserved and underserved areas. We also build on federal and state universal service programs that have supported networks in rural America for many years.

6. Our existing universal service and intercarrier compensation systems are based on decades-old assumptions that fail to reflect today's networks, the evolving nature of communications services, or the current competitive landscape. As a result, these systems are ill equipped to address the universal service challenges raised by broadband, mobility, and the transition to Internet Protocol (IP) networks.

7. With respect to broadband, the component of the Universal Service Fund (USF) that supports telecommunications service in high-cost areas has grown from \$2.6 billion in 2001 to a projected \$4.5 billion in 2011, but recipients lack any obligations or accountability for advancing broadband-capable infrastructure. We also lack sufficient mechanisms to ensure all Commission-funded broadband investments are prudent and efficient, including the means to target investment only to areas that require public support to build broadband. Due in part to these problems, a "rural-rural" divide persists in broadband access—some parts of rural America are connected to state-of-the-art broadband, while other parts of rural America have no broadband access, because the existing program fails to direct money to all parts of rural America where it is needed.

8. Similarly, the Fund supports some mobile providers, but only based on cost characteristics and locations of wireline providers. As a result, the universal service high-cost program provides approximately \$1 billion in annual support to wireless carriers, yet there remain areas of the country where people live, work, and travel that lack even basic mobile voice coverage, and many more areas that lack mobile broadband coverage. We need dedicated mechanisms to support mobility and close these gaps in mobile coverage, and we must rationalize the way that funding is provided to ensure that it is cost-effective and targeted to areas of need.

9. The intercarrier compensation (ICC) system is similarly outdated, designed for an era of separate long-distance companies and high per-minute charges, and established long before competition emerged among telephone companies, cable companies, and wireless providers for bundles of local and long distance phone service and other services. Over time, ICC has become riddled with inefficiencies and opportunities for wasteful arbitrage. And the system is eroding rapidly as consumers increasingly shift from traditional telephone service to substitutes including Voice over Internet Protocol (VoIP), wireless, texting, and email. As a result, companies' ICC revenues have become dangerously unstable, impeding investment, while costly disputes and arbitrage schemes have proliferated. The existing system, based on minutes rather than megabytes, is also fundamentally in tension with and a deterrent to deployment of IP networks. The system creates competitive distortions because traditional phone companies receive implicit subsidies from competitors for voice service, while wireless and other companies largely compete without the benefit of such subsidies. Most concerning, the current ICC system is unfair for consumers, with hundreds of millions of Americans paying more on their wireless and long distance bills than they should in the form of hidden, inefficient charges. We need a more incentive-based, market-driven approach that can reduce arbitrage and competitive distortions by phasing down byzantine per-minute and geography-based charges. And we need to provide more certainty and predictability regarding revenues to enable carriers to invest in modern, IP networks.

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<sup>8</sup> See USDA Rural Development—UTP Broadband Initiatives Program Main, [http://www.rurdev.usda.gov/utp\\_bip.html](http://www.rurdev.usda.gov/utp_bip.html); NTIA, BROADBAND TECHNOLOGY OPPORTUNITIES PROGRAM, EXPANDING BROADBAND ACCESS AND ADOPTION IN COMMUNITIES ACROSS AMERICA, OVERVIEW OF GRANT AWARDS (2010) (available at [http://www.ntia.doc.gov/reports/2010/NTIA\\_Report\\_on\\_BT0P\\_12142010.pdf](http://www.ntia.doc.gov/reports/2010/NTIA_Report_on_BT0P_12142010.pdf)).

10. Under these circumstances, modernizing USF and ICC from supporting just voice service to supporting voice and broadband, both fixed and mobile, through IP networks is required by statute. The Communications Act directs the Commission to preserve and advance universal service: “Access to advanced telecommunications and information services should be provided in all regions of the Nation.”<sup>9</sup> It is the Commission’s statutory obligation to maintain the USF consistent with that mandate and to continue to support the nation’s telecommunications infrastructure in rural, insular, and high-cost areas. The statute also requires the Commission to update our mechanisms to reflect changes in the telecommunications market. Indeed, Congress explicitly defined universal service as “an evolving level of telecommunications services . . . taking into account advances in telecommunications and information technologies and services.”<sup>10</sup> More recently, Congress required the Commission to report annually on the state of broadband availability, and to develop the National Broadband Plan, “to ensure that all people of the United States have access to broadband capability.”<sup>11</sup>

11. Upon the release of the National Broadband Plan last year, the Commission said in its Joint Statement on Broadband, “[USF] and [ICC] should be comprehensively reformed to increase accountability and efficiency, encourage targeted investment in broadband infrastructure, and emphasize the importance of broadband to the future of these programs.”<sup>12</sup> Consistent with the Joint Statement and the Broadband Plan, we proposed in the *USF/ICC Transformation NPRM* to be guided in the USF-ICC reform process by the following four principles, rooted in the Communications Act:<sup>13</sup>

- *Modernize USF and ICC for Broadband.* Modernize and refocus USF and ICC to make affordable broadband available to all Americans and accelerate the transition from circuit-switched to IP networks, with voice ultimately one of many applications running over fixed and mobile broadband networks. Unserved communities across the nation cannot continue to be left behind.
- *Fiscal Responsibility.* Control the size of USF as it transitions to support broadband, including by reducing waste and inefficiency. We recognize that American consumers and businesses ultimately pay for USF, and that if it grows too large this contribution burden may undermine the benefits of the program by discouraging adoption of communications services.
- *Accountability.* Require accountability from companies receiving support to ensure that public investments are used wisely to deliver intended results. Government must also be accountable for the administration of USF, including through clear goals and performance metrics for the program.
- *Incentive-Based Policies.* Transition to incentive-based policies that encourage technologies and services that maximize the value of scarce program resources and the benefits to all consumers.

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<sup>9</sup> 47 U.S.C. § 254(b)(2).

<sup>10</sup> *Id.* § 254(c)(1).

<sup>11</sup> Recovery Act, 123 Stat. at 516.

<sup>12</sup> *Joint Statement on Broadband*, GN Docket No. 10-66, Joint Statement on Broadband, 25 FCC Rcd 3420, 3421 (2010).

<sup>13</sup> *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, 4560-61 (2011) (*USF/ICC Transformation NPRM*).



We have also sought to phase in reform with measured but certain transitions, so companies affected by reform have time to adapt to changing circumstances.

12. There has been enormous interest in and public participation in our data-driven reform process.<sup>14</sup> We have received over 2,700 comments, reply comments, and ex parte filings totaling over 26,000 pages, including hundreds of financial filings from telephone companies of all sizes, including numerous small carriers that operate in the most rural parts of the nation. We have held over 400 meetings with a broad cross-section of industry and consumer advocates. We held three open, public workshops, and engaged with other federal, state, Tribal, and local officials throughout the process. We are appreciative of the efforts of many parties, including the State Members of the Federal-State Universal Service Joint Board, to propose comprehensive solutions to the challenging problems of our current system.

13. The reforms we adopt today build on the input of all stakeholders, including Tribal leaders, states, territories, consumer advocates, incumbent and competitive telecommunications providers, cable companies, wireless providers (including wireless Internet service providers – WISPs), satellite providers, community anchor institutions, and other technology companies. We have taken a holistic view of the entire record, and have adopted—though often with modifications designed to better serve the public interest—a number of elements from various stakeholder proposals.

14. Our actions today will benefit consumers. In rural communities throughout the country our reforms will expand broadband and mobility significantly, providing access to critical employment, public safety, educational, and health care opportunities to millions of Americans for the first time. It has been more than a decade since the Commission has comprehensively updated its USF and ICC rules. Those prior efforts helped usher in significant reductions in long distance rates and the proliferation of innovative new offerings, such as all-distance and flat-priced wireless calling plans, with substantial consumer benefits. We expect that today's ICC actions will have similar pro-consumer, pro-innovation results, providing over \$1.5 billion annually in benefits for wireless and all long-distance customers. These benefits may take many forms, including cost savings, more robust wireless service, and more innovative IP-based communications offerings. Given these effects, we project that the average consumer benefits of our reforms outweigh any costs by at least 3 to 1 -- and of course, by much more for the million of consumers that will get broadband for the first time. Eliminating implicit subsidies also helps level the competitive playing field by allowing consumers to more accurately compare service offerings from telephone companies, cable companies, and wireless providers. In addition, we adopt a number of safeguards to protect consumers during the reform process, placing clear limits on end-user charges and putting USF on a firm budget to help stabilize the contribution burden on consumers.

15. We recognize that USF and ICC are both hybrid state-federal systems, and it is critical to our reforms' success that states remain key partners even as these programs evolve and traditional roles shift. Over the years, we have engaged in ongoing dialogue with state commissions on a host of issues, including universal service. We recognize the statutory role that Congress created for state commissions with respect to eligible telecommunications carrier designations, and we do not disturb that framework. We know that states share our interest in extending voice and broadband service, both fixed and mobile,

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<sup>14</sup> The comment cycle for the *USF/ICC Transformation NPRM* was at least 30 days for each section, and the NPRM was available for ex parte comment from its release on February 9, 2011 until the Sunshine period began on October 21, 2011. See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4554; FCC To Hold Open Commission Meeting Thursday, October 27, 2011, Public Notice (rel. Oct. 20, 2011). Stakeholders thus had ample time to participate in this proceeding, notwithstanding the claims of some parties. See, e.g., Letter from Jerry Petrowski, Wisconsin State Representative, to Hon. Julius Genachowski, Chairman, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket Nos. 01-32, 96-45; GN Docket No. 09-51 (filed Oct. 18, 2011).

where it is lacking, to better meet the needs of their consumers.<sup>15</sup> Therefore, we do not seek to modify the existing authority of states to establish and monitor carrier of last resort (COLR) obligations. We will continue to rely upon states to help us determine whether universal service support is being used for its intended purposes, including by monitoring compliance with the new public interest obligations described in this Order. We also recognize that federal and state regulators must reconsider how legacy regulatory obligations should evolve as service providers accelerate their transition from the Public Switched Telephone Network (PSTN) to an all IP world.

16. We believe that the framework adopted today provides all stakeholders with a clear path forward as the Commission transitions its voice support mechanisms to expressly include broadband and mobility, from the PSTN to IP, and toward market-based policies, such as competitive bidding. We will closely monitor the progress made and stand ready to adjust the framework as necessary to protect consumers, expand broadband access and opportunities, eliminate new arbitrage or inefficient behavior, ensure USF stays within our budget, and continue our transition to IP communications in a competitive and technologically neutral manner.

## II. EXECUTIVE SUMMARY

### A. Universal Service Reform

17. *Principles and Goals.* We begin by adopting support for broadband-capable networks as an express universal service principle under section 254(b) of the Communications Act, and, for the first time, we set specific performance goals for the high-cost component of the USF that we are reforming today, to ensure these reforms are achieving their intended purposes. The goals are: (1) preserve and advance universal availability of voice service; (2) ensure universal availability of modern networks capable of providing voice and broadband service to homes, businesses, and community anchor institutions; (3) ensure universal availability of modern networks capable of providing advanced mobile voice and broadband service; (4) ensure that rates for broadband services and rates for voice services are reasonably comparable in all regions of the nation; and (5) minimize the universal service contribution burden on consumers and businesses.

18. *Budget.* We establish, also for the first time, a firm and comprehensive budget for the high-cost programs within USF.<sup>16</sup> The annual funding target is set at no more than \$4.5 billion over the next six years, the same level as the high-cost program for Fiscal Year 2011, with an automatic review trigger if the budget is threatened to be exceeded. This will provide for more predictable funding for carriers and will protect consumers and businesses that ultimately pay for the fund through fees on their communications bills. We are today taking important steps to control costs and improve accountability in USF, and our estimates of the funding necessary for components of the Connect America Fund (CAF) and legacy high-cost mechanisms represent our predictive judgment as to how best to allocate limited resources at this time. We anticipate that we may revisit and adjust accordingly the appropriate size of each of these programs by the end of the six-year period, based on market developments, efficiencies realized, and further evaluation of the effect of these programs in achieving our goals.

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<sup>15</sup> See *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Recommended Decision 22 FCC Rcd 20477 (Fed.-State Jt. Bd. 2007).

<sup>16</sup> While we recognize that over time several of our existing support mechanisms will be phased down and eliminated, for purposes of this budget, the term “high-cost” includes all support mechanisms in place as of the date of this Order, specifically, high-cost loop support, safety net support, safety valve support, local switching support, interstate common line support, high cost model support, and interstate access support, as well as the new Connect America Fund, which includes funding to support and advance networks that provide voice and broadband services, both fixed and mobile, and funding provided in conjunction with the recovery mechanism adopted as part of intercarrier compensation reform.

19. *Public Interest Obligations.* While continuing to require that all eligible telecommunications carriers (ETCs) offer voice services, we now require that they also offer broadband services. We update the definition of voice services for universal service purposes, and decline to disrupt any state carrier of last resort obligations that may exist. We also establish specific and robust broadband performance requirements for funding recipients.

20. *Connect America Fund.* We create the Connect America Fund, which will ultimately replace all existing high-cost support mechanisms. The CAF will help make broadband available to homes, businesses, and community anchor institutions in areas that do not, or would not otherwise, have broadband, including mobile voice and broadband networks in areas that do not, or would not otherwise, have mobile service, and broadband in the most remote areas of the nation. The CAF will also help facilitate our ICC reforms. The CAF will rely on incentive-based, market-driven policies, including competitive bidding, to distribute universal service funds as efficiently and effectively as possible.

21. *Price Cap Territories.* More than 83 percent of the approximately 18 million Americans that lack access to residential fixed broadband at or above the Commission's broadband speed benchmark live in areas served by price cap carriers—Bell Operating Companies and other large and mid-sized carriers. In these areas, the CAF will introduce targeted, efficient support for broadband in two phases.

22. *Phase I.* To spur immediate broadband buildout, we will provide additional funding for price cap carriers to extend robust, scalable broadband to hundreds of thousands of unserved Americans beginning in early 2012. To enable this deployment, all existing legacy high-cost support to price cap carriers will be frozen, and an additional \$300 million in CAF funding will be made available. Frozen support will be immediately subject to the goal of achieving universal availability of voice and broadband, and subject to obligations to build and operate broadband-capable networks in areas unserved by an unsubsidized competitor over time. Any carrier electing to receive the additional support will be required to deploy broadband and offer service that satisfies our new public interest obligations to an unserved location for every \$775 in incremental support. Specifically, carriers that elect to receive this additional support must provide broadband with actual speeds of at least 4 Mbps downstream and 1 Mbps upstream,<sup>17</sup> with latency suitable for real-time applications and services such as VoIP, and with monthly usage capacity reasonably comparable to that of residential terrestrial fixed broadband offerings in urban areas. In addition, to ensure fairness for consumers across the country who pay into USF, we reduce existing support levels in any areas where a price cap company charges artificially low end-user voice rates.

23. *Phase II.* The next phase of the CAF will use a combination of a forward-looking broadband cost model and competitive bidding to efficiently support deployment of networks providing both voice and broadband service for five years. We expect that the CAF will expand broadband availability to millions more unserved Americans.

24. We direct the Wireline Competition Bureau to undertake a public process to determine the specific design and operation of the cost model to be used for this purpose, with stakeholders encouraged to participate in that process. The model will be used to establish the efficient amount of support required to extend and sustain robust, scalable broadband in high-cost areas. In each state, each incumbent price cap carrier will be asked to undertake a "state-level commitment" to provide affordable broadband to all high-cost locations in its service territory in that state, excluding extremely high cost areas as determined by the model. Importantly, the CAF will only provide support in those areas where a federal subsidy is necessary to ensure the build-out and operation of broadband networks. The CAF will not provide support in areas where unsubsidized competitors are providing broadband that meets our

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<sup>17</sup> 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.

definition. Carriers accepting the state-level commitment will be obligated to meet rigorous broadband service requirements—with interim build-out requirements in three years and final requirements in five years—and will receive CAF funding, in an amount calculated by the model, over a five-year period, with significant financial consequences in the event of non- or under-performance. We anticipate that CAF obligations will keep pace as services in urban areas evolve, and we will ensure that CAF-funded services remain reasonably comparable to urban broadband services over time. After the five-year period, the Commission will use competitive bidding to distribute any universal service support needed in those areas.

25. In areas where the incumbent declines the state-level commitment, we will use competitive bidding to distribute support in a way that maximizes the extent of robust, scalable broadband service subject to an overall budget. In the Further Notice of Proposed Rulemaking (FNPRM) that accompanies today's Order, we propose a structure and operational details for the competitive bidding mechanism, in which any broadband provider that has been designated as an ETC for the relevant area may participate. The second phase of the CAF will distribute a total of up to \$1.8 billion annually in support for areas with no unsubsidized broadband competitor. We expect that the model and competitive bidding mechanism will be adopted by December 2012, and disbursements will ramp up in 2013 and continue through 2017.

26. *Rate-of-Return Reforms.* Although they serve less than five percent of access lines in the U.S., smaller rate-of-return carriers operate in many of the country's most difficult and expensive areas to serve. Rate-of-return carriers' total support from the high-cost fund is approaching \$2 billion annually. We reform our rules for rate-of-return companies in order to support continued broadband investment while increasing accountability and incentives for efficient use of public resources. Rate-of-return carriers receiving legacy universal service support, or CAF support to offset lost ICC revenues, must offer broadband service meeting initial CAF requirements, with actual speeds of at least 4 Mbps downstream and 1 Mbps upstream, upon their customers' reasonable request. Recognizing the economic challenges of extending service in the high-cost areas of the country served by rate-of-return carriers, this flexible approach does not require rate-of-return companies to extend service to customers absent such a request.

27. Alongside these broadband service rules, we adopt reforms to: (1) establish a framework to limit reimbursements for excessive capital and operating expenses, which will be implemented no later than July 1, 2012, after an additional opportunity for public comment; (2) encourage efficiencies by extending existing corporate operations expense limits to the existing high-cost loop support (HCLS) and interstate common line support (ICLS) mechanisms, effective January 1, 2012; (3) ensure fairness by reducing HCLS for carriers that maintain artificially low end-user voice rates, with a three-step phase-in beginning July 1, 2012; (4) phase out the Safety Net Additive (SNA) component of HCLS over time; (5) address Local Switching Support (LSS) as part of comprehensive ICC reform; (6) phase out over three years support in study areas that overlap completely with an unsubsidized facilities-based terrestrial competitor that provides voice and fixed broadband service, beginning July 1, 2012; and (7) cap per-line support at \$250 per month, with a gradual phasedown to that cap over a three-year period commencing July 1, 2012. In the FNPRM, we seek comment on establishing a long-term broadband-focused CAF mechanism for rate-of-return carriers, and relatedly seek comment on reducing the interstate rate-of-return from its current level of 11.25 percent. We expect rate-of-return carriers will receive approximately \$2 billion per year in total high-cost universal service support under our budget through 2017.

28. *CAF Mobility Fund.* Concluding that mobile voice and broadband services provide unique consumer benefits, and that promoting the universal availability of such services is a vital component of the Commission's universal service mission, we create the Mobility Fund, the first universal service mechanism dedicated to ensuring availability of mobile broadband networks in areas where a private-sector business case is lacking. Mobile broadband carriers will receive significant legacy support during the transition to the Mobility Fund, and will have opportunities for new Mobility Fund

dollars. The providers receiving support through the CAF Phase II competitive bidding process will also be eligible for the Mobility Fund, but carriers will not be allowed to receive redundant support for the same service in the same areas. Mobility Fund recipients will be subject to public interest obligations, including data roaming and collocation requirements.

- *Phase I.* We provide up to \$300 million in one-time support to immediately accelerate deployment of networks for mobile voice and broadband services in unserved areas. Mobility Fund Phase I support will be awarded through a nationwide reverse auction, which we expect to occur in third quarter 2012. Eligible areas will include census blocks unserved today by mobile broadband services, and carriers may not receive support for areas they have previously stated they plan to cover. The auction will maximize coverage of unserved road miles within the budget, and winners will be required to deploy 4G service within three years, or 3G service within two years, accelerating the migration to 4G. We also establish a separate and complementary one-time Tribal Mobility Fund Phase I to award up to \$50 million in additional universal service funding to Tribal lands to accelerate mobile voice and broadband availability in these remote and underserved areas.

- *Phase II.* To ensure universal availability of mobile broadband services, the Mobility Fund will provide up to \$500 million per year in ongoing support. The Fund will expand and sustain mobile voice and broadband services in communities in which service would be unavailable absent federal support. The Mobility Fund will include ongoing support for Tribal areas of up to \$100 million per year as part of the \$500 million total budget. In the FNPRM we propose a structure and operational details for the ongoing Mobility Fund, including the proper distribution methodology, eligible geographic areas and providers, and public interest obligations. We expect to adopt the distribution mechanism for Phase II in 2012 with implementation in 2013.

29. *Identical Support Rule.* In light of the new support mechanisms we adopt for mobile broadband service and our commitment to fiscal responsibility, we eliminate the identical support rule that determines the amount of support for mobile, as well as wireline, competitive ETCs today. We freeze identical support per study area as of year end 2011, and phase down existing support over a five-year period beginning on July 1, 2012. The gradual phase down we adopt, in conjunction with the new funding provided by Mobility Fund Phase I and II, will ensure that an average of over \$900 million is provided to mobile carriers for each of the first four years of reform (through 2015). The phase down of competitive ETC support will stop if Mobility Fund Phase II is not operational by June 30, 2014, ensuring approximately \$600 million per year in legacy support will continue to flow until the new mechanism is operational.

30. *Remote Areas Fund.* We allocate at least \$100 million per year to ensure that Americans living in the most remote areas in the nation, where the cost of deploying traditional terrestrial broadband networks is extremely high, can obtain affordable access through alternative technology platforms, including satellite and unlicensed wireless services.<sup>18</sup> We propose in the FNPRM a structure and operational details for that mechanism, including the form of support, eligible geographic areas and providers, and public interest obligations. We expect to finalize the Remote Areas Fund in 2012 with implementation in 2013.

31. *Reporting and Enforcement.* We establish a national framework for certification and reporting requirements for all universal service recipients to ensure that their public interest obligations are satisfied, that state and federal regulators have the tools needed to conduct meaningful oversight, and that public funds are expended in an efficient and effective manner. We do not disturb the existing role of

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<sup>18</sup> We note that satellite broadband providers and wireless Internet service providers (WISPs) are not confined to participating only in this component of the CAF; they are eligible to participate in any CAF program for which they can meet the specified performance requirements.

states in designating ETCs and in monitoring that ETCs within their jurisdiction are using universal service support for its intended purpose. We seek comment on whether and how we should adjust federal obligations on ETCs in areas where legacy funding is phased down. We also adopt rules to reduce or eliminate support if public interest obligations or other requirements are not satisfied, and seek comment on the appropriateness of additional enforcement mechanisms.

32. *Waiver.* As a safeguard to protect consumers, we provide for an explicit waiver mechanism under which a carrier can seek relief from some or all of our reforms if the carrier can demonstrate that the reduction in existing high-cost support would put consumers at risk of losing voice service, with no alternative terrestrial providers available to provide voice telephony.

## **B. Intercarrier Compensation Reform**

33. *Immediate ICC Reforms.* We take immediate action to curtail wasteful arbitrage practices, which cost carriers and ultimately consumers hundreds of millions of dollars annually:

- *Access Stimulation.* We adopt rules to address the practice of access stimulation, in which carriers artificially inflate their traffic volumes to increase ICC payments. Our revised interstate access rules generally require competitive carriers and rate-of-return incumbent local exchange carriers (LECs) to refile their interstate switched access tariffs at lower rates if the following two conditions are met: (1) a LEC has a revenue sharing agreement and (2) the LEC either has (a) a three-to-one ratio of terminating-to-originating traffic in any month or (b) experiences more than a 100 percent increase in traffic volume in any month measured against the same month during the previous year. These new rules are narrowly tailored to address harmful practices while avoiding burdens on entities not engaging in access stimulation.
- *Phantom Traffic.* We adopt rules to address “phantom traffic,” *i.e.*, calls for which identifying information is missing or masked in ways that frustrate intercarrier billing. Specifically, we require telecommunications carriers and providers of interconnected VoIP service to include the calling party’s telephone number in all call signaling, and we require intermediate carriers to pass this signaling information, unaltered, to the next provider in a call path.

34. *Comprehensive ICC Reform.* We adopt a uniform national bill-and-keep framework as the ultimate end state for all telecommunications traffic exchanged with a LEC. Under bill-and-keep, carriers look first to their subscribers to cover the costs of the network, then to explicit universal service support where necessary. Bill-and-keep has worked well as a model for the wireless industry; is consistent with and promotes deployment of IP networks; will eliminate competitive distortions between wireline and wireless services; and best promotes our overall goals of modernizing our rules and facilitating the transition to IP. Moreover, we reject the notion that only the calling party benefits from a call and therefore should bear the entire cost of originating, transporting, and terminating a call. As a result, we now abandon the calling-party-network-pays model that dominated ICC regimes of the last century. Although we adopt bill-and-keep as a national framework, governing both inter- and intrastate traffic, states will have a key role in determining the scope of each carrier’s financial responsibility for purposes of bill-and-keep, and in evaluating interconnection agreements negotiated or arbitrated under the framework in sections 251 and 252 of the Communications Act. We also address concerns expressed by some commenters about potential fears of traffic “dumping” and seek comment in the FNPRM on whether any additional measures are necessary in this regard.

35. *Multi-Year Transition.* We focus initial reforms on reducing terminating switched access rates, which are the principal source of arbitrage problems today. This approach will promote migration to all-IP networks while minimizing the burden on consumers and staying within our universal service budget. For these rates, as well as certain transport rates, we adopt a gradual, measured transition that

will facilitate predictability and stability. First, we require carriers to cap most ICC rates as of the effective date of the rules. To reduce the disparity between intrastate and interstate terminating end office rates, we next require carriers to bring these rates to parity within two steps, by July 2013. Thereafter, we require carriers to reduce their termination (and for some carriers also transport) rates to bill-and-keep, within six years for price cap carriers and nine for rate-of-return carriers. The framework and transition are default rules and carriers are free to negotiate alternatives that better address their individual needs. Although the Order begins the process of reforming all ICC charges by capping all interstate rate elements and most intrastate rate elements, the FNPRM seeks comment on the appropriate transition and recovery for the remaining originating and transport rate elements. States will play a key role in overseeing modifications to rates in intrastate tariffs to ensure carriers are complying with the framework adopted in this Order and not shifting costs or otherwise seeking to gain excess recovery. The FNPRM also seeks comment on interconnection issues likely to arise in the process of implementing a bill-and-keep methodology for ICC.

36. *New Recovery Mechanism.* We adopt a transitional recovery mechanism to mitigate the effect of reduced intercarrier revenues on carriers and facilitate continued investment in broadband infrastructure, while providing greater certainty and predictability going forward than the *status quo*. Although carriers will first look to limited increases from their end users for recovery, we reject notions that all recovery should be borne by consumers. Rather, we believe, consistent with past reforms, that carriers should have the opportunity to seek partial recovery from all of their end user customers. We permit incumbent telephone companies to charge a limited monthly Access Recovery Charge (ARC) on wireline telephone service, with a maximum annual increase of \$0.50 for consumers and small businesses, and \$1.00 per line for multi-line businesses, to partially offset ICC revenue declines. To protect consumers, we adopt a strict ceiling that prevents carriers from assessing any ARC for any consumer whose total monthly rate for local telephone service, inclusive of various rate-related fees, is at or above \$30. Although the maximum ARC is \$0.50 per month, we expect the actual average increase across all wireline consumers to be no more than \$0.10-\$0.15 a month, which translates into an expected maximum of \$1.20-\$1.80 per year that the average consumer will pay.<sup>19</sup> We anticipate that consumers will receive more than three times that amount in benefits in the form of lower calling prices, more value for their wireless or wireline bill, or both, as well as greater broadband availability. Furthermore, the ARC will phase down over time as carriers' eligible revenue decreases, and we prevent carriers from charging any ARC on Lifeline customers or further drawing on the Lifeline program, so that ICC reform will not raise rates at all for these low-income consumers. We also seek comment in the FNPRM about reassessing existing subscriber line charges (SLCs), which are not otherwise implicated by this Order, to determine whether those charges are set at appropriate levels.

37. Likewise, although we do not adopt a rate ceiling for multi-line businesses customers, we do adopt a cap on the combination of the ARC and the existing SLC to ensure that multi-line businesses do not bear a disproportionate share of recovery and that their rates remain just and reasonable. Specifically, carriers cannot charge a multi-line business customer an ARC when doing so would result in the ARC plus the existing SLC exceeding \$12.20 per line. Moreover, to further protect consumers, we adopt measures to ensure that carriers must apportion lost revenues eligible for ICC recovery between residential and business lines, appropriately weighting the business lines (*i.e.*, according to the higher maximum annual increase in the business ARC) to prevent carriers that elect not to receive ICC CAF from recovering their entire ICC revenue loss from consumers. Carriers may receive CAF support for any otherwise-eligible revenue not recovered by the ARC. In addition, carriers receiving CAF support to

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<sup>19</sup> The maximum theoretical ARC for customers of price cap carriers would be \$2.50 after 5 years and for customers of rate-of-return carriers would be \$3 after 6 years, although we expect the average actual ARC to be less than half of those totals.

offset lost ICC revenues will be required to use the money to advance our goals for universal voice and broadband.

38. In defining how much of their lost revenues carriers will have the opportunity to recover, we reject the notion that ICC reform should be revenue neutral. We limit carriers' total eligible recovery to reflect the existing downward trends on ICC revenues with declining switching costs and minutes of use. For price cap carriers, baseline recovery amounts available to each price cap carrier will decline at 10 percent annually. Price cap carriers whose interstate rates have largely been unchanged for a decade because they participated in the Commission's 2000 CALLS plan will be eligible to receive 90 percent of this baseline every year from ARCs and the CAF. In those study areas that have recently converted from rate-of-return to price cap regulation, carriers will initially be permitted to recover the full baseline amount to permit a more gradual transition, but we will decline to 90 percent recovery for these areas as well after 5 years. All price cap CAF support for ICC recovery will phase out over a three-year period beginning in the sixth year of the reform.

39. For rate-of-return carriers, recovery will be calculated initially based on rate-of-return carriers' fiscal year 2011 interstate switched access revenue requirement, intrastate access revenues that are being reformed as part of this Order, and net reciprocal compensation revenues. This baseline will decline at five percent annually to reflect combined historical trends of an annual three percent interstate cost and associated revenue decline, and ten percent intrastate revenue decline, while providing for true ups to ensure CAF recovery in the event of faster-than-expected declines in demand. Both recovery mechanisms provide carriers with significantly more revenue certainty than the *status quo*, enabling carriers to reap the benefits of efficiencies and reduced switching costs, while giving providers stable support for investment as they adjust to an IP world.

40. *Treatment of VoIP Traffic.* We make clear the prospective payment obligations for VoIP traffic exchanged in TDM between a LEC and another carrier, and adopt a transitional framework for VoIP intercarrier compensation. We establish that default charges for "toll" VoIP-PSTN traffic will be equal to interstate rates applicable to non-VoIP traffic, and default charges for other VoIP-PSTN traffic will be the applicable reciprocal compensation rates. Under this framework, all carriers originating and terminating VoIP calls will be on equal footing in their ability to obtain compensation for this traffic.

41. *CMRS-Local Exchange Carrier (LEC) Compensation.* We clarify certain aspects of CMRS-LEC compensation to reduce disputes and address existing ambiguity. We adopt bill-and-keep as the default methodology for all non-access CMRS-LEC traffic. To provide rate-of-return LECs time to adjust to bill-and-keep, we adopt an interim transport rule for rate-of-return carriers to specify LEC transport obligations under the default bill-and-keep framework for non-access traffic exchanged between these carriers. We also clarify the relationship between the compensation obligations in section 20.11 of the Commission's rules and the reciprocal compensation framework, thus addressing growing concerns about arbitrage related to rates set without federal guidance. Further, in response to disputes, we make clear that a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the call has done so through a CMRS provider. Finally, we affirm that all traffic routed to or from a CMRS provider that, at the beginning of a call, originates and terminates within the same MTA, is subject to reciprocal compensation, without exception.

42. *IP-to-IP Interconnection.* We recognize the importance of interconnection to competition and the associated consumer benefits. We anticipate that the reforms we adopt will further promote the deployment and use of IP networks, and seek comment in the accompanying FNPRM regarding the policy framework for IP-to-IP interconnection. We also make clear that even while our FNPRM is pending, we expect all carriers to negotiate in good faith in response to requests for IP-to-IP interconnection for the exchange of voice traffic.



### III. ADOPTION OF A NEW PRINCIPLE FOR UNIVERSAL SERVICE

43. Section 254(b) of the Communications Act sets forth six “universal service principles” and directs the Commission to “base policies for the preservation and advancement of universal service on” these principles.<sup>20</sup> In addition, section 254(b)(7) directs the Commission and the Federal-State Joint Board on Universal Service to adopt “other principles” that we “determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with” the Act.<sup>21</sup>

44. In November 2010, the Federal-State Joint Board on Universal Service recommended that the Commission “specifically find that universal service support should be directed where possible to networks that provide advanced services, as well as voice services,” and adopt such a principle pursuant to its 254(b)(7) authority.<sup>22</sup> The Joint Board believes that this principle is consistent with section 254(b)(3) and would serve the public interest.<sup>23</sup> We agree.<sup>24</sup> Section 254(b)(3) provides that consumers in rural, insular and high-cost areas should have access to “advanced telecommunications and information services . . . that are reasonably comparable to those services provided in urban areas.”<sup>25</sup> Section 254(b)(2) likewise provides that “Access to advanced telecommunications and information services should be provided in all regions of the Nation.”<sup>26</sup> Providing support for broadband networks will further all of these goals.

45. Accordingly, we adopt “support for advanced services” as an additional principle upon which we will base policies for the preservation and advancement of universal service. For the reasons discussed above, we find, per section 254(b)(7), that this new principle is “necessary and appropriate.” Consistent with the Joint Board’s recommendation, we define this principle as: “Support for Advanced Services – Universal service support should be directed where possible to networks that provide advanced services, as well as voice services.”

### IV. GOALS

46. *Background.* Consistent with the Government Performance and Results Act of 1993 (GPRA), clear performance goals and measures for the Connect America Fund, including the Mobility Fund, and existing high-cost support mechanisms will enable the Commission to determine not just whether federal funding is used for the intended purposes, but whether that funding is accomplishing the intended results—including our objectives of preserving and advancing voice, broadband, and advanced

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<sup>20</sup> 47 U.S.C. § 254(b).

<sup>21</sup> 47 U.S.C. § 254(b)(7).

<sup>22</sup> *Federal-State Joint Board on Universal Service, Lifeline and Link Up*, CC Docket No. 96-45, WC Docket No. 03-109, Recommended Decision, 25 FCC Rcd 15598, 15625, para. 75 (Fed.-State Jt. Bd. 2010) (*Joint Board 2010 Recommended Decision*). Numerous commenters supported that recommendation. See, e.g., Massachusetts Department of Telecommunications & Cable *USF/ICC Transformation Comments* at 2-6; Nebraska Public Service Commission *USF/ICC Transformation Comments* at 7-8; Ohio Public Utilities Commission *USF/ICC Transformation Comments* at 3; Telecommunications Industry Association *USF/ICC Transformation Comments* at 5.

<sup>23</sup> *Id.*

<sup>24</sup> We hereby act on a recommendation from the *Joint Board 2010 Recommended Decision*. We are considering the other recommendations and expect to address other issues raised in the *Joint Board 2010 Recommended Decision* in the near future.

<sup>25</sup> 47 U.S.C. § 254(b)(3).

<sup>26</sup> 47 U.S.C. § 254(b)(2).

mobility for all Americans.<sup>27</sup> Moreover, performance goals and measures may assist in identifying areas where additional action by state regulators, Tribal governments, or other entities is necessary to achieve universal service. Performance goals and measures should also improve participant accountability.

47. In the *USF-ICC Transformation NPRM*, the Commission proposed several performance goals and measures to improve program accountability.<sup>28</sup> While commenters generally supported the concept of reorienting the universal service program to support broadband, we received limited comment on the specific goals and measures we proposed in the *NPRM*. No commenter objected to the proposed goals, and the Mercatus Center describes them as “excellent intermediate outcomes to measure.”<sup>29</sup>

48. *Discussion.* We adopt the following performance goals for our efforts to preserve and advance service in high cost, rural, and insular areas through the Connect America Fund and existing support mechanisms: (1) preserve and advance universal availability of voice service; (2) ensure universal availability of modern networks capable of providing voice and broadband service to homes, businesses, and community anchor institutions; (3) ensure universal availability of modern networks capable of providing mobile voice and broadband service where Americans live, work, and travel; (4) ensure that rates are reasonably comparable in all regions of the nation, for voice as well as broadband services; and (5) minimize the universal service contribution burden on consumers and businesses.<sup>30</sup> We also adopt performance measures for the first, second, and fifth of these goals, and direct the Wireline Competition Bureau and the Wireless Telecommunications Bureau (Bureaus) to further develop other measures. We delegate authority to the Bureaus to finalize performance measures as appropriate consistent with the goals we adopt today.

49. *Preserve and Advance Voice Service.* The first performance goal we adopt is to preserve and advance universal availability of voice service. In doing so, we reaffirm our commitment to ensuring that all Americans have access to voice service while recognizing that, over time, we expect that voice service will increasingly be provided over broadband networks.<sup>31</sup>

50. As a performance measure for this goal, we will use the telephone penetration rate, which measures subscription to telephone service.<sup>32</sup> The telephone penetration rate has historically been

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<sup>27</sup> The Government Performance and Results Act of 1993 established statutory requirements for federal agencies to engage in strategic planning and performance measurement. Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (1993). Federal agencies must develop strategic plans with long-term, outcome-related goals and objectives, develop annual goals linked to the long-term goals, and measure progress toward the achievement of those goals in annual performance plans and report annually on their progress in program performance reports. See also GPRA Modernization Act of 2010, Pub. L. 111-352, 124 Stat. 3866 (2011). The Office of Management and Budget (OMB) has built upon GPRA through its Program Assessment Rating Tool (PART), which sets forth three types of performance measures: (1) outcome measures; (2) output measures; and (3) efficiency measures. See Memorandum from Clay Johnson III, Deputy Director for Management, Office of Management and Budget, to Program Associate Directors, Budget Data Request No. 04-31 (Mar. 22, 2003) (*OMB PART Guidance Memorandum*).

<sup>28</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4697-701, paras. 479-89.

<sup>29</sup> Mercatus *USF/ICC Transformation NPRM* Comments at 17; see also Kansas Commission *USF/ICC Transformation NPRM* Comments at 22 (“the KCC supports these priorities”).

<sup>30</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4584, 4697-701, paras. 80, 479-89.

<sup>31</sup> See 47 U.S.C. § 254(b); *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4584, para. 80.

<sup>32</sup> See Industry Analysis and Technology Division, Wireline Competition Bureau, *Telephone Subscribership in the United States* at 1 (Aug. 2010) (Aug. 2010 Subscribership Report).

used by the Commission as a proxy for network deployment<sup>33</sup> and, as a result, will be a consistent measure of the universal service program's effects. We will also continue to use the Census Bureau's Current Population Survey (CPS) to collect data regarding telephone penetration.<sup>34</sup> Although CPS data does not specifically break out wireless, VoIP, or over-the-top voice options available to consumers,<sup>35</sup> a better data set is not currently available. In recognition of the limitations of existing data, the Commission is considering revising the types of data it collects,<sup>36</sup> and we anticipate further Commission action in this proceeding, which may provide more complete information that we can use to evaluate this performance goal.

51. *Ensure Universal Availability of Voice and Broadband to Homes, Businesses, and Community Anchor Institutions.* The second performance goal we adopt is to ensure the universal availability of modern networks capable of delivering broadband and voice service to homes, businesses, and community anchor institutions.<sup>37</sup> All Americans in all parts of the nation, including those in rural, insular, and high-cost areas, should have access to affordable modern communications networks capable of supporting the necessary applications that empower them to learn, work, create, and innovate.<sup>38</sup>

52. As an outcome measure for this goal, we will use the number of residential, business, and community anchor institution locations that newly gain access to broadband service.<sup>39</sup> As an efficiency measure, we will use the change in the number of homes, businesses, and community anchor institutions passed or covered per million USF dollars spent.<sup>40</sup> To collect data, we will use the National Broadband Map and/or Form 477. We will also require CAF recipients to report on the number of community anchor institutions that newly gain access to fixed broadband service as a result of CAF support.<sup>41</sup> Although these measures are imperfect, we believe that they are the best available to us.<sup>42</sup> Other options, such as the Mercatus Centers' suggestion of using an assessment of what might have occurred without the programs, are not administratively feasible at this time.<sup>43</sup> But we direct the Bureaus to revisit these measures at a later point, and to consider refinements and alternatives.

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<sup>33</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4605, para. 146; *see also* Aug. 2010 Subscribership Report at 1-2.

<sup>34</sup> *See* Aug. 2010 Subscribership Report at 1.

<sup>35</sup> *See USF/ICC Transformation NPRM*, 26 FCC Rcd at 4699, para. 483.

<sup>36</sup> *See Broadband Data NPRM*, 26 FCC Rcd at 1527-33, paras. 49-65.

<sup>37</sup> We use the term "modern networks" because we expect that supported equipment and services will change over time to keep up with technological advancements. We note that "[c]ommunity anchor institutions" as defined in the Recovery Act include schools, libraries, medical and healthcare providers, community colleges and other institutions of higher education, and other community support organizations and entities. *See* 47 U.S.C. § 1305(b)(3)(A). We adopt that definition for purposes of these rules.

<sup>38</sup> *See USF/ICC Transformation NPRM*, 26 FCC Rcd at 4699-700, para. 485; *see also* 47 U.S.C. § 254(b).

<sup>39</sup> *See USF/ICC Transformation NPRM*, 26 FCC Rcd at 4699-700, para. 485.

<sup>40</sup> *See id.*

<sup>41</sup> *See infra* Section VII.A.2.

<sup>42</sup> As the Mercatus Center points out, both measures fail to take into account the change in deployment that would have occurred without the high-cost program and CAF. Mercatus *USF/ICC Transformation NPRM* Comments at 12-14. And as previously noted, the efficiency measure could be biased towards lower-cost areas. *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4699-700, para. 485.

<sup>43</sup> Mercatus *USF/ICC Transformation NPRM* Comments at 12-14.

53. *Ensure Universal Availability of Mobile Voice and Broadband Where Americans Live, Work, or Travel.* The third performance goal we adopt is to ensure the universal availability of modern networks capable of delivering mobile broadband and voice service in areas where Americans live, work, or travel. Like the preceding parallel goal, our third performance goal is designed to help ensure that all Americans in all parts of the nation, including those in rural, insular, and high-cost areas, have access to affordable technologies that will empower them to learn, work, create, and innovate. But we believe that ensuring universal advanced mobile coverage is an important goal on its own, and that we will be better able track program performance if we measure it separately.

54. We decline to adopt performance measures for this goal at this time but direct the Wireless Telecommunications Bureau to develop one or more appropriate measures for this goal.

55. *Ensure Reasonably Comparable Rates for Broadband and Voice Services.* The fourth performance goal we adopt is to ensure that rates are reasonably comparable for voice as well as broadband service, between urban and rural, insular, and high cost areas. Rates must be reasonably comparable so that consumers in rural, insular, and high cost areas have meaningful access to these services.<sup>44</sup>

56. We also decline to adopt measures for this goal at this time. Although the Commission proposed one outcome measure and asked about others in the *USF/ICC Transformation NPRM*,<sup>45</sup> we received only limited input on that proposal. The Mercatus Center agrees that “[t]he ratio of prices to income is an intuitively sensible way of defining ‘reasonably comparable’” but cautions that, again, the real challenge is crafting measures that distinguish how the programs affect rates apart from other factors.<sup>46</sup> The Bureaus may seek to further develop the record on the performance and efficiency measures suggested by the Mercatus Center,<sup>47</sup> the Commission’s original proposals, and any other measures commenters think would be appropriate. In undertaking this analysis, we direct the Bureaus to develop separate measures for (1) broadband services for homes, businesses, and community anchor institutions; and (2) mobile services.

57. *Minimize Universal Service Contribution Burden on Consumers and Businesses.* The fifth performance goal we adopt is to minimize the overall burden of universal service contributions on American consumers and businesses. With this performance goal, we seek to balance the various objectives of section 254(b) of the Act, including the objective of providing support that is sufficient but not excessive so as to not impose an excessive burden on consumers and businesses who ultimately pay to support the Fund.<sup>48</sup> As we have previously recognized, “if the universal service fund grows too large, it

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<sup>44</sup> See 47 U.S.C. § 254(b)(3); *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4584, para. 80.

<sup>45</sup> We proposed that the ratio of the rural price to rural household disposable income should be similar to the ratio in urban areas, both for voice services and for broadband services. We also asked whether we should measure instead the percentage of total household income devoted to these services, or the relative actual prices of these services in rural and urban areas. *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4700, para. 486.

<sup>46</sup> Mercatus *USF/ICC Transformation NPRM* Comments at 14-15.

<sup>47</sup> *Id.* at 15.

<sup>48</sup> Contributions are assessed on the basis of a contributor’s projected collected interstate and international end-user telecommunications revenues, based on a percentage or “contribution factor” that is calculated every quarter. See 47 C.F.R. § 54.709. A contributor may recover the costs of universal service contributions by passing an explicit charge through to its customers. 47 CFR § 54.712(a). See *Federal-State Joint Board on Universal Service, High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Order on Remand and Memorandum Opinion and Order, 25 FCC Rcd 4072, 4088, para. 29 (2010) (*Qwest II Remand Order*) (explaining that the Commission could not be a prudent guardian of the public’s resources without taking into account the costs of universal service, alongside the benefit); *Vermont Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 65 (D.C. Cir. 2011); *Rural* (continued...)

will jeopardize other statutory mandates, such as ensuring affordable rates in all parts of the country, and ensuring that contributions from carriers are fair and equitable.”<sup>49</sup>

58. As a performance measure for this goal, we will divide the 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.<sup>50</sup> This calculation will be relatively straightforward and rely on publicly available data.<sup>51</sup> As such, the measure will be transparent and easily verifiable.<sup>52</sup> By adjusting for inflation and looking at the universal service burden, we will be able to determine whether the overall burden of universal service contribution costs is increasing or decreasing for the typical American household.<sup>53</sup> As an efficiency measure, the Mercatus Center suggests comparing the estimate of economic deadweight loss associated with the contribution mechanism to the deadweight loss associated with taxation.<sup>54</sup> We anticipate that the Bureaus may seek further input on this option and any others commenters believe would be appropriate.

59. *Program Review.* Using the adopted goals and measures, the Commission will, as required by GPRA, monitor the performance of our universal service program as we modernize the current high-cost program and transition to the CAF.<sup>55</sup> If the programs are not meeting these performance goals, we will consider corrective actions. Likewise, to the extent that the adopted measures do not help us assess program performance, we will revisit them as well.

## V. LEGAL AUTHORITY

60. In this section, we address our statutory authority to implement Congress’s goal of promoting ubiquitous deployment of, and consumer access to, both traditional voice calling capabilities and modern broadband services over fixed and mobile networks. As explained below, Congress has authorized the Commission to support universal service in the broadband age. Section 254 grants the Commission clear authority to support telecommunications services and to condition the receipt of universal service support on the deployment of broadband networks, both fixed and mobile, to consumers. Section 706 provides the Commission with independent authority to support broadband networks in order

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*Cellular Ass’n v. FCC*, 588 F.3d 1095, 1102 (D.C. Cir. 2009); *see also, e.g., Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620-21 (5th Cir. 2000) (concluding that the Commission properly considered the costs of universal service in reforming one part of the high-cost support mechanism).

<sup>49</sup> *Qwest II Remand Order*, 25 FCC Rcd at 4087, para. 28.

<sup>50</sup> *See USF/ICC Transformation NPRM*, 263 FCC Rcd at 4700-01, para. 487. Adjustments for inflation will be calculated using the Bureau of Labor Statistics’ Consumer Price Index Inflation Calendar. *See* [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm) (last visited Sept. 9, 2011).

<sup>51</sup> *USF/ICC Transformation NPRM*, 263 FCC Rcd at 4700-01, para. 487; *see also* Mercatus Center *USF/ICC Transformation NPRM* Comments at 16 (“This is a sensible and straightforward measure of the contribution.”).

<sup>52</sup> *USF/ICC Transformation NPRM*, 263 FCC Rcd at 4700-01, para. 487.

<sup>53</sup> As a starting point, we will use the overall per-household burden of the high-cost program. In 2010, this was \$3.03 per month. *See USF/ICC Transformation NPRM*, 263 FCC Rcd at 4700-01, para. 487.

<sup>54</sup> Mercatus Center *USF/ICC Transformation NPRM* Comments at 16.

<sup>55</sup> If the Commission identifies an outcome as a “priority goal,” then it must review progress quarterly. Otherwise performance must only be reviewed annually. *See* GPRA Modernization Act of 2010, §§ 1116, 1120-1121. Most priority goals will be published in February 2012. Office of Management and Budget, Memorandum for Heads of Executive Departments and Agencies, at 13 (Aug. 17, 2011), *available at* <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-31.pdf> (last visited Oct. 31, 2011).

to “accelerate the deployment of broadband capabilities” to all Americans. Recently, moreover, Congress has reaffirmed its strong interest in ubiquitous deployment of high speed broadband communications networks: the 2008 Farm Bill directing the Chairman to submit to Congress “a comprehensive rural broadband strategy,” including recommendations for the rapid buildout of broadband in rural areas and for how federal resources can “best . . . overcome obstacles that impede broadband deployment”;<sup>56</sup> the Broadband Data Improvement Act, to improve data collection and “promote the deployment of affordable broadband services to all parts of the Nation”;<sup>57</sup> and the Recovery Act, which required the Commission to develop the National Broadband Plan to ensure that every American has “access to broadband capability and . . . establish benchmarks for meeting that goal.”<sup>58</sup> By exercising our statutory authority consistent with the thrust of these provisions, we ensure that the national policy of promoting broadband deployment and ubiquitous access to voice telephony services is fully realized.

61. *Section 254.* The principle that all Americans should have access to communications services has been at the core of the Commission’s mandate since its founding. Congress created this Commission in 1934 for the purpose of making “available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”<sup>59</sup> In the 1996 Act, Congress built upon that longstanding principle by enacting section 254. Section 254 sets forth six principles upon which we must “base policies for the preservation and advancement of universal service.”<sup>60</sup> Among these principles are that “[q]uality services should be available at just, reasonable, and affordable rates,” that “[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation,” and that “[c]onsumers in all regions of the Nation . . . should have access to telecommunications and information services, including . . . advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas” and at reasonably comparable rates.<sup>61</sup>

62. Under section 254, we have express statutory authority to support telecommunications services that we have designated as eligible for universal service support.<sup>62</sup> Section 254(c)(1) of the Act defines “[u]niversal service” as “an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services.” As discussed more fully below, in this Order, we adopt our proposal to simplify how we describe the various supported services that the Commission historically has defined in functional terms (*e.g.*, voice grade access to the PSTN, access to emergency services) into a single supported service designated as “voice telephony service.”<sup>63</sup> To the extent carriers offer traditional voice telephony services as telecommunications services over traditional circuit-switched networks, our authority to provide support for such services is well established.

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<sup>56</sup> Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 6112, 122 Stat. 923, 1966 (2008) (2008 Farm Bill). Acting Chairman Copps transmitted the report to Congress on May 22, 2009. *See Rural Broadband Report Published in the FCC Record*, GN Docket No. 09-29, Public Notice, 24 FCC Rcd 12791 (2009).

<sup>57</sup> Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (codified at 47 U.S.C. § 1301 *et seq.*).

<sup>58</sup> *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009); 47 U.S.C. § 1305(k)(2).

<sup>59</sup> 47 U.S.C. § 151.

<sup>60</sup> 47 U.S.C. § 254(b).

<sup>61</sup> 47 U.S.C. § 254(b)(1)-(3).

<sup>62</sup> 47 U.S.C. § 254(c).

<sup>63</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4590, para. 95; *see infra* Section VI.A.

63. Increasingly, however, consumers are obtaining voice services not through traditional means but instead through interconnected VoIP providers offering service over broadband networks. As AT&T notes, “[c]ircuit-switched networks deployed primarily for voice service are rapidly yielding to packet-switched networks,” which offer voice as well as other types of services.<sup>64</sup> The data bear this out. As we observed in the *Notice*, “[f]rom 2008 to 2009, interconnected VoIP subscriptions increased by 22 percent, while switched access lines decreased by 10 percent.”<sup>65</sup> Interconnected VoIP services, among other things, allow customers to make real-time voice calls to, and receive calls from, the PSTN, and increasingly appear to be viewed by consumers as substitutes for traditional voice telephone services.<sup>66</sup> Our authority to promote universal service in this context does not depend on whether interconnected VoIP services are telecommunications services or information services under the Communications Act.<sup>67</sup>

64. Section 254 grants the Commission the authority to support not only voice telephony service but also the facilities over which it is offered. Section 254(e) makes clear that “[a] carrier that receives such [universal service] support shall use that support only for the provision, maintenance, and upgrading of *facilities and services* for which the support is intended.”<sup>68</sup> By referring to “facilities” and “services” as distinct items for which federal universal service funds may be used, we believe Congress granted the Commission the flexibility not only to designate the types of telecommunications services for which support would be provided, but also to encourage the deployment of the types of facilities that will best achieve the principles set forth in section 254(b) and any other universal service principle that the Commission may adopt under section 254(b)(7).<sup>69</sup> For instance, under our longstanding “no barriers” policy, we allow carriers receiving high-cost support “to invest in infrastructure capable of providing access to advanced services” as well as supported voice services.<sup>70</sup> That policy, we explained, furthers

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<sup>64</sup> AT&T *USF/ICC Transformation NPRM* Comments.

<sup>65</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4560, para. 8 (citing Industry Analysis and Technology Division, Wireline Competition Bureau, *Local Telephone Competition Report: Status as of December 2009*, at 6 (Jan. 2011) (Jan. 2011 Local Competition Report)). From 2009 to 2010, interconnected VoIP subscriptions increased by 22 percent (from 26 million to 32 million) and retail switched access lines decreased by 8 percent (from 127 million to 117 million). Industry Analysis and Technology Division, Wireline Competition Bureau, *Local Telephone Competition Report: Status as of December 31, 2010*, at 2 (Oct. 2011) (Oct. 2011 Local Competition Report).

<sup>66</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4747, para. 612; *see also IP-Enabled Services*, 20 FCC Rcd 10245, 10256, para. 23 (2005) (“consumers expect that VoIP services that are interconnected with the PSTN will function in some ways like a ‘regular telephone’ service.”), *pet. for review denied*, *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006).

<sup>67</sup> If interconnected VoIP services are telecommunications services, our authority under section 254 to define universal service after “taking into account advances in telecommunications and information technologies and services” enables us to include interconnected VoIP services as a type of voice telephony service entitled to federal universal service support. And, as explained below, if interconnected VoIP services are information services, we have authority to support the deployment of broadband networks used to provide such services.

<sup>68</sup> 47 U.S.C. § 254(e) (emphasis added).

<sup>69</sup> In establishing the rules governing the designation and responsibilities of ETCs pursuant to section 214(e), we have long defined the term “facilities” to mean “any physical components of the telecommunications network that are used in the transmission or routing of the services that are designated for support.” 47 C.F.R. § 54.201(e); *see also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8813, para. 67 (1997) (*Universal Service First Report and Order*) (subsequent history omitted).

<sup>70</sup> *See Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 96-45, CC Docket No. 00-256, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, (continued...)

the policy Congress set forth in section 254(b) of “ensuring access to advanced telecommunications and information services throughout the nation.”<sup>71</sup> While this policy was enunciated in an Order adopting rule changes for rural incumbent carriers, by its terms it is not limited to such carriers. The “no-barriers” policy has applied, and will continue to apply, to all ETCs, and we codify it in our rules today. Section 254(e) thus contemplates that carriers may receive federal support to enable the deployment of broadband facilities used to provide supported telecommunications services as well as other services.<sup>72</sup>

65. We further conclude that our authority under section 254 allows us to go beyond the “no barriers” policy and require carriers receiving federal universal service support to invest in modern broadband-capable networks.<sup>73</sup> We see nothing in section 254 that requires us simply to provide federal funds to carriers and hope that they will use such support to deploy broadband facilities. To the contrary, we have a “mandatory duty” to adopt universal service policies that advance the principles outlined in section 254(b), and we have the authority to “create some inducement” to ensure that those principles are achieved.<sup>74</sup> Congress made clear in section 254 that the deployment of, and access to, information services – including “advanced” information services – are important components of a robust and successful federal universal service program.<sup>75</sup> Furthermore, we are adopting today the recommendation of the Federal-State Joint Board on Universal Service to establish a new universal service principle pursuant to section 254(b)(7) “that universal service support should be directed where possible to networks that provide advanced services, as well as voice services.”<sup>76</sup> In today’s communications environment, achievement of these principles requires, at a minimum, that carriers receiving universal service support invest in and deploy networks capable of providing consumers with access to modern broadband capabilities, as well as voice telephony services. Accordingly, as explained in greater detail below, we will exercise our authority under section 254 to require that carriers receiving support – both

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16 FCC Rcd 11244, 11322, para. 200 (2001) (*Rural Task Force Order*) (“[U]se of support to invest in infrastructure capable of providing access to advanced services does not violate section 254(e), which mandates that support be used “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.” The public switched telephone network is not a single-use network. Modern network infrastructure can provide access not only to voice services, but also to data, graphics, video, and other services.”) (footnote reference omitted)

<sup>71</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order and Order on Reconsideration, 18 FCC Rcd 15090, 15096, para. 13.

<sup>72</sup> We also note that the Commission has historically concluded that “the proper measure of cost for determining the level of universal service support is the forward-looking economic cost of constructing and operating the network facilities and functions used to provide the supported services,” First Report and Order, 12 FCC Rcd at 8899, para. 224, and that the record contains evidence that the forward-looking cost of deploying voice- and broadband-capable networks today is generally not significantly higher than deploying voice-only networks, *see, e.g.*, Letter from Donna Epps, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51 at 2-3 (filed Feb. 12, 2010) (“Fiber networks are . . . more efficient, and more reliable than the legacy copper network. . . . [T]hey are cheaper to maintain and have fewer potential points of failure than copper lines.”). Indeed, although we are updating the high-cost fund to support modern voice and broadband networks, we are not increasing the overall size of the fund to do so.

<sup>73</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4581, para. 71.

<sup>74</sup> *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200, 1204 (10th Cir. 2001) (*Qwest I*).

<sup>75</sup> 47 U.S.C. §§ 254(b)(2), (b)(3).

<sup>76</sup> *See infra* Section III.



CAF support, including Mobility Fund support,<sup>77</sup> and support under our existing high-cost support mechanisms – offer broadband capabilities to consumers.<sup>78</sup> We conclude that this approach is sufficient to ensure access to voice and broadband services and, therefore, we do not, at this time, add broadband to the list of supported services, as some have urged.<sup>79</sup>

66. *Section 706.*<sup>80</sup> We also have independent authority under section 706 of the Telecommunications Act of 1996 to fund the deployment of broadband networks. In section 706, Congress recognized the importance of ubiquitous broadband deployment to Americans’ civic, cultural, and economic lives and, thus, instructed the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”<sup>81</sup> Of particular importance, Congress adopted a definition of “advanced telecommunications capability” that is not confined to a particular technology or regulatory classification. Rather, “‘advanced telecommunications capability’ is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video communications using any technology.”<sup>82</sup> Section 706 further requires the

<sup>77</sup> Recipients of Mobility Fund Phase One support, however, are not required to provide broadband as discussed below. *See infra* Section VII.E.1.b.vi.

<sup>78</sup> Section 254(e) states that “support should be explicit and sufficient to achieve the purposes” of section 254. As discussed below, our CAF rules satisfy this requirement. *See generally infra*, Section VII.

<sup>79</sup> *See, e.g.*, Communications Workers of America *USF/ICC Transformation NPRM* Comments at 5-6; National Association of Telecommunications Officers and Advisors *USF/ICC Transformation NPRM* Comments at 3; State Members *USF/ICC Transformation NPRM* Comments at 2; Vonage *USF/ICC Transformation NPRM* Comments at 6-8.

<sup>80</sup> Commissioner McDowell does not support the view that section 706 provides the Commission with authority to support broadband through universal service funds. Instead, Commissioner McDowell’s view is that section 706 is very narrow in scope and is therefore unnecessary in reaching this conclusion.

<sup>81</sup> 47 U.S.C. § 1302(a). This direct mandate is consistent with numerous other statutory provisions governing the Commission. *See, e.g.*, 47 U.S.C. §§ 151 (instituting FCC for, among other objectives, “the purpose of regulating interstate and foreign communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges”), 157 (“It shall be the policy of the United States to encourage the provision of new technologies and services to the public.”), 230(b)(1) (“It is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media”), 257 (mandating ongoing review to identify and eliminate “market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services,” with the goal of promoting “the policies and purposes of this [Communications] Act favoring a diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity”); *see also* Recovery Act § 6001(k)(1) (requiring the Commission to develop a National Broadband Plan with the goal of promoting, among other things, “private sector investment, entrepreneurial activity, job creation and economic growth”).

<sup>82</sup> 47 U.S.C. § 1302(d)(1); *see also National Broadband Plan for our Future*, Notice of Inquiry, 24 FCC Rcd 4342, 4309, App., para. 13 (2009) (“advanced telecommunications capability” includes broadband Internet access); *Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans in a Reasonable and Timely Fashion*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2400, para. 1 (1999) (section 706 addresses “the deployment of broadband capability”), 2406, para. 20 (same). The Commission has observed that the phrase “advanced telecommunications capability” in section 706 is similar to the term “advanced telecommunications and information services” in section 254. *See Rural Health Care Support Mechanism*, WC Docket No. 02-60, Order, 21 FCC Rcd 11111, 11113 n.9 (2006).

Commission to “determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion” and, if the Commission concludes that it is not, to “*take immediate action* to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”<sup>83</sup> The Commission has found that broadband deployment to all Americans has not been reasonable and timely<sup>84</sup> and observed in its most recent broadband deployment report that “too many Americans remain unable to fully participate in our economy and society because they lack broadband.”<sup>85</sup> This finding triggers our duty under section 706(b) to “remov[e] barriers to infrastructure investment” and “promot[e] competition in the telecommunications market” in order to accelerate broadband deployment throughout the Nation.

67. Providing support for broadband networks helps achieve section 706(b)’s objectives. First, the Commission has recognized that one of the most significant barriers to investment in broadband infrastructure is the lack of a “business case for operating a broadband network” in high-cost areas “[i]n the absence of programs that provide additional support.”<sup>86</sup> Extending federal support to carriers deploying broadband networks in high-cost areas will thus eliminate a significant barrier to infrastructure investment and accelerate broadband deployment to unserved and underserved areas of the Nation. The deployment of broadband infrastructure to all Americans will in turn make services such as interconnected VoIP service accessible to more Americans.

68. Second, supporting broadband networks helps “promot[e] competition in the telecommunications market,” particularly with respect to voice services.<sup>87</sup> As we have long recognized, “interconnected VoIP service ‘is increasingly used to replace analog voice service.’”<sup>88</sup> Thus, we previously explained that requiring interconnected VoIP providers to *contribute* to federal universal service support mechanisms promoted competitive neutrality because it “reduces the possibility that carriers with universal service obligations will compete directly with providers without such obligations.”<sup>89</sup> Just as “we do not want contribution obligations to shape decisions regarding the technology that interconnected VoIP providers use to offer voice services to customers or to create

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<sup>83</sup> 47 U.S.C. § 1302(b) (emphasis added).

<sup>84</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, A National Broadband Plan for Our Future*, GN Docket Nos. 09-137, 09-51, Sixth Broadband Deployment Report, 25 FCC Rcd 9556, 9558, paras. 2-3; *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 10-159, Seventh Broadband Progress Report and Order on Reconsideration, 26 FCC Rcd 8008, 8023, para. 25 (2011) (2011 Seventh Broadband Progress Report).

<sup>85</sup> 2011 Seventh Broadband Progress Report, 26 FCC Rcd at 8011, para. 4.

<sup>86</sup> *Id.* at 8040, para. 66.

<sup>87</sup> 47 U.S.C. § 1302(b).

<sup>88</sup> *Universal Service Contribution Methodology, Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, Telecommunications Services for Individuals with Hearing and Speech Disabilities, Number Resource Optimization, Telephone Number Portability, Truth-In-Billing and Billing Format, IP-Enabled Services*, WC Docket Nos. 06-122 and 04-36, CC Docket Nos. 96-45, 98-171, 92-237, 99-200, 90-571, 95-116 98-170, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7541, para. 44 (2006) (*VoIP USF Order*) (quoting *CALEA First Report and Order*, 20 FCC Rcd at 15009-10, para. 42).

<sup>89</sup> *Id.*

opportunities for regulatory arbitrage,”<sup>90</sup> we do not want to create regulatory distinctions that serve no universal service purpose or that unduly influence the decisions providers will make with respect to how best to offer voice services to consumers. The “telecommunications market” – which includes interconnected VoIP and by statutory definition is broader than just telecommunications services<sup>91</sup> – will be more competitive, and thus will provide greater benefits to consumers, as a result of our decision to support broadband networks, regardless of regulatory classification.

69. By exercising our authority under section 706 in this manner, we further Congress’s objective of “accelerat[ing] deployment” of advanced telecommunications capability “to all Americans.”<sup>92</sup> Under our approach, federal support will not turn on whether interconnected VoIP services or the underlying broadband service falls within traditional regulatory classifications under the Communications Act. Rather, our approach focuses on accelerating broadband deployment to unserved and underserved areas, and allows providers to make their own judgments as to how best to structure their service offerings in order to make such deployment a reality.

70. We disagree with commenters who assert that we lack authority under section 706(b) to support broadband networks.<sup>93</sup> While 706(a) imposes a general duty on the Commission to encourage broadband deployment through the use of “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment,” section 706(b) is triggered by a specific finding that broadband capability is not being “deployed to all Americans in a reasonable and timely fashion.” Upon making that finding (which the Commission has done<sup>94</sup>), section 706(b) requires the Commission to “take immediate action to accelerate” broadband deployment. Given the statutory structure, we read section 706(b) as conferring on the Commission the additional authority, beyond what the Commission possesses under section 706(a) or elsewhere in the Act, to take steps necessary to fulfill Congress’s broadband deployment objectives. Indeed, it is hard to see what additional work section 706(b) does if it is not an independent source of statutory authority.<sup>95</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> Compare 47 U.S.C. § 153(50) (defining “telecommunications”) with 47 U.S.C. § 153(53) (defining “telecommunications service”).

<sup>92</sup> 47 U.S.C. § 1302(b).

<sup>93</sup> See, e.g., Cellular South *USF/ICC Transformation NPRM* Comments at 9; RTCC *USF/ICC Transformation NPRM* Comments at 12.

<sup>94</sup> See *supra* para. 64.

<sup>95</sup> The legislative history supports our conclusion that sections 706(a) and (b) are independent sources of authority. The relevant Senate Report explained that the provisions of section 304 (the Senate analogue to section 706) are “intended to ensure that one of the primary objectives of the [1996 Act]—to accelerate deployment of advanced telecommunications capability—is achieved,” and stressed that these provisions are “a necessary fail-safe” to guarantee that Congress’s objective is reached. S. Rep. No. 104-23, at 50–51 (1995). As we previously explained, “[i]t would be odd indeed to characterize Section 706(a) as a ‘fail-safe’ that ‘ensures’ the Commission’s ability to promote advanced services if it conferred no actual authority.” *Preserving the Open Internet*, 25 FCC Rcd 17905, 17970 (2010). Moreover, section 304(a) of the Senate bill would have required the Commission, upon a finding that broadband deployment is not reasonable and timely, to “take immediate action *under this section*,” S. 652, § 304(b) (1995) (emphasis added), which necessarily related back to the Commission’s authority conferred by section 304(a) of the bill to promote broadband deployment through “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” Ultimately, however, Congress did not define the authority conferred by section 706(b) by reference to section 706(a). Instead, Congress instructed the Commission to go beyond section 706(a) if it found (continued...)

71. We also reject the view that providing support for broadband networks under section 706(b) conflicts with section 254, which defines universal service in terms of telecommunications services.<sup>96</sup> Information services are not excluded from section 254 because of any policy judgment made by Congress. To the contrary, Congress contemplated that the federal universal service program would promote consumer access to both advanced telecommunications and advanced information services “in all regions of the Nation.”<sup>97</sup> When Congress enacted the 1996 Act, most consumers accessed the Internet through dial-up connections over the PSTN,<sup>98</sup> and broadband capabilities were provided over tariffed common carrier facilities.<sup>99</sup> Interconnected VoIP services had only a nominal presence in the marketplace in 1996. It was not until 2002 that the Commission first determined that one form of broadband – cable modem service – was a single offering of an information service rather than separate offerings of telecommunications and information services,<sup>100</sup> and only in 2005 did the Commission conclude that wireline broadband service should be governed by the same regulatory classification.<sup>101</sup> Thus, marketplace and technological developments and the Commission’s determinations that broadband services may be offered as information services have had the effect of removing such services from the scope of the explicit reference to “universal service” in section 254(c). Likewise, Congress did not exclude interconnected VoIP services from the federal universal service program; indeed, there is no reason to believe it specifically anticipated the development and growth of such services in the years following the enactment of the 1996 Act.

72. The principles upon which the Commission “shall base policies for the preservation and advancement of universal service” make clear that supporting networks used to offer services that are or may be information services for purposes of regulatory classification is consistent with Congress’s overarching policy objectives.<sup>102</sup> For example, section 254(b)(2)’s principle that “[a]ccess to advanced telecommunications and *information services* should be provided in all regions of the Nation” dovetails comfortably with section 706(b)’s policy that “advanced telecommunications capability [be] deployed to all Americans in a reasonable and timely fashion.”<sup>103</sup> Our decision to exercise authority under Section 706 does not undermine section 254’s universal service principles, but rather ensures their fulfillment. By contrast, limiting federal support based on the regulatory classification of the services offered over broadband networks as telecommunications services would exclude from the universal service program providers who would otherwise be able to deploy broadband infrastructure to consumers. We see no

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that broadband was not being deployed in the United States on a reasonable and timely basis and to “take immediate action” to correct that failure.

<sup>96</sup> See Cellular South *USF/ICC Transformation NPRM* Comments at 16-20; RTCC *USF/ICC Transformation NPRM* Comments at 5.

<sup>97</sup> 47 U.S.C. § 254(b)(2).

<sup>98</sup> *Universal Service First Report and Order*, 12 FCC Rcd at 8622-23, para. 83.

<sup>99</sup> See *GTE Telephone Operating Cos.*, 13 FCC Rcd 22466 (1998).

<sup>100</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002), *aff’d sub nom. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 978 (2005).

<sup>101</sup> *Wireline Broadband Order*, 20 FCC Rcd 14853.

<sup>102</sup> 47 U.S.C. § 254(b)(2), (3).

<sup>103</sup> Section 214(e)(1) requires services supported by the universal service mechanisms to be offered throughout a carrier’s designated service area. This requirement, coupled with the rules we adopt in this Order, will further promote the Commission’s goal of bringing broadband capability to “all Americans.”

basis in the statute, the legislative history of the 1996 Act, or the record of this proceeding for concluding that such a constricted outcome would promote the Congressional policy objectives underlying sections 254 and 706.

73. Finally, we note the limited extent to which we are relying on section 706(b) in this proceeding. Consistent with our longstanding policy of minimizing regulatory distinctions that serve no universal service purpose, we are not adopting a separate universal service framework under section 706(b). Instead, we are relying on section 706(b) as an alternative basis to section 254 to the extent necessary to ensure that the federal universal service program covers services and networks that could be used to offer information services as well as telecommunications services. Carriers seeking federal support must still comply with the same universal service rules and obligations set forth in sections 254 and 214, including the requirement that such providers be designated as eligible to receive support, either from state commissions or, if the provider is beyond the jurisdiction of the state commission, from this Commission.<sup>104</sup> In this way, we ensure that our exercise of section 706(b) authority will advance, rather than detract from, the universal service principles established under section 254 of the Act.

## VI. PUBLIC INTEREST OBLIGATIONS

74. Universal service support is a public-private partnership to preserve and advance access to modern communications networks. ETCs that benefit from public investment in their networks must be subject to clearly defined obligations associated with the use of such funding.<sup>105</sup>

75. Consistent with the Commission's longstanding practice, we continue to require all USF recipients to offer voice service. In addition, as a condition of receiving support, recipients must now also offer broadband service. In this section, we define the requirements for voice and describe in concept the broadband service obligations that apply to all fund recipients. We defer to subsequent sections discussion of the specific broadband requirements that apply to each of our new or reformed funding mechanisms according to each mechanism's particular purpose. Importantly, these reforms do not displace existing state requirements for voice service, including state COLR obligations. We will continue to work in partnership with the states on the future of such requirements as we consider the future of the PSTN.

### A. Voice Service

76. *Background.* Pursuant to section 254 of the Act, the Commission must establish the definition of the services that are supported by the federal universal service mechanisms.<sup>106</sup> In accordance with this mandate, in 1997, the Commission defined the supported services in functional terms as: voice grade access to the public switched network; local usage; dual tone multi-frequency (DTMF) signaling or its functional equivalent; single-party service or its functional equivalent; access to emergency services; access to operator services; access to interexchange service; access to directory assistance; and toll limitation to qualifying low-income consumers.<sup>107</sup> However, the telecommunications marketplace has changed significantly since 1997. For example, the "distinction between local and long distance calling is becoming irrelevant in light of flat rate service offerings that do not distinguish

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<sup>104</sup> See 47 U.S.C. § 214(e)(1), (2), (6).

<sup>105</sup> Throughout this Order, unless otherwise specified, the term "ETC" does not include ETCs that are designated only for the purposes of the low income program.

<sup>106</sup> 47 U.S.C. § 254(c)(1).

<sup>107</sup> 47 C.F.R. § 54.101(a)(1)-(9); see also *Universal Service First Report and Order*, 12 FCC Rcd at 8810, para. 61 (defining supported services).

between local and toll calls.”<sup>108</sup> In light of the changes in technology and in the marketplace, the Commission sought comment on simplifying the core functionalities of the supported services into the overarching concept, “voice telephony service.”<sup>109</sup>

77. *Discussion.* We determine that it is appropriate to describe the core functionalities of the supported services as “voice telephony service.” Some commenters support redefining the voice functionalities as voice telephony services,<sup>110</sup> while others oppose the change, arguing that the current list of functionalities remains important today, the term “voice telephony” is too vague, and such a modification may result in a lower standard of voice service.<sup>111</sup> Given that consumers are increasingly obtaining voice services over broadband networks as well as over traditional circuit switched telephone networks,<sup>112</sup> we agree with commenters that urge the Commission to focus on the functionality offered, not the specific technology used to provide the supported service.<sup>113</sup>

78. The decision to classify the supported services as voice telephony should not result in a lower standard of voice service: Many of the enumerated services are universal today, and we require eligible providers to continue to offer those particular functionalities as part of voice telephony. Rather, the modified definition simply shifts to a technologically neutral approach, allowing companies to provision voice service over any platform, including the PSTN and IP networks.<sup>114</sup> This modification will benefit both providers (as they may invest in new infrastructure and services) and consumers (who reap the benefits of the new technology and service offerings). Accordingly, to promote technological neutrality while ensuring that our new approach does not result in lower quality offerings, we amend section 54.101 of the Commission rules to specify that the functionalities of eligible voice telephony services include voice grade access to the public switched network or its functional equivalent; minutes of

<sup>108</sup> *Lifeline and Link Up Reform and Modernization, Federal-State Joint Board on Universal Service, Lifeline and Link Up*, WC Docket Nos. 11-42, 03-109, CC Docket No. 96-45, Notice of Proposed Rulemaking, 26 FCC Rcd 2770, 2844, para. 242 (2011) (*2011 Lifeline/Link Up NPRM*).

<sup>109</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd 4590, para. 96. The Commission also sought comment on whether it should modify the definition of voice grade access to the public switched network and whether ETCs should still be required to provide operator services and directory assistance. *Id.* at para. 77.

<sup>110</sup> See T-Mobile *USF/ICC Transformation NPRM* Comments at 7; New America Foundation, et al. *USF/ICC Transformation NPRM* Comments at 10, Frontier *USF/ICC Transformation NPRM* Comments at 19, State Members *USF/ICC Transformation NPRM* Comments at 130–31; see also Cricket *2011 Lifeline/Link Up NPRM* Comments at 15–16; FPSC *2011 Lifeline/Link Up NPRM* Comments at 29.

<sup>111</sup> Frontier *USF/ICC Transformation NPRM* Comments at 55–6 (“maintaining that the requirement that USF recipients provide voice grade access to the public switched network...is essential to ensure that robust voice services continue to be available to the American public”); Alaska *2011 Lifeline/Link Up NPRM* Comments at 8–9 (arguing that the redefining or eliminating the current supported services would lead to lower standards of voice service); Indiana *2011 Lifeline/Link Up NPRM* Comments at 12 (stating that local usage and single-party service are important functionalities); NASUCA *2011 Lifeline/Link Up NPRM* Comments at 26–7 (stating that the term “voice telephony” is unnecessarily vague); New Jersey Rate Counsel *2011 Lifeline/Link Up NPRM* Comments at 24.

<sup>112</sup> See *supra* at para. 63. The nine enumerated voice functionalities historically have been delivered over Time Division Multiplexing (TDM), a method of transmitting and receiving voice signals over the PSTN.

<sup>113</sup> Windstream *USF/ICC Transformation NPRM* Comments at 20.

<sup>114</sup> In particular, we find that changes in technology and the marketplace allow for elimination of the requirements to provide single-party service. In its comments, CWA stated that the Commission should continue to require recipients of USF or CAF support to provide operator services and directory assistance to customers. See CWA Comments at 2. However, while we encourage carriers to continue to offer operator services and directory assistance, we do not mandate that ETCs provide operator services or directory assistance; we find the importance of these services to telecommunications consumers has declined with changes in the marketplace.

use for local service provided at no additional charge to end users;<sup>115</sup> toll limitation to qualifying low-income consumers; and access to the emergency services 911 and enhanced 911 services to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems.<sup>116</sup>

79. Today, all ETCs, whether designated by a state commission or this Commission, are required to offer the supported service -- voice telephony service -- throughout their designated service area. ETCs also must provide Lifeline service throughout their designated service area. In the FNPRM, we seek comment on modifying incumbent ETCs' obligations to provide voice service in situations where the incumbent's high-cost universal service funding is eliminated, for example as a result of a competitive bidding process in which another ETC wins universal support for an area and is subject to accompanying voice and broadband service obligations.

80. As a condition of receiving support, we require ETCs to offer voice telephony as a standalone service throughout their designated service area.<sup>117</sup> As indicated above, ETCs may use any technology in the provision of voice telephony service.

81. Additionally, consistent with the section 254(b) principle that "[c]onsumers in all regions of the Nation . . . should have access to telecommunications and information services . . . that are available at rates that are reasonably comparable to rates charged for similar services in urban areas,"<sup>118</sup> ETCs must offer voice telephony service, including voice telephony service offered on a standalone basis, at rates that are reasonably comparable to urban rates.<sup>119</sup> We find that these requirements are appropriate to help ensure that consumers have access to voice telephony service that best fits their particular needs.<sup>120</sup>

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<sup>115</sup> We have never prescribed a minimum number of local access minutes, and we see no reason to do so now. We do, however, make a non-substantive revision to clarify the intent of the rule (section 54.101). Specifically, we replace "provided free of charge to end users" with "provided at no additional charge to end users." When the Commission adopted this rule, it sought to ensure that consumers would not pay additional charges for message units on top of the rate charged for basic local service. *Universal Service First Report and Order*, 12 FCC Rcd at 8813, para. 67.

<sup>116</sup> The Commission recently sought comment on ways to modernize the current voice-based 911 system to a Next Generation 911 (NG911) system that will enable the public to send texts, photos, videos, and other data to 911 call centers; ETCs will be required to comply with NG911 rules upon implementation by state and local governments. *See Facilitating the Deployment of Text-to-911 and Other Next Generation 911 Applications, Framework for Next Generation 911 Deployment*, Notice of Proposed Rulemaking; PS Docket Nos. 11-153, 10-255, Notice of Proposed Rulemaking, FCC 11-134 (rel. Sep. 22, 2011).

<sup>117</sup> With respect to "standalone service," we mean that consumers must not be required to purchase any other services (e.g., broadband) in order to purchase voice service. *See California Commission USF/ICC Transformation NPRM Comments at 10; Greenlining USF/ICC Transformation NPRM Comments at 8; Missouri Commission USF/ICC Transformation NPRM Comments at 7; NASUCA USF/ICC Transformation NPRM Comments at 38.*

<sup>118</sup> 47 U.S.C. § 254(b)(3).

<sup>119</sup> *See id.*

<sup>120</sup> *See AT&T USF/ICC Transformation NPRM Comments at 103* (indicating that competition will ensure that customers have multiple options for voice service). *But see Frontier USF/ICC Transformation NPRM Comments at 17-9* (stating that many Americans will have access to broadband but will not use it, so fund recipients must continue to provide standalone voice service).

82. We decline to preempt state obligations regarding voice service, including COLR obligations, at this time.<sup>121</sup> Proponents of such preemption have failed to support their assertion that state service obligations are inconsistent with federal rules and burden the federal universal service mechanisms, nor have they identified any specific legacy service obligations that represent an unfunded mandate that make it infeasible for carriers to deploy broadband in high-cost areas.<sup>122</sup> Carriers must therefore continue to satisfy state voice service requirements.

83. That said, we encourage states to review their respective regulations and policies in light of the changes we adopt here today and revisit the appropriateness of maintaining those obligations for entities that no longer receive federal high-cost universal service funding, just as we intend to explore the necessity of maintaining ETC obligations when ETCs no longer are receiving funding. For example, states could consider providing state support directly to the incumbent LEC to continue providing voice service in areas where the incumbent is no longer receiving federal high-cost universal service support or, alternatively, could shift COLR obligations from the existing incumbent to another provider who is receiving federal or state universal service support in the future.

84. *Voice Rates.* We will consider rural rates for voice service to be “reasonably comparable” to urban voice rates under section 254(b)(3) if rural rates fall within a reasonable range of urban rates for reasonably comparable voice service. Consistent with our existing precedent, we will presume that a voice rate is within a reasonable range if it falls within two standard deviations above the national average.<sup>123</sup>

85. Because the data used to calculate the national average price for voice service is out of date, we direct the Wireline Competition Bureau and the Wireless Telecommunications Bureau to develop and conduct an annual survey of voice rates in order to compare urban voice rates to the rural voice rates that ETCs will be reporting to us.<sup>124</sup> The results of this survey will be published annually. For purposes of conducting the survey, the Bureaus should develop a methodology to survey a representative sample of facilities-based fixed voice service providers taking into account the relative categories of fixed voice providers as determined in the most recent FCC Form 477 data collection. In the FNPRM, we seek comment on whether to collect separate data on fixed and mobile voice rates and whether fixed and mobile voice services should have different benchmarks for purposes of determining reasonable comparability.<sup>125</sup>

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<sup>121</sup> Letter from Robert W. Quinn, Jr., AT&T, Steve Davis, CenturyLink, Michael T. Skrivan, FairPoint, Kathleen Q. Abernathy, Frontier, Kathleen Grillo, Verizon, and Michael D. Rhoda, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., Attach. 1 at 13 (filed July 29, 2011) (ABC Plan).

<sup>122</sup> *Id.* See, e.g., AT&T *USF/ICC Transformation NPRM* Comments at 61-69, T-Mobile *USF/ICC Transformation NPRM* Comments at 8, Verizon *USF/ICC Transformation NPRM* Reply at 44 (each opposing COLR obligations). But see Alaska Commission *USF/ICC Transformation NPRM* Comments at 24-5, NARUC *USF/ICC Transformation NPRM* Comments at 17, South Dakota Commission *USF/ICC Transformation NPRM* Reply at 11, State Members *USF/ICC Transformation NPRM* Comments at 136, Texas Telephone *USF/ICC Transformation NPRM* Comments at 11-3.

<sup>123</sup> The standard deviation is a measure of dispersion. The sample standard deviation is the square root of the sample variance. The sample variance is calculated as the sum of the squared deviations of the individual observations in the sample of data from the sample average divided by the total number of observations in the sample minus one. In a normal distribution, about 68 percent of the observations lie within one standard deviation above and below the average and about 95 percent of the observations lie within two standard deviations above and below the average.

<sup>124</sup> See *infra* Sections VII.D.5, VIII.A.2.

<sup>125</sup> See *infra* para. 1018.



## B. Broadband Service

86. As a condition of receiving federal high-cost universal service support, all ETCs, whether designated by a state commission or the Commission,<sup>126</sup> will be required to offer broadband service in their supported area that meets certain basic performance requirements and to report regularly on associated performance measures.<sup>127</sup> ETCs must make this broadband service available at rates that are reasonably comparable to offerings of comparable broadband services in urban areas.

87. In developing these performance requirements, we seek to ensure that the performance of broadband available in rural and high cost areas is “reasonably comparable” to that available in urban areas.<sup>128</sup> All Americans should have access to broadband that is capable of enabling the kinds of key applications that drive our efforts to achieve universal broadband, including education (*e.g.*, distance/online learning),<sup>129</sup> health care (*e.g.*, remote health monitoring),<sup>130</sup> and person-to-person communications (*e.g.*, VoIP or online video chat with loved ones serving overseas).<sup>131</sup>

88. To help ensure reasonable comparability of the capabilities offered to end users, we provide guidance in this section on benchmarks for evaluating whether particular broadband offerings adequately afford these capabilities, in order to provide clear performance targets and ensure accountability. Specifically, we discuss the technical characteristics of broadband offerings – speed, latency, and capacity – that influence the capabilities afforded to users, and therefore their ability to use broadband connections for the key purposes articulated above. We also discuss characteristics common to the broadband buildout obligations imposed on all recipients of the CAF.

89. In subsequent sections of the Order we provide more detailed guidance on the requirements for technical characteristics and broadband buildout associated with specific funding mechanisms under which particular ETCs will receive support, *i.e.*, rate-of-return support mechanisms, the CAF mechanisms in price cap territories, CAF ICC support, and Mobility Fund Phase I.<sup>132</sup> In the FNPRM, we seek comment on how the requirements we adopt here should be adjusted for the Remote Areas Fund and Mobility Fund Phase II.

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<sup>126</sup> As used throughout this order, the term “high-cost support” refers to all existing high-cost USF mechanisms as well as the Connect America Fund, including the Mobility Fund Phase I, unless otherwise expressly noted.

<sup>127</sup> Although we do not at this time require it, we expect that ETCs that offer standalone broadband service in any portion of their service territory will also offer such service in all areas that receive CAF support. By “standalone service,” we mean that consumers are not required to purchase any other service (*e.g.*, voice or video service) in order to purchase broadband service.

<sup>128</sup> 47 U.S.C. § 254(b)(3) (“Consumers in all regions of the Nation . . . should have access to . . . advanced telecommunications and information services[] that are reasonably comparable to those services provided in urban areas . . .”).

<sup>129</sup> See National Broadband Plan at 223-244.

<sup>130</sup> See, *e.g.*, Omnibus Broadband Initiative, *Health Care Broadband in America, Early Analysis and a Path Forward*, at 5 (Aug. 2010); Center for Technology and Aging, *Technologies for Remote Patient Monitoring for Older Adults*, Position Paper, at 13 (April 2010), available at <http://www.techandaging.org/RPMPositionPaper.pdf> (discussing data transmission methods used for various continuous cardiac remote patient monitoring technologies).

<sup>131</sup> See National Broadband Plan at 59.

<sup>132</sup> See *infra* sections VII.C (Providing Support in Areas Served by Price Cap Carriers), VII.D (Universal Support for Rate-of-Return Carriers), and VII.E (Rationalizing Support for Mobility).

## 1. Broadband Performance Metrics

90. Broadband services in the market today vary along several important dimensions. As discussed more fully below, we focus on speed, latency, and capacity as three core characteristics that affect what consumers can do with their broadband service, and we therefore include requirements related to these three characteristics in defining ETCs' broadband service obligations.<sup>133</sup>

91. For each of these characteristics, we require that funding recipients offer service that is reasonably comparable to comparable services offered in urban areas.<sup>134</sup> That is, the actual download and upload speeds, latency, and usage limits (if any) for providers' broadband must be reasonably comparable to the typical speeds, latency, and usage limits (if any) of comparable broadband services in urban areas. Funding recipients may use any wireline, wireless, terrestrial, or satellite technology, or combination of technologies, to deliver service that satisfies this requirement.<sup>135</sup>

92. *Speed.* Users and providers commonly refer to the bandwidth of a broadband connection as its "speed." The bandwidth (speed) of a connection indicates the rate at which information can be transmitted by that connection, typically measured in bits, kilobits (kbps), or megabits per second (Mbps). The speed of consumers' broadband connections affects their ability to access and utilize Internet applications and content. To ensure that consumers are getting the full benefit of broadband, we require funding recipients to provide broadband that meets performance metrics for actual speeds,<sup>136</sup> measured as described below, rather than "advertised" or "up to" metrics.

93. In the past two Broadband Progress Reports,<sup>137</sup> the Commission found that the availability of residential broadband connections that actually enable an end user to download content from the Internet at 4 Mbps and to upload such content at 1 Mbps over the broadband provider's network was a reasonable benchmark for the availability of "advanced telecommunications capability," defined by

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<sup>133</sup> See *Measuring Broadband America Report* at 12; see also TIA USF/ICC Transformation NPRM Comments at 9 (define broadband service by functionality rather than merely speed).

<sup>134</sup> As discussed in the Goals section above, see *supra* section IV (Goals), universal advanced mobile coverage is an important goal in its own right. By limiting reasonable comparability to "comparable services," we are intending to ensure that fixed broadband services in rural areas are compared with fixed broadband services in urban areas, and similarly that mobile broadband services in rural areas are compared with mobile broadband services in urban areas. Because fixed and mobile broadband technologies may differ in some of their capabilities, we find it appropriate to adopt different performance benchmarks for the CAF funding mechanisms that are specifically oriented towards the goal of universal mobility, namely, Mobility Fund Phase I and Tribal Mobility Fund Phase I. In the FNPRM, we seek comment on how to compare mobile broadband to fixed broadband as product offerings evolve over time. See *infra* paras. 1021-1024.

<sup>135</sup> See, e.g., T-Mobile USF/ICC Transformation NPRM Comments at 8 (define broadband in technology neutral way).

<sup>136</sup> See ADTRAN USF/ICC Transformation NPRM Comments at 31 (four characteristics required for measuring actual speed); Missouri Commission USF/ICC Transformation NPRM Comments at 7 (broadband provided should be at actual speeds not advertised speeds).

<sup>137</sup> See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act; A National Broadband Plan for Our Future*, GN Docket Nos. 09-137, 09-51, Report, 25 FCC Rcd 9556, 9559, para. 5 (2010) (2010 Sixth Broadband Progress Report); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 10-159, Seventh Broadband Progress Report And Order On Reconsideration, 26 FCC Rcd 8008, 8018-19, paras. 14-15 (2011) (2011 Seventh Broadband Progress Report).

the statute as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”<sup>138</sup> This conclusion was based on the Commission’s examination of overall Internet traffic patterns, which revealed that consumers increasingly are using their broadband connections to view high-quality video, and want to be able to do so while still using basic functions such as email and web browsing.<sup>139</sup> The evidence shows that streaming standard definition video in near real-time consumes anywhere from 1-5 Mbps, depending on a variety of factors.<sup>140</sup> This conclusion also was drawn from the National Broadband Plan, which, based on an analysis of user behavior, demands this usage places on the network, and recent experience in network evolution, recommended as a national broadband availability target that every household in America have access to affordable broadband service offering actual download speeds of at least 4 Mbps and actual upload speeds of at least 1 Mbps.

94. Given the foregoing, other than for the Phase I Mobility Fund,<sup>141</sup> we adopt an initial minimum broadband speed benchmark for CAF recipients of 4 Mbps downstream and 1 Mbps upstream.<sup>142</sup> Broadband connections that meet this speed threshold will provide subscribers in rural and high cost areas with the ability to use critical broadband applications in a manner reasonably comparable to broadband subscribers in urban areas.<sup>143</sup>

95. Some commenters, including DSL and mobile wireless broadband providers, observe that the 1 Mbps upload speed requirement in particular could impose costs well in excess of the benefits of 1 Mbps versus 768 kilobits per second (kbps) upstream.<sup>144</sup> In general, we expect new installations to provide speeds of at least 1 Mbps upstream. However, to the extent a CAF recipient can demonstrate that support is insufficient to enable 1 Mbps upstream for all locations, temporary waivers of the upstream requirement for some locations will be available. We delegate authority to the Wireline Competition Bureau and Wireless Telecommunications Bureau to address such waiver requests. We note, however,

<sup>138</sup> 47 U.S.C. § 1302(d)(1). Voice, data, graphics, and video telecommunications are the fundamental building blocks for the key education, health care, and person-to-person communication applications discussed above.

<sup>139</sup> 2010 *Sixth Broadband Progress Report*, 25 FCC Rcd at 9563-64, para. 11. We continue to expect that it is not uncommon for more than one person to make use of a single Internet connection simultaneously, particularly in multi-member households that subscribe to a single Internet access service.

<sup>140</sup> See Omnibus Broadband Initiative, *Broadband Performance: OBI Technical Paper No. 4*, at 8 (OBI, Broadband Performance).

<sup>141</sup> See *supra* note 134.

<sup>142</sup> Many commenters supported a 4 Mbps download speed. See, e.g., CWA *USF/ICC Transformation NPRM* Comments at 14, 16-17; Cox *USF/ICC Transformation NPRM* Comments at 4-5; Frontier *USF/ICC Transformation NPRM* Comments at 23; Greenlining *USF/ICC Transformation NPRM* Comments at 5-6; Cellular One *USF/ICC Transformation NPRM* Comments at 26-27; U.S. Cellular *USF/ICC Transformation NPRM* Reply at 86-90 (summarizing support of TDS, RBA, CTIA, ACA, Sprint, T-Mobile, and USA Coalition for a 4 Mbps/1 Mbps speed threshold).

<sup>143</sup> Requiring 4 Mbps/1 Mbps to be provided to all locations, including the more distant locations on a landline network and regardless of the served location’s position in a wireless network, implies that customers located closer to the wireline switch or wireless tower will be capable of receiving service in excess of this minimum standard. See, e.g., Letter from Jonathan Banks, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 2 (filed Oct. 17, 2011) (discussing how shorter loop lengths could lead to some locations receiving broadband service at 6 Mbps downstream speed and others receiving 12 Mbps downstream speed).

<sup>144</sup> See, e.g., ADTRAN *USF/ICC Transformation NPRM* Comments at 28-29; AT&T *USF/ICC Transformation NPRM* Comments at 94 (stating that 4 Mbps/1 Mbps would require 50 percent more support than 4 Mbps/768 kbps); Florida Commission *USF/ICC Transformation NPRM* Comments at 5-6 (supporting 3 Mbps/768 kbps); T-Mobile *USF/ICC Transformation NPRM* Reply at 22 (stating that 768 kbps is less costly than 1 Mbps).

that we expect that those facilities that are not currently capable of providing the minimum upstream speed will eventually be upgraded, consistent with our build-out requirements adopted below, with scalable technology capable of meeting future speed increases.

96. *Latency.* Latency is a measure of the time it takes for a packet of data to travel from one point to another in a network. Because many communication protocols depend on an acknowledgement that packets were received successfully, or otherwise involve transmission of data packets back and forth along a path in the network, latency is often measured by round-trip time in milliseconds. Latency affects a consumer's ability to use real-time applications, including interactive voice or video communication, over the network. We require ETCs to offer sufficiently low latency to enable use of real-time applications, such as VoIP.<sup>145</sup> The Commission's broadband measurement test results showed that most terrestrial wireline technologies could reliably provide latency of less than 100 milliseconds.<sup>146</sup>

97. *Capacity.* Capacity is the total volume of data sent and/or received by the end user over a period of time. It is often measured in gigabytes (GB) per month. Several broadband providers have imposed monthly data usage limits, restricting users to a predetermined quantity of data, and these limits typically vary between fixed and mobile services.<sup>147</sup> The terms of service may include an overage fee if a consumer exceeds the monthly limit. Some commenters recommended we specify a minimum usage limit.<sup>148</sup>

98. Although at this time we decline to adopt specific minimum capacity requirements for CAF recipients, we emphasize that any usage limits imposed by an ETC on its USF-supported broadband offering must be reasonably comparable to usage limits for comparable broadband offerings in urban areas.<sup>149</sup> In particular, ETCs whose support is predicated on offering of a fixed broadband service – namely, all ETCs other than recipients of the Phase I Mobility Funds – must allow usage at levels comparable to residential terrestrial fixed broadband service in urban areas.<sup>150</sup> We define terrestrial fixed

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<sup>145</sup> See, e.g., ADTRAN *USF/ICC Transformation NPRM* Comments at 18 (describing latency's effect on voice communications); ITU-T, "International telephone connections and circuits – General Recommendations on the transmission quality for an entire international telephone connection," Recommendation G.114, May 2003.

<sup>146</sup> *Measuring Broadband America Report* at 22, Chart 9 (illustrating latencies of wireline technologies tested). Fiber-to-the-home had a latency averaging 17 milliseconds, and DSL ranged as high as approximately 75 milliseconds. We note that satellite companies contend that their services are adequate for some real-time applications like VoIP, even with round-trip latencies of more than 100 milliseconds. Satellite Providers *USF/ICC Transformation NPRM* Joint Reply at 8. But see Letter from John Kuykendall, on behalf of BEK Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., Attach. at 15 (filed Oct. 6, 2011) (criticizing satellite latency that cannot be improved by increased data speeds).

<sup>147</sup> For example, as of May 2011, AT&T's DSL offering had a 150 GB limit, and its U-verse offering had a 250 GB limit. See "To Cap, or Not," N.Y. Times, July 21, 2011. Since 2008, Comcast has had a 250 GB monthly data usage threshold on residential accounts. See Comcast Announcement Regarding An Amendment to Our Acceptable Use Policy, <http://xfinity.comcast.net/terms/network/amendment/>. In contrast, Verizon Wireless offers data plans with usage limits of 2GB, 5GB, and 10GB. See, e.g., Verizon Wireless, Nationwide Single-Line Plans, <http://www.verizonwireless.com/b2c/plans/?page=single>.

<sup>148</sup> ADTRAN *USF/ICC Transformation NPRM* Comments at 19 (limitations on usage should be appropriate for the service being funded, whether fixed or mobile, given the disparity in traffic volumes for each service); Public Knowledge and Benton *USF/ICC Transformation NPRM* Comments at 13 (arguing capacity should match average in urban areas).

<sup>149</sup> We note that such service could include, for instance, use of a wireless data card if it can provide the performance characteristics described in this section.

<sup>150</sup> See *supra* para. 87 ("In developing these performance requirements, we seek to ensure that the performance of broadband available in rural and high cost areas is "reasonably comparable" to that available in urban areas").

broadband service as one that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user's home router, computer or other Internet access device to the network. This term includes fixed wireless broadband services (including those offered over unlicensed spectrum).

99. In 2009, residential broadband users who subscribed to fixed broadband service with speeds between 3 Mbps and 5 Mbps used, on average, 10 GB of capacity per month,<sup>151</sup> and annual per-user growth was between 30 and 35 percent.<sup>152</sup> We note that AT&T's DSL usage limit is 150 GB and its U-Verse offering has a 250 GB limit.<sup>153</sup> Since 2008, Comcast has had a 250 GB monthly data usage threshold on residential accounts.<sup>154</sup> Without endorsing or approving of these or other usage limits, we provide guidance by noting that a usage limit significantly below these current offerings (e.g., a 10 GB monthly data limit) would not be reasonably comparable to residential terrestrial fixed broadband in urban areas.<sup>155</sup> A 250 GB monthly data limit for CAF-funded fixed broadband offerings would likely be adequate at this time because 250 GB appears to be reasonably comparable to major current urban broadband offerings. We recognize, however, that both pricing and usage limitations change over time. We delegate authority to the Wireline Competition Bureau and Wireless Telecommunications Bureau to monitor urban broadband offerings, including by conducting an annual survey, in order to specify an appropriate minimum for usage allowances, and to adjust such a minimum over time.<sup>156</sup>

100. Similarly, for Mobility Fund Phase I, we decline to adopt a specific minimum capacity requirement that supported providers must offer mobile broadband users.<sup>157</sup> However, we emphasize that any usage limits imposed by a provider on its mobile broadband offerings supported by the Mobility Fund must be reasonably comparable to any usage limits for mobile comparable broadband offerings in urban areas.

101. *Areas with No Terrestrial Backhaul.* Recognizing that satellite backhaul may limit the performance of broadband networks as compared to terrestrial backhaul, we relax the broadband public interest obligation for carriers providing fixed broadband that are compelled to use satellite backhaul facilities.<sup>158</sup> The Regulatory Commission of Alaska reports that "for many areas of Alaska, satellite links

<sup>151</sup> Omnibus Broadband Initiative, *The Broadband Availability Gap: OBI Technical Paper No. 1*, at 112, Ex. 4-BQ (April 2010) (OBI, Broadband Availability Gap), available at <http://www.broadband.gov/plan/broadband-working-reports-technical-papers.html>.

<sup>152</sup> OBI, Broadband Performance at 7.

<sup>153</sup> See "To Cap, or Not," N.Y. Times, July 21, 2011.

<sup>154</sup> Comcast Announcement Regarding An Amendment to Our Acceptable Use Policy, <http://xfinity.comcast.net/terms/network/amendment/>.

<sup>155</sup> We note that this should not be interpreted to mean that the Commission intends to regulate usage limits.

<sup>156</sup> We expect that the Bureaus will conduct this survey in conjunction with the pricing survey we direct the Bureaus to conduct below. See *supra* para. 114 (delegating to the Bureaus the authority to conduct an annual survey of urban broadband rates).

<sup>157</sup> See *supra* para. 87 ("In developing these performance requirements, we seek to ensure that the performance of broadband available in rural and high cost areas is "reasonably comparable" to that available in urban areas").

<sup>158</sup> ACS USF/ICC Transformation NPRM Comments at 11 ("Even if the modest speeds of 4 Mbps down/1 Mbps up are adopted by the FCC as target throughput speeds, substantial construction of terrestrial facilities and expansion of satellite capacity will be needed to create the backhaul capability that will be necessary to deliver broadband at those speeds in Alaska." (footnote omitted)); ACS USF/ICC Transformation NPRM Reply at 8 (same); Alaska Commission USF/ICC Transformation NPRM Comments at 24; GCI USF/ICC Transformation NPRM Comments at 2. As discussed elsewhere, we decline to relax the technical performance requirements due to satellite backhaul limitations for purposes of Mobility Fund Phase I, although we clarify that funds may be used to upgrade middle (continued...)

may be the only viable option to deploy broadband.”<sup>159</sup> Carriers seeking relaxed public interest obligations because they lack the ability to obtain terrestrial backhaul—either fiber, microwave, or other technology—and are therefore compelled to rely exclusively on satellite backhaul in their study area, must certify annually that no terrestrial backhaul options exist, and that they are unable to satisfy the broadband public interest obligations adopted above due to the limited functionality of the available satellite backhaul facilities.<sup>160</sup> Any such funding recipients must offer broadband service speeds of at least 1 Mbps downstream and 256 kbps upstream within the supported area served by satellite middle-mile facilities.<sup>161</sup> Latency and capacity requirements discussed above will not apply to this subset of providers. Buildout obligations – which are dependent on the mechanism by which a carrier receives funding – remain the same for this class of carriers. We will monitor and review the public interest obligations for satellite backhaul areas. To the extent that new terrestrial backhaul facilities are constructed, or existing facilities improve sufficiently to meet the public interest obligations, we require funding recipients to satisfy the relevant broadband public interest obligations in full within twelve months of the new backhaul facilities becoming commercially available.<sup>162</sup>

102. *Community Anchor Institutions.*<sup>163</sup> We expect that ETCs will likely offer broadband at greater speeds to community anchor institutions in rural and high cost areas, although we do not set requirements at this time, as the 4 Mbps/1 Mbps standard will be met in the more rural areas of an ETC’s service territory, and community anchor institutions are typically located in or near small towns and more inhabited areas of rural America.<sup>164</sup> We also expect ETCs to engage with community anchor institutions in the network planning stages with respect to the deployment of CAF-supported networks.<sup>165</sup> We require ETCs to identify and report on the community anchor institutions that newly gain access to fixed

(Continued from previous page) \_\_\_\_\_

mile facilities. We seek additional comment on how to address satellite backhaul issues for Mobility Fund Phase II in the FNPRM. See *infra* section XVII.I (Mobility Fund Phase II).

<sup>159</sup> Alaska Commission *USF/ICC Transformation NPRM* Comments at 22; GCI *August 3 PN* Comments at 10 (estimating that “[t]wenty-seven percent of the state’s population lives in villages that are not on Alaska’s road/rail/pipeline network, and thus are today reached only by satellite middle-mile.”).

<sup>160</sup> See *supra* paras. 92-96 (adopting speed and latency requirements).

<sup>161</sup> GCI *August 3 PN* Comments at 27.

<sup>162</sup> This limited exemption is only available to providers that have no access in their study area to any terrestrial backhaul facilities, and does not apply to any providers that object to the cost of backhaul facilities. Similarly, providers relying on terrestrial backhaul facilities today will not be allowed this exemption if they elect to transition to satellite backhaul facilities.

<sup>163</sup> For purposes of this order, we define “community anchor institutions” to mean schools, libraries, medical and healthcare providers, public safety entities, community colleges and other institutions of higher education, and other community support organizations and agencies that provide outreach, access, equipment, and support services to facilitate greater use of broadband service by vulnerable populations, including low-income, the unemployed, and the aged. We draw upon the definition used in implementing American Recovery and Reinvestment Act of 2009. See 75 Fed. Reg. 3792, 3797 (Jan. 22, 2010).

<sup>164</sup> There is nothing in this order that requires a carrier to provide broadband service to a community anchor institution at a certain rate, but we acknowledge that community anchor institutions generally require more bandwidth than a residential customer, and expect that ETCs would provide higher bandwidth offerings to community anchor institutions in high-cost areas at rates that are reasonably comparable to comparable offerings to community anchor institutions in urban areas.

<sup>165</sup> See *infra* sections VII.C.2.b (Price Cap Public Interest Obligations) and VII.D.2 (Public Interest Obligations of Rate-of-Return Carriers).

broadband service as a result of CAF support.<sup>166</sup> In addition, the Wireline Competition Bureau will invite further input on the unique needs of community anchor institutions as it develops a forward-looking cost model to estimate the cost of serving locations, including community anchor locations, in price cap territories.<sup>167</sup>

103. *Broadband Buildout Obligations.* All CAF funding comes with obligations to build out broadband within an ETC's service area, subject to certain limitations. The timing and extent of these obligations varies across the different CAF mechanisms, and details are discussed in the specific sections explaining the separate mechanisms. However, all broadband buildout obligations for fixed broadband are conditioned on not spending the funds to serve customers in areas already served by an "unsubsidized competitor."<sup>168</sup> We define an unsubsidized competitor as a facilities-based provider of residential terrestrial fixed voice and broadband service that does not receive high-cost support.<sup>169</sup>

104. We limit this definition to fixed, terrestrial providers because we think these limitations will disqualify few, if any, broadband providers that meet CAF speed, capacity, or latency minimums for all locations within relevant areas of comparison, while significantly easing administration of the definition. For example, the record suggests that satellite providers are generally unable to provide affordable voice and broadband service that meets our minimum capacity requirements without the aid of a subsidy: Consumer satellite services have limited capacity allowances today, and future satellite services appear unlikely to offer capacity reasonably comparable to urban offerings in the absence of universal service support.<sup>170</sup> Likewise, while 4G mobile broadband services may meet our speed requirements in many locations, meeting minimum speed and capacity guarantees is likely to prove challenging over larger areas, particularly indoors.<sup>171</sup> And because the performance offered by mobile

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<sup>166</sup> See *infra* para. 587.

<sup>167</sup> See Alliance for Community Media Reply at 2; CWA Comments at 17; Internet2 Comments at 2; SHLB Coalition Comments at 4; Letter from John Windhausen, Jr., SHLB Coalition, to Chairman Genachowski and Commissioners (dated Sept. 28, 2011).

<sup>168</sup> We recognize that the best data available at this time to determine whether broadband is available from an unsubsidized competitor at speeds at or above the 4 Mbps/1 Mbps speed threshold will likely be data on broadband availability at 3 Mbps downstream and 768 kbps upstream, which is collected for the National Broadband Map and through the Commission's Form 477. Such data may therefore be used as a proxy for the availability of 4 Mbps/1 Mbps broadband. Depending on our anticipated reform to the Form 477 data collection, we may have additional data in the future upon which the Commission may rely. See *Modernizing the FCC Form 477 Data Program*, WC Docket No. 11-10, *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, *Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering*, WC Docket No. 08-190, *Review of Wireline Competition Bureau Data Practices*, WC Docket No. 10-132, Notice of Proposed Rulemaking, 26 FCC Rcd 1508 (2011) (*Broadband Data NPRM*) (seeking comment on reforms to FCC Form 477 data collection).

<sup>169</sup> We define a fixed voice and broadband service as one that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user's home router, computer, or other Internet access device to the network. This term encompasses fixed wireless broadband services (including services using unlicensed spectrum). The term does not include a broadband service that serves end users primarily using mobile stations. See 47 U.S.C. § 153(34) ("The term 'mobile station' means a radio-communication station capable of being moved and which ordinarily does move.").

<sup>170</sup> OBI, Broadband Performance at 89; Letter from Lisa Scalpone, ViaSat, Inc., Jeffrey H. Blum, Dish Network L.L.C., and Dean Manson, Echostar Technologies L.L.C., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 8 (filed Oct. 18, 2011).

<sup>171</sup> OBI, Broadband Performance at 66.

services varies by location, it would be very difficult and costly for a CAF recipient or the Commission to evaluate whether such a service met our performance requirements at all homes and businesses within a study area, census block, or other required area. A wireless provider that currently offers mobile service can become an “unsubsidized competitor,” however, by offering a fixed wireless service that guarantees speed, capacity, and latency minimums will be met at all locations within the relevant area. Taken together, these considerations persuade us that the advantages of limiting our definition of unsubsidized providers outweigh any potential concerns that we may unduly disqualify service providers that otherwise meet our performance requirements. As mobile and satellite services develop over time, we will revisit the definition of “unsubsidized competitor” as warranted. Recognizing the benefits of certainty, however, we do not anticipate changing the definition for the next few years.

105. *Summary and Evolution of Technical Characteristics.* As set forth in further detail in section VII, this Order establishes several funding mechanisms within the CAF, each customized to particular user needs (e.g., fixed vs. mobile voice and broadband) and time horizons (phases I vs. II). The technical characteristics and broadband buildout obligation under each of these new CAF components can be summarized as follows:

Figure 1

Component of CAF	Broadband Performance Characteristics	Obligation
<b>Price Cap CAF (Phase I)</b> <b>(Incremental support)</b>	<ul style="list-style-type: none"> <li>• Speed of at least 4 Mbps/1 Mbps to a specified number of locations, depending on level of incremental support</li> <li>• Latency sufficient for real-time applications, including VoIP</li> <li>• Usage at levels comparable to terrestrial residential fixed broadband service in urban areas</li> </ul>	Extend broadband to areas lacking 768 kbps according to National Broadband Map and carrier’s best knowledge; can’t use for areas already in capital improvements plan or to fulfill merger commitments or Recovery Act projects.
<b>CAF in Price Cap Areas (Phase II)</b>	<ul style="list-style-type: none"> <li>• Speed of at least 4 Mbps/1 Mbps to all supported locations, with at least 6 Mbps/1.5 Mbps to a number of supported locations to be specified by model</li> <li>• Latency sufficient for real-time applications, including VoIP</li> <li>• Usage at levels comparable to terrestrial residential fixed broadband service in urban areas</li> </ul>	Extend broadband to supported locations; supported locations do not include areas where there is an unsubsidized competitor offering 4 Mbps/1 Mbps.



Component of CAF	Broadband Performance Characteristics	Obligation
<b>Areas with no terrestrial backhaul</b>	<ul style="list-style-type: none"> <li>Speed of at least 1 Mbps/256 kbps in locations where otherwise would be obligated to provide 4 Mbps/1 Mbps</li> </ul>	
<b>Mobility Fund, Phase I</b>	<ul style="list-style-type: none"> <li>3G (200 kbps/50 kbps minimum at cell edge) OR 4G (768 kbps/200 kbps minimum at cell edge)</li> <li>Latency sufficient for real-time applications</li> <li>Usage at levels comparable to mobile 3G/4G offerings in urban areas</li> </ul>	<p>Provide coverage of between 75 and 100 percent of road miles in unserved census blocks.</p> <p>OR</p> <p>For Tribal Mobility Fund: Provide coverage of between 75 and 100 percent of pops in unserved census blocks within Tribal lands.</p>

106. Because most of these funding mechanisms are aimed at immediately narrowing broadband deployment gaps, both fixed and mobile, their performance benchmarks reflect technical capabilities and user needs that are expected at this time to be suitable for today and the next few years.<sup>172</sup> However, we must also lay the groundwork for longer-term evolution of CAF broadband obligations, as we expect technical capabilities and user needs will continue to evolve. We therefore commit to monitoring trends in the performance of urban broadband offerings through the survey data we will collect and rural broadband offerings through the reporting data we will collect,<sup>173</sup> and to initiating a proceeding no later than the end of 2014 to review our performance requirements and ensure that CAF continues to support broadband service that is reasonably comparable to broadband service in urban areas.<sup>174</sup>

107. In advance of that future proceeding, we rely on our predictive judgment to provide guidance to CAF recipients on metrics that will satisfy our expectation that they invest the public's funds in robust, scalable broadband networks. As shown in the chart below, the National Broadband Plan estimated that by 2017, average advertised speeds for residential broadband would be approximately 5.76 Mbps downstream.<sup>175</sup> Applying growth rates measured by Akamai, one finds a projected average actual

<sup>172</sup> Phased down competitive ETC support is not aimed at these objectives. Therefore, it is not subject to these broadband requirements. Obligations of competitive ETCs are addressed below. *See infra* section VII.E.5 (Transition of Competitive ETC Support to CAF).

<sup>173</sup> *See supra* para. 99 (delegating authority to the Bureaus conduct an annual survey to monitor urban broadband offerings) and *infra* section VIII.A.2 (Reporting Requirements).

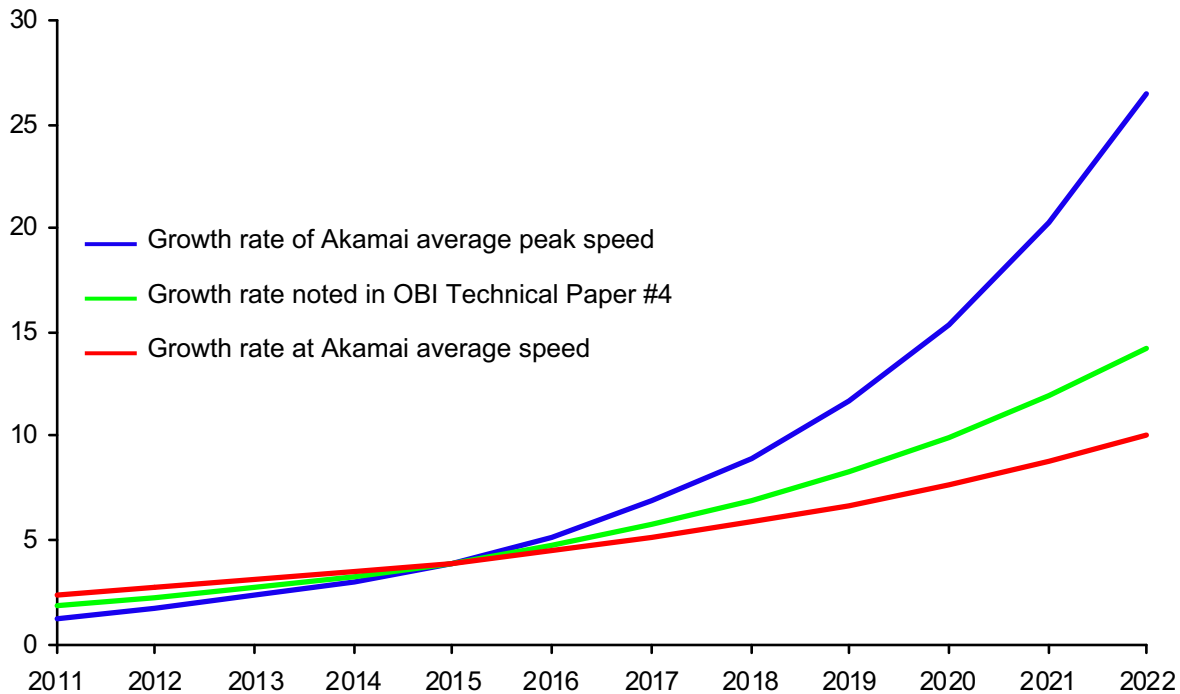
<sup>174</sup> 47 U.S.C. § 254(b). Commenters recommended reviewing the public interest obligations periodically, with suggested periods ranging from every year to every five years. *See, e.g.,* Frontier *USF/ICC Transformation NPRM* Comments at 24 (review every 5 years); Google *USF/ICC Transformation NPRM* Comments at 16 (review every 3 years); Greenlining *USF/ICC Transformation NPRM* Comments at 7 (review annually); Nebraska Commission *USF/ICC Transformation NPRM* Comments at 16 (review every 4 years). We select three years in light of the timing of the funding mechanisms we adopt in this Order.

<sup>175</sup> *See* OBI, Broadband Performance at 16 (historical 20 percent annual growth of advertised speeds); Cisco, Cable and Telco Service Provider Abstract Network Model, (continued...)

downstream speed by 2017 of 5.2 Mbps, and a projected average actual peak downstream speed of 6.86 Mbps.

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[http://www.cisco.com/web/siteassets/legal/terms\\_condition.html](http://www.cisco.com/web/siteassets/legal/terms_condition.html) (forecasting increase in file sharing and video); Akamai State of the Internet Q1 2011 Report, p. 12, fig. 7, [www.akamai.com/stateoftheinternet](http://www.akamai.com/stateoftheinternet) (showing growth across the last year in average speed of 14 percent in the U.S.).

Figure 2<sup>176</sup>**Forecast for typical downstream speed**

108. Based on these projections, we establish a benchmark of 6 Mbps downstream and 1.5 Mbps upstream for broadband deployments in later years of CAF Phase II.

## **2. Measuring and Reporting Broadband**

109. We will require recipients of funding to test their broadband networks for compliance with speed and latency metrics and certify to and report the results to the Universal Service Administrative Company (USAC)<sup>177</sup> on an annual basis.<sup>178</sup> These results will be subject to audit. In

<sup>176</sup> Speed forecasts based on growth rates, assuming 4 Mbps speed in 2015.

<sup>177</sup> The Universal Service Administrative Company (USAC), a subsidiary of the National Exchange Carrier Association (NECA), is the private not-for-profit corporation created to serve as the Administrator of the Fund under the Commission's direction. *See Changes to the Board of Directors of the National Exchange Carrier Association*, Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45, 13 FCC Rcd 25,058, 25,063-66, paras. 10-14 (1998); 47 C.F.R. § 54.701(a). The Commission appointed USAC the permanent Administrator of all of the federal universal service support mechanisms. *See* 47 C.F.R. §§ 54.702(b)-(m), 54.711, 54.715. USAC administers the Fund in accordance with the Commission's rules and orders. The Commission provides USAC with oral and written guidance, as well as regulation through its rulemaking process. USAC plays a critical role as day-to-day Administrator in collecting necessary information that enables the Commission to oversee the entire universal service fund. *See, e.g.,* Memorandum of Understanding Between the Federal Communications Commission and the Universal Service Administrative Company (Sept. 9, 2008) (*2008 FCC-USAC MOU*), available at <http://www.fcc.gov/omd/usac-mou.pdf>. As set forth throughout this Order, we expect USAC to administer the new fund we create today, the Connect America Fund, including the Mobility Fund.

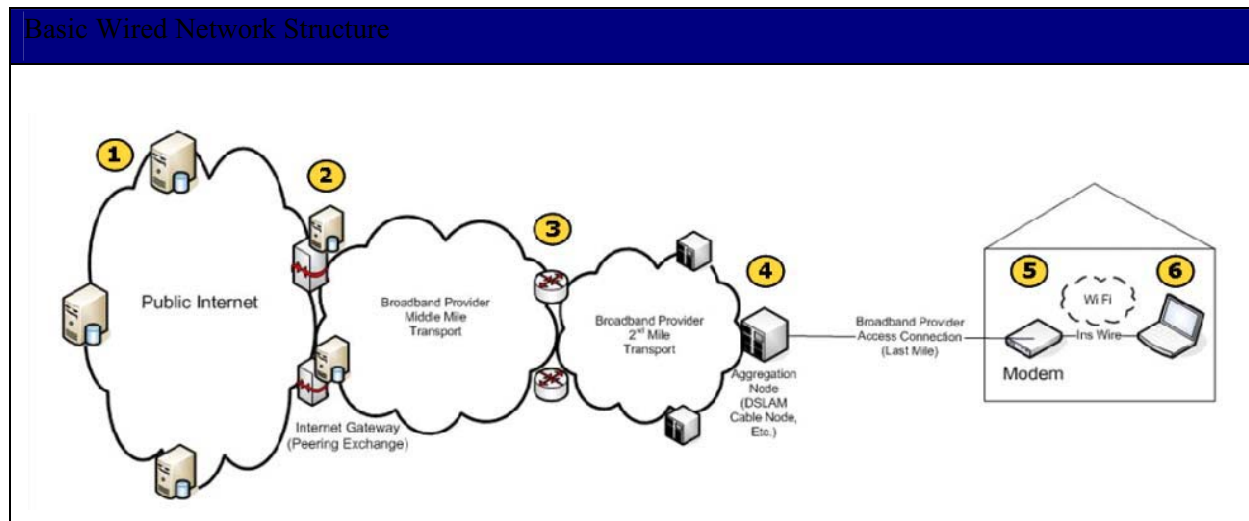
<sup>178</sup> *See infra* para. 585.

addition, as part of the federal-state partnership for universal service, we expect and encourage states to assist us in monitoring and compliance and therefore require funding recipients to send a copy of their annual broadband performance report to the relevant state or Tribal government.<sup>179</sup>

110. Commenters generally supported testing and reporting of broadband performance.<sup>180</sup> While some preferred only certifications without periodic testing,<sup>181</sup> we find that requiring ETCs to submit verifiable test results to USAC and the relevant state commissions will strengthen the ability of this Commission and the states to ensure that ETCs that receive universal service funding are providing at least the minimum broadband speeds, and thereby using support for its intended purpose as required by section 254(e).

111. We adopt the proposal in the *USF-ICC Transformation NPRM* that actual speed and latency be measured on each ETC's access network from the end-user interface to the nearest Internet access point. In Figures 3 and 4 below, we illustrate basic network structure for terrestrial broadband networks (wired and wireless, respectively). In these diagrams, the end-user interface end-point would be (5) the modem, the customer premise equipment typically managed by a broadband provider as the last connection point to the managed network, while the nearest Internet access point end-point would be (2) the Internet gateway, the closest peering point between the broadband provider and the public Internet for a given consumer connection. The results of Commission testing of wired networks suggest that "broadband performance that falls short of expectations is caused primarily by the segment of an ISP's network from [5] the consumer gateway to [2] the ISP's core network."<sup>182</sup>

Figure 3



<sup>179</sup> See *infra* para. 582.

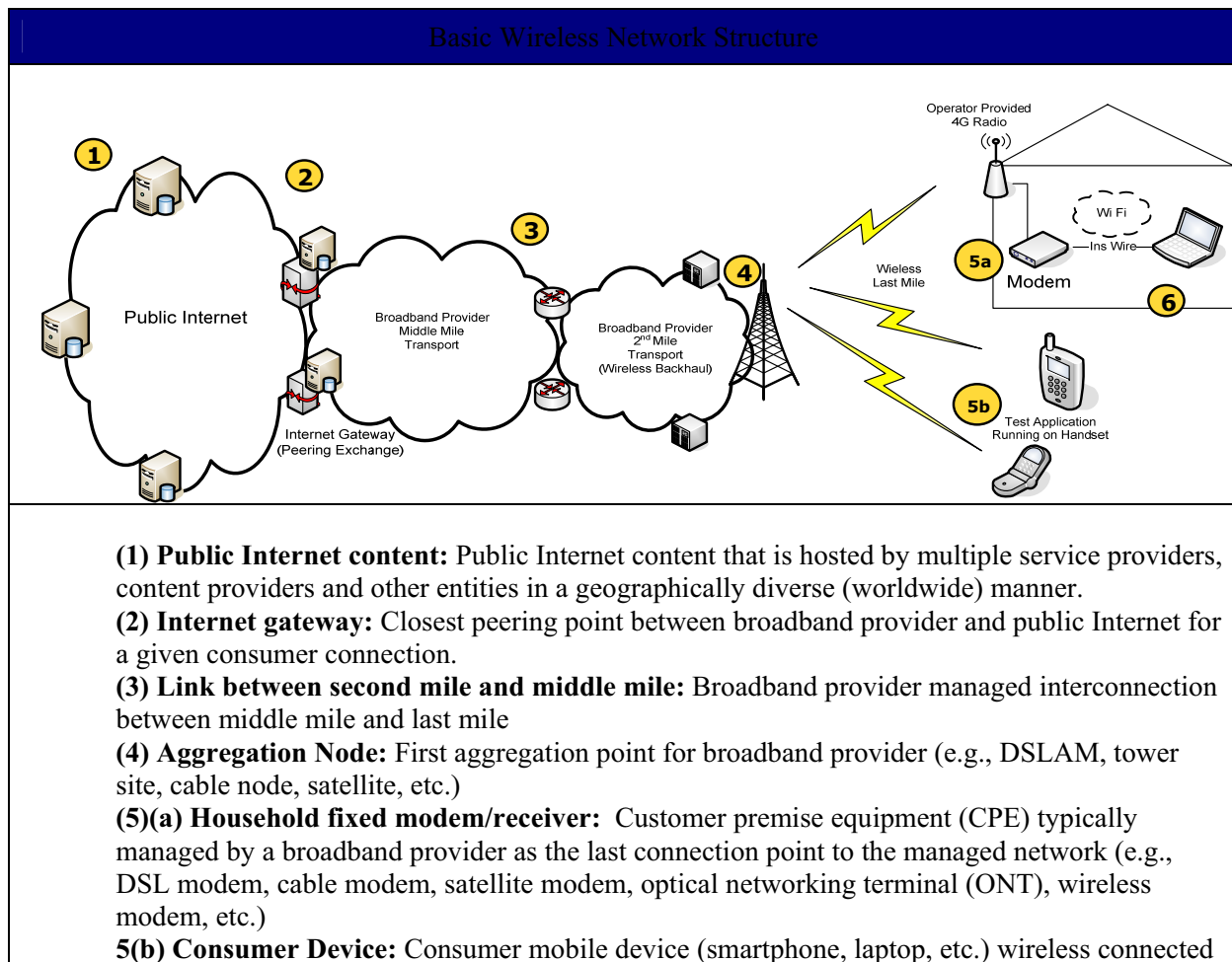
<sup>180</sup> ADTRAN *USF/ICC Transformation NPRM* Comments at 32; GVNW *USF/ICC Transformation NPRM* Reply at 26 (must be a process for verifying performance); ICORE *USF/ICC Transformation NPRM* Comments at 12-13 (quality of service obligations and extensive reporting requirements are safeguards that prevent waste and inefficiency).

<sup>181</sup> U.S. Cellular *USF/ICC Transformation NPRM* Comments at 46-47.

<sup>182</sup> *Measuring Broadband America Report* at 11; see ADTRAN *USF/ICC Transformation NPRM* Comments at 33-35 (supporting use of Points 2 and 5 as the end-points for measuring broadband performance).

- (1) **Public Internet content:** Public Internet content that is hosted by multiple service providers, content providers and other entities in a geographically diverse (worldwide) manner.
- (2) **Internet gateway:** Closest peering point between broadband provider and public Internet for a given consumer connection.
- (3) **Link between second mile and middle mile:** Broadband provider managed interconnection between middle mile and last mile
- (4) **Aggregation Node:** First aggregation point for broadband provider (e.g., Digital Subscriber Line Access Multiplexer (DSLAM), cable node, satellite, etc.)
- (5) **Modem:** Customer premise equipment (CPE) typically managed by a broadband provider as the last connection point to the managed network (e.g., DSL modem, cable modem, satellite modem, optical networking terminal (ONT), etc.)
- (6) **Consumer device:** Consumer device connected to modem through internal wire or Wi-Fi (home networking), including hardware and software used to access the Internet and process content (customer managed)

Figure 4



to provider network

**(6) Consumer device:** Consumer device connected to modem through internal wire or Wi-Fi (home networking), including hardware and software used to access the Internet and process content (customer managed)

112. In the FNPRM, we seek further comment on the specific methodology ETCs should use to measure the performance of their broadband services subject to these general guidelines, and the format in which funding recipients should report their results.<sup>183</sup> We direct the Wireline Competition Bureau, the Wireless Telecommunications Bureau, and the Office of Engineering and Technology to work together to refine the methodology for such testing, which we anticipate will be implemented in 2013.

### 3. Reasonably Comparable Rates for Broadband Service

113. Section 254(b) of the Act requires the Commission to base its universal service policies on certain principles, including that “[c]onsumers in all regions of the Nation . . . should have access to telecommunications and information services . . . that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.”<sup>184</sup> As with voice services, for broadband services we will consider rural rates to be “reasonably comparable” to urban rates under section 254(b)(3) if rural rates fall within a reasonable range of urban rates for reasonably comparable broadband service. However, we have never compared broadband rates for purposes of section 254(b)(3), and therefore we direct the Bureaus to develop a specific methodology for defining that reasonable range, taking into account that retail broadband service is not rate regulated and that retail offerings may be defined by price, speed, usage limits, if any, and other elements.<sup>185</sup> In the FNPRM, we seek comment on how specifically to define a reasonable range.<sup>186</sup>

114. We also delegate to the Wireline Competition Bureau and Wireless Telecommunications Bureau the authority to conduct an annual survey of urban broadband rates, if necessary, in order to derive a national range of rates for broadband service.<sup>187</sup> We do not currently have sufficient data to establish such a range for broadband pricing, and are unaware of any adequate third-party sources of data for the relevant levels of service to be compared. We therefore delegate authority to the Bureaus to determine the appropriate components of such a survey. By conducting our own survey, we believe we will be able to tailor the data specifically to our need to satisfy our statutory obligation. We require recipients of funding to provide information regarding their pricing for service offerings, as described

<sup>183</sup> See *infra* section XVII.A.1 (Measuring Broadband Service).

<sup>184</sup> 47 U.S.C. § 254(b)(3).

<sup>185</sup> Consistent with the fact that the Commission does not set regulated rates for broadband Internet access service, the comparison of rural and urban rates will be conducted pursuant to the principles set forth in section 254(b)(3) of the Act and is solely for the purposes of compliance with section 254’s mandates.

<sup>186</sup> See *infra* section XVII.A.2 (Reasonably Comparable Voice and Broadband Services).

<sup>187</sup> In the *Broadband Data NPRM*, the Commission proposed collecting pricing data through a revised FCC Form 477. *Broadband Data NPRM*, 26 FCC Rcd at 1533-36, paras. 66-76 (seeking comment on whether and how the Commission should collect price data). We will rely on any pricing data collected pursuant to a revised FCC Form 477 data collection to calculate a national average urban rate for broadband. However, the process of collecting and publishing industry-wide data through a revised FCC Form 477 may not be completed before the first annual certification, and therefore a survey may be necessary. See also *supra* para. 99 (delegating authority to the Wireline Competition Bureau and Wireless Telecommunications Bureau to conduct annual survey of urban broadband offerings).

more fully below.<sup>188</sup> We also encourage input from the states and other stakeholders as the Bureaus develop the survey.

## VII. ESTABLISHING THE CONNECT AMERICA FUND

### A. Overview

115. As described more fully below, we establish the Connect America Fund to bring broadband to unserved areas; support advanced mobile voice and broadband networks in rural, insular and high-cost areas; expand fixed broadband and facilitate reform of the intercarrier compensation system. In establishing the CAF, we also set for the first time a firm and comprehensive budget for the high-cost program.

116. For areas served by price cap companies, we institute immediate reforms (Phase I) to streamline and redirect legacy universal service payments to accelerate broadband deployment in unserved areas. We also adopt a longer-term approach (Phase II) that, starting as soon as the Wireline Competition Bureau completes work on a forward-looking broadband cost model, will direct funds for five years to those areas that are unserved through the operation of market forces, using a mechanism that combines use of this model and competitive bidding. We also adopt the necessary measures to transition carriers from existing support to CAF.

117. For areas served by rate-of-return carriers, we decline to immediately shift support to the model- and competitive bidding-based mechanism in CAF. Instead, we reform legacy support mechanisms for rate-of-return carriers to begin the transition towards a more incentive-based form of regulation with better incentives for efficient operations. In the accompanying FNPRM, we seek further comment on how best to ensure a predictable path forward for rate-of-return companies to extend broadband.

118. Within CAF, we also establish support for mobile voice and broadband services in recognition of the fact that promoting the universal availability of advanced mobile services is a vital component of the Commission's universal service mission. We establish the Mobility Fund as part of CAF to first provide one-time support (Phase I) to immediately accelerate deployment of networks for mobile broadband services in unserved areas, and then provide ongoing support (Phase II) to expand and sustain mobile voice and broadband service in communities in which service would be unavailable absent federal support. We also set forth the necessary transition for carriers receiving support today under the legacy rules.

119. Finally, to ensure that Americans living in the most costly areas in the nation can obtain affordable broadband through alternative technology platforms, including satellite and unlicensed wireless, the CAF also includes dedicated funding for extremely high cost areas, which will be disbursed through a market-based mechanism.

120. Through these coordinated mechanisms, the CAF will immediately begin making available broadband and advanced mobile services to unserved American homes, businesses, and community anchor institutions, while transitioning universal service to an efficient, technology-neutral system that uses tools, including competitive bidding, to ensure that scarce public resources support the best possible communications services for rural Americans. Given the disparate treatment of different carriers and technologies under legacy rules, it is not practicable to transition immediately all components of the program to competitive-bidding principles. But the approach we take today provides us the opportunity to see the application of these principles in practice and evaluate their effectiveness, creates a transition period for carriers to adapt to more incentive-based approaches, and allows time for new technologies, new competitors, and consumer demand to continue to evolve and mature.

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<sup>188</sup> See *infra* paras. 592-594.

## B. The Budget

121. *Background.* Many individual mechanisms within the high-cost program function under fixed budgets under the current system.<sup>189</sup> The high-cost program as a whole, however, has never had a budget. In the *USF-ICC Transformation NPRM*, the Commission noted its commitment to controlling the size of the universal service fund.<sup>190</sup> The Commission sought comment on setting an overall budget for the CAF such that the sum of the CAF and any existing legacy high-cost support mechanisms (however modified in the future) in a given year would remain equal to current funding levels. The Broadband Plan similarly recommended that the “FCC should aim to keep the overall size of the fund close to its current size (in 2010 dollars).”<sup>191</sup>

122. In response, a broad cross-section of interested stakeholders, including consumer groups, state regulators, current recipients of funding, and those that do not currently receive funding, agreed that the Commission should establish a budget for the overall high-cost program, with many urging the Commission to set that budget at \$4.5 billion per year, the estimated size of the program in fiscal year (FY) 2011.<sup>192</sup> Some argue that we should adopt a hard cap to ensure that budget is not exceeded.<sup>193</sup>

123. *Discussion.* For the first time, we now establish a defined budget for the high-cost component of the universal service fund.<sup>194</sup> We believe the establishment of such a budget will best ensure that we have in place “specific, predictable, and sufficient” funding mechanisms to achieve our universal service objectives.<sup>195</sup> We are today taking important steps to control costs and improve

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<sup>189</sup> See *High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Alltel Communications, Inc., et al. Petitions for Designation as Eligible Telecommunications Carriers*, RCC Minnesota, Inc. and RCC Atlantic, Inc. *New Hampshire ETC Designation Amendment*, Order, 23 FCC Rcd 8834, 8834, para. 1 (2008) (*Interim Cap Order*) (adopting an emergency cap on high-cost support for competitive ETCs); *Amendment of Part 36 of the Commission’s Rules and Establishment of a Joint Board*, CC Docket No. 80-286, Report and Order, 9 FCC Rcd 303 (1993) (detailing cap on HCLS); *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users*, *Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) (*CALLS Order*), *rev’d and remanded*, *Texas Office of Public Utility Counsel v. FCC*, 265 F. 3d 313 (5th Cir. 2001); and *Access Charge Reform*, CC Docket No. 96-262, *Price Cap Performance Review for LECs*, CC Docket No. 94-1, *Low-Volume Long Distance Users*, CC Docket No. 99-249, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order on Remand, 18 FCC Rcd 14976 (2003). See also *High-Cost Universal Service Support*, *Federal State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd. 8834 (2008) (capping IAS for ILECs as of 2008).

<sup>190</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4680-82, paras. 412-414.

<sup>191</sup> National Broadband Plan at 150.

<sup>192</sup> ABC Plan Proponents *August 3 PN* Joint Comments at 17; NASUCA *USF/ICC Transformation NPRM* Comments at 10; Rural Associations *August 3 PN* Comments at 5; State Members *USF/ICC Transformation NPRM* Comments at 11.

<sup>193</sup> Comcast *August 3 PN* Comments at 21; Free State *USF/ICC Transformation NPRM* Comments at 10-11; NCTA *August 3 PN* Comments at 6; XO *USF/ICC Transformation NPRM* Reply at 20-22.

<sup>194</sup> As noted above, for purposes of this budget, the term “high-cost” includes all support mechanisms in place as of the date of this order, specifically, high-cost loop support, safety net support, safety valve support, local switching support, interstate common line support, high cost model support, and interstate access support, as well as the new Connect America Fund, which includes funding to support and advance networks that provide voice and broadband services, both fixed and mobile, and funding provided in conjunction with the recovery mechanism adopted as part of intercarrier compensation reform. See *supra* note 16.

<sup>195</sup> 47 U.S.C. 254(b)(5).



accountability in USF, and our estimates of the funding necessary for components of the CAF and legacy high-cost mechanisms represent our predictive judgment as to how best to allocate limited resources at this time. We anticipate that we may revisit and adjust accordingly the appropriate size of each of these programs by the end of the six-year period we budget for today, based on market developments, efficiencies realized, and further evaluation of the effect of these programs in achieving our goals.

124. Importantly, establishing a CAF budget ensures that individual consumers will not pay more in contributions due to the reforms we adopt today. Indeed, were the CAF to significantly raise the end-user cost of services, it could undermine our broader policy objectives to promote broadband and mobile deployment and adoption. As we explained with respect to the budget for the Schools and Libraries program, we “must balance [our] desire to ensure that schools and libraries have access to valuable communications opportunities with the need to ensure that consumer rates for communications services remain affordable. End users ultimately bear the cost of supporting universal service, through carrier charges.”<sup>196</sup>

125. We therefore establish an annual funding target, set at the same level as our current estimate for the size of the high-cost program for FY 2011, of no more than \$4.5 billion. This budgetary target will remain in place until changed by a vote of the Commission. We believe that setting the budget at this year’s support levels will minimize disruption and provide the greatest certainty and predictability to all stakeholders. We do not find that amount to be excessive given the reforms we adopt today, which expand the high-cost program in important ways to promote broadband and mobility; facilitate intercarrier compensation reform; and preserve universal voice connectivity. At the same time, we do not believe a higher budget is warranted, given the substantial reforms we concurrently adopt to modernize our legacy funding mechanisms to address long-standing inefficiencies and wasteful spending. We conclude that it is appropriate, in the first instance, to evaluate the effect of these reforms before adjusting our budget.

126. The total \$4.5 billion budget will include CAF support resulting from intercarrier compensation reform, as well as new CAF funding for broadband and support for legacy programs during a transitional period. As part of this budget, we will provide \$500 million per year in support through the Mobility Fund, of which up to \$100 million in funding will be reserved for Tribal lands.<sup>197</sup> We will also provide at least \$100 million to subsidize service in the highest cost areas. The remaining amount – approximately \$4 billion – will be divided between areas served by price cap carriers and areas served by rate-of-return carriers, with no more than \$1.8 billion available annually for price cap territories after a transition period and up to \$2 billion available annually for rate-of-return territories, including, in both instances, intercarrier compensation recovery. We also institute a number of safeguards in this new

<sup>196</sup> *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Sixth Report and Order, 25 FCC Rcd 18762, 18781, par. 36 (2010).

<sup>197</sup> Throughout this document, “Tribal lands” include any federally recognized Indian tribe’s reservation, pueblo or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlements Act (85 Stat. 688), and Indian Allotments, *see* 47 C.F.R. § 54.400(e), as well as Hawaiian Home Lands—areas held in trust for native Hawaiians by the state of Hawaii, pursuant to the Hawaiian Homes Commission Act, 1920, Act July 9, 1921, 42 Stat. 108, *et seq.*, as amended. We adopt a definition of “Tribal lands” that includes Hawaiian Home Lands, as the term was used in the Notice. *USF/ICC Transformation NPRM*, 26 FCC at 4558, para. 3 n.4. We note that Hawaiian Home Lands were not included within the Tribal definition in the 2007 order that adopted an interim cap on support for competitive eligible telecommunications carriers, with an exemption of Tribal lands from that cap. *See Interim Cap Order*, 23 FCC Rcd at 8848-49, paras. 31-33. We agree with the State of Hawaii that Hawaiian Home Lands should be included in the definition of Tribal lands in the context of the comprehensive reforms we adopt today for the universal service program. Letter from Bruce A. Olcott, Counsel to the State of Hawaii, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. (filed Oct. 15, 2011).

framework to ensure that carriers that warrant additional funding have the opportunity to petition for such relief. Although we expect that in some years CAF may distribute less than the total budget, and in other years slightly more, we adopt mechanisms later in this Order to keep the contribution burden at no more than \$4.5 billion per year, plus administrative expenses, notwithstanding variations on the distribution side.<sup>198</sup> Meanwhile, we will closely monitor the CAF mechanisms for longer-term consistency with the overall budget goal, while ensuring the budget remains at appropriate levels to satisfy our statutory mandates.

### **C. Providing Support in Areas Served by Price Cap Carriers**

127. More than 83 percent of the approximately 18 million Americans who lack access to fixed broadband live in price cap study areas.<sup>199</sup> As a first step to delivering robust, scalable broadband to these unserved areas, the first phase of the CAF will provide the opportunity for price cap carriers to begin extending broadband service to hundreds of thousands of unserved locations in their territories. In the second phase of the CAF, we will use a combination of a forward-looking broadband cost model and competitive bidding to efficiently support deployment of networks providing both voice and broadband service for a five-year period. Before 2018, we will determine how best to further expand the use of market-based mechanisms, such as competitive bidding, to fulfill our universal service mandate in the most efficient and fiscally responsible manner.

#### **1. Immediate Steps To Begin Rationalizing Support Levels For Price Cap Carriers**

128. In this section, we begin the process of transitioning high cost support for price cap carriers to the CAF by establishing CAF Phase I. In CAF Phase I, we freeze support under our existing high-cost support mechanisms—HCLS, SNA, safety valve support (SVS), high-cost model support (HCMS), LSS, interstate access support (IAS), and ICLS—for price cap carriers and their rate-of-return affiliates.<sup>200</sup> We will now call this support “frozen high-cost support.” In addition, to spur the

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<sup>198</sup> See *infra* section VII.H (Enforcing the Budget for Universal Service). The \$4.5 billion budget includes only disbursements of support and does not include administrative expenses, which will continue to be collected consistent with past practices. Typically, administrative expenses attributed to the high-cost program (including other overhead expenses from USAC) range from 1 to 2 percent of total program expenses. See USAC Quarterly Administrative Filings, available at <http://www.usac.org/about/governance/fcc-filings/fcc-filings-archive.aspx> (for 1998-First Quarter 2012). Similarly, the \$4.5 billion budget does not include prior period adjustments associated with support attributable to years prior to 2012. For example, USAC will be performing true-ups associated with 2010 ICLS in 2012. See 47 C.F.R. 54.903(b)(3). To the extent that those true-ups result in increased support for 2010, those disbursements would not apply to the budget discussed here.

<sup>199</sup> See National Broadband Map, available at <http://www.broadbandmap.gov>. Based on data as of December 2010, there were an estimated 18.8 million Americans who lacked access to terrestrial fixed broadband services with a maximum advertised download speed of at least 3 Mbps and a maximum advertised upload speed of at least 768 kbps. *Id.* For these purposes, terrestrial fixed broadband technologies include xDSL, other copper, cable modem, fiber to the end user, fixed wireless, whether licensed or unlicensed, and electric power line. To obtain the numbers of unserved people in price cap regions, staff used data from TeleAtlas North America representing boundaries of wire centers. These wire centers contain study area codes, which staff associated with USAC codes classifying those areas as either price cap or rate of return. Staff linked this set of data to the data underlying the National Broadband Map, which can be used to report broadband availability by study area. See <http://www.broadbandmap.gov/nbm/summarize>. The resulting link shows that, of the 18.8 million people without service, 83 percent are in price cap areas and 17 percent are in rate of return areas, as defined by USAC.

<sup>200</sup> In doing so, we eliminate altogether the current HCMS and IAS mechanisms for price cap companies. For further discussion of changes to HCLS, SNA, LSS and ICLS, applicable to rate-of-return carriers, see *infra* Section VII.D.

deployment of broadband in unserved areas, we allocate up to \$300 million in additional support to such carriers, distributed through the mechanism described below;<sup>201</sup> we call this component of CAF Phase I support “incremental support.”

129. In establishing CAF Phase I, we set the stage for a full transition to a system where support in price cap territories is determined based on competitive bidding or the forward-looking costs of a modern multi-purpose network. The reforms we adopt today represent an important step away from distinctions based on whether a company is classified as a rural carrier or a non-rural carrier—distinctions that, for the purposes of calculating universal service support, are artifacts of our rules rather than required by the Act. Instead, we establish two pathways for how support is determined—one for companies whose interstate rates are regulated under price caps, and the other for those whose interstate rates are regulated under rate-of-return. We make conforming changes to our Part 36 and Part 54 rules as necessary to reflect that framework.<sup>202</sup> Consistent with our goal of providing support to price cap companies on a forward-looking cost basis, rather than based on embedded costs, we will, for the purposes of CAF Phase I, treat as price cap carriers the rate-of-return operating companies that are affiliated with holding companies for which the majority of access lines are regulated under price caps. That is, we will freeze their universal service support and consider them as price cap areas for the purposes of our new CAF Phase I distribution mechanism.<sup>203</sup>

130. *Background.* Historically, the Commission’s intrastate universal service programs have distinguished between companies classified as “rural” and “non-rural” carriers, with the former eligible for HCLS and the latter eligible for HCMS.<sup>204</sup> The term “rural telephone company,” however, as defined by the Act, does not simply mean a carrier that serves rural areas.<sup>205</sup> Rather, a rural telephone company, generally speaking, is a relatively small telephone company that *only* serves rural areas. Many “non-rural” carriers serve both urban and rural areas. In fact, price cap companies, which largely are classified as non-rural companies, today serve more than 83 percent of the people that lack broadband, many of whom live in areas that are just as low-density and remote as areas served by rural companies.<sup>206</sup> Today,

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<sup>201</sup> As detailed more fully above, we set the total CAF budget for areas served by price cap carriers at \$1.8 billion out of the total \$4.5 billion annual budget. *See supra* para. 126. The \$300 million in additional support we allocate to price cap carriers today begins the process of closing the rural-rural divide by directing additional funds to areas served by price cap carriers in a manner consistent with our overall budget goals and the more limited purpose of Phase I.

<sup>202</sup> We recognize that the statute also makes a distinction in how it directs the states and this Commission to evaluate requests for designation by additional carriers in areas served by rural companies. In particular, section 214(e)(6) specifies that the Commission “may, with respect to an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated under this paragraph . . . . Before designating an additional telecommunications carrier for an area served by a rural telephone company, the Commission shall find that the designation is in the public interest.” Nothing in this Order is intended to undermine those statutory directives.

<sup>203</sup> This action does not require mandatory price cap conversion for those operating companies, but rather establishes the principle that such companies in the future will receive support based on a forward looking cost model rather than their embedded costs.

<sup>204</sup> *See* 47 U.S.C. § 153(37) (definition of rural telephone company); 47 C.F.R. § 51.5 (adopting the Act’s definition of “rural telephone company” for universal service purposes).

<sup>205</sup> *See* 47 U.S.C. § 153(37).

<sup>206</sup> *See supra* note 199. The distinction in how universal service support is calculated for rural and non-rural carriers is a vestige of how the Commission initially implemented section 254 in the wake of the 1996 Act. At that time, the Commission concluded that it would use a forward-looking cost model to calculate the cost of providing universal service in high-cost areas, but it chose to implement such a mechanism initially only for companies classified as (continued...)

some price cap carriers meet the Act's definition of a rural telephone company and are eligible for HCLS, while others do not and are eligible for HCMS. In addition, at least some price cap carriers currently receive support from each of the other high-cost support mechanisms: LSS, IAS, and ICLS.<sup>207</sup>

131. In response to the *USF/ICC Transformation NPRM*, several price cap carriers proposed, as a transitional measure, to provide support to price cap carriers based on a simplified forward-looking estimate of the costs of serving each wire center, without averaging such costs on a statewide basis as the current non-rural support mechanism does.<sup>208</sup> We sought further comment on this proposal in the *August 3 Public Notice*.<sup>209</sup> We also specifically requested comment on the amount of support that should be distributed under such a mechanism and the public interest obligations that should attach to recipients of such support.<sup>210</sup>

(Continued from previous page)

“non-rural” under the 1996 Act, which were the Bell operating companies and other large incumbent telephone companies. It allowed the more than 1,000 small carriers operating in rural areas to continue to receive support temporarily based on their embedded costs under mechanisms that pre-dated the 1996 Act, with some modifications. Then, in 2001, the Commission adopted a plan to maintain the existing high-cost loop support program, with some modifications, for those rural carriers. See *Rural Task Force Order*, 16 FCC Rcd 11244; see also *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, WC Docket No. 05-337, Order, 21 FCC Rcd 5514, 5515, para. 2 (2006) (extending rules, which originally had been designed to last for five years, until such time that the Commission “adopts new high-cost support rules for rural carriers”). Because some price cap carriers meet the definition of a rural carrier under the 1996 Act, however, those companies still receive support today based on their embedded costs in some study areas.

<sup>207</sup> LSS is intended to support the cost of switching equipment; it provides support for study areas with 50,000 or fewer access lines. See 47 C.F.R. §§ 54.301, 36.125(f)(j); see also *infra* para. 253. IAS was created as part of the May 2000 *CALLS Order*; it was designed to offset certain reductions in price cap carriers' interstate access charges made in the same order. See *CALLS Order*, 15 FCC Rcd at 12974-75, para. 30; see also *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4633-34, paras. 229-31. Only those carriers that were price cap carriers at the time of the *CALLS Order* receive IAS, however, so the Commission has permitted those carriers that have transitioned from rate-of-return regulation to price cap regulation subsequent to that order to continue to receive ICLS (which is ordinarily available only to rate-of-return carriers) on a frozen basis—such support is known as frozen ICLS. See, e.g., *Windstream Petition for Conversion to Price Cap Regulation and for Limited Waiver Relief*, 23 FCC Rcd 5294, 5302-04, paras. 19-22 (2008).

<sup>208</sup> See *Windstream USF/ICC Transformation NPRM Comments* at 9; Letter from Jennie B. Chandra, Windstream Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. (filed June 30, 2011); Letter from Michael D. Saperstein, Jr., Frontier Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. (filed July 26, 2011).

<sup>209</sup> See *Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, Public Notice, 26 FCC Rcd 1112, at 10 (Wireline Comp. Bur. rel. Aug. 3, 2011) (*August 3 Public Notice*). NASUCA generally supported the proposal to combine disparate support mechanisms, while noting that it cannot evaluate the proposed targeting of support without knowing which carriers will receive more and which less. See *NASUCA August 3 PN Comments* at 97-98. We do not think, however, that our decision on whether this interim measure appropriately advances our goals depends on a specific analysis of how much money flows to particular price cap carriers. The Rural Broadband Alliance objects to any use of the existing cost model to determine support levels, arguing that the only currently appropriate means to provide support is on a rate-of-return basis. Rural Broadband Alliance *August 3 PN Comments*, Attach. at 23-24. We find the Rural Broadband Alliance's undeveloped and unsupported objections to be without merit.

<sup>210</sup> *August 3 Public Notice* at 10. No commenter offered a proposal regarding the specific amount of support that should be provided through such a mechanism nor did any specify the public interest obligations that should be associated with such support.

132. *Discussion.* Below, we adopt a framework for the Connect America Fund that will provide support in price cap territories based on a combination of competitive bidding and a forward-looking cost model. Developing and implementing such a cost model with appropriate opportunities for public inspection and comment and finalizing the rules for competitive bidding are expected to take a year or more. In order to immediately start to accelerate broadband deployment to unserved areas across America, we modify our rules to provide support to price cap carriers under a transitional distribution mechanism, CAF Phase I.

133. Specifically, effective January 1, 2012, we freeze all support under our existing high-cost support mechanisms, HCLS,<sup>211</sup> forward-looking model support (HCMS), safety valve support, LSS, IAS, and ICLS, on a study area basis for price cap carriers and their rate-of-return affiliates. On an interim basis, we will provide frozen high-cost support to such carriers equal to the amount of support each carrier received in 2011 in a given study area.<sup>212</sup> Frozen high-cost support will be reduced to the extent that a carrier's rates for local voice service fall below an urban local rate floor that we adopt below to limit universal service support where there are artificially low rates.<sup>213</sup> In addition to frozen high-cost support, we will distribute up to \$300 million in incremental support to price cap carriers and their rate of return affiliates using a simplified forward-looking cost estimate, based on our existing cost model.

134. This simplified, interim approach is based on a proposal in the record from several carriers.<sup>214</sup> Support will be determined as follows: First, a forward-looking cost estimate will be generated for each wire center served by a price cap carrier. Our existing forward-looking cost model, designed to estimate the costs of providing voice service, generates estimates only for wire centers served by non-rural carriers; it cannot be applied to areas served by rural carriers without obtaining additional data from those carriers. The simplest, quickest, and most efficient means to provide support solely based on forward-looking costs for both rural and non-rural price cap carriers is to extend the existing cost model by using an equation designed to reasonably predict the output of the existing model for wire centers it already applies to, and apply it to data that are readily available for wire centers in all areas served by price cap carriers and their affiliates, including areas the current model does not apply to.<sup>215</sup> Three price cap carriers submitted an estimated cost equation that was derived through a regression analysis of support provided under the existing high-cost model, and they submitted, under protective order, the data necessary to replicate their analysis.<sup>216</sup> No commenter objected to the proponents' cost-

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<sup>211</sup> HCLS includes SNA.

<sup>212</sup> Frozen high-cost support amounts will be calculated by USAC, and will be equal to the amount of support disbursed in 2011, without regard to prior period adjustments related to years other than 2011 and as determined by USAC on January 31, 2012. USAC shall publish each carrier's frozen high-cost support amount, as calculated, on its website, no later than February 15, 2012. As a consequence of this action, rate-of-return operating companies that will be treated as price cap areas will no longer be required to perform cost studies for purposes of calculating HCLS or LSS, as their support will be frozen on a study area basis as of year-end 2011.

<sup>213</sup> See *infra* Section VII.D.5. We note that price cap carriers' rates in some areas are currently well below the urban local rate average. See *infra* note 380.

<sup>214</sup> See Letter from Cathy Carpino, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. (filed Oct. 21, 2011); see also *infra* note 216.

<sup>215</sup> We note that the State Members of the Joint Board recommended as part of their comprehensive plan that the Commission continue to use its existing cost model, with some modifications. State Members *USF/ICC Transformation NPRM* Comments at 37. They also suggested that "statistical cost models are a potentially promising substitute for the engineering-based cost models currently in use." *Id.* at 38.

<sup>216</sup> See Letter from Jennie B. Chandra, Windstream Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. (filed June 30, 2011) (detailing the regression analysis and the proposed cost-estimation equation); Letter from Jennie B. Chandra, Windstream Communications, Inc., to Marlene H. Dortch, (continued...)

estimation function.<sup>217</sup> Following our own assessment of the regression analysis and the proposed cost-estimation function, we conclude that the proposed function will serve our purpose well to estimate costs on an interim basis in wire centers now served by rural price cap carriers, and we adopt it. That cost-estimation function is defined as:

$$\begin{aligned} \ln(\text{Total cost}) = & 7.08 + 0.02 * \ln(\text{distance to nearest central office in feet} + 1) \\ & - 0.15 * \ln(\text{number of households} + \text{businesses in the wire center} + 1) \\ & + 0.22 * \ln(\text{total road feet in wire center} + 1) \\ & + 0.06 * (\ln(\text{number of households} + \text{businesses in wire center} + 1))^2 \\ & - 0.01 * (\ln(\text{number of businesses in wire center} + 1))^2 \\ & - 0.07 * \ln((\text{number of households} + \text{businesses})/\text{square miles} + 1) \end{aligned}$$

135. The output of the cost-estimation function will be converted into dollars and then further converted into a per-location cost in the wire center. The resulting per-location cost for each wire center will be compared to a funding threshold, which, as explained below, will be determined by our budget constraint. Support will be calculated based on the wire centers where the cost for the wire center exceeds the funding threshold. Specifically, the amount by which the per-location cost exceeds the funding threshold will be multiplied by the total number of household and business locations in the wire center.

136. The funding threshold will be set so that, using the distribution process described above, all \$300 million of incremental support potentially available under the mechanism would be allocated. We delegate to the Wireline Competition Bureau the task of performing the calculations necessary to

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Secretary, FCC, CC Docket No. 96-45 (filed July 20, 2011) (providing data necessary to evaluate the regression analysis). The  $r^2$  value for the regression was 0.91. *See* Letter from Jennie B. Chandra, Windstream Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al., Attach. at 8 (filed June 30, 2011).

<sup>217</sup> One commenter expressed some general concerns with the regression equation, but did not argue that using it would be inappropriate. *See* Letter from Peter Bluhm to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. (filed Oct. 18, 2011). In particular, the commenter noted that two variables in the regression equation, total locations (business locations plus households) and the separate business locations variable, operate in ways that seem unintuitive, because as locations increase, predicted costs decrease. While we acknowledge this concern, we note that this is not a model that attempts to predict costs by focusing on variables that cause those costs; instead the model seeks only to predict costs. Variables capturing locations explicitly might also capture density implicitly; to the extent they do, as locations increase costs would tend to decrease. While cost equations could be created that separated these effects, the goal of the cost prediction equation is to predict the output of the current cost model with as simple a model as possible.

We find that the relevant question for our purposes is whether the equation reliably produces accurate results, which, as discussed above, it does. In the absence of criticism of its results, or a proposal for an equation that is superior (*e.g.*, one that produces more accurate results without unduly increasing complexity), we see no reason to fault it on this basis. This commenter also expressed concern that a log-linear equation regression creates a risk of inaccuracy for very low values and from synergistic interactions among terms. Such risks, however, appear to be more theoretical than actual in this case. That is, the commenter does not argue that using a log-linear equation has actually caused these effects, and we have not seen evidence to suggest that any such effects have rendered the regression unreliable as a general matter. Finally, this commenter argues that the Commission should give the public access to the underlying data for it to evaluate the regression to see if it can be improved. As noted above, *see supra* note 216, carriers submitted the necessary data under protective order, and the data were made available for review in accordance with the terms of that order.

determine the support amounts and selecting any necessary data sources for that task.<sup>218</sup> The Bureau will announce incremental support amounts via Public Notice; we anticipate the Bureau will complete its work and announce such support amounts on or before March 31, 2012. USAC will disburse CAF Phase I funds on its customary schedule.<sup>219</sup>

137. CAF Phase I incremental support is designed to provide an immediate boost to broadband deployment in areas that are unserved by any broadband provider. Carriers have been steadily expanding their broadband footprints, funded through a combination of support provided under current mechanisms and other sources, and we expect such deployment will continue. We intend for CAF Phase I to enable additional deployment beyond what carriers would otherwise undertake, absent this reform. Thus, consistent with our other reforms, we will require carriers that accept incremental support under CAF Phase I to meet concrete broadband deployment obligations.<sup>220</sup>

138. Specifically, the Bureau will calculate, on a holding company basis, how much CAF Phase I incremental support price cap carriers are eligible for. Carriers may elect to receive all, none, or a portion of the incremental support for which they are eligible. A carrier accepting incremental support will be required to deploy broadband to a number of locations equal to the amount it accepts divided by \$775. For example, a carrier projected to receive \$7,750,000 will be permitted to accept up to that amount of incremental support. If it accepts the full amount, it will be required to deploy broadband to at least 10,000 unserved locations; if it accepts \$3,875,000, it will be required to deploy broadband to at least 5,000 unserved locations. To the extent incremental support is declined, it may be used in other ways to advance our broadband objectives pursuant to our statutory authority.<sup>221</sup>

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<sup>218</sup> In the event the Wireline Competition Bureau concludes that appropriate data are not readily available for these purposes for certain areas, such as some or all U.S. territories served by price cap carriers, the Bureau may exclude such areas from the analysis for this interim mechanism, which would result in the carriers in such areas continuing to receive frozen support.

<sup>219</sup> In 2012, USAC will disburse frozen high-cost support over the course of the entire year. Because incremental support will not be distributed until carriers accept such funding, in 2012, USAC will be required to disburse 2012 incremental support over the course of less than a full calendar year.

<sup>220</sup> We acknowledge that our existing cost model, on which our distribution mechanism for CAF Phase I incremental funding is based, calculates the cost of providing voice service rather than broadband service, although we are requiring carriers to meet broadband deployment obligations if they accept CAF Phase I incremental funding. We find that using estimates of the cost of deploying voice service, even though we impose broadband deployment obligations, is reasonable in the context of this interim support mechanism. First, this interim mechanism is designed to identify the most expensive wire centers, and the same characteristics that make it expensive to provide voice service to a wire center (e.g., lack of density) make it expensive to provide broadband service to that wire center as well. Using a cost estimation function based on our existing model will help to identify *which* wire centers are likely to be the most expensive to provide broadband service to, even if it does not reliably identify precisely *how expensive* those wire centers will be to serve. Second, and related, our funding threshold is determined by our budget limit of \$300 million for CAF Phase I incremental support rather than by a calculation of what amount we expect a carrier to need to serve that area. That is, this interim mechanism is not designed to “fully” fund any particular wire center—it is not designed to fund the difference between (i) the deployment cost associated with the most expensive wire center in which we could reasonably expect a carrier to deploy broadband without any support at all and (ii) the actual estimated deployment cost for a wire center. Instead, the interim mechanism is designed to provide support to carriers that serve areas where we expect that providing broadband service will require universal service support.

<sup>221</sup> For instance, the funds could be held as part of accumulated reserve funds that would help minimize budget fluctuations in the event the Commission grants some petitions for waiver. Also, a number of parties have urged us to use high-cost funding to advance adoption programs. We note that the Commission has an open proceeding to reform the low income assistance programs, which specifically contemplates broadband pilots in the Lifeline and (continued...)

139. Our objective is to articulate a measurable, enforceable obligation to extend service to unserved locations during CAF Phase I. For this interim program, we are not attempting to identify the precise cost of deploying broadband to any particular location. Instead, we are trying to identify an appropriate standard to spur immediate broadband deployment to as many unserved locations as possible, given our budget constraint. In this context, we find that a one-time support payment of \$775 per unserved location for the purpose of calculating broadband deployment obligations for companies that elect to receive additional support is appropriate.

140. To develop that performance obligation, we considered broadband deployment projects undertaken by a mid-sized price cap carrier under the BIP program.<sup>222</sup> The average per-location cost of deployment for those projects—including both the public contribution and the company’s own capital contribution—was \$557,<sup>223</sup> significantly lower than the \$775 per-location amount—which does not include any company contribution—we adopt today. We note that our analysis indicated that the per-location cost for deployments funded through the BIP program varied considerably. In addition, we observe that the BIP program’s requirements differ from the requirements we adopt here. Specifically, carriers could obtain BIP funding for improving service to underserved locations as well as deploying to unserved locations, while carriers can meet their CAF Phase I deployment obligations only by deploying broadband to unserved locations.<sup>224</sup> For these reasons, while we find this average per-location cost to be relevant, we decline to set our requirement at a per-location cost of \$557.

141. In addition, we considered data from the analysis done as part of the National Broadband Plan. The cost model used in developing the National Broadband Plan estimated that the median cost of upgrading existing unserved homes is approximately \$650 to \$750, with approximately 3.5 million locations whose upgrade cost is below that figure.<sup>225</sup>

142. Commission staff also conducted an analysis using the ABC plan cost model, which

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LinkUp programs. To the extent that savings were available from CAF programs, the Commission could reallocate that funding for broadband adoption programs, consistent with our statutory authority, while still remaining within our budget target. *Cf.* Letter from Blair Levin to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. (filed Oct. 19, 2011) (urging the Commission to focus on promoting adoption); Letter from Parul P. Desai, Consumers Union, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. (filed Oct. 14, 2011) (same). Alternatively, savings could be used to reduce the contribution burden.

<sup>222</sup> Only one price cap carrier received BIP grant funding for last-mile broadband deployment; we considered all of that carrier’s projects. Information about BIP projects is *available at* [http://www.rurdev.usda.gov/supportdocuments/RBBreport\\_V5ForWeb.pdf](http://www.rurdev.usda.gov/supportdocuments/RBBreport_V5ForWeb.pdf).

<sup>223</sup> The per-location cost for those carrier’s projects ranged from a low of \$286 to a high of \$3,000. Assuming all locations in a project had a per-location cost equal to the average per-location cost in the project, the median location’s cost was \$377, while the 25th percentile cost was \$286 and the 75th percentile cost was \$813.

<sup>224</sup> We also recognize that the cost of future deployment for a carrier may be higher than the average cost of deployments that the carrier already completed because the carrier may have prioritized deployment to areas that were least costly to reach.

<sup>225</sup> *See* OBI, Broadband Availability Gap. The OBI model estimated that the initial capex to serve all but the most expensive 250,000 homes terrestrially is \$9.2 billion (*see id.*, Exhibit 4-AP); this investment serves approximately 7 million locations, making the average cost per location approximately \$1,300. The average cost is much higher than the median cost, however, even excluding the most expensive 1 percent of locations (*see, e.g., id.*, Exhibit 1-C). According to the OBI model, the calculated median cost is roughly 60-70 percent of the average, or approximately \$650 to \$750.



calculates the cost of deploying broadband to unserved locations on a census block basis.<sup>226</sup> Commission staff estimated that the median cost of a brownfield deployment of broadband to low-cost unserved census blocks is \$765 per location (*i.e.*, there are 1.75 million unserved, low-cost locations in areas served by price cap carriers with costs below \$765); the cost of deploying broadband to the census block at the 25th percentile of the cost distribution is approximately \$530 per location (under this analysis, there are 875,000 such locations whose cost is below \$530).<sup>227</sup> Although, as discussed below, we do not adopt the proposed cost model to calculate support amounts for CAF Phase II,<sup>228</sup> these estimates provide additional data points to consider.

143. In addition, we note that several carriers placed estimates of the per-location cost of extending broadband to unserved locations in their respective territories into the record.<sup>229</sup> While several carriers claim that the cost to serve unserved locations is higher than the figure we adopt today, those estimates did not provide supporting data sufficient to fully evaluate them.

144. Taking into account all of these factors, including the cost estimates developed in the course of BIP applications as well as the flexibility we provide to carriers accepting such funding to determine where to deploy and our expectation that carriers will supplement incremental support with their own investment, we conclude that the \$775 per unserved location figure represents a reasonable

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<sup>226</sup> See Letter from Mike Lieberman, AT&T, Michael D. Saperstein, Jr., Frontier, Jeffrey S. Lanning, CenturyLink, Maggie McCready, Verizon, Michael T. Skrivan, Fairpoint Communications, Frank Schueneman, Windstream Communications, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, et al. (filed Sept. 28, 2011).

<sup>227</sup> Because CAF Phase I is structured to provide one-time support, rather than ongoing support, Commission staff focused on the modeled costs in the ABC plan cost model for areas where the cost to provide service is lower: areas unserved by both cable and telco broadband, with total costs less than \$80 per month. As proposed by the proponents of the ABC plan, in order to meet their proposed budget target, these areas would not be eligible for ongoing support.

The ABC model calculates the total cost to serve, including initial capex as well as ongoing capex and opex.

Because of the focus on lower-cost areas, staff assumed that end-user revenue would meet or exceed ongoing costs, and therefore focused only on a subsidy for the initial investment. The ABC model calculates costs for a greenfield 12,000-foot-loop DSL plant. Since the focus here is on upgrading existing lines to broadband, staff had to estimate the cost associated only with that upgrade. To do so, staff excluded the capital costs associated with the last 12,000 feet of copper, which staff assumed already exist; these costs are captured in the ABC filing, in the file named CBG\_Detail, as Node3Inv\_Res, Node4Inv\_Res, Node3Inv\_Bus, and Node4Inv\_Bus. The cost of upgrading is the total investment (TotalInv\_Res plus TotalInv\_Bus) less the capital costs for the last 12,000 feet of copper. That total cost is then divided by the total number of locations (TotalActiveSubscribers\_Res plus TotalActiveSubscribers\_Bus, divided by 0.9 to get locations instead of subscribers, given that the CQBAT model assumed that 90 percent of locations would subscribe) to get the initial investment per location in each census block group.

Staff then focused only on those parts of low-cost census block groups that are unserved by cable and by telco broadband in price cap areas. Census block groups were arranged from lowest to highest cost (for the cost of the brownfield costs described above), and the 25th, 50th (median), and 75th percentile by locations were determined to be \$529, \$764, and \$1,057 respectively.

<sup>228</sup> See *infra* paras. 184-185.

<sup>229</sup> See Letter from Michael D. Saperstein, Frontier Communications, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, et al. (filed Oct. 20, 2011); Letter from Jeffrey S. Lanning, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. (filed Oct. 20, 2011); see also Letter from Russell M. Blau, counsel for Consolidated Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al., Attach. at 2 (filed Oct. 19, 2011) (providing an estimate of the per-line cost to provide 6 Mbps downstream and 1.5 Mbps upstream service to all 7,500 customers in its service area to whom Consolidated does not currently offer broadband service).

estimate of an interim performance obligation for this one-time support. We also emphasize that CAF Phase I incremental support is optional—carriers that cannot meet our broadband deployment requirement may decline to accept incremental support or may choose to accept only a portion of the amount for which they are eligible.

145. We find that, in this interim support mechanism, setting our broadband deployment obligations based on the costs of deploying to lower-cost wire centers that would not otherwise be served, even though we base support on the predicted costs of the highest-cost wire centers, is reasonable because we are trying to expand voice and broadband availability as much and as quickly as possible. We distribute support based on the costs of the highest-cost wire centers because the ultimate goal of our reforms is to ensure that *all* areas get broadband-capable networks, whether through the operation of the market or through support from USF. In this interim mechanism, we distribute funding to those carriers that provide service in the highest-cost areas because these are the areas where we can be most confident, based on available information, that USF support will be necessary in order to realize timely deployment. Thus, we can be confident we are allocating support to carriers that will need it to deploy broadband in some portion of their service territory. At the same time, to promote the most rapid expansion of broadband to as many households as possible, we wish to encourage carriers to use the support in lower-cost areas where there is no private sector business case for deployment of broadband, to the extent carriers also serve such areas. Although at this time we lack data sufficient to identify these areas, we can encourage this use of funding by setting the deployment requirement based on our overall estimate of upgrade costs in lower cost unserved areas, while providing carriers flexibility to allocate funding to these areas, rather than the highest cost wire centers identified by the cost-estimation equation. Accordingly, while we allocate CAF Phase I support on the basis of carriers' service to the highest-cost areas, we allow carriers to use that support in lower-cost areas, and we size their deployment obligations accordingly. We note that, historically, carriers have always been able to use support in wire centers other than the ones for which support is paid, and nothing in the Act constrains that flexibility such that it applies only within state boundaries. Accordingly, in the context of this interim mechanism, we will permit carriers to continue to have such flexibility.

146. Within 90 days of being informed of the amount of incremental support it is eligible to receive, each carrier must provide notice to the Commission, the Administrator, the relevant state or territorial commission, and any affected Tribal government, identifying the amount of support it wishes to accept and the areas by wire center and census block in which the carrier intends to deploy broadband to meet its obligation, or stating that the carrier declines to accept incremental support for that year.<sup>230</sup> Carriers accepting incremental support must make the following certifications. First, the carrier must certify that deployment funded through CAF Phase I incremental support will occur in areas shown on the most current version of the National Broadband Map as unserved by fixed broadband with a minimum speed of 768 kbps downstream and 200 kbps upstream, and that, to the best of the carrier's knowledge, are, in fact, unserved by fixed broadband at those speeds.<sup>231</sup> Second, the carrier must certify that the

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<sup>230</sup> Because carriers will accept or decline incremental support on a holding company basis, carriers should notify USAC regarding which ETC operating company or companies USAC should disburse funds to.

<sup>231</sup> The National Broadband Map divides broadband transmission technologies into 12 types: asymmetric xDSL, symmetric xDSL, other copper wireline, cable modem - DOCSIS 3.0, cable modem - other, satellite, terrestrial fixed wireless - unlicensed, terrestrial fixed wireless - licensed, terrestrial mobile wireless - licensed, electric power line, and all other. The term "unserved by fixed broadband" for the purpose of CAF Phase I includes areas not identified by the National Broadband Map as served by at least one of the following technologies: asymmetric xDSL, symmetric xDSL; other copper wireline; cable modem - DOCSIS 3.0; cable modem - other; electric power line; terrestrial fixed wireless - unlicensed; and terrestrial fixed wireless - license. For the purposes of CAF Phase I we find it appropriate to distinguish fixed from mobile broadband service. *See supra* note 134. We acknowledge that some have claimed that the National Broadband Map is not completely accurate. Nevertheless, we find that using it (continued...)

carrier's current capital improvement plan did not already include plans to complete broadband deployment to that area within the next three years,<sup>232</sup> and that CAF Phase I incremental support will not be used to satisfy any merger commitment or similar regulatory obligation.<sup>233</sup>

147. Carriers 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, after filing their notices of acceptance. Carriers must provide a certification to that effect to the Commission, the Administrator, the relevant state or territorial commission, and any affected Tribal government, as part of their annual certifications pursuant to new section 54.313 of our rules, following both the two-thirds and completion milestones. To fulfill their deployment obligation, carriers must offer broadband service of at least 4 Mbps downstream and 1 Mbps upstream,<sup>234</sup> with latency sufficiently low to enable the use of real-time communications, including VoIP, and with usage limits, if any, that are reasonably comparable to those for comparable services in urban areas.<sup>235</sup> Carriers failing to meet a deployment milestone will be required to return the incremental support distributed in connection with that deployment obligation and will be potentially subject to other penalties, including additional forfeitures, as the Commission deems appropriate. If a carrier fails to meet the two-thirds deployment milestone within two years and returns

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in this way, along with our requirement that carriers certify that the areas to which they intend to deploy are unserved to the best of each carrier's knowledge, is a reasonable and efficient means to identify areas that are, in fact, unserved, even if there might be other areas that are also unserved.

<sup>232</sup> If a carrier's pre-existing capital improvement plan provided for build out to an area within three years on the assumption that the carrier would get support under our existing high-cost mechanisms, the carrier could not make this certification for that area. We anticipate that carriers will adjust their capital improvement plans in light of our reforms, which will provide additional incremental funding to many carriers to reach areas where they otherwise did not intend to deploy broadband. A carrier intends to use incremental CAF Phase I funding to deploy broadband to such an area could make the required certification for that area.

<sup>233</sup> Other similar obligations include, but are not limited to, BIP deployment obligations or state-funded broadband deployment obligations.

We note that Frontier Communications has already committed, pursuant to the transfer of Verizon properties to Frontier, to the following: Within areas transferred from Verizon to Frontier, Frontier will offer broadband service delivering at least 4 Mbps downstream to at least 70 percent of housing units by the end of 2012, to at least 75 percent of housing units by the end of 2013, to at least 80 percent of housing units by the end of 2014, and to at least 85 percent of housing units by the end of 2015. Frontier will offer at least 1 Mbps upstream to those housing units built after the transaction closed. Frontier will offer these services to both residential and small business users. *In the Matter of Applications Filed by Frontier Communications Corp. & Verizon Communications Inc. for Assignment or Transfer of Control*, 25 FCC Rcd 5972, 6001 (2010).

Similarly, CenturyLink, pursuant to its merger with Qwest, committed to, among other things, the following: Within areas transferred from Qwest to CenturyLink, CenturyLink will offer broadband service delivering at least 5 Mbps downstream to at least 62 percent of living units within three years of the merger closing date, to at least 68 percent of living units within five years of the merger closing date, and to at least 78.8 percent of living units within seven years of the merger closing date. *In the Matter of Applications filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control*, WC Docket No. 10-110, Memorandum Opinion and Order, 26 FCC Rcd 4194, 4219 (2011).

These obligations are independent of obligations Frontier or CenturyLink would incur in return for receiving CAF Phase I support, and that such support cannot be used to satisfy Frontier's or CenturyLink's pre-existing obligations.

<sup>234</sup> 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.

<sup>235</sup> See *supra* Section VI.B.1.

the incremental support provided, and then meets its full deployment obligation associated with that support by the third year, it will be eligible to have support it returned restored to it.

148. Our expectation is that CAF Phase II will begin on January 1, 2013. However, absent further Commission action, if CAF Phase II has not been implemented to go into effect by that date, CAF Phase I will continue to provide support as follows. Annually, no later than December 15, the Bureau will announce via Public Notice CAF Phase I incremental support amounts for the next term of incremental support, indicating whether support will be allocated for the full year or for a shorter term. We delegate to the Wireline Competition Bureau the authority to adjust the term length of incremental support amounts, and to pro-rate obligations as appropriate, to the extent Phase II CAF is anticipated to be implemented on a date after the beginning of the calendar year. The amount of incremental support to be distributed during a term will be calculated in the manner described above, based on allocating \$300 million through the incremental support mechanism, but that amount will be reduced by a factor equal to the portion of a year that the term will last.<sup>236</sup> Within 90 days of the beginning of each term of support, carriers must provide notice to the Commission, the relevant state commission, and any affected Tribal government, identifying the amount of support it wishes to accept and the areas by wire center and census block in which the carrier intends to deploy broadband or stating that the carrier declines to accept incremental support for that term, with the same certification requirements described above.<sup>237</sup>

149. CAF Phase I will also begin the process of transitioning all federal high-cost support to price cap carriers to supporting modern communications networks capable of supporting voice and broadband in areas without an unsubsidized competitor. Effective January 1, 2012, we require carriers to use their frozen high-cost support in a manner consistent with achieving universal availability of voice and broadband. If CAF Phase II has not been implemented to go into effect on or before January 1, 2013, we will phase in a requirement that carriers use such support for building and operating broadband-capable networks used to offer their own retail service in areas substantially unserved by an unsubsidized competitor.<sup>238</sup>

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<sup>236</sup> For example, if the Bureau sets a term as six months, only \$150 million will be allocated. Support amounts would be calculated by first calculating the amount of support each carrier would be entitled to if the full \$300 million were to be allocated, and then reducing the amount for which each carrier is eligible proportionately. While this approach should ensure that total funding to price cap territories in the year in which CAF Phase II is implemented remains below the overall annual budget for price cap territories of \$1.8 billion, we direct the Bureau to ensure the overall annual budget of \$1.8 billion for price cap territories is not exceeded.

<sup>237</sup> For purposes of this Order, a carrier accepting incremental support in terms after 2012 will be required to deploy broadband to a number of locations equal to the amount of incremental support it accepts divided by \$775, similar to the obligation for accepting support in 2012.

<sup>238</sup> Support should be used to further the goal of universal voice and broadband, and not to subsidize competition in areas where an unsubsidized competitor is providing service. However, we recognize that certain expenditures, such as investments in a digital subscriber line access multiplexer (DSLAM) and/or middle mile infrastructure, that benefit a geographic area unserved by an unsubsidized competitor may also benefit some locations where an unsubsidized competitor provides service. We do not intend to preclude such investments. While we expect CAF recipients to use support in areas without an unsubsidized competitor, to the extent support is used to serve any geographic area that is partially served by an unsubsidized competitor, the recipient must certify that, with respect to the frozen high-cost support dollars subject to this obligation, at least 50 percent of the locations served are in census blocks shown as unserved by an unsubsidized competitor, as shown on the National Broadband Map. For example, if a given middle mile feeder for which frozen high-cost support dollars are used serves 100 locations, and only 40 of those locations are in census blocks shown as unserved by an unsubsidized competitor on the National Broadband Map, the recipient would not be in compliance with this requirement. For purposes of determining whether this requirement is met, carriers must be prepared to provide asset records demonstrating the existence of facilities, such (continued...)

150. Specifically, in 2013, all carriers receiving frozen high-cost support must use at least one-third of that support 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.<sup>239</sup> For 2014, at least two-thirds of the frozen high-cost support must be used in such fashion, and for 2015 and subsequent years, all of the frozen high-cost support must be spent in such fashion. Carriers will be required to certify that they have spent frozen high-cost support consistent with these requirements in their annual filings pursuant to new section 54.313 of our rules.

151. These interim reforms to our support mechanisms for price cap carriers are an important step in the transition to full implementation of the Connect America Fund. While we intend to complete implementation of the CAF rapidly, we find that these interim reforms offer immediate improvements over our existing support mechanisms. First, existing support for price cap carriers will be frozen and no longer calculated based on embedded costs. Rather, we begin the process of transitioning all high-cost support to forward-looking costs and market-based mechanisms, which will improve incentives for carriers to invest efficiently. Second, these reforms begin the process of eliminating the distinction, for the purposes of calculating high-cost support, between price cap carriers that are classified as rural and those that are classified as non-rural, a classification that has no direct or necessary relation to the cost of providing voice and broadband services. In this way, our support mechanisms will be better aligned with the text of section 254, which directs us to focus on the needs of consumers in "rural, insular, and high cost areas"<sup>240</sup> but makes no reference to the classification of the *company* receiving support.<sup>241</sup> In addition, we note that the reforms we adopt today, which include providing immediate support to spur broadband deployment, can be implemented quickly, without the need to overhaul an admittedly dated cost model that does not reflect modern broadband network architecture.<sup>242</sup> Thus, although the simplified interim mechanism is imperfect in some respects, it will allow us to begin providing additional support to price cap carriers on a more efficient basis, while spurring immediate and material broadband deployment pending implementation of CAF competitive bidding- and model-based support for price cap areas.<sup>243</sup>

152. *No Effect on Interstate Rates.* Historically, IAS was intended to replace allowable common line revenues that otherwise are not recovered through SLCs, while some carriers received frozen ICLS because, due to the timing of their conversion to price cap regulation, they could not receive IAS.<sup>244</sup> We note that many price cap carriers did not object to the elimination of the IAS mechanism, as long as it did not occur before the implementation of CAF.<sup>245</sup> We have no indication that these price cap

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as a DSLAM and/or middle mile plant, that serve locations in census blocks where there is no unsubsidized competitor.

<sup>239</sup> See *supra* para. 103. We note that this obligation applies to carriers, regardless of whether or not they accept CAF Phase I incremental support.

<sup>240</sup> 47 U.S.C. § 254(b)(3) (emphasis added).

<sup>241</sup> See 47 U.S.C. § 153(37).

<sup>242</sup> We note that the State Members of the Joint Board recommended as part of their comprehensive plan that the Commission continue to use its existing cost model, with some modifications. State Members *USF/ICC Transformation NPRM* Comments at 37.

<sup>243</sup> See *infra* Section VII.C.2.

<sup>244</sup> See *supra* note 207.

<sup>245</sup> CenturyLink/Qwest *USF/ICC Transformation NPRM* Comments at 26-28; Frontier *USF/ICC Transformation NPRM* Comments at 12-14; Frontier *USF/ICC Transformation NPRM* Reply Comments at 11-12 (supporting Windstream proposal); Independent Tel. & Telecom. Alliance *USF/ICC Transformation NPRM* Comments at 9-11; (continued...)

carriers expect to raise their SLCs, presubscribed interexchange carrier charges, or other interstate rates as a result of any reform that would eliminate IAS. For clarity, however, we specifically note that while carriers receive support under CAF Phase I, the amount of their frozen high cost support equal to the amount of IAS for which each carrier was eligible in 2011 as being received under IAS, including, but not limited to, for the purposes of calculating interstate rates will be treated as IAS for purposes of our existing rules. To the extent that a carrier believes that it cannot meet its obligations with the revenues it receives under the CAF and ICC reforms, it may avail itself of the total cost and earnings review process described below.<sup>246</sup>

153. *Elimination of State Rate Certification Filings.* Under section 54.316 of our existing rules, states are required to certify annually whether residential rates in rural areas of their state served by non-rural carriers are reasonably comparable to urban rates nationwide.<sup>247</sup> As part of the reforms we adopt today, however, we require carriers to file rate information directly with the Commission.<sup>248</sup> For this reason, we conclude that continuing to impose this obligation on the states is unnecessary, and we relieve state commissions of their obligations under that provision.<sup>249</sup>

154. *Hawaiian Telcom Petition for Waiver.* Hawaiian Telcom, a non-rural price cap incumbent local exchange carrier, previously sought a waiver of certain rules relating to the support to which it would be entitled under the high-cost model.<sup>250</sup> As Hawaiian Telcom explained, it received no high-cost model support at all because support under the model was based not on the estimated costs of individual wire centers but rather the statewide average of the costs of all individual wire centers included in the model.<sup>251</sup> In its petition, Hawaiian Telcom requested that its support under the model be determined on a wire center basis, without regard to the statewide average of estimated costs calculated under the high-cost model.<sup>252</sup>

155. In light of the reforms we adopt today for support to price cap carriers, we deny the Hawaiian Telcom petition. We note that our reforms are largely consistent with the thrust of Hawaiian Telcom's petition. Phase II support will not involve statewide averaging of costs determined by a model, but instead will be determined on a much more granular basis. In Phase I, we adopt, on an interim basis, a new method for distributing support to price cap carriers. While we freeze existing support, we provide incremental support to price cap carriers through a mechanism that, consistent with Hawaiian Telcom's proposal, identifies carriers serving the highest-cost wire centers but does not average wire center costs in

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Verizon and Verizon Wireless *USF/ICC Transformation NPRM* Comments at 50-51; Windstream *USF/ICC Transformation NPRM* Comments at 44.

<sup>246</sup> See *infra* Section XIII.G.

<sup>247</sup> See 47 C.F.R. § 54.316.

<sup>248</sup> See *infra* para. 592.

<sup>249</sup> We note that under our existing rules, states are also required to certify that carriers have used non-rural support (*i.e.*, high cost model support) for the provision, maintenance, and upgrading of the facilities and services for which it is intended. See 47 C.F.R. § 54.313. A similar obligation applies with regard to support to rural carriers. See 47 C.F.R. § 54.314. As described in more detail below, we simplify our rules and combine these two provisions. See *infra* para. 613.

<sup>250</sup> See Hawaiian Telcom, Inc. Petition for Waiver of Sections 54.309 and 54.313(d)(vi) of the Commission's Rules, WC Docket No. 08-4 (filed Dec. 31, 2007).

<sup>251</sup> See *id.* at 4.

<sup>252</sup> See *id.* at 1.

a state. We therefore believe that the reforms we adopt today will achieve the relief Hawaiian Telcom seeks in its waiver petition and that, to the extent they do not, Hawaiian Telcom may seek additional targeted support through a request for waiver.

## **2. New Framework for Ongoing Support in Price Cap Territories**

156. In this section, we adopt Phase II of the Connect America Fund: a framework for extending broadband to millions of unserved locations over a five-year period, including households, businesses, and community anchor institutions, while sustaining existing voice and broadband services. CAF Phase II will have an annual budget of no more than \$1.8 billion. To distribute this funding, we will use a combination of competitive bidding and a new forward-looking model of the cost of constructing modern multi-purpose networks. Using the model, we will estimate the support necessary to serve areas where costs are above a specified benchmark, but below a second “extremely high-cost” benchmark. The Commission will offer each price cap ETC a model-derived support amount in exchange for a commitment to serve all locations in its service territory in a state that, based on the model, fall within the high-cost range and are not served by a competing, unsubsidized provider. As part of this state-level commitment, the ETC will be required to ensure that the service it offers meets specified voice and broadband performance criteria. In areas where the price cap ETC refuses the state-level commitment, support will be determined through a competitive bidding mechanism.

157. In order to expedite adoption of the model to determine statewide support amounts in price cap areas, we delegate to the Wireline Competition Bureau the task of selecting a specific engineering cost model and associated inputs that meet the criteria specified below. We anticipate adoption of the selected model by the end of 2012 for purposes of providing support beginning January 1, 2013.

### **a. Budget for Price Cap Areas**

158. Within the total \$4.5 billion annual budget, we set the total annual CAF budget for areas currently served by price cap carriers at no more than \$1.8 billion for a five-year period.<sup>253</sup> In 2010, the most recent year for which complete disbursement data are available, price cap carriers and their rate-of-return affiliates received approximately \$1.076 billion in support.<sup>254</sup> Collectively, more than 83 percent of the unserved locations in the nation are in price cap areas,<sup>255</sup> yet such areas currently receive approximately 25 percent of high-cost support.<sup>256</sup>

159. We conclude that increased support to areas served by price cap carriers, coupled with rigorous, enforceable deployment obligations, is warranted in the near term to meet our universal service mandate to unserved consumers residing in these communities. At the same time, we seek to balance many competing demands for universal service funds, including the need to extend advanced mobile services and to preserve and advance universal service in areas currently served by rate-of-return companies. Budgeting up to \$1.8 billion for price cap territories, in our judgment, represents a reasonable

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<sup>253</sup> For purposes of CAF Phase II, consistent with our approach in CAF Phase I, we will treat as price cap carriers the rate-of-return operating companies that are affiliated with holding companies for which the majority of access lines are regulated under price caps. A “price cap territory” therefore includes a study area served by a rate-of-return operating company affiliated with price cap companies.

<sup>254</sup> See Federal Communications Commission, Staff Analysis of 2010 High-Cost Disbursement Data, *available at* <http://www.fcc.gov/document/universal-service-high-cost-program-disbursements> (2010 Disbursement Analysis). Price cap study areas received approximately \$1.036 billion. See *id.*

<sup>255</sup> See *supra* para. 127. This figure does not include unserved locations in the service areas of rate-of-return carriers affiliated with price cap carriers.

<sup>256</sup> In 2010, high-cost USF disbursements totaled \$4.268 billion. See 2010 Disbursement Analysis.

balance of these considerations. We also stress that these subsidies will go to carriers serving price cap areas, not necessarily incumbent price cap carriers. Before 2018, we will re-evaluate the need for ongoing support at these levels and determine how best to drive support to efficient levels, given consumer demand and technological developments at that time.

**b. Price Cap Public Interest Obligations**

160. Price cap ETCs that accept a state-level commitment must provide broadband service that is reasonably comparable to terrestrial fixed broadband service in urban America. Specifically, price cap ETCs that receive model-based CAF support will be required, for the first three years they receive support, to offer broadband at actual speeds of at least 4 Mbps downstream and 1 Mbps upstream, with latency suitable for real-time applications, such as VoIP, and with usage capacity reasonably comparable to that available in comparable offerings in urban areas. By the end of the third year, ETCs must offer at least 4 Mbps/1 Mbps broadband service to at least 85 percent of their high-cost locations – including locations on Tribal lands – covered by the state-level commitment, as described below. By the end of the fifth year, price cap ETCs must offer at least 4 Mbps/1 Mbps broadband service to all supported locations, and at least 6 Mbps/1.5 Mbps to a number of supported locations to be specified.

161. We establish the 85 percent third-year milestone to ensure that recipients of funding remain on track to meet their performance obligations. While a number of parties agreed generally with the concept of setting specific, enforceable interim milestones to safeguard the use of public funds,<sup>257</sup> there are few concrete suggestions in the record on what those intermediate deadlines should be. We agree with the State Members of the Joint Board that there should be intermediate milestones for the required broadband deployment obligations.<sup>258</sup> We set an initial requirement of offering broadband to at least 85 percent of supported locations by the end of the third year, and to all supported locations by the end of the fifth year.<sup>259</sup> As set forth more fully below,<sup>260</sup> recipients of funding will be required annually to report on their progress in extending broadband throughout their areas and must meet the interim deadline established for the third year, or face loss of support.

162. Before the end of the fifth year, we expect to have reviewed our minimum broadband performance metrics in light of expected increases in speed, and other broadband characteristics, in the intervening years. Based on the information before us today, we expect that consumer usage of applications, including those for health and education, may evolve over the next five years to require speeds higher than 4 Mbps downstream/1 Mbps upstream.<sup>261</sup> For this reason, we expect ETCs to build robust, scalable networks that will provide speeds of at least 6 Mbps/1.5 Mbps to a number of supported locations to be determined in the model development process, as set forth more fully below.

163. After the end of the five-year term of CAF Phase II, the Commission expects to be distributing all CAF support in price cap areas pursuant to a market-based mechanism, such as

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<sup>257</sup> CWA *August 3 PN* Comments at 4; NASUCA *August 3 PN* Comments at 86 (supporting State Members deployment milestones proposal); TIA *August 3 PN* Comments at 5 (opposing State Members proposal of losing funding for failing to meet milestones, but supporting flexible deployment milestones).

<sup>258</sup> State Members *USF/ICC Transformation NPRM* Comments at 63.

<sup>259</sup> The State Members suggested that support be reduced if a carrier failed to provide 1.5 Mbps service to 95 percent of the residential locations in its study area by year three. *Id.* We recognize, however, that carriers typically would extend service on a project-by-project-basis, and therefore adopt a lower percentage milestone relative to the higher 4 Mbps/1 Mbps standard.

<sup>260</sup> See *infra* para. 585.

<sup>261</sup> See *supra* paras. 106-107.



competitive bidding.<sup>262</sup> However, if such a mechanism is not implemented by the end of the five-year term of CAF Phase II, the incumbent ETCs will be required to continue providing broadband with performance characteristics that remain reasonably comparable to the performance characteristics of terrestrial fixed broadband service in urban America, in exchange for ongoing CAF Phase II support.

**c. Methodology for Allocating Support**

164. *Background.* In the *USF/ICC Transformation NPRM*, the Commission sought comment on alternative approaches for determining CAF recipients and appropriate amounts of ongoing CAF support that would replace all existing high-cost funding.<sup>263</sup> Under one option, the Commission proposed to use a competitive bidding mechanism to award funding to one provider per geographic area in all areas designated to receive CAF support.<sup>264</sup> Under another option, the Commission proposed to offer the current carrier of last resort in each service area (typically an incumbent telephone company) a right of first refusal to serve the area for an ongoing amount of annual support based on a forward-looking cost model, with ongoing support awarded through a competitive bidding mechanism where the right of first refusal was refused.<sup>265</sup> We also sought comment on limiting the full transition to the CAF to a subset of geographic areas, such as those served by price cap companies, while continuing to provide ongoing support to smaller, rate-of-return companies based on reasonable actual investment.<sup>266</sup>

165. *Discussion.* We conclude that the Connect America Fund should ultimately rely on market-based mechanisms, such as competitive bidding, to ensure the most efficient and effective use of public resources. However, the CAF is not created on a blank slate, but rather against the backdrop of a decades-old regulatory system. The continued existence of legacy obligations, including state carrier of last resort obligations for telephone service, complicate the transition to competitive bidding. In the transition, we seek to avoid consumer disruption—including the loss of traditional voice service—while getting robust, scalable broadband to substantial numbers of unserved rural Americans as quickly as possible. Accordingly, we adopt an approach that enables competitive bidding for CAF Phase II support in the near-term in some price cap areas, while in other areas holding the incumbent carrier to broadband and other public interest obligations over large geographies in return for five years of CAF support.

166. Specifically, we adopt the following methodology for providing CAF support in price cap areas. First, the Commission will model forward-looking costs to estimate the cost of deploying broadband-capable networks in high-cost areas and identify at a granular level the areas where support will be available. Second, using the cost model, the Commission will offer each price cap LEC annual support for a period of five years in exchange for a commitment to offer voice across its service territory within a state and broadband service to supported locations within that service territory, subject to robust public interest obligations and accountability standards.<sup>267</sup> Third, for all territories for which price cap LECs decline to make that commitment, the Commission will award ongoing support through a

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<sup>262</sup> See *infra* section XVII.J (Competitive Process in Price Cap Territories). We anticipate that the performance requirements adopted by the Commission for the auction in areas where the state-level commitment is declined may be different from the performance requirements used for the post-five-year auction, in part because of the difference in timing and likely changes in network capabilities and consumer demand.

<sup>263</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4677, para. 400, 4681-92, paras. 417-56.

<sup>264</sup> *Id.* at 4677, para. 400, 4681-84, paras. 418-30.

<sup>265</sup> *Id.* at 4677, para. 400, 4684-90, paras. 431-47.

<sup>266</sup> *Id.* at 4677, para. 401, 4689-92, paras. 447-56.

<sup>267</sup> We seek comment in the FNPRM whether and how to adjust ETC voice service obligations in areas where the ETC is no longer receiving federal support. See *infra* Section XVII.F.

competitive bidding mechanism.

167. *Determination of Eligible Areas.* We will use a forward-looking cost model to determine, on a census block or smaller basis, areas that will be eligible for CAF Phase II support.<sup>268</sup> In doing so, we will allocate our budget of no more than \$1.8 billion for price cap areas to maximize the number of expensive-to-serve residences, businesses, and community anchor institutions that will have access to modern networks providing voice and robust, scalable broadband.<sup>269</sup> Specifically, we will use the model to identify those census blocks where the cost of service is likely to be higher than can be supported through reasonable end-user rates alone, and, therefore, should be eligible for CAF support. We will also use the model to identify, from among these, a small number of extremely high-cost census blocks that should receive funding specifically set aside for remote and extremely high-cost areas, as described below,<sup>270</sup> rather than receiving CAF Phase II support, in order to keep the total size of the CAF and legacy high-cost mechanisms within our \$4.5 billion budget.

168. This methodology balances our desire to extend robust, scalable broadband to all Americans with our recognition that the very small percentage of households that are most expensive to serve via terrestrial technology represent a disproportionate share of the cost of serving currently unserved areas.<sup>271</sup> In light of this fact, the State Members of the Joint Board propose that universal service support be limited to not more than \$100 per high-cost location per month, which they suggest is somewhat higher than the prevailing retail price of satellite service.<sup>272</sup> Similarly, ABC Plan proponents recommend an alternative technology benchmark of \$256 per month based on the plan proponents' cost model – the CostQuest Broadband Analysis Tool (CQBAT) – which would limit support per location to no more than \$176 per month (\$256 - \$80 cost benchmark).<sup>273</sup> We agree that the highest cost areas are more appropriately served through alternative approaches, and in the FNPRM we seek comment on how best to utilize at least \$100 million in annual CAF funding to maximize the availability of affordable broadband in such areas. Here, we adopt a methodology for calculating support that will target support to areas that exceed a specified cost benchmark, but not provide support for areas that exceed an “extremely high cost” threshold.

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<sup>268</sup> Areas with particularly low population density have large census blocks, which may overlap company boundaries. For example, some blocks may have areas partially served by a rate-of-return carrier, so these areas would not be eligible for the support available to price cap carriers. The Wireline Competition Bureau will address this issue in conjunction with finalization of the cost model that will be developed with public input. *See infra* paras. 192-193. We believe this flexibility would also allow us to address the concerns raised by the state of Hawaii. *See* Letter from Bruce A. Olcott, Counsel to the State of Hawaii, to Hon. Julius Genachowski, Chairman, FCC at 2, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51 (Oct. 19, 2011).

<sup>269</sup> The reference to community anchor institutions should not signal an intention that the model will skew more funds to communities that have community anchor institutions. In fact, it may be the case that the most unserved areas do not have community anchor institutions due to their low population density.

<sup>270</sup> *See infra* Section VII.F.

<sup>271</sup> *See, e.g.*, National Broadband Plan at 138, 150.

<sup>272</sup> State Members *USF/ICC Transformation Comments*, at 59.

<sup>273</sup> *See* ABC Plan, Attach. 2 at 2, Attach. 3.

169. We delegate to the Wireline Competition Bureau the responsibility for setting the extremely high-cost threshold in conjunction with adoption of a final cost model. The threshold should be set to maintain total support in price cap areas within our up to \$1.8 billion annual budget.<sup>274</sup>

170. In determining the areas eligible for support, we will also exclude areas where an unsubsidized competitor offers broadband service that meets the broadband performance requirements described above, with those areas determined by the Wireline Competition Bureau as of a specified future date as close as possible to the completion of the model.<sup>275</sup> The model scenarios submitted by the ABC Plan proponents excluded areas already served by a cable company offering broadband.<sup>276</sup> State Members propose, at a minimum, excluding areas with unsubsidized wireline competition, and suggested that areas with reliable 4G wireless service could also be excluded.<sup>277</sup> In an “Amended ABC Plan,” NCTA proposes to exclude areas where there is an unsupported wireline or wireless broadband competitor, and areas that received American Recovery and Reinvestment Act stimulus funding from RUS or NTIA to build broadband facilities.<sup>278</sup> We conclude, on balance, that it would be appropriate to exclude any area served by an unsubsidized competitor and we delegate to the Wireline Competition Bureau the task of implementing the specific requirements of this rule.

171. *State-Level Commitment.* Following adoption of the cost model, which we anticipate will be before the end of 2012, the Bureau will publish a list of all eligible census blocks associated with each incumbent price cap carrier within each state. After the list is published, there will be an opportunity for comments and data to be filed to challenge the determination of whether or not areas are unserved by an unsubsidized competitor. Each incumbent carrier will then be given an opportunity to accept, for each state it serves, the public interest obligations associated with all the eligible census blocks in its territory, in exchange for the total model-derived annual support associated with those census blocks, for a period of five years. The model-derived support amount associated with each census block will be the difference between the model-determined cost in that census block, provided that cost is below the highest-cost threshold, and the cost benchmark used to identify high-cost areas. If the incumbent accepts the state-level broadband commitment, it shall be subject to the public interest obligations described above for all locations for which it receives support in that state, and shall be the presumptive recipient of the model-derived support amount for the five-year CAF Phase II period.<sup>279</sup>

172. Carriers accepting a state-level commitment will receive funding for five years. At the

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<sup>274</sup> We anticipate that less—and possibly much less—than one percent of all U.S. residences are likely to fall above the “extremely high-cost” threshold in the final cost model.

<sup>275</sup> See *supra* Section VI.B.

<sup>276</sup> See ABC Plan, Attach. 2. Three scenarios used a combination of cable coverage from both the NTIA and Warren Media, and one scenario used Nielsen data.

<sup>277</sup> State Members *USF/ICC Transformation Comments* at 43.

<sup>278</sup> NCTA *August 3 PN Comments*, Attach. at 3. NCTA argues that the ABC Plan will spend more money than necessary because it does not account for the availability of wireless broadband services (either fixed or mobile), wireline broadband services other than cable, or reasonably anticipate deployments, such as construction pursuant to Recovery Act stimulus funding from RUS or NTIA, announced deployment schedules for 4G wireless services, and construction commitments made in context of merger proceedings. *Id.* at 14-15.

<sup>279</sup> In meeting its obligation to serve a particular number of locations in a state, an incumbent that has accepted the state-level commitment may choose to serve some census blocks with costs above the highest cost threshold instead of eligible census blocks (*i.e.*, census blocks with lower costs), provided that it meets the public interest obligations in those census blocks, and provided that the total number of unserved locations and the total number of locations covered is greater than or equal to the number of locations in the eligible census blocks.

end of the five-year term, in the areas where the price cap carriers have accepted the five-year state level commitment, we expect the Commission will use competitive bidding to award CAF support on a going-forward basis, and may use the competitive bidding structure adopted by the Commission for use in areas where the state-level commitment is declined.<sup>280</sup>

173. We conclude that the state-level commitment framework we adopt is preferable to the right of first refusal approach proposed by the Commission in the *USF/ICC Transformation NPRM*, which would have been offered at the study area level,<sup>281</sup> and to a right of first refusal offered at the wire center level, as proposed by some commenters.<sup>282</sup> Both of these approaches would have allowed price cap carriers to pick and choose on a granular basis the areas where they would receive model-based support within a state. This would allow the incumbent to cherry pick the most attractive areas within its service territory, leaving the least desirable areas for a competitive process. This concern was greatest with the ABC proposal, under which carriers would have been able to exercise a right of first refusal on a wire center basis, but also applies to the study area proposal in our NPRM. Although for some price cap carriers, their study areas are their entire service area within a state, other carriers still have many study areas within a state.<sup>283</sup> These carriers may have acquired various properties over time and chosen to keep them as separate study areas for various reasons, including potentially to maximize universal service support. Rather than enshrine such past decisions in the new CAF, we conclude that it is more equitable to treat all price cap carriers the same and require them to offer service to all high-cost locations between an upper and lower threshold within their service territory in a state, consistent with the public interest obligations described above, in exchange for support. Requiring carriers to accept or decline a commitment for all eligible locations in their service territory in a state should reduce the chances that eligible locations that may be less economically attractive to serve, even with CAF support, get bypassed, and increase the chance such areas get served along with eligible locations that are more economically attractive.

174. In determining how best to award CAF support in price cap areas, we carefully weighed the risks and benefits of alternatives, including using competitive bidding everywhere, without first giving incumbent LECs an opportunity to enter a state-level service commitment. We conclude that, on balance, the approach we adopt will best ensure continued universal voice service and speed the deployment of broadband to all Americans over the next several years, while minimizing the burden on the Universal Service Fund.

175. In particular, several considerations support our determination not to immediately adopt competitive bidding everywhere for the distribution of CAF support. Because we exclude from the price cap areas eligible for support all census blocks served by an unsubsidized competitor,<sup>284</sup> we will generally be offering support for areas where the incumbent LEC is likely to have the only wireline facilities, and there may be few other bidders with the financial and technological capabilities to deliver scalable broadband that will meet our requirements over time. In addition, it is our predictive judgment that the

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<sup>280</sup> See *infra* Section XVII.J.

<sup>281</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4684, para. 431 (proposing that a carrier accepting the right of first refusal would commit to deploying a network capable of delivering broadband and voice services “throughout its service area”).

<sup>282</sup> ABC Plan, Attach. 1.

<sup>283</sup> CenturyLink, for example, has sixteen study areas in Wisconsin. See USAC Quarterly Administrative Filings, available at <http://www.usac.org/about/governance/fcc-filings/fcc-filings-archive.aspx> (for Fourth Quarter 2011, at HC01).

<sup>284</sup> See *supra* para. 103.

incumbent LEC is likely to have at most the same, and sometimes lower, costs compared to a new entrant in many of these areas.<sup>285</sup> We also weigh the fact that incumbent LECs generally continue to have carrier of last resort obligations for voice services. While some states are beginning to re-evaluate those obligations, in many states the incumbent carrier still has the continuing obligation to provide voice service and cannot exit the marketplace absent state permission. On balance, we believe that that our approach best serves consumers in these areas in the near term, many of whom are receiving voice services today supported in part by universal service funding and some of whom also receive broadband, and will speed the delivery of broadband to areas where consumers have no access today.

176. We disagree with commenters who assert that the principle of competitive neutrality precludes the Commission from giving incumbent carriers an opportunity to commit to deploying broadband throughout their service areas in a state in exchange for five years of funding. The principle of competitive neutrality states that “[u]niversal service support mechanisms and rules should be competitively neutral,” which means that they should not “unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.”<sup>286</sup> The competitive neutrality principle does not require all competitors to be treated alike, but “only prohibits the Commission from treating competitors differently in ‘unfair’ ways.”<sup>287</sup> Moreover, neither the competitive neutrality principle nor the other section 254(b) principles impose inflexible requirements for the Commission’s formulation of universal service rules and policies. Instead, the “promotion of any one goal or principle should be tempered by a commitment to ensuring the advancement of each of the principles” in section 254(b).<sup>288</sup>

177. As an initial matter, we note that our USF reforms generally advance the principle of competitive neutrality by limiting support to only those areas of the nation that lack unsubsidized providers. Thus, providers that offer service without subsidy will no longer face competitors whose service in the same area is subsidized by federal universal service funding. Especially in this light, we conclude that any departure from strict competitive neutrality occasioned by affording incumbent LECs an opportunity to commit to deploying broadband in their statewide service areas is outweighed by the advancement of other section 254(b) principles, in particular, the principles that “[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation,” and that consumers in rural areas should have access to advanced services comparable to those available in urban areas.<sup>289</sup> Although other classes of providers may be well situated to make broadband commitments with respect to relatively small geographic areas such as discrete census blocks, the purpose of the five-year commitment is to establish a limited, one-time opportunity for the rapid deployment of broadband services over a large geographic area. The fact that incumbent LECs’ have had a long history of

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<sup>285</sup> See *infra* para. 191, discussing the relative costs of wireless and wireline networks for residential and business broadband.

<sup>286</sup> See *Universal Service First Report and Order*, 12 FCC Rcd at 8801, para. 47.

<sup>287</sup> *Rural Cellular Ass’n. v. FCC*, 588 F.3d 1095, 1104 (D.C. Cir. 2009).

<sup>288</sup> *Universal Service First Report and Order*, 12 FCC Rcd at 8803, para. 52; see also *Qwest Corp. v. FCC*, 258 F.3d 1191, 1199 (10th Cir. 2001) (*Qwest I*) (“The FCC may balance the principles against one another, but must work to achieve each one unless there is a direct conflict between it and either another listed principle or some other obligation or limitation on the FCC’s authority.”); *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 621 (5th Cir. 2000) (“We reiterate that predictability is only a principle, not a statutory command. To satisfy a countervailing statutory principle, therefore, the FCC may exercise reasoned discretion to ignore predictability.”); *Rural Cellular Ass’n*, 588 F.3d at 1103 (“The Commission enjoys broad discretion when conducting exactly this type of balancing.”) (citing *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999)).

<sup>289</sup> 47 U.S.C. § 254(b)(2), (3).

providing service throughout the relevant areas – including the fact that incumbent LECs generally have already obtained the ETC designation necessary to receive USF support throughout large service areas – puts them in a unique position to deploy broadband networks rapidly and efficiently in such areas.<sup>290</sup> We see nothing in the record that suggests a more competitively neutral way of achieving that objective quickly, without abandoning altogether the goal of obtaining large-area build-out commitments or substantially ballooning the cost of the program.<sup>291</sup>

178. Moreover, it is important to emphasize the limited scope and duration of the state-level commitment procedure. Incumbent LECs are afforded only a one-time opportunity to make a commitment to build out broadband networks throughout their service areas within a state. If the incumbent declines that opportunity in a particular state, support to serve the unserved areas located within the incumbent's service area will be awarded by competitive bidding, and all providers will have an equal opportunity to seek USF support, as described below. Furthermore, even where the incumbent LEC makes a state-level commitment, its right to support will terminate after five years, and we expect that support after such five-year period will be awarded through a competitive bidding process in which all eligible providers will be given an equal opportunity to compete. Thus, we anticipate that funding will soon be allocated on a fully competitive basis. In light of all these considerations, we conclude that adhering to strict competitive neutrality at the expense of the state-level commitment process would unreasonably frustrate achievement of the universal service principles of ubiquitous and comparable broadband services and promoting broadband deployment, and unduly elevate the interests of competing providers over those of unserved and under-served consumers who live in high-cost areas of the country, as well as of all consumers and telecommunications providers who make payments to support the Universal Service Fund.

179. *Competitive Bidding.* In areas where the incumbent declines a state-level commitment, we will use a competitive bidding mechanism to distribute support. In the FNPRM, we propose to design this mechanism in a way that maximizes the extent of robust, scalable broadband service subject to the budget.<sup>292</sup> Assigning support in this way should enable us to identify those providers that will make most effective use of the budgeted funds, thereby extending services to as many consumers as possible. We propose to use census blocks as the minimum geographic unit eligible for competitive bidding and seek comment on ways to allow aggregation of such blocks. Although we propose using the same areas identified by the CAF Phase II model as eligible for support, we also seek comment on other approaches—for example, excluding areas served by any broadband provider, or using different cost thresholds.<sup>293</sup> We also seek targeted comment on other issues, including bidder eligibility, auction design,

<sup>290</sup> As noted above, incumbent LECs in many states are designated as the carriers of last resort and thus have a preexisting obligation to ensure service to consumers who request it. *See supra* para. 175.

<sup>291</sup> For example, NCTA proposes a commitment framework based upon counties rather than statewide service areas to accommodate the ability of other types of providers to make commitments. *See* NCTA Oct. 21, 2011 Letter Att. B, at 1. NCTA concedes, however, that “[c]ounties are smaller than . . . statewide ILEC study areas.” *Id.* at 2. For example, in Texas there are 254 counties but only five price cap companies. 2010 United States Census Data, [http://www2.census.gov/census\\_2010/01-Redistricting\\_File--PL\\_94-171/](http://www2.census.gov/census_2010/01-Redistricting_File--PL_94-171/) and documentation at <http://www.census.gov/prod/cen2010/doc/pl94-171.pdf>; 2010 Disbursement Analysis. Moreover, under NCTA's proposal, there may be greater delay in implementing any commitment because “[p]roviders that are not already designated ETCs would be required to certify that they will apply for ETC status if they are selected to receive support and must acknowledge that no support will be provided until ETC status is obtained.” *Id.* at 1. As noted, incumbent LECs typically have already obtained ETC designations and, therefore, could begin the buildout of broadband infrastructure to unserved areas more quickly.

<sup>292</sup> *See infra* Section XVII.J.

<sup>293</sup> *See infra* 1191.

and auction process.

180. *Transition to New Support Levels.* Support under CAF Phase II will be phased in, in the following manner. For a carrier accepting the state-wide commitment, in the first year, the carrier will receive one-half the full amount the carrier will receive under CAF Phase II and one-half the amount the carrier received under CAF Phase I for the previous year (which would be the frozen amount if the carrier declines Phase I or the frozen amount plus the incremental amount if the carrier accepts Phase I); in the second year, each carrier accepting the state-wide commitment will receive the full CAF Phase II amount.<sup>294</sup> For a carrier declining the state-wide commitment, 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. No additional broadband obligations apply to funds received during the transition period. That is, carriers accepting the state-wide commitment are obliged to meet the Phase II broadband obligations described above, while carriers declining the state-wide commitment will be required to meet their pre-existing Phase I obligations, but will not be required to deploy additional broadband in connection with their receipt of transitional funding.

**d. Forward-Looking Cost Model**

181. *Background.* In the *USF Reform NOI/NPRM*, the Commission sought comment generally on whether we should develop a nationwide broadband model, and what type of model, to help determine support levels in areas where there is no private sector business case to provide broadband and voice services.<sup>295</sup> In the *USF/ICC Transformation NPRM*, we proposed that the Commission use a green-field, “scorched node” approach in developing a broadband cost model, rather than a brown-field approach that assumes the existence of a last-mile copper network.<sup>296</sup> We also noted that “[o]ver the lifetime of a network, the cost of a fiber-to-the-premises (FTTP) and short-loop (12,000-foot) DSL network may be basically equal, meaning that green-field costs are equivalent to those for a FTTP deployment.”<sup>297</sup> In the *August 3 Public Notice*, the Bureau sought further comment on specific proposals for reform that would use a forward-looking cost model to determine support, including the State Members’ Plan, and the ABC Plan.<sup>298</sup>

<sup>294</sup> To the extent a carrier will receive less money from CAF Phase II than it will receive under frozen high-cost support, there will be an appropriate multi-year transition to the lower amount. It is premature to specify the length of that transition now, before the cost model is adopted, but it will be addressed in conjunction with finalization of the cost model that will be developed with public input.

<sup>295</sup> *Connect America Fund*, WC Docket No. 10-90, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, *High-Cost Universal Service Support*, WC Docket No. 05-337, Notice of Inquiry and Notice of Proposed Rulemaking, 25 FCC Rcd 6657, 6665-6673, paras. 14-40 (2010) (*USF Reform NOI/NPRM*). Specifically, the Commission sought comment on whether we should develop a new model, rather than updating the Commission’s existing model; whether the model should estimate total costs or incremental costs; and whether the model should estimate revenues as well as costs. *Id.* at 6669-73, paras. 31-40.

<sup>296</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4687, paras. 437-38.

<sup>297</sup> *Id.* at 4684, para. 436 & n.617 (citing OBI Technical Paper No. 1). This observation was based on Commission staff analysis of the model used to create the National Broadband Plan. See *id.* at 4684, para. 436 n.617. We also sought more focused comment on developing a total cost model, rather than an incremental cost model, and on the difficulties in accurately estimating and modeling revenues. *Id.* at 4687, paras. 438-39.

<sup>298</sup> *Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, (continued...)

182. The State Members' Plan proposes that the Commission continue to use its existing cost model – which was originally adopted in 1998 – with certain modifications. Specifically, they propose that the model: use current geocoded data for customer locations; be revised to account for current special access line counts by wire center; use a road-constrained minimum spanning tree to route plant; be adjusted to reflect the costs of actual distribution plant mix (aerial, buried, and underground); and include the costs of current calling usage and middle mile transport costs for Internet data.<sup>299</sup> Under the State Members' Plan, support for all non-rural carriers would be determined by an updated version of the current model; rural carriers could receive model-determined support, but also could elect to have their support determined on an embedded cost basis.<sup>300</sup>

183. The ABC Plan Coalition proposes that the Commission use a different forward-looking cost model – the CQBAT – which estimates the greenfield costs of deploying a network with a maximum copper loop length of 12,000 feet.<sup>301</sup> The model estimates build-out investments and operating costs for each census block, and calculates support amounts based on a number of user-defined parameters.<sup>302</sup> The ABC Plan summarizes results from the CQBAT model under four different scenarios.<sup>303</sup> Although the model itself was not filed in the record of this proceeding, the ABC Plan Coalition subsequently offered interested parties free online access to CQBAT results, subject to the terms of a protective order and licensing agreement, and more extensive access to the model for certain fees, subject to a mutual non-disclosure agreement, as well as the protective order and licensing agreement.<sup>304</sup>

184. *Discussion.* Although we agree with both the State Members and the ABC Plan proponents that we should use a forward-looking model to assist in setting support levels in price cap territories, we do not adopt the CQBAT cost model proposed by the ABC Coalition, nor do we accept the State Board's proposal that we simply update our existing cost model. Instead, we initiate a public

(Continued from previous page) —————

Public Notice, DA 11-1348 (Wireline Comp. Bur. rel. Aug. 3, 2011); State Members' *USF/ICC Transformation NPRM* Comments; ABC Plan.

<sup>299</sup> State Members *USF/ICC Transformation NPRM* Comments at 37-38.

<sup>300</sup> *Id.* at 36.

<sup>301</sup> See ABC Plan, Attach. 3 at 11, Fig. 1.

<sup>302</sup> See ABC Plan, Attach. 3 at 9, 19.

<sup>303</sup> See ABC Plan, Attach. 2. The ABC Plan Coalition filed additional information regarding CQBAT results and inputs. See Letter from Jonathan Banks, US Telecom, to Marlene H. Dortch, Secretary, FCC, Docket No. 10-90 et al., (filed Aug. 16, 2011) (number of residential and business locations in served and unserved areas, and in areas that would be served by satellite as modeled; state-by-state support amounts); Letter from Mike Lieberman, AT&T, Jeffrey S. Lanning, CenturyLink, Michael T. Skrivan, FairPoint, Michael D. Saperstein, Jr., Frontier, Margaret McCready, Verizon, and Frank Schueneman, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. (filed Aug. 18, 2011) (inputs) (ABC Coalition Aug 18 Ex Parte).

<sup>304</sup> See *Developing a Unified Intercarrier Compensation Regime, Establishing Just and Reasonable Rates for Local Exchange Carriers, Connect America Fund, High-Cost Universal Service Support, A National Broadband Plan for Our Future*, CC Docket No. 01-92, WC Docket Nos. 07-135, 10-90, 05, 337, GN Docket No. 09-51, Supplemental Protective Order, DA 11-1525 (rel. Sept. 9, 2011); Letter from Mike Lieberman, AT&T, Michael D. Saperstein, Jr., Frontier, Jeffrey S. Lanning, CenturyLink, Maggie McCready, Verizon, Michael T. Skrivan, Fairpoint Communications, Frank Schueneman, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. (filed Sept. 9, 2011); Letter from Mike Lieberman, AT&T, Michael D. Saperstein, Jr., Frontier, Jeffrey S. Lanning, CenturyLink, Maggie McCready, Verizon, Michael T. Skrivan, Fairpoint Communications, Frank Schueneman, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. (filed Sept. 28, 2011).



process to develop a robust cost model for the Connect America Fund to accurately estimate the cost of a modern voice and broadband capable network, and delegate to the Wireline Competition Bureau the responsibility of completing it.

185. In light of the limited opportunity the public has received to review and modify the ABC Coalition's proposed CQBAT model, we reject the group's suggestion that we adopt that model at this time. The Commission has previously held that before any cost model may be "used to calculate the forward-looking economic costs of providing universal service in rural, insular, and high cost areas," the "model and all underlying data, formulae, computations, and software associated with the model must be available to all interested parties for review and comment. All underlying data should be verifiable, engineering assumptions reasonable, and outputs plausible."<sup>305</sup> We see no reason to depart from this conclusion here, and the CQBAT model, as presented to the Commission at this time, does not meet this requirement.

186. We likewise reject the State Members' proposal to modify the Commission's existing cost model to estimate the costs of modern voice and broadband-capable network. The Commission's existing cost model does not fully reflect the costs associated with modern voice and broadband networks because the model calculates cost based on engineering assumptions and equipment appropriate to the 1990s. In addition, modeling techniques and capabilities have advanced significantly since 1998, when the Commission's existing high cost model was developed, and the new techniques could significantly improve the accuracy of modeled costs in a new model relative to an updated version of the Commission's existing model. For example, new models can estimate the costs of efficient routing along roads in a way that the older model cannot.<sup>306</sup> We see the benefits of leveraging our existing model to rapidly deploy interim support, and we do just that for Phase I of the CAF. For the longer-term disbursement of support, however, we conclude that it is preferable to use a more accurate, up to date model based on modern techniques.

187. To expedite the process of finalizing the model to be used as part of the state-level commitment, we delegate to the Wireline Competition Bureau the authority to select the specific engineering cost model and associated inputs, consistent with this Order. For the reasons below, the model should be of wireline technology and at a census block or smaller level. In other respects, we direct the Wireline Competition Bureau to ensure that the model design maximizes the number of locations that will receive robust, scalable broadband within the budgeted amounts. Specifically, the model should direct funds to support 4 Mbps/1 Mbps broadband service to all supported locations, subject only to the waiver process for upstream speed described above, and should ensure that the most locations possible receive a 6 Mbps/1.5 Mbps or faster service at the end of the five year term, consistent with the CAF Phase II budget. The Wireline Competition Bureau's ultimate choice of a greenfield or brownfield model, the modeled architecture, and the costs and inputs of that model should ensure that the public interest obligations are achieved as cost-effectively as possible.

188. *Geographic Granularity.* We conclude that the CAF Phase II model should estimate costs at a granular level – the census block or smaller – in all areas of the country. Geographic granularity is important in capturing the forward-looking costs associated with deploying broadband

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<sup>305</sup> *Universal Service First Report and Order*, 12 FCC Rcd at 8913, 8915, para. 250.

<sup>306</sup> The State Members advocate that we adopt a road-constrained minimum spanning tree to route plant as an "update" to the existing model, but we think this would change the model so fundamentally that the process involved would be comparable to the adoption of a new model. We anticipate that the new model will adopt the routing method the State Members suggest, although we delegate the final decision on this point to the Wireline Competition Bureau.

networks in rural and remote areas.<sup>307</sup> Using the average cost per location of existing deployments in large areas, even when adjusted for differences in population and linear densities, presents a risk that costs may be underestimated in rural areas. Deployments in rural markets are likely to be subscale, so an analysis based on costs averaged over large areas, particularly large areas that include both low- and high-density zones, will be inaccurate. A granular approach, calculating costs based on the plant and hardware required to serve each location in a small area (i.e., census block or smaller), will provide sufficient geographic and cost-component granularity to accurately capture the true costs of subscale markets. For example, if only one home in an area with very low density is connected to a DSLAM, the entire cost of that DSLAM should be allocated to the home rather than the fraction based on DSLAM capacity. Furthermore, to the extent that a home is served by a long section of feeder or distribution cabling that serves only that home, the entire cost of such cabling should be allocated to the home as well.<sup>308</sup>

189. *Wireline Network Architecture.* We conclude that the CAF Phase II model should estimate the cost of a wireline network. For a number of reasons, we reject some commenters' suggestion that we should attempt to model the costs of both wireline and wireless technologies and base support on whichever technology is lower cost in each area of the country.<sup>309</sup>

190. For one, we have concerns about the feasibility of developing a wireless cost model with sufficient accuracy for use in the CAF Phase II framework. We recognize that all cost models involve a certain degree of imprecision. As we noted in the *USF Reform NOI/NPRM*, however, accurately modeling wireless deployment may raise challenges beyond those that exist for wireline models, particularly where highly localized cost estimates are required.<sup>310</sup> For example, the availability of desirable cell sites can significantly affect the cost of covering any given small geographic area and is challenging to model without detailed local siting information. Propagation characteristics may vary based on local and difficult to model features like foliage. Access to spectrum, which substantially affects overall network costs, varies dramatically among potential funding recipients and differs across geographies. Because the cost model for CAF Phase II will need to calculate costs for small areas (census-block or smaller), high local variability in the accuracy of outputs will create challenges, even if a cost model provides high quality results when averaged over a larger area. In light of the issues with modeling wireless costs, we remain concerned that a lowest-cost technology model including both wireless and wireline components could introduce greater error than a wireline-only model in identifying eligible areas.<sup>311</sup> We do not believe that delaying implementation of CAF Phase II to resolve these issues serves the public interest.

191. Finally, the record fails to persuade us that, in general, the costs of cellular wireless networks are likely to be significantly lower than wireline networks for providing broadband service that meets the CAF Phase II speed, latency, and capacity requirements. In particular, we emphasize that, as described above, carriers receiving CAF Phase II support should expect to offer service with increasing download and upload speeds over time, and that allows monthly usage reasonably comparable to

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<sup>307</sup> See Omnibus Broadband Initiative, The Broadband Availability Gap: OBI Technical Paper No. 1, at 35-37 (April 2010) (OBI, Broadband Availability Gap), available at <http://www.broadband.gov/plan/broadband-working-reports-technical-papers.html>.

<sup>308</sup> *Id.*

<sup>309</sup> See NASUCA August 3 PN Comments at 83.

<sup>310</sup> See *USF Reform NOI/NPRM*, 25 FC Rcd at 6669, paras. 28-29.

<sup>311</sup> See *infra* Section XVII.I.6.

terrestrial fixed residential broadband offerings in urban areas.<sup>312</sup> The National Broadband Plan modeled the nationwide costs of a wireless broadband network dimensioned to support typical usage patterns for fixed services to homes, and found that the cost was similar to that of wireline networks.<sup>313</sup> None of the parties advocating for the use of a wireless model has submitted into the record a wireless model for fixed service and, therefore, we have no evidence that such service would be less costly.

192. *Process for Adopting the Model.* We anticipate that the Wireline Competition Bureau will adopt the specific model to be used for purposes of estimating support amounts in price cap areas by the end of 2012 for purposes of providing support beginning January 1, 2013. Before the model is adopted, we will ensure that interested parties have access to the underlying data, assumptions, and logic of all models under consideration, as well as the opportunity for further comment. When the Commission adopted its existing cost model, it did so in an open, deliberative process with ample opportunity for interested parties to participate and provide valuable assistance. We have had three rounds of comment on the use of a model for purposes of determining Connect America Fund support and remain committed to a robust public comment process. To expedite this process, we delegate to the Wireline Competition Bureau the authority to select the specific engineering cost model and associated inputs, consistent with this Order. We direct the Wireline Competition Bureau to issue a public notice within 30 days of release of this Order requesting parties to file models for consideration in this proceeding consistent with this Order, and to report to the Commission on the status of the model development process no later than June 1, 2012.

193. We note that price cap carriers serving Alaska, Hawaii, Puerto Rico, the U.S. Virgin Islands and Northern Marianas Islands argue they face operating conditions and challenges that differ from those faced by carriers in the contiguous 48 states.<sup>314</sup> We direct the Wireline Competition Bureau to consider the unique circumstances of these areas when adopting a cost model, and we further direct the Wireline Competition Bureau to consider whether the model ultimately adopted adequately accounts for the costs faced by carriers serving these areas. If, after reviewing the evidence, the Wireline Competition Bureau determines that the model ultimately adopted does not provide sufficient support to any of these

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<sup>312</sup> Today, mobile broadband providers that limit data usage often impose monthly usage limits that are an order of magnitude or more lower than limits for residential and business services in urban areas. *See supra* note 147.

<sup>313</sup> OBI, Broadband Availability Gap, at 62, Ex. 4-C (comparing costs of fixed wireless and 12,000 foot DSL networks). Modeling done for the National Broadband Plan shows that the total cost of building out a wireless network to all unserved homes in the country is approximately 1.3 times more expensive than the cost of upgrading existing facilities to offer broadband over 12,000-foot-loop DSL. *See id.* at 62-83 (describing methodology for modeling fixed wireless costs). Although the National Broadband Plan modeling focused on the difference between cost and expected revenue, the data sets published in conjunction with the Broadband Availability Gap technical paper include data showing that the total cost for wireless is significantly higher than the total cost for DSL. *See* “All Cost/All Revenue” data sets published at <http://www.broadband.gov/plan/deployment-cost-model.html>. Furthermore, the cost calculations described in the Broadband Availability Gap technical paper assumed an average bandwidth per user of 160 kbps through 2015. As demand for capacity increases, wireless providers will face much larger cost increases as they undertake costly cell splitting to accommodate increased usage. So while a wireless deployment may be lower cost for a significant fraction of locations, assuming a 160 kbps average bandwidth per user, increase in demand drives more cost in wireless and leads to wireless being more expensive in a growing majority of areas. In addition, to the extent that locations that already have access to broadband choose to subscribe to the wireless offering, providers would have to add still more capacity, driving costs even higher.

<sup>314</sup> *See, e.g.,* Regulatory Commission of Alaska *USF/ICC Transformation NPRM* Comments at 3-7; Alaska Communications Systems *USF/ICC Transformation NPRM* Comments at 3-5; GCI *USF/ICC Transformation NPRM* Comments at 2; Hawaiian Telcom *USF/ICC Transformation NPRM* Comments, appendix; Puerto Rico Telephone Company *USF/ICC Transformation NPRM* Comments at 7-8; Vtelco *USF/ICC Transformation NPRM* Comments at 4-5; Docomo Pacific, Inc., et al *USF/ICC Transformation NPRM* Comments of, at 4-10.

areas, the Bureau may maintain existing support levels, as modified in this Order, to any affected price cap carrier, without exceeding the overall budget of \$1.8 billion per year for price cap areas.

#### **D. Universal Service Support for Rate-of-Return Carriers**

##### **1. Overview**

194. As we transition to the CAF, many carriers will still, for some time period, receive support under our existing support mechanisms, subject to specific modifications to improve the efficiency and effectiveness of such universal service support pending full transition to the CAF. Here, we discuss the immediate steps we are taking that affect rate-of-return carriers. Some of our current rules are not meeting their intended purposes, while others simply no longer make sense in a broadband world. Reforming these rules will help further the statutory goals of ensuring (1) quality services at “just, reasonable, and affordable rates,” and (2) “equitable and non-discriminatory” contributions such that support is “sufficient” to meet the purposes of section 254 of the Act,<sup>315</sup> and will advance the Commission’s goals of ensuring fiscal responsibility in all USF expenditures, increasing the accountability for Fund recipients, and extending modern broadband-capable networks.

195. In particular, we implement a number of reforms to eliminate waste and inefficiency and improve incentives for rational investment and operation by rate-of-return LECs. Consistent with the competitive bidding approach we adopt for the Mobility Fund Phase I and the framework we establish for support in price cap territories that combines a new forward-looking cost model and competitive bidding, we also lay the foundation for subsequent Commission action that will set rate-of-return companies on a path toward a more incentive-based form of regulation. These reforms, summarized below, will ensure that the overall size of the Fund is kept within budget by maintaining total funding for rate-of-return companies at approximately \$2 billion per year—approximately equal to current levels—while transitioning from a system that supports only telephone service to a system that will enable the deployment of modern high-speed networks capable of delivering 21<sup>st</sup> century broadband services and applications, including voice. We believe that keeping rate-of-return carriers at approximately current support levels in the aggregate during this transition appropriately balances the competing demands on universal service funding and the desire to sustain service to consumers and provide continued incentives for broadband expansion as we improve the efficiency of rate-of-return mechanisms.

196. First, we establish benchmarks that, for the first time, will establish parameters for what actual unseparated loop and common line costs carriers may seek recovery for under the federal universal service program. Specifically, we adopt a rule to limit reimbursable capital and operations expenses for purposes of determining HCLS support, which we expect will be implemented no later than July 1, 2012 after further public comment on a proposed methodology.<sup>316</sup> As suggested by the Rural Associations,<sup>317</sup>

<sup>315</sup> 47 USC §§ 254(b)(1), (b)(4)-(5), (d), (e). The Commission’s interpretation of the term “sufficient” to mean that support should not be excessive has been upheld by the Fifth, Tenth, and District of Columbia Circuit Courts of Appeal. See *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620-21 (5th Cir. 2000) (“The agency’s broad discretion to provide sufficient universal service funding includes the decision to impose cost controls to avoid excessive expenditures that will detract from universal service.”); *Qwest Communications Int’l, Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005) (“excessive subsidization arguably may affect the affordability of telecommunications services, thus violating the principle in § 254(b)(1)”) (citing *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001)); *Rural Cellular Assn. v. FCC*, 588 F.3d 1095, 1102 (D.C. Cir. 2009) (explaining that, in assessing whether universal service subsidies are excessive, the Commission “must consider not only the possibility of pricing some customers out of the market altogether, but the need to limit the burden on customers who continue to maintain telephone service”).

<sup>316</sup> See *infra* Section VII.D.3.

<sup>317</sup> See Rural Associations *USF/ICC Transformation NPRM* Comments at 11.

we also extend the limit on recovery of corporate operations expenses, currently only applicable to HCLS, to ICLS effective January 1, 2012. In so doing, we update the formula formerly applicable only to HCLS, which has not been modified since 2001, and apply the updated formula to the two programs.<sup>318</sup>

197. Second, we take immediate steps to ensure that carriers in rural areas are not unfairly burdening consumers across the nation by using excess universal service support to subsidize artificially low end-user rates. Specifically, effective July 1, 2012, we will reduce, on a dollar-for-dollar basis, high-cost loop support to the extent that a carrier's local rates are below a specified urban local rate floor. This rule will be phased in gradually before full implementation in 2014.

198. Third, we eliminate a program that is no longer meeting its intended purpose. Safety net additive support was put in place more than a decade ago to encourage new investment, but is not effectively performing that function. Two-thirds of such support today rewards companies because they are losing access lines, rather than because they are investing. In addition, the program fails to target new investment to areas of need and, in particular, may be rewarding investment in areas where there are unsubsidized competitors, contrary to our principle of fiscal responsibility. Accordingly, safety net additive support received as a result of line loss will be phased out during 2012. The remaining current recipients of safety net additive support will continue to receive such support pursuant to the existing rules; however, no new carriers will receive safety net additive support.

199. Fourth, we eliminate local switching support effective July 1, 2012; thereafter, any allowable recovery for switching investment will occur through the recovery mechanism adopted as part of ICC reform.<sup>319</sup>

200. Fifth, we adopt a rule to eliminate support for rate-of-return companies in any study area that is completely overlapped by an unsubsidized competitor, as defined above,<sup>320</sup> as there is no need for universal service subsidies to flow to such areas to ensure that consumers are served.

201. Sixth, we adopt a rule that support in excess of \$250 per line per month will no longer be provided to any carrier. Support reductions will be phased in over three years for carriers currently above the cap, beginning July 1, 2012.

202. We recognize that the aggregate impact of the foregoing rule changes will affect different individual companies to a greater or lesser degree. To the extent that any individual company can demonstrate that it needs temporary and/or partial relief from one or more of these reforms in order for its customers to continue receiving voice service in areas where there is no terrestrial alternative, the Commission is prepared to review a waiver request for additional support.<sup>321</sup> However, we do not expect to routinely grant requests for additional support, and any company that seeks additional funding will be subject to a thorough total company earnings review.

203. We also make certain technical corrections and improvements to our rules in light of other rule changes adopted today. We rebase the 2012 annual high cost loop cap to reflect the fact that support for price cap companies, including their rate-of-return study areas, will be distributed through a transitional method in the first phase of the CAF. Because price cap companies and their rate-of-return

<sup>318</sup> These two steps are consistent with the recommendations of the Rural Associations who proposed taking the immediate steps of (1) capping the recovery of corporate operations expenses by applying the current HCLS corporate operations expense cap formula to ICLS and LSS, and (2) imposing a limitation on federal USF recovery of certain RLEC capital expenditures. *See id.* at 8-11.

<sup>319</sup> *See infra* para. 872.

<sup>320</sup> *See supra* para. 103.

<sup>321</sup> *See infra* Section VII.G.

affiliates will no longer receive HCLS as of January 1, 2012, we reduce downward the HCLS cap by the amount of HCLS to be received by those companies in 2012. We also articulate a new standard for study area waivers and streamline the process for review of such waiver requests.

204. Finally, we seek comment in the FNRPM on the specific proposal offered by the rural associations for new CAF support.<sup>322</sup> The reforms we adopt today are interim steps that are necessary to allow rate-of-return carriers to continue receiving support based on existing mechanisms for the time being, but also begin the equally necessary process of transitioning to a more incentive-based form of regulation.<sup>323</sup>

## 2. Public Interest Obligations of Rate-of-Return Carriers

205. We recognize that, in the absence of any federal mandate to provide broadband, rate-of-return carriers have been deploying broadband to millions of rural Americans, often with support from a combination of loans from lenders such as RUS and ongoing universal service support.<sup>324</sup> We now require that recipients use their support in a manner consistent with achieving universal availability of voice and broadband.

206. To implement this policy, rather than establishing a mandatory requirement to deploy broadband-capable facilities to all locations within their service territory, we continue to offer a more flexible approach for these smaller carriers. Specifically, beginning July 1, 2012, we require the following of rate-of-return carriers that continue to receive HCLS or ICLS or begin receiving new CAF funding in conjunction with the implementation of intercarrier compensation reform, as a condition of receiving that support: Such carriers must provide broadband service at speeds of at least 4 Mbps downstream and 1 Mbps upstream with latency suitable for real-time applications, such as VoIP, and with usage capacity reasonably comparable to that available in residential terrestrial fixed broadband offerings in urban areas, upon reasonable request.<sup>325</sup> We thus require rate-of-return carriers to provide their customers with at least the same initial minimum level of broadband service as those carriers who receive model-based support, but given their generally small size, we determine that rate-of-return carriers should be provided greater flexibility in edging out their broadband-capable networks in response to consumer demand. At this time we do not adopt intermediate build-out milestones or increased speed requirements

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<sup>322</sup> See *infra* Section XVII.B. Under the Rural Association Plan, loop costs would be allocated to the interstate jurisdiction based on the current 25 percent allocator or the individual carrier's broadband adoption rate, whichever is greater. The new interstate revenue requirement would also include certain key broadband-related costs (*i.e.*, middle mile facilities and Internet backbone access). CAF support would be provided under this new mechanism for any provider's broadband costs that exceeded a specified benchmark representing wholesale broadband costs in urban areas. Existing HCLS and ICLS would phase out as customers adopt broadband. See Rural Associations *USF/ICC Transformation NPRM* Comments at iv-v, 27-38.

<sup>323</sup> This is consistent with the approach taken in the *Universal Service First Report and Order*, 12 FCC Rcd at 8889, para. 204 ("rural carriers would gradually shift to a support system based on forward-looking economic cost at a date the Commission will set after further review"). "The Commission...will also consider whether a competitive bidding process could be used to set support levels for rural carriers." *Id.* 8918, para. 256.

<sup>324</sup> According to NTCA's 2010 survey, 75 percent of NTCA's predominantly rural member carriers reported offering Internet access service at speeds of 1.5 to 3.0 Mbps (downstream). NTCA 2010 Broadband/Internet Availability Survey Report, National Telecommunications Cooperative Assoc. (Jan. 2011), *available at* [http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2010\\_NTCA\\_Broadband\\_Survey\\_Report.pdf](http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2010_NTCA_Broadband_Survey_Report.pdf).

<sup>325</sup> We intend to target support to areas where there is no unsubsidized competitor. In the FNPRM, we seek comment on how to apply this policy in areas where a rate-of-return ETC is overlapped in part by an unsubsidized competitor. See *infra* Section XVII.D (Eliminating Support for Areas with an Unsubsidized Competitor).

for future years, but we expect carriers will deploy scalable broadband to their communities and will monitor their progress in doing so, including through the annual reports they will be required to submit.<sup>326</sup> The broadband deployment obligation we adopt is similar to the voice deployment obligations many of these carriers are subject to today.

207. We believe these public interest obligations are reasonable.<sup>327</sup> Although many carriers may experience some reduction in support as a result of the reforms adopted herein, those reforms are necessary to eliminate waste and inefficiency and improve incentives for rational investment and operation by rate-of-return LECs. We note that these carriers benefit by receiving certain and predictable funding through the CAF created to address access charge reform.<sup>328</sup> In addition, rate-of-return carriers will not necessarily be required to build out to and serve the most expensive locations within their service area.

208. Upon receipt of a reasonable request for service, carriers must deploy broadband to the requesting customer within a reasonable amount of time.<sup>329</sup> We agree with the State Members of the Federal-State Joint Board on Universal Service that construction charges may be assessed, subject to limits.<sup>330</sup> In the Accountability and Oversight section of this Order, we require ETCs to include in their annual reports to USAC and to the relevant state commission and Tribal government, if applicable, the number of unfulfilled requests for service from potential customers and the number of customer complaints, broken out separately for voice and broadband services.<sup>331</sup> We will monitor carriers' filings to determine whether reasonable requests for broadband service are being fulfilled, and we encourage states and Tribal governments to do the same. As discussed in the legal authority section above,<sup>332</sup> we are funding a broadband-capable voice network, so we believe that to the extent states retain jurisdiction over voice service, states will have jurisdiction to monitor these carriers' responsiveness to customer requests for service.

209. We recognize that smaller carriers serve some of the highest cost areas of the nation. We seek comment in the FNPRM below on alternative ways to meet the needs of consumers in these highest cost areas. Pending development of the record and resolution of these issues, rate-of-return carriers are simply required to extend broadband on reasonable request. We expect that rate-of-return carriers will follow pre-existing state requirements, if any, regarding service line extensions in their highest-cost areas.

### 3. Limits on Reimbursable Capital and Operating Costs

210. In this section, we adopt a framework for ensuring that companies do not receive more support than necessary to serve their communities. The framework consists of benchmarks for prudent levels of capital and operating costs; these costs are used for purposes of determining high-cost support

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<sup>326</sup> See *supra* paras. 105-106.

<sup>327</sup> See *supra* paras. 92-100 (adopting broadband performance metrics).

<sup>328</sup> See *infra* Section XIII.F.3 (Monitoring Compliance with Recovery Mechanism).

<sup>329</sup> C.f. 47 C.F.R. § 54.202 (requiring any carrier petitioning to be federally-designated ETCs to “[c]ommit to provide service throughout its proposed designated service area to all customers making a reasonable request for service” and to certify that it will provide service “on a timely basis” to customers within its existing network coverage and “within a reasonable time” to customers outside of its existing network coverage if service can be provided at reasonable cost).

<sup>330</sup> State Members *August 3 PN Comments* at Appx. A, 159.

<sup>331</sup> See *infra* para. 580.

<sup>332</sup> See *supra* section V (Legal Authority).

amounts for rate-of-return carriers. This framework will create structural incentives for rate-of-return companies to operate more efficiently and make prudent expenditures. In the attached FNPRM, we seek comment on a specific proposed methodology for setting the benchmark levels to estimate appropriate levels of capital expenses and operating expenses for each incumbent rate-of-return study area, using publicly available data.<sup>333</sup> We delegate authority to the Wireline Competition Bureau to implement a methodology and expect that limits will be implemented no later than July 1, 2012.

211. *Background.* In the *USF/ICC Transformation NPRM*, we proposed to establish benchmarks for reimbursable capital and operating costs for loop plant for rate-of-return companies. Under our current rules, some carriers with high loop costs may have up to 100 percent of their marginal loop costs above a certain threshold reimbursed from the federal universal service fund.<sup>334</sup> As we explained, this produces two interrelated effects that may lessen incentives for some carriers to control costs and invest rationally. First, carriers have incentives to increase their loop costs and recover the marginal amount entirely from the federal universal service fund. Second, carriers that take measures to cut their costs to operate more efficiently may actually lose support to carriers that increase their costs.<sup>335</sup>

212. To address these problems, we proposed to use regression analyses to estimate appropriate levels of capital expenses and operating expenses for each incumbent rate-of-return study area and limit expenses falling above a benchmark based on this estimate.<sup>336</sup> We noted that the Nebraska Rural Companies had submitted an analysis of outside plant capital expenditures in January 2011.<sup>337</sup> Consultants for the Nebraska Companies analyzed engineering cost estimates for hundreds of fiber-to-the-premises projects built or planned by rate-of-return companies from 2004 to 2010, with the goal of producing a statistically reliable cost predictor.<sup>338</sup> They compared individual company non-public cost data to a variety of objective publicly available geographic and demographic variables (public variables) and performed regression analyses using the public variables as independent variables and construction cost per household as the dependent variable.<sup>339</sup> Their final resulting regression equation included six independent public variables: linear density, households, frost index, wetlands percentage, soils texture, and road intersections frequency.<sup>340</sup>

213. The Nebraska Companies submitted a similar regression analysis designed to predict operating expenses of rate-of-return companies that operate voice and broadband-capable networks in rural areas.<sup>341</sup> In this regression the dependent variable was average annual operating expenses per

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<sup>333</sup> See *infra* section XVII.E.

<sup>334</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4624-26, paras. 201-07.

<sup>335</sup> *Id.* at 4624-25, para. 202.

<sup>336</sup> *Id.* at 4625, para. 203.

<sup>337</sup> See Letter from Thomas Moorman, Counsel to Nebraska Rural Independent Companies, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 05-337, GN Docket No. 09-51, Attach. (Nebraska Rural Independent Companies' Capital Expenditure Study: Predicting the Cost of Fiber to the Premise) (dated Jan. 7, 2011) (Nebraska Companies' Capital Expenditure Study).

<sup>338</sup> See Nebraska Companies' Capital Expenditure Study at 1-3; Reply Comments of the Nebraska Rural Independent Companies, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, at 13 (filed May 23, 2011).

<sup>339</sup> Nebraska Companies' Capital Expenditure Study at 4-11.

<sup>340</sup> *Id.* at 18.

<sup>341</sup> See Letter from Paul M. Schudel, Counsel to Nebraska Rural Independent Companies, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, (continued...)



connection (in thousands of dollars) and the four independent variables that were found to be significant were customer density, company location, company size, and number of employees.<sup>342</sup>

214. *Discussion.* We conclude that the Commission should use regression analyses to limit reimbursable capital expenses and operating expenses for purposes of determining high-cost support for rate-of-return carriers. The methodology will generate caps, to be updated annually, for each rate-of-return company. This rule change will place important constraints on how rate-of-return companies invest and operate that over time will incent greater operational efficiencies.

215. Several commenters support our proposal to impose reasonable limits on reimbursable capital and operating expenses.<sup>343</sup> Although many small rate-of-return carriers seem to imply that we should not adopt operating expense benchmarks because their operating expenses are “fixed,”<sup>344</sup> other representatives of rural rate-of-return companies support the concept of imposing reasonable benchmarks.<sup>345</sup> The Rural Associations concede that “[t]o the extent any ‘race to the top’ occurs, it undermines predictability and stability for current USF recipients.”<sup>346</sup>

216. We set forth in the FNPRM and Appendix H a specific methodology for capping recovery for capital expenses and operating expenses using quantile regression techniques and publicly available cost, geographic and demographic data. The net effect would be to limit high-cost loop support amounts for rate-of-return carriers to reasonable amounts relative to other carriers with similar characteristics.<sup>347</sup> Specifically, the methodology uses NECA cost data and 2010 Census data to cap permissible expenses

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96-45, Attach. (Operating Expense Study Sponsored by the Nebraska Rural Independent Companies and Telegee Alliance of Certified Public Accounting Firms: Predicting the Operating Expenses of Rate-of-Return Telecommunications Companies) (dated May 10, 2011) (Nebraska Companies’ Operating Expense Study); Letter from Cheryl L. Parrino, Parrino Strategic Consulting Group, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, WC Docket Nos. 10-90, 05-337, CC Docket No. 01-92, Attach. 2 (Operating Expense Study Sponsored by the Nebraska Rural Companies: Update to Predicting the Operating Expenses of Rate-of-Return Telecommunications Companies) (dated Sept. 29, 2011) (Parrino Sept. 29 Ex Parte).

<sup>342</sup> Nebraska Companies’ Operating Expense Study at 6-10.

<sup>343</sup> See, e.g., Moss Adams *USF/ICC Transformation NPRM* Comments, at 13 (recommending that, “rather than drastically reducing or eliminating these funding mechanisms on a wholesale basis, the FCC could utilize expense and capital investment benchmarks to determine annual costs to be recovered by rural carriers”); CTIA *USF/ICC Transformation NPRM* Comments at 16; Rural Broadband Alliance *USF/ICC Transformation NPRM* Comments at 16-17; Moss Adams *August 3 PN* Comments at 6 (recognizing it may be appropriate to limit the costs that a company can incur in a year, taking into account variability of companies).

<sup>344</sup> See e.g., Ducor Telephone *USF/ICC Transformation NPRM* Comments at 7. They also claim that the *USF/ICC Transformation NPRM* suggests that operating expenses are discretionary. *Id.*

<sup>345</sup> See Moss Adams *August 3 PN* Comments, at 6 (recognizing it may be appropriate to limit the costs that a company can incur in a year, taking into account variability of companies); Rural Broadband Alliance *USF/ICC Transformation NPRM* Comments, at 16-17.

<sup>346</sup> Rural Associations *USF/ICC Transformation NPRM* Comments at 9.

<sup>347</sup> HCLS helps offset the non-usage based costs associated with the local loop in areas where the cost to provide voice service is relatively high compared to the national average cost per line. Today, 75 percent of loop costs are assigned to the intrastate jurisdiction and 25 percent of such costs are assigned to the interstate jurisdiction. Carriers recover up to 75 percent of their unseparated loop costs above a specified dollar figure from HCLS. The remaining 25 percent of loop cost is recovered through ICLS, to the extent the interstate common line revenue requirement exceeds their SLC revenues.

for certain costs used in the HCLS formula.<sup>348</sup> We invite public input in the attached FNPRM on that methodology and anticipate that HCLS benchmarks will be implemented for support calculations beginning in July 2012.

217. We set forth here the parameters of the methodology that the Bureau should use to limit payments from HCLS. We require that companies' costs be compared to those of similarly situated companies. We conclude that statistical techniques should be used to determine which companies shall be deemed similarly situated. For purposes of this analysis, we conclude the following non-exhaustive list of variables may be considered: number of loops, number of housing units (broken out by whether the housing units are in urbanized areas, urbanized clusters, and nonurban areas), as well as geographic measures such as land area, water area, and the number of census blocks (all broken out by urbanized areas, urbanized clusters, and nonurban areas). We grant the Bureau discretion to determine whether other variables, such as soil type, would improve the regression analysis. We note that the soils data from the Natural Resource Conservation Service (NRCS) that the Nebraska study used to generate soil, frost and wetland variables do not cover the entire United States.<sup>349</sup> We seek comment in the FNPRM on sources of other publicly available soil data. We delegate authority to the Bureau to adopt the initial methodology, to update it as it gains more experience and additional information, and to update its regression analysis annually with new cost data.

218. Each year the Wireline Competition Bureau will publish in a public notice the updated capped values that will be used in the NECA formula in place of an individual company's actual cost data for those rate-of-return cost companies whose costs exceed the caps, which will result in revised support amounts.<sup>350</sup> We direct NECA to modify the high-cost loop support universal service formula for average schedule companies annually to reflect the caps derived from the cost company data.

219. We conclude that establishing reasonable limits on recovery for capital expenses and operating expenses will provide better incentives for carriers to invest prudently and operate efficiently than the current system.<sup>351</sup> Under our current HCLS rules, a company receives support when its costs are

<sup>348</sup> NECA's HCLS formula, i.e., the 26-step Cost Company Loop Cost Algorithm, is *available at* <http://transition.fcc.gov/wcb/iatd/neca.html>. See National Exchange Carrier Assoc., Inc., NECA's Overview of Universal Service Fund, Submission of 2010 Study Results, at App. B (filed Sept. 30, 2011); 2010 United States Census Data, [http://www2.census.gov/census\\_2010/01-Redistricting\\_File--PL\\_94-171/](http://www2.census.gov/census_2010/01-Redistricting_File--PL_94-171/) and documentation at <http://www.census.gov/prod/cen2010/doc/pl94-171.pdf>. The census block level data was rolled up to study areas using Study Area Boundaries: Tele Atlas Telecommunications Suite, June 2010.

<sup>349</sup> These data, called the Soil Survey Geographic Database or SSURGO, do not cover about 24 percent of the United States land mass, including Puerto Rico, Guam, American Samoa, US Virgin Islands and Northern Mariana Islands as well as Alaska, which accounts for much of the missing land area. Thus, there are some study areas where there is no SSURGO data (such as the study area served by Adak Tel Utility) and other study areas where the SSURGO data not cover the entire study area.

<sup>350</sup> Incumbent local exchange carriers file investment and expense account data and loop counts pursuant to sections 36.611 and 36.612 of the Commission's rules for purposes of determining whether they are entitled to receive HCLS. See 47 C.F.R. §§ 36.611, 36.612. Only "cost" companies files such data, however. "Average schedule" companies are not required to perform company-specific cost studies – the basis upon which a carrier's HCLS is calculated. HCLS for average schedule companies is calculated pursuant to formulas developed by NECA and approved or modified annually by the Wireline Competition Bureau. See, e.g., *National Exchange Carrier Association, Inc. and Universal Service Administrative Company, 2010 Modification of Average Schedule Universal Service Support Formulas, High-Cost Universal Service Support*, WC Docket No. 05-337, Order, 25 FCC Rcd 17520 (Wireline Comp. Bur. 2010).

<sup>351</sup> Implementing this methodology would have two potential effects. First, as designed, it gives carriers an incentive to constrain their capital and operating costs. Carriers considering significant new capital investment will need to consider how those projects would impact their capital and operating expenses. Carriers could still choose a (continued...)

relatively high compared to a national average – without regard to whether a lesser amount would be sufficient to provide supported services to its customers. The current rules fail to create incentives to reduce expenditures; indeed, because of the operation of the overall cap on HCLS, carriers that take prudent measures to cut costs under our current rules may actually lose HCLS support to carriers that significantly increase their costs in a given year.

220. Under our new rule, we will place limits on the HCLS provided to carriers whose costs are significantly higher than other companies that are similarly situated, and support will be redistributed to those carriers whose unseparated loop cost is not limited by operation of the benchmark methodology. We note that the fact that an individual company will not know how the benchmark affects its support levels until after investments are made is no different from the current operation of high-cost loop support, in which a carrier receives support based on where its own cost per loop falls relative to a national average that changes from year to year. Even today, companies can only estimate whether their expenditures will be reimbursed through HCLS. In contrast to the current situation, the new rule will discourage companies from over-spending relative to their peers. The new rule will provide additional support to those companies that are otherwise at risk of losing HCLS altogether, and would not otherwise be well-positioned to further advance broadband deployment.

221. We reject the argument that imposing benchmarks in this fashion would negatively impact companies that have made past investments in reliance upon the current rules or the “no barriers to advanced services” policy. Section 254 does not mandate the receipt of support by any particular carrier. Rather, as the Commission has indicated and the courts have agreed, the “purpose of universal service is to benefit the customer, not the carrier.”<sup>352</sup> That is, while section 254 directs the Commission to provide support that is sufficient to achieve universal service goals, that obligation does not create any entitlement or expectation that ETCs will receive any particular level of support or even any support at all. The new rule will inject greater predictability into the current HCLS mechanism, as companies will have more certainty of support if they manage their costs to be in alignment with their similarly situated peers.

222. Our obligation to consumers is to ensure that they receive supported services. Our expectation is that carriers will provide such services to their customers through prudent facility investment and maintenance. To the extent costs above the benchmark are disallowed under this new rule, companies are free to file a petition for waiver to seek additional support.<sup>353</sup>

223. We find that our approach – which limits allowable investment and expenses with reference to similarly situated carriers – is a reasonable way to place limits on recovery of loop costs. The Rural Associations propose an alternative limitation on capital investment that would tie the amount of a rural company’s recovery of prospective investment that qualifies for high-cost support to the accumulated depreciation in its existing loop plant.<sup>354</sup> Their proposal would limit only future annual loop investment for individual companies by multiplying (a) the ratio of accumulated loop depreciation to total loop plant

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more expensive deployment, but if the costs associated with the capital expenditures exceed their benchmarks, these carriers would have to recover those costs from sources other than USF (such as from their customer base) to ensure a return on that increased investment. Just as carriers will be more mindful of the cost of their future capital expenditures, they will need to be mindful of future operating expenses associated with new investment. Second, this methodology also will help to identify those study areas where past investments may have been excessive and caps their reimbursement.

<sup>352</sup> *Rural Cellular Association v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) (quoting *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 621 (5th Cir. 2000)). See also *infra* paras. 293-294.

<sup>353</sup> See *infra* paras. 539-544.

<sup>354</sup> See Rural Associations *USF/ICC Transformation NPRM* Comments at 8-10, App. A.

or (b) twenty percent, whichever is lower, times (c) an estimated total loop plant investment amount (adjusted for inflation). This proposal would do little to limit support for capital expenses if past investments for a particular company were high enough to be more than sufficient to provide supported services, and would do nothing to limit support for operating expenses, which are on average more than half of total loop costs.<sup>355</sup> In addition, it would likely be administratively impracticable for the Commission to verify the inflation adjustments each company would make for various pieces of equipment acquired at various times.

224. We also conclude that our approach can be more readily implemented and updated than the specific proposal presented by the Nebraska Companies.<sup>356</sup> Consultants for the Nebraska Companies, in their regression analyses, used proprietary cost data. Because the proprietary cost data were not placed in the record, Commission staff was not able to verify the results of the Nebraska Companies' studies. The Nebraska Companies subsequently proposed that the Commission begin collecting similar investment and operating expense data, as well as independent variables such as density per route mile, to be used in similar regression analyses.<sup>357</sup> For example, they suggest that "[o]ne useful source for this data would be the investment costs associated with actual broadband construction projects that meet or exceed current engineering standards."<sup>358</sup> Although the Nebraska Companies' proposal shares objectives similar to our methodology, it would require the collection of additional data that the Commission does not currently have, which would lead to considerable delay in implementation. We also are concerned about the difficulty in obtaining a sufficiently representative and standardized data set based on construction projects that will vary in size, scope and duration. Moreover, regressions based on such data could not easily be updated on a regular basis without further data collection and standardization. On balance, we do not believe that any advantages of the Nebraska Companies' approach outweigh the benefits of relying on cost data that the Commission already collects on a regular basis. As explained in detail in the attached FNPRM and Appendix H, Commission staff used publicly available NECA cost data and other publicly available geographic and demographic data sets to develop the proposed benchmarks.<sup>359</sup>

225. Finally, we note that while the methodology in Appendix H is specifically designed to modify the formula for determining HCLS, we conclude that we should also develop similar benchmarks for determining ICLS. We direct NECA to file the detailed revenue requirement data it receives from carriers, no later than thirty days after release of this Order, so that the Wireline Competition Bureau can evaluate whether it should adopt a methodology using these data. Over time, benchmarks to limit reimbursable recovery of costs will provide incentives for each individual company to keep its costs lower than its own cap from prior years, and more generally moderate expenditures and improve

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<sup>355</sup> Indeed, as one commenter notes, such an approach would lock in past disparities in investment patterns, so that a company that spent excessively on its current plant could continue to invest significant amounts in the future, while a company that has not invested sufficiently in the past would face a limited budget to upgrade aging plant. Nebraska Rural Independent Companies *USF/ICC Transformation NPRM* Reply, at 6.

<sup>356</sup> Parrino Sept. 29 Ex Parte, at Attach. 1 (Letter from Wendy Thompson Fast, Consolidated Companies, and Ken Pfister, Great Plains Communications, to Carol Matthey, FCC, GN Docket No. 09-51, WC Docket Nos. 10-90, 05-337, CC Docket No. 01-92).

<sup>357</sup> *Id.* at Attach. 1, 2, 5-7.

<sup>358</sup> *Id.* at Attach. 1, 2 ("Cost data should be derived solely from broadband networks that have been engineered to ensure that consumer applications in rural areas will remain comparable to those generally available and used in urban areas.").

<sup>359</sup> See National Exchange Carrier Assoc., Inc., Universal Service Fund Data: NECA Study Results, 2010 Report (filed Sept. 30, 2011), <http://transition.fcc.gov/wcb/iatd/neca.html>.

efficiency, and we believe these objectives are as important in the context of ICLS as they are for HCLS. We seek comment in the FNPRM on ICLS benchmarks.

226. We delegate authority to the Wireline Competition Bureau to finalize a methodology to limit HCLS and ICLS reimbursements after this further input.

#### 4. Corporate Operations Expense

227. *Background.* Corporate operations expenses are general and administrative expenses, sometimes referred to as overhead expense. More specifically, corporate operations expense includes expenses for overall administration and management, accounting and financial services, legal services, and public relations. Corporate operations expenses are currently eligible for recovery through HCLS, LSS, and ICLS. For many years the Commission has limited the amount of recovery for these expenses through HCLS but not through LSS and ICLS.<sup>360</sup>

228. In the *USF/ICC Transformation NPRM*, we proposed to reduce or eliminate universal service support for corporate operations expense.<sup>361</sup> We also sought comment on reducing or eliminating corporate operations expense as an eligible expense for both LSS and ICLS.<sup>362</sup>

229. *Discussion.* As supported by many parties,<sup>363</sup> we will adopt the more modest reform proposal to extend the limit on recovery of corporate operations expense to ICLS effective January 1, 2012. We concluded in the *Universal Service First Report and Order* that the amount of recovery of corporate operations expense from HCLS should be limited to help ensure that carriers use such support only to offer better service to their customers through prudent facility investment and maintenance, consistent with their obligations under section 254(k).<sup>364</sup> We now conclude that the same reasoning applies to ICLS.<sup>365</sup> Extending the limit on the recovery of corporate operations expenses to ICLS likewise furthers our goal of fiscal responsibility and accountability.<sup>366</sup>

230. We note, however, that the current formula for limiting the eligibility of corporate operations expenses for HCLS has not been revised since 2001.<sup>367</sup> The initial formula was implemented

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<sup>360</sup> 47 C.F.R. § 32.6720.

<sup>361</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4623, para. 194.

<sup>362</sup> See *id.* at 4624, para. 198. The FPSC supported eliminating eligibility of corporate operations expense from all support mechanisms. See Florida Commission *USF/ICC Transformation NPRM* Comments at 7-8.

<sup>363</sup> See, e.g. Rural Associations *USF/ICC Transformation NPRM* Comments at 42; Alexicon *USF/ICC Transformation NPRM* Comments at 11; FairPoint *USF/ICC Transformation NPRM* Comments at 11-12; Montana Commission *USF/ICC Transformation NPRM* Reply at 6; Moss Adams *USF/ICC Transformation NPRM* Comments at 12-13.

<sup>364</sup> See *Universal Service First Report and Order*, 12 FCC Rcd at 8930, para. 283.

<sup>365</sup> The same reasoning also would apply to LSS; however, as discussed below in section VII.D.7 (Local Switching Support), we are eliminating LSS as a stand-alone support program and will not extend the corporate operations limit to LSS for the remainder of its existence. Those costs will be addressed through the ICC recovery mechanism adopted in section XII (Comprehensive Intercarrier Compensation Reform) and section XIII (Recovery Mechanism) below.

<sup>366</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4560-61, para. 10.

<sup>367</sup> See *Rural Task Force Order*, 16 FCC Rcd at 11270-77, paras. 60-76; 47 C.F.R. § 36.621(a)(4)

in 1998, based on 1995 cost data.<sup>368</sup> In 2001, the formula was modified to reflect increases in Gross Domestic Product-Chained Price Index (GDP-CPI),<sup>369</sup> but has not been updated since then.

231. There have been considerable changes in the telecommunications industry in the last decade, given the “ongoing evolution of the voice network into a broadband network,”<sup>370</sup> and we believe updating the formula based on more recent cost data will ensure that it reflects the current economics of serving rural areas and appropriately provides incentives for efficient operations. Therefore, we now update the limitation formula based on an analysis of the most recent actual corporate operations expense submitted by rural incumbent LECs.<sup>371</sup> As set forth in Appendix C, the basic statistical methods for developing the limitation formula and the structure of the formula are the same as before.<sup>372</sup> We also conclude that the updated formula we adopt today should include a growth factor, consistent with the current formula that applies to HCLS.<sup>373</sup>

232. Accordingly, effective January 1, 2012, we modify the existing limitation on corporate operations expense formula as follows:

- For study areas with 6,000 or fewer total working loops the monthly amount per loop shall be (a)  $\$42.337 - (.00328 \times \text{number of total working loops})$ , or (b)  $\$63,000 / \text{number of total working loops}$ , whichever is greater;
- For study areas with more than 6,000, but fewer than 17,887 total working loops, the monthly amount per loop shall be  $\$3.007 + (117,990 / \text{number of total working loops})$ ; and
- For study areas with 17,887 or more total working loops, the monthly amount per loop shall be \$9.56;
- Beginning January 1, 2013, the monthly per-loop limit shall be adjusted each year to reflect the annual percentage change in GDP-CPI.

233. The chart below depicts the per-line limits on corporate operations expense currently in place for 2011 compared to the new per-line limit we adopt today, which will become effective January 1, 2012.

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<sup>368</sup> See *Universal Service First Report and Order*, 12 FCC Rcd at 8930-32, paras. 283-85, 8942, para. 307.

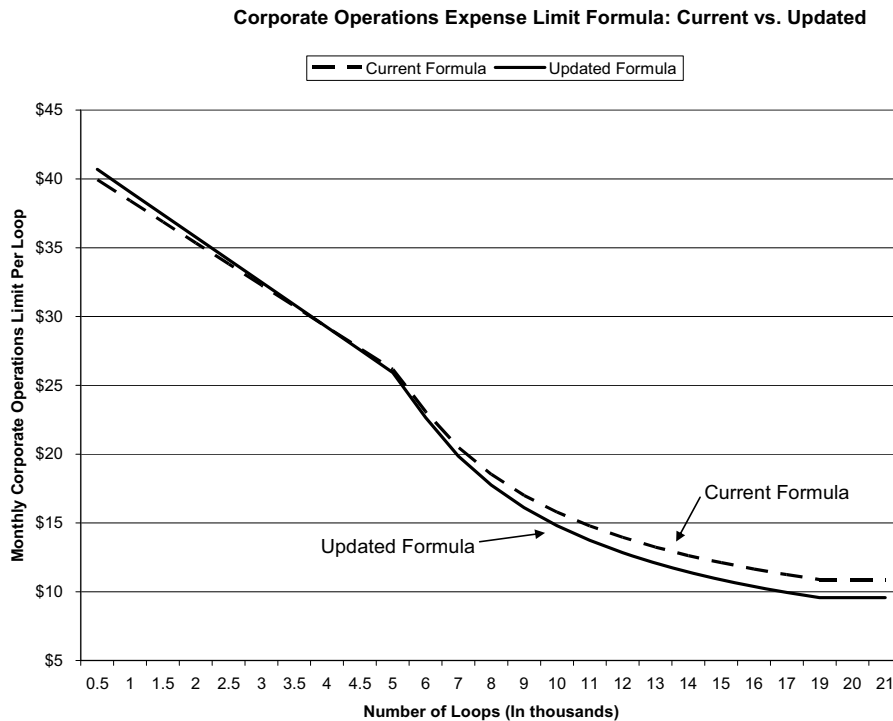
<sup>369</sup> See *Rural Task Force Order*, 16 FCC Rcd at 11275, para. 73.

<sup>370</sup> See *August 3 PN*; Rural Associations *August 3 PN* Comments at 19.

<sup>371</sup> In the *August 3 PN*, we sought comment on applying an updated formula to limit recovery of corporate operations expenses for HCLS, ICLS, and LSS. See *August 3 PN* 26 FCC Rcd at 11117.

<sup>372</sup> See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order on Reconsideration, 12 FCC Rcd 10095, 10102-05, paras. 17-22 and Appendix B.

<sup>373</sup> The Rural Associations commented that the updated formula did not include a growth factor to reflect increases in GDP-CPI, as does the current formula that applies to HCLS. See Rural Associations *August 3 PN* Comments at 21-22.



## 5. Reducing High Cost Loop Support for Artificially Low End-User Rates

234. *Background.* Section 254(b) of the Act requires that “[c]onsumers in all regions of the Nation . . . should have access to telecommunications and information services . . . that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.”<sup>374</sup> In the *USF/ICC Transformation NPRM*, we sought comment on tools, such as rate benchmarks and imputation of revenues, that might be used both today and as the marketplace fully transitions to broadband networks to meet this statutory mandate.<sup>375</sup> Among other things, we sought comment on using a rate benchmark, or floor, based on local rates for voice service at the outset of any transition for high-cost support reform.<sup>376</sup> One commenter, in response to the *USF/ICC Transformation NPRM*, suggested we develop a benchmark for voice service and reduce a carrier’s high-cost support by the amount that its rate falls below the benchmark.<sup>377</sup>

235. *Discussion.* We now adopt a rule to limit high-cost support where end-user rates do not meet a specified local rate floor. This rule will apply to both rate-of-return carriers and price cap companies.

<sup>374</sup> 47 U.S.C. § 254(b)(3).

<sup>375</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4733-34, para. 573. Under a benchmark approach, the benchmarked rate is imputed to the carrier for purposes of determining support, but carriers typically are not required to raise their rates to the benchmark level.

<sup>376</sup> *Id.* See also *id.* at 4603, para. 139 and n. 223 (seeking comment on developing a rate benchmark for voice [and broadband] services to satisfy Congress’s requirement that universal service ensure that services are available to all regions, “including rural, insular, and high cost areas,” at rates that are “affordable” and “reasonably comparable” to those in urban areas).

<sup>377</sup> Ad Hoc *USF/ICC Transformation NPRM* Comments at 26. We sought comment specifically on this approach in a subsequent Public Notice addressing specific aspects of additional proposals and issues. *August 3 PN*, 26 FCC Rcd at 11118.

Section 254 obligates states to share in the responsibility of ensuring universal service. We recognize some state commissions may not have examined local rates in many years, and carriers may lack incentives to pursue a rate increase when federal universal service support is available. Based on evidence in the record, however, there are a number of carriers with local rates that are significantly lower than rates that urban consumers pay.<sup>378</sup> Indeed, as noted in Figure 5 below, there are local rates paid by customers of universal service recipients as low as \$5 in some areas of the country. For example, we note that two carriers in Iowa and one carrier in Minnesota offer local residential rates below \$5 per month.<sup>379</sup> We do not believe that Congress intended to create a regime in which universal service subsidizes artificially low local rates in rural areas when it adopted the reasonably comparable principle in section 254(b); rather, it is clear from the overall context and structure of the statute that its purpose is to ensure that rates in rural areas not be significantly higher than in urban areas.

236. We focus here on the impact of such a rule on rate-of-return companies.<sup>380</sup> Data submitted by NECA summarizing residential R-1 rates for over 600 companies — a broad cross-section of carriers that typically receive universal service support — show that approximately 60 percent of those study areas have local residential rates that are below the 2008 national average local rate of \$15.62. This distribution plot shows that most rates fall within a five-dollar range of the national average, but more than one hundred companies, collectively representing hundreds of thousands of access lines, have a basic R-1 rate that is significantly lower. This appears consistent with rate data filed by other commenters.<sup>381</sup>

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<sup>378</sup> In the *August 3 PN*, we stated that our high-cost universal service rules may subsidize excessively low rates for consumers served by rural and rate-of-return carriers. *August 3 PN*, 26 FCC Rcd at 4614-15, para. 172. We noted that one commenter stated that roughly 20 percent of the residential lines of small rate-of-return companies have monthly rates of \$12 or less and another 22 percent have local rates between \$12 and \$15 per month, while the nationwide average urban rate, it contends, was approximately \$15.47 based on the most recent published reference book of rates by the FCC. *Id.* While individual consumers in those areas may benefit from such low rates, when a carrier uses universal service support to subsidize local rates well below those required by the Act, the carrier is spending universal service funds that could potentially be better deployed to the benefit of consumers elsewhere. *Id.*

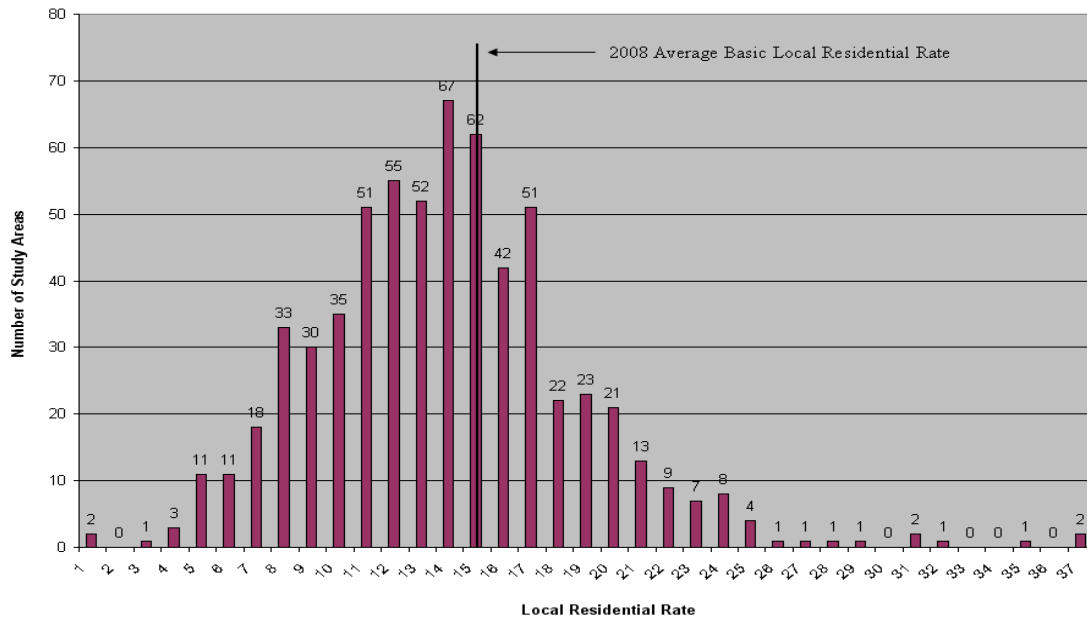
<sup>379</sup> Local residential rates, or flat rates for residential service, are more commonly referred to as the “R-1” rate. *See, e.g.,* Letter from the Supporters of the Missoula Plan to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 3 (filed February 5, 2007) (referencing “the basic residential local rate (1FR or equivalent)”).

<sup>380</sup> While price cap companies on average tend to have higher R-1 rates than rate-of-return companies, we note that data in the record indicates that a number of price cap companies also have local R-1 rates below the most recently available national average local rate, \$15.62, in a number of states. *See* Letter from Malena F. Barzilai, Regulatory Counsel & Director, Windstream Communications, to Marlene H. Dortch, Secretary, FCC, Confidential Information Subject to Protective Order in CC Docket No. 01-92, WC Docket Nos. 05-337, 07-135, 10-90, and GN Docket No. 09-51 (filed Oct. 15, 2011) (*NECA Survey*); Letter from Michael D. Saperstein, Jr., Director of Federal Regulatory Affairs, Frontier Communications, to Marlene H. Dortch, Secretary, FCC, Confidential Information Subject to Protective Order in CC Docket No. 01-92, WC Docket Nos. 05-337, 07-135, 10-90, and GN Docket No. 09-51 (filed Dec. 16, 2010). In fact, price cap companies have some R-1 rates lower than \$9.

<sup>381</sup> The data for this distribution comes from the *NECA Survey*. *See also* Oregon Telecommunications Association and the Washington Independent Telecommunications Association Comments, Table 7 (filed July 12, 2010) (providing existing monthly local residential rates ranging from \$10.00 to \$27.39 not including subscriber line charges of \$6.50 per month); Oregon Telecommunications Association and the Washington Independent Telecommunications Association Reply Comments, Table 3 (filed August 11, 2010) (providing existing monthly local residential rates ranging from \$12.25 to \$30.50 not including subscriber line charges of \$6.50 per month).



Figure 5  
**Sample of Local Residential Service Monthly Rates**  
**NECA Survey of 641 Respondents**



237. It is inappropriate to provide federal high-cost support to subsidize local rates beyond what is necessary to ensure reasonable comparability. Doing so places an undue burden on the Fund and consumers that pay into it. Specifically, we do not believe it is equitable for consumers across the country to subsidize the cost of service for some consumers that pay local service rates that are significantly lower than the national urban average.

238. Based on the foregoing, and as described below, we will limit high-cost support where local end-user rates plus state regulated fees (specifically, state SLCs, state universal service fees, and mandatory extended area service charges) do not meet an urban rate floor representing the national average of local rates plus such state regulated fees. Our calculation of this urban rate floor does not include federal SLCs, as the purposes of this rule change are to ensure that states are contributing to support and advance universal service and that consumers are not contributing to the Fund to support customers whose rates are below a reasonable level.<sup>382</sup>

239. We will phase in this rate floor in three steps, beginning with an initial rate floor of \$10 for the period July 1, 2012 through June 30, 2013 and \$14 for the period July 1, 2013 through June 30, 2014. Beginning July 1, 2014, and in each subsequent calendar year, the rate floor will be established after the Wireline Competition Bureau completes an updated annual survey of voice rates. Under this approach,

<sup>382</sup> See 47 U.S.C. §§ 254(b)(5), 254(f), 254(k); *Federal-State Joint Board on Universal Service*, Order on Remand, CC Docket No. 96-45, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, 18 FCC Rcd 22559, 22568 para. 17 (2003) (“The Act makes clear that preserving and advancing universal service is a shared federal and state responsibility.”).

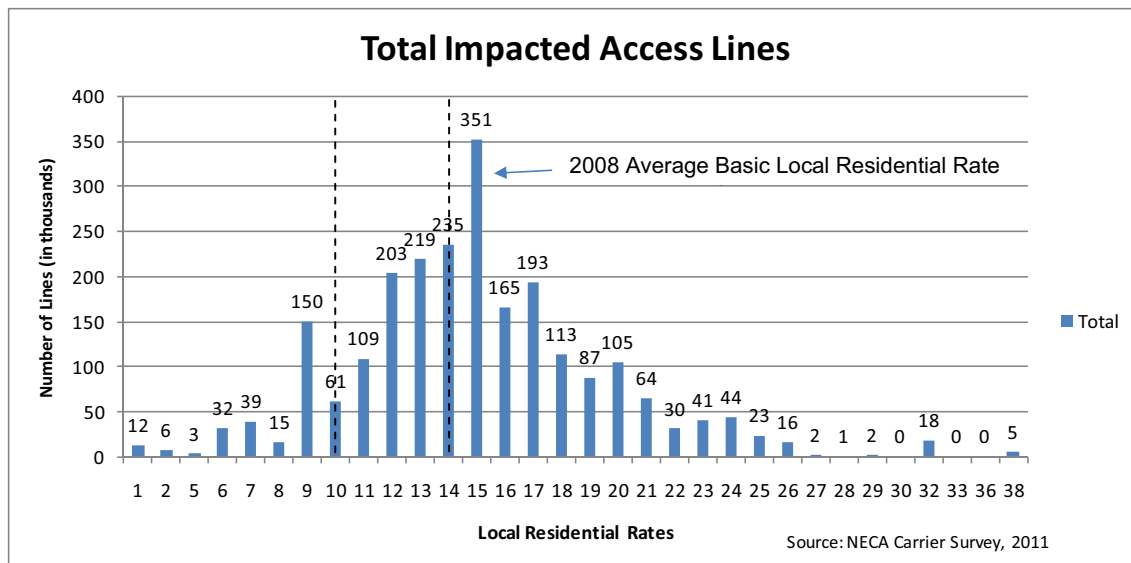
the Commission will reduce, on a dollar-for-dollar basis, HCLS and CAF Phase I support to the extent that a carrier's local rates (plus state regulated fees) do not meet the urban rate floor.

240. To the extent end-user rates do not meet the rate floor, USAC will make appropriate reductions in HCLS support. This calculation will be pursuant to a rule that is separate from our existing rules for calculation of HCLS, which is subject to an annual cap. As a consequence, any calculated reductions will not flow to other carriers that receive HCLS, but rather will be used to fund other aspects of the CAF pursuant to the reforms we adopt today.<sup>383</sup>

241. This offset does not apply to ICLS because that mechanism provides support for interstate rates, not intrastate end-user rates. Accordingly, we will revise our rules to limit a carrier's high-cost loop support when its rates do not meet the specified local urban rate floor.<sup>384</sup>

242. As shown in Figures 6 and 7 below, phasing in this requirement in three steps will appropriately limit the impact of the new requirement in a measured way. Based on the NECA data, we estimate that there are only 257,000 access lines in study areas having local rates less than \$10 – which would be affected by the rule change in the second half of 2012 – and there are 827,000 access lines in study areas that potentially would be affected in 2013.<sup>385</sup> We assume, however, that by 2013 carriers will have taken necessary steps to mitigate the impact of the rule change. By adopting a multi-year transition, we seek to avoid a flash cut that would dramatically affect either carriers or the consumers they serve.

Figure 6

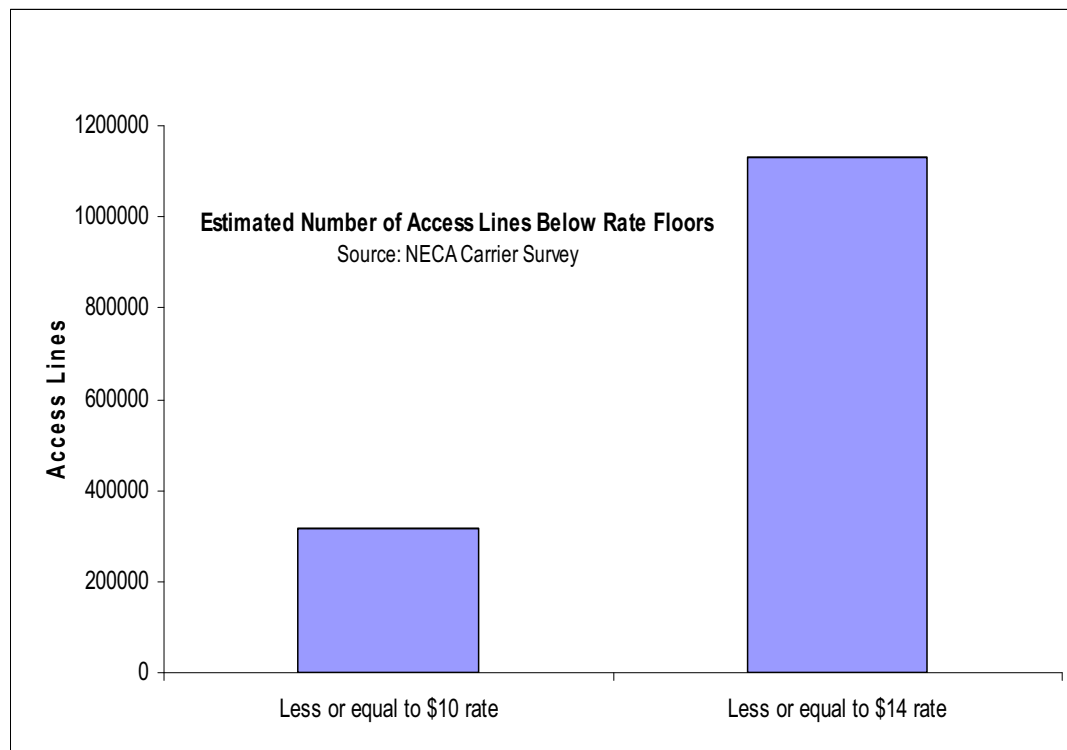


<sup>383</sup> See *supra* Section VII.H.

<sup>384</sup> See *infra* Section 54.318, Appendix A.

<sup>385</sup> The data for this distribution comes from the *NECA Survey*. See *supra* note 381.

Figure 7



243. In addition, because we anticipate that the rate floor for the third year will be set at a figure close to the sum of \$15.62 plus state regulated fees, we are confident that \$10 and \$14 are conservative levels for the rate floors for the first two years. \$15.62 was the average monthly charge for flat-rate service in 2008, the most recent year for which data was available.<sup>386</sup> Under our definition of “reasonably comparable,” rural rates are reasonably comparable to urban rates under section 254(b) if they fall within a reasonable range above the national average.<sup>387</sup> Under this definition, we could set the rate floor *above* the national average urban rate but within a range considered reasonable. In the present case, we are expecting to set the end point rate floor *at* the average rate, and we are setting rate floors well *below* our current best estimate of the average during the multi-year transition period.

<sup>386</sup> Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service, Industry Analysis and Technology Division, Wireline Competition Bureau, Residential Rates for Local Service in Urban Areas, Table 1.1 (2008) (*2008 Reference Book of Rates*). We note that some parties have submitted information into the record indicating that the local rates are higher than this \$15.62 figure in a number of states. For example, Kansas has increased its affordable residential rates for rural incumbent LECs to \$16.25 per month, and Nebraska has conditioned state USF eligibility upon carriers increasing local rates to its adopted rate floor of \$17.95 in urban areas and \$19.95 in rural areas. Letter from Mark Sievers, Chairman, Kansas Corporation Commission; Orjiakor Isiogu, Chairman, Michigan Public Service Commission; Tim Schram, Chairman, Nebraska Public Service Commission; Patrick H. Lyons, Chairman, New Mexico Public Regulation Commission; Steve Oxley, Deputy Chair, Wyoming Public Service Commission, to Marlene H. Dortch, Secretary, FCC, re: Universal Service Intercarrier Compensation Transformation Proceeding, WC Docket Nos. 10-90, 07-135, 05-337 and 03-109; CC Docket Nos. 01-92 and 96-45; GN Docket No. 09-51 (filed September 15, 2011).

<sup>387</sup> *Federal-State Joint Board on Universal Service, High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Order on Remand and Memorandum Opinion and Order, 25 FCC Rcd 4072, 4101, para. 53 (2010) (*Qwest II Remand Order*).

244. Although the high-cost program is not the primary universal service program for addressing affordability, we note that some commenters have argued that if rates increase, service could become unaffordable for low-income consumers.<sup>388</sup> However, staff analysis suggests that this rule change should not disproportionately affect low-income consumers, because there is no correlation between local rates and average incomes in rate-of-return study areas—that is, rates are not systematically lower where consumer income is lower and higher where consumer income is higher. We further note that the Commission’s Lifeline and Link Up program remains available to low-income consumers regardless of this rule change.<sup>389</sup>

245. In 2010, 1,048 rate-of-return study areas received HCLS support. Using data from the NECA survey filed pursuant to the Protective Order in this proceeding and U.S. Census data from third-party providers, we analyzed monthly local residential rate data for 641 of these study areas and median income data for 618 of those 641 study areas.<sup>390</sup> Based on the 618 study areas for which we have both local rate data and median income data, when we set one variable dependent upon the other (price as a function of income), we do not observe prices correlating at all with median income levels in the given study areas. We observe a wide range of prices — many are higher than expected and just as many are lower than expected. In fact, some areas with extremely low residential rates exhibit higher than average consumer income.

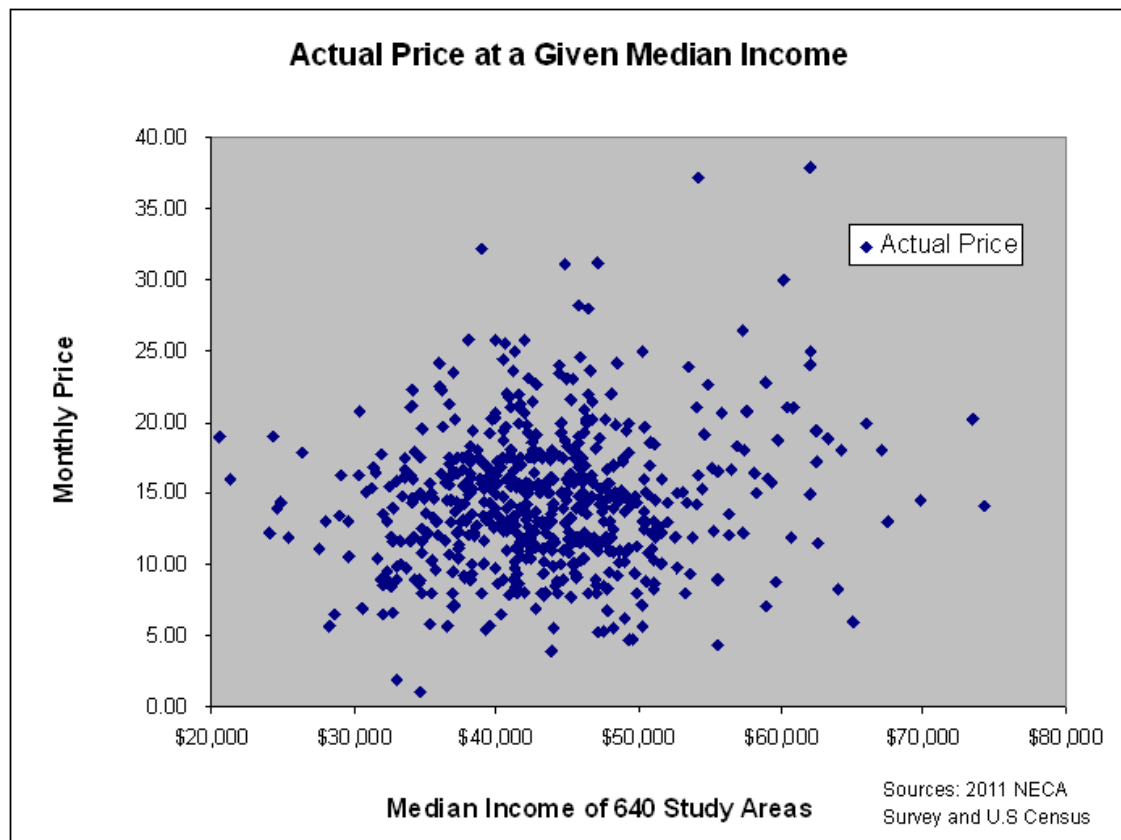
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<sup>388</sup> See, e.g., Comments of the Asian American Justice Center at 2 (filed August 24, 2011); see also Comments of the National Association of State Utility Consumer Advocates at 51 (filed April 18, 2011); see generally Reply Comments of the National Association of State Utility Consumer Advocates at 50-51 (filed May 23, 2011).

<sup>389</sup> For more than two decades, the Lifeline and Link Up Program has helped tens of millions of Americans afford basic phone service, providing a “lifeline” for essential daily communications as well as emergencies. See generally *Lifeline and Link Up Reform and Modernization, Federal-State Joint Board on Universal Service, Lifeline and Link Up*, WC Docket No. 11-42, CC Docket No. 96-45, WC Docket No. 03-109, Notice of Proposed Rulemaking, 26 FCC Rcd 2770 (2011).

<sup>390</sup> See NECA Survey. Median income data was based on data from the U.S. Census Bureau.

Figure 8



246. To implement these rule changes, we direct that all carriers receiving HCLS must report their basic voice rates and state regulated fees on an annual basis, so that necessary support adjustments can be calculated.<sup>391</sup> In addition, all carriers receiving frozen high-cost support will be required to report their basic voice rates and state regulated fees on an annual basis.<sup>392</sup> Carriers will be required to report their rates to USAC, as set forth more fully below (see Section VIII.A.2, *infra*). As noted above, we have delegated authority to the Wireline Competition Bureau and the Wireless Telecommunications Bureau to take all necessary steps to develop an annual rate survey for voice services.<sup>393</sup> We expect this annual survey to be implemented as part of the annual survey described above in the section discussing public interest obligations for voice telephony. We expect the initial annual rate survey will be completed prior to the implementation of the third step of the transition.<sup>394</sup>

<sup>391</sup> Similarly, companies that receive HCMS will also be required to report their basic voice rates and state-regulated fees, so that USAC can determine any reductions in support that are required.

<sup>392</sup> See *supra* Section VII.C.1.

<sup>393</sup> See *supra* Section VI.A.

<sup>394</sup> See *Modernizing the FCC Form 477 Data Program, Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership, Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering, Review of Wireline Competition Bureau Data Practices*, Notice of Proposed Rulemaking, WC Docket Nos. 11-10, 07-38, 08- (continued...)

247. Finally, we note that the Rural Associations contend that a benchmark approach for voice services fails to address rate comparability for broadband services.<sup>395</sup> Although we address only voice services here, elsewhere in this Order we address reasonable comparability in rates for broadband services.<sup>396</sup> We believe that it is critical to reduce support for voice — the supported service — where rates are artificially low. Doing so will relieve strain on the USF and, thus, greatly assist our efforts in bringing about the overall transformation of the high-cost program into the CAF.<sup>397</sup>

## 6. Safety Net Additive

248. *Background.* In 2001, as part of the Rural Task Force proceeding, the Commission adopted the “safety net additive” with the intent of providing additional support to rural incumbent LECs who make additional significant investments, notwithstanding the cap on high-cost loop support.<sup>398</sup> Once an incumbent LEC qualifies for such support, it receives such support for the qualifying year plus the four subsequent years.<sup>399</sup> Specifically, the safety net additive provides additional loop support if the incumbent LEC realizes growth in year-end telecommunications plant in service (TPIS) (as prescribed in section 32.2001 of the Commission’s rules) on a per-line basis of at least 14 percent more than the study area’s TPIS per-line investment at the end of the prior period.<sup>400</sup>

(Continued from previous page) \_\_\_\_\_

90 and 10-132, 26 FCC Rcd 1508 (2011). The Bureau may elect to develop the relevant rate benchmark using data from Form 477 if changes in that collection provide access to relevant pricing information. Even if the Commission does decide to collect pricing information on Form 477, and even if that information will allow the development of a rate benchmark, we recognize that PRA requirements and other timing constraints may limit the availability of such data, particularly in the near future. Therefore, an additional separate survey to implement this rule may be necessary.

<sup>395</sup> Rural Associations *August 3 PN* Comments at 31.

<sup>396</sup> See *supra* Section VI.B.3.

<sup>397</sup> The Rural Associations contend that if the Commission were to adopt the RLEC Plan and also the Ad Hoc Telecommunications Users Committee benchmark approach, it would create the potential for a “double whammy” for rural carriers and their customers; *i.e.*, that there would be two benchmarks – one for USF and one for ICC – with separate and distinct revenue reductions tied to a single rate charged to each customer, dramatically upsetting the careful balance of revenue reductions and support mechanisms. Rural Associations *August 3 PN* Comments at 32. Our benchmark mechanism in the universal service context is a floor for eligibility for support that complements the ICC residential rate ceiling by adding an incentive for local rate rebalancing. If a carrier’s rate is below the benchmark in the USF context, then its payments are reduced by the difference between its rates and the benchmark; *i.e.*, the benchmark rate is imputed to the carrier as the minimum amount a customer is expected to pay and of which USF will not cover. Once a carrier’s rates reach or exceed the benchmark, no reduction would be applied to the high-cost support the carrier would otherwise be eligible for.

<sup>398</sup> 47 C.F.R. § 36.605. The safety net additive was adopted based on the recommendation of the Rural Task Force. See *Rural Task Force Order*, 16 FCC Rcd at 11276-81, paras. 77-90. Specifically, the safety net additive is equal to the amount of capped high-cost loop support in the qualifying year minus the amount of support in the year prior to qualifying for support subtracted from the difference between the uncapped expense adjustment for the study area in the qualifying year minus the uncapped expense adjustment in the year prior to qualifying for support as shown in the by the following equation: Safety net additive support = (Uncapped support in the qualifying year–Uncapped support in the base year)–(Capped support in the qualifying year–Amount of support received in the base year). 47 C.F.R. § 36.605(b).

<sup>399</sup> For the four subsequent years, the safety net additive is the lesser of the sum of capped support and the safety net additive support received in the qualifying year or the rural telephone company’s uncapped support. See 47 C.F.R. § 36.605(c)(3)(ii).

<sup>400</sup> See 47 C.F.R. §§ 36.605(c) and 32.2001.

249. From 2003 to 2010, the safety net additive increased from \$9.1 million to \$78.9 million.<sup>401</sup> It is projected to be \$94 million for 2011, an increase of approximately ten-fold in nine years.<sup>402</sup> To qualify for the safety net additive, an incumbent LEC's year-over-year TPIS, *on a per-line basis*, must increase by a minimum of 14 percent. The majority of incumbent LECs that currently are receiving the safety net additive qualified in large part due to significant loss of lines, not because of significant increases in investment, which is contrary to the intent of the rule to provide additional funding only for significant new investment.<sup>403</sup> When the Commission adopted the safety net additive, access lines were growing. The Commission did not anticipate that incumbent telephone companies would lose access lines as they have over the past decade. For the past two years, close to sixty percent of incumbent LECs that qualified for the safety net additive did not have total TPIS increase by more than 14 percent year-over-year.<sup>404</sup> However, because of the loss of lines, such incumbent LECs qualified for the safety net additive because the rule is based on *per-line* investment. Accordingly, in the *USF/ICC Transformation NPRM*, we proposed to eliminate safety net additive support.<sup>405</sup>

250. *Discussion.* We conclude the safety net additive is not designed effectively to encourage additional significant investment in telecommunications plant,<sup>406</sup> and therefore eliminate the rule immediately. We grandfather existing recipients and begin phasing out their support in 2012.<sup>407</sup>

251. Several commenters suggest that rather than eliminate the safety net additive, we revise the rule to base qualification on the *total* year-over-year changes in TPIS, rather than on *per-line* change in TPIS.<sup>408</sup> We decline to adopt this suggestion, and we conclude instead that we should phase out safety net additive rather than modify how it operates. While revising the rule as some commenters suggested would address one deficiency with safety net additive support, doing so would not address our

<sup>401</sup> See 2010 Universal Service Monitoring Report at Table 3.7.

<sup>402</sup> See Universal Service Administrative Company, Quarterly Administrative Filings for 2011, Fourth Quarter (4Q), Appendices at HC01 (filed Aug. 2, 2011) (USAC 4Q 2011 Filing), <http://www.usac.org/about/governance/fcc-filings/2011/>

<sup>403</sup> For example, one incumbent LEC will receive approximately \$6.4 million in safety net additive during 2011 (the highest among any incumbent LEC), even though its total annual year-end TPIS has increased only in the range of between 5 percent and 9 percent per-year, during the past five years. That carrier, however, lost approximately 8 percent of its lines in each of the past two years and 18 percent of its lines over the past five years. Additionally, its cost per loop is well below the HCLS qualifying threshold and therefore does not qualify for HCLS. See USAC 2Q 2011 filing, Appendices at HC01; NECA 2010 USF Data Filing. We also note that two incumbent LECs qualified for safety net additive beginning 2010 due to line loss and their TPIS also declined. See NECA 2010 USF Data Filing and National Exchange Carrier Assoc., Inc., Universal Service Fund Data; NECA Study Results, 2009 Report (filed Sept. 30, 2009) (NECA 2009 USF Data Filing).

<sup>404</sup> Staff analysis of National Exchange Carrier Assoc., Inc., Universal Service Fund Data: NECA Study Results, 2008 Report through 2010 Report, <http://www.fcc.gov/wcb/iatd/neca.html>.

<sup>405</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4621, para. 185.

<sup>406</sup> Several parties support eliminating the safety net additive. See e.g. NCTA *USF/ICC Transformation NPRM* Comments at 12 (arguing that the safety net additive rule, as designed, is an inefficient use of limited universal service funds); Florida Commission *USF/ICC Transformation NPRM* Comments at 7; Nebraska Rural Companies *August 3 PN* Reply at 17 ("it is reasonable to remove SNA from companies that have received such funding due to line decreases, as well as not permit new recipients of SNA").

<sup>407</sup> While we focus here on rate-of-return companies, we note that today rural price cap companies also may receive SNA. As discussed more fully above in Section VII.C.I, SNA is completely eliminated for price cap companies, who will receive all support from a forward-looking model.

<sup>408</sup> See, e.g. Rural Associations *USF/ICC Transformation NPRM* Comments at 42-43.

overarching concern that safety net additive as a whole does not provide the right incentives for investment in modern communications networks. It does not ensure that investment is reasonable or cost-efficient, nor does it ensure that investment is targeted to areas that would not be served absent support. For example, even if we changed the rule as proposed, safety net additive could continue to allow incumbent LECs to get additional support if, for instance, they choose to build fiber-to-the-home on an accelerated basis in an area that is also served by an unsubsidized cable competitor. That said, we do modify our proposed phase out of safety net additive based on the record.

252. We conclude that beneficiaries of safety net additive whose total TPIS increased by more than 14 percent over the prior year at the time of their initial qualification should continue to receive such support for the remainder of their eligibility period, consistent with the original intent of the rule. For the remaining beneficiaries of safety net, we find that such support should be phased down in 2012 because such support is not being paid on the basis of significant investment in telecommunications plant. Specifically, for the latter group of beneficiaries, the safety net additive will be reduced 50 percent in 2012, and eliminated in 2013. We do not provide any new safety net support for costs incurred after 2009.<sup>409</sup>

## 7. Local Switching Support

253. *Background.* LSS allows rural incumbent LECs serving 50,000 access lines or fewer to allocate a larger percentage of their switching costs (including related overhead costs) to the interstate jurisdiction and recover those costs through the federal universal service fund.<sup>410</sup> Historically, the rationale for LSS was that traditional circuit switches, which were based on specialized hardware, were relatively expensive for the smallest of carriers because such switches were not easily scaled to the size of the carrier, and therefore required additional support from the federal jurisdiction. In recent years, however, telecommunications technology has been evolving from circuit-switched to IP-based, and many smaller rate-of-return carriers are purchasing soft switches and routers which tend to be cheaper and more efficiently scaled to smaller operating sizes than the specialized hardware-based switches that

<sup>409</sup> See Nebraska Rural Companies August 3 PN Reply at 17 (“it is reasonable to remove SNA from companies that have received such funding due to line decreases, as well as not permit new recipients of SNA”). We recognize that some carriers denied support under this rule may have made investments in 2010 and 2011 expecting to receive SNA in 2012 or 2013 for those expenditures. As described above, however, we reject the argument that carriers have any entitlement to support based on this expectation. See *supra* para. 221. Moreover, since early 2010, the Commission has given carriers ample notice that we intended to undertake comprehensive universal service reform in the near term. See, e.g., *Joint Statement on Broadband*, GN Docket No. 10-66, *Joint Statement on Broadband*, 25 FCC Rcd 3420, 3421 (2010); *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4560-61, para. 10. Thus, carriers that have not yet started receiving SNA but may have been anticipating such support based on 2010 and 2011 investments stand in a materially different position than companies that have already started receiving support based on earlier expenditures. Moreover, because SNA support has grown rapidly in recent years, allowing USF recovery for 2010 or 2011 investments would likely place large new burdens on the Fund, while slowing the Commission’s effort to transition to more efficient, targeted, and accountable mechanisms for incenting new broadband deployment. See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4620-21, para. 184; Universal Service Administrative Company, Quarterly Administrative Filings for 2012, First Quarter (1Q), Appendices at HC06 (filed Nov. 2, 2011) (USAC 1Q 2012 Filing) (projecting SNA support of \$122 million for 2012), <http://www.usac.org/about/governance/fcc-filings/2012/>

<sup>410</sup> Incumbent LECs recover their interstate switching costs through interstate tariffs (i.e., interstate access charges) and recover intrastate switching costs (i.e., intrastate access charges and basic local service) as provided by the relevant state ratemaking authority. 47 C.F.R. § 36.125(f), (j). The precise amount of the extra allocation depends on a dial equipment minute (DEM) weighting factor determined by the number of access lines served by the incumbent LEC, with key thresholds established at 10,000, 20,000, and 50,000 lines. See 47 C.F.R. § 36.125(f); 47 C.F.R. § 54.301.



predominated when LSS was created.<sup>411</sup> Qualification for LSS is solely based on the size of the incumbent LEC study area, i.e. the number of access lines served, with eligibility thresholds that bear no rational linkage to modern network architecture. Moreover, incumbent LECs do not have to meet a high-cost threshold to qualify for LSS.

254. In the *USF/ICC Transformation NPRM*, we proposed to eliminate local switching support, or in the alternative, to combine this program with high-cost loop support.<sup>412</sup> A number of commenters agree that LSS should be eliminated because today's soft switches are less expensive and more efficiently scaled to small operating sizes than past circuit-based switches,<sup>413</sup> while other commenters oppose the elimination of LSS.<sup>414</sup> The Rural Associations state that the future of LSS should be addressed in conjunction with the Commission's ICC reform proceeding.<sup>415</sup>

255. *Discussion.* We agree with the Rural Associations that reforms to LSS should be integrated with reforms to ICC and the accompanying creation of a CAF to provide measured replacement of lost intercarrier revenues. We continue to believe that the rationale for LSS has weakened with the advent of cheaper, more scalable switches and routers.<sup>416</sup> We also agree with the Ad Hoc Telecommunications Users Committee that the LSS funding mechanism provides a disincentive for those carriers owning multiple study areas in the same state to combine those study areas, potentially resulting in inefficient, costly deployment of resources.<sup>417</sup> Further, because qualification is solely based on the number of lines in the study area, LSS does not appropriately target funding to high-cost areas, nor does it target funding to areas that are unserved with broadband.<sup>418</sup>

256. At the same time, we recognize that today many small companies recover a portion of the costs of their switching investment, both for circuit switches and recently purchased soft switches, through LSS. LSS is a form of explicit recovery for switching investment that otherwise would be

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<sup>411</sup> See, e.g., *High-Cost Universal Service Support*, WC Docket No. 05-337, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, 6610-14, App. A, paras. 254-57, 260-61. A soft switch connects calls by means of software running on a computer system. In such configurations the "switching" is virtual because the actual path through the electronics is based on signaling and database information rather than a physical pair of wires. Soft switches are economically desirable because they offer significant savings in procurement, development, and maintenance. Such devices feature vastly improved economies of scale compared to switches based on specialized hardware.

<sup>412</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4621, para. 186.

<sup>413</sup> See e.g. Florida Commission *USF/ICC Transformation NPRM* Comments at 7-8; CTIA *USF/ICC Transformation NPRM* Comments at 15; Comcast *USF/ICC Transformation NPRM* Comments at 13; New Jersey Rate Counsel *USF/ICC Transformation NPRM* Reply at 7.

<sup>414</sup> Rural incumbent LECs and their trade associations generally oppose eliminating LSS or combining it with HCLS. See e.g. Rural Associations *USF/ICC Transformation NPRM* Comments at 43-45; Eastern Rural Telecom Association *USF/ICC Transformation NPRM* Comments at 4-5; Delhi Telephone *USF/ICC Transformation NPRM* Comments at 5; FairPoint *USF/ICC Transformation NPRM* Comments at 9-10.

<sup>415</sup> See Rural Associations *USF/ICC Transformation NPRM* Comments at 45.

<sup>416</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4621, para. 187.

<sup>417</sup> See Ad Hoc *USF/ICC Transformation NPRM* Comments at 12.

<sup>418</sup> For this reason, we decline to adopt Alexicon's alternative proposal that we adjust downward the qualifying threshold for LSS from 50,000 access lines to 15,000 access lines. See Alexicon *USF/ICC Transformation NPRM* Comments at 13-14. Changing the size threshold does not address our underlying concern that in an era of scalable soft switches, it does not make sense to base eligibility for LSS solely on the size of the study area, without regard to whether the area in question in fact is high-cost.

recovered through intrastate access charges or end user rates. As such, any reductions in LSS would result in a revenue requirement flowing back to the state jurisdiction.

257. For all of these reasons, we conclude that it is time to end LSS as a stand-alone universal service support mechanism, but that, as discussed in more detail in the ICC section of this Order, limited recovery of the costs previously covered by LSS should be available pursuant to our ICC reform and the accompanying creation of an ICC recovery mechanism through the CAF. Effective July 1, 2012 we will eliminate LSS as a separate support mechanism. In order to simplify the transition of LSS, beginning January 1, 2012 and until June 30, 2012, LSS payments to each eligible incumbent LEC shall be frozen at 2011 support levels subject to true-up based on 2011 operating results. To the extent that the elimination of LSS support affects incumbent LECs interstate switched access revenue requirement, we address that issue in the ICC context.<sup>419</sup>

## 8. Other High-Cost Rule Changes

### a. Adjusted High Cost Loop Cap for 2012

258. *Background.* In 1993, the Commission adopted a cap on high-cost loop support.<sup>420</sup> In 2001, the Commission modified the cap to adjust it annually by an index based on changes in the GDP/CPI and access lines.<sup>421</sup> In recent years, with low inflation and loss of access lines, the annual cap for HCLS has been adjusted downward.

259. *Discussion.* NECA projects that the high-cost loop cap will be \$858 million for all rural incumbent LECs for 2012, which is \$48 million less than the \$906 million projected to be disbursed in 2011.<sup>422</sup> Due to the elimination of HCLS for price cap companies as discussed above, we are lowering the HCLS cap for 2012 by the amount of HCLS support price cap carriers would have received for 2012. We reset the 2012 high-cost loop cap to the level that remaining rate-of-return carriers are projected to receive in 2012. Although price cap holding companies currently receive HCLS in a few rate-of-return study areas, as a result of the rule changes discussed above, all of their remaining rate-of-return support will be distributed through a new transitional CAF program, rather than existing mechanisms like HCLS.<sup>423</sup> Accordingly, NECA is required to re-calculate the HCLS cap for 2012 after deducting all HCLS that price cap carriers and their affiliated rate-of-return study areas would have received for 2012. NECA is required to submit to the Wireline Bureau the revised 2012 HCLS cap within 30 days of the release of this Order. NECA shall provide to the Wireline Bureau all calculations and assumptions used in re-calculating the HCLS cap.

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<sup>419</sup> See *infra* para. 872.

<sup>420</sup> See *Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No 80-286, Report and Order, 9 FCC Rcd 303 (1993) (subsequent history omitted).

<sup>421</sup> 47 C.F.R. § 36.603

<sup>422</sup> National Exchange Carrier Association, Universal Service Fund, 2011 Submission of 2010 Data Collection Study Results (Sep. 30, 2011).

<sup>423</sup> See *supra* paras. 115-193.

**b. Study Area Waivers****(i) Standards for Review**

260. *Background.* A study area is the geographic territory of an incumbent LEC's telephone operations. The Commission froze all study area boundaries effective November 15, 1984.<sup>424</sup> The Commission took this action to prevent incumbent LECs from establishing separate study areas made up only of high-cost exchanges to maximize their receipt of high-cost universal service support. A carrier must therefore apply to the Commission for a waiver of the study area boundary freeze if it wishes to transfer or acquire additional exchanges.<sup>425</sup> In evaluating petitions seeking a waiver of the rule freezing study area boundaries, the Commission currently applies a three-prong standard: (1) the change in study area boundaries must not adversely affect the universal service fund; (2) the state commission having regulatory authority over the transferred lines does not object to the transfer; and (3) the transfer must be in the public interest.<sup>426</sup> In evaluating whether a study area boundary change will have an adverse impact on the universal service fund, the Commission historically analyzed whether a study area waiver would result in an annual aggregate shift in an amount equal to or greater than one percent of nationwide high-cost support in the most recent calendar year.<sup>427</sup>

261. The Commission began applying the one-percent guideline in 1995 to limit the potential adverse impact of exchange sales on the overall fund, and partially in response to the concern that, because high-cost loop support was capped, an increase in the draw of any fund recipient necessarily would reduce the amounts that other LECs receive from that support fund.<sup>428</sup> Although the Commission adopted the "parent trap" rule in 1997 prohibiting companies that acquire lines from realizing additional high-cost support for those lines, it continued to apply the one-percent guideline to determine the impact on the universal service fund on changes in safety valve support and ICLS, to which the parent trap rule did not apply.<sup>429</sup>

262. At the time the one-percent guideline was implemented in 1995, the Universal Service Fund consisted of high-cost loop support for incumbent LECs.<sup>430</sup> The annual aggregate high-cost loop support

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<sup>424</sup> See *MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Decision and Order, 50 Fed. Reg. 939 (1985) (*Part 67 Order*). See also 47 C.F.R. Part 36, App.

<sup>425</sup> *Part 67 Order* Fed. Reg. at 939-40, para. 1.

<sup>426</sup> See, e.g., *US WEST Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules*, AAD 94-27, Memorandum Opinion and Order, 10 FCC Rcd 1771, 1772, para. 5 (1995) (*PTI/Eagle Order*).

<sup>427</sup> See *id.* at 1774, paras. 14-17; see also *US WEST Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, and Petition for Waiver of Section 61.41(c) of the Commission's Rules*, AAD 94-27, Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 4644 (1997).

<sup>428</sup> See *PTI/Eagle Order*, 10 FCC Rcd at 1773-74, para. 13.

<sup>429</sup> 47 C.F.R. § 54.305; see *infra* note 444.

<sup>430</sup> See *PTI/Eagle Order*, 10 FCC Rcd at 1773, para. 17; 47 C.F.R. § 36.601-631. Although dial equipment minute (DEM) weighting and other implicit support flows were present in the Commission's rules at the time, only high-cost loop support was considered for the purposes of the one-percent rule.

at that time was approximately \$745 million.<sup>431</sup> The threshold for determining an adverse impact, therefore, was approximately \$7.45 million. Subsequently, the Telecommunications Act of 1996 directed the Commission to make universal service support explicit, rather than implicitly included in interstate access rates.<sup>432</sup> As a result, over the next few years the Commission created explicit universal service high-cost support mechanisms for local switching, interstate common line access, and interstate access.<sup>433</sup>

263. The expansion of universal service high-cost support to include additional mechanisms, pursuant to the 1996 Act, significantly increased the base from which the one-percent guideline is calculated. Currently, annual aggregate high-cost support for all mechanisms is projected to be approximately \$4.5 billion.<sup>434</sup> One-percent of \$4.5 billion is \$45 million. No study area waiver request in recent years has come close to triggering the one-percent rule.<sup>435</sup>

264. In the *USF/ICC Transformation NPRM*, we proposed to eliminate the one-percent guideline as a measure of evaluating whether a study area waiver will have an adverse impact on the universal service fund because continuing to apply the one-percent guideline in this manner is unlikely to shed any insight on whether a study area waiver should be granted.<sup>436</sup>

265. *Discussion.* We conclude that the one-percent guideline is no longer an appropriate guideline to evaluate whether a study area waiver would result in an adverse effect on the fund and, therefore, eliminate the one-percent guideline in evaluating petitions for study area waiver. Therefore, on a prospective basis, our standards for evaluating petitions for study area waiver are: (1) the state commission having regulatory authority over the transferred exchanges does not object to the transfer and (2) the transfer must be in the public interest.<sup>437</sup> As proposed in the *USF/ICC Transformation NPRM*, our evaluation of the public interest benefits of a proposed study area waiver will include: (1) the number of lines at issue; (2) the projected universal service fund cost per line; and (3) whether such a grant would result in consolidation of study areas that facilitates reductions in cost by taking advantage of the economies of scale, *i.e.*, reduction in cost per line due to the increased number of lines.<sup>438</sup> We stress that

<sup>431</sup> See Universal Service Fund 1997 Submission of 1996 Study Results by the National Exchange Carrier Association, Tab 11, page 225 (October 1, 1997). This filing included five years of historical data. High-cost loop payments for 1995 were based on 1993 cost and loop data.

<sup>432</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the 1996 Act). The 1996 Act amended the Communications Act of 1934. 47 U.S.C. §§ 151, *et seq.* 47 U.S.C. § 254(e) (“Any such [universal service] support should be explicit and sufficient to achieve the purposes of this section.”).

<sup>433</sup> 47 C.F.R. §§ 54.301, 54.901-904, and 54.800-809. Forward-looking high-cost model support was also implemented to provide support to non-rural incumbent LECs, however, but not as a result of the statute’s requirement that all support be explicit. 47 C.F.R. § 54.309.

<sup>434</sup> See USAC 4Q 2011 Filing at Appendices at HC01.

<sup>435</sup> The study area waiver with the greatest estimated impact on universal service support in the past several years was the *United-Twin Valley Order* where the estimated increase in support was \$800,000 or only approximately 2 percent of the current \$45 million one-percent threshold. See *United Telephone Company of Kansas, United Telephone of Eastern Kansas, and Twin Valley Telephone, Inc., Joint Petition for Waiver of the Definition of “Study Area” Contained in Part 36 of the Commission’s Rules; Petition for Waiver of Section 69.3(e)(11) of the Commission’s Rules, Petition for Clarification or Waiver of Section 54.305 of the Commission’s Rules*, CC Docket No. 96-45, Order, 21 FCC Rcd 10111 (Wireline Comp. Bur. 2006) (*United-Twin Valley Order*).

<sup>436</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4631-32, para. 224.

<sup>437</sup> Petitions for study area waiver filed prior to the adoption of this order will be evaluated based on the former three-prong standard. See *supra* note 426.

<sup>438</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4631-32, para. 224.

these guidelines are only guidelines and not rigid measures for evaluating a petition for study area waiver. We believe that this streamlined process will provide greater regulatory certainty and a more certain timetable for carriers seeking to invest in additional exchanges.

**(ii) Streamlining the Study Area Waiver Process**

266. *Background.* In the *USF/ICC Transformation NPRM*, we proposed to streamline the process for addressing petitions for study area waivers.<sup>439</sup> The Commission's current procedures for addressing petitions for study area waiver require the Wireline Competition Bureau to issue an order either granting or denying the request. Most petitions for study area waiver are routine in nature and are granted as filed without modification. Nevertheless, the current procedure requires the issuance of an order granting the petition for waiver. In the *USF/ICC Transformation NPRM*, we proposed a process similar to the Bureau's processing of routine section 214 transfers of control applications.<sup>440</sup> The section 214 process deems the application granted, absent any further action by the Bureau, on the 31st day after the date of the public notice listing the application as accepted for filing as a streamlined application.<sup>441</sup>

267. *Discussion.* To more efficiently and effectively process petitions for waiver of the study area freeze, we adopt our proposal to streamline the study area waiver process. Upon receipt of a petition for study area waiver, a public notice shall be issued seeking comment on the petition. As is our usual practice, comments and reply comments will be due within 30 and 45 days, respectively, after release of the public notice. Absent any further action by the Bureau, the waiver will be deemed granted on the 60th day after the reply comment due date. Additionally, any study area waiver related waiver requests that petitioners routinely include in petitions for study area waiver and we routinely grant – such as requests for waiver of sections 69.3(e)(11) (to include any acquired lines in the NECA pool) and 69.605(c) (to remain an average schedule company after an acquisition of exchanges) – will also be deemed granted on the 60th day after the reply comment due date absent any further action by the Bureau.<sup>442</sup> Should the Bureau have concerns with any aspect of the petition for study area waiver or related waivers, however, the Bureau may issue a second public notice stating that the petition will not be deemed granted on the 60th day after the reply comment due date and is subject to further analysis and review.<sup>443</sup>

**c. Revising the “Parent Trap” Rule, Section 54.305**

268. *Background.* Section 54.305(b) of the Commission's rules provides that a carrier acquiring exchanges from an unaffiliated carrier shall receive the same per-line levels of high-cost universal service support for which the acquired exchanges were eligible prior to their transfer.<sup>444</sup> The Commission adopted section 54.305 to discourage a carrier from placing unreasonable reliance upon potential

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<sup>439</sup> See *id.* at 4630, para. 219.

<sup>440</sup> See *id.*; 47 C.F.R. §§ 63.03-04.

<sup>441</sup> 47 C.F.R. § 63.03.

<sup>442</sup> 47 C.F.R. §§ 69.3(e)(11) and 69.605(c). Requests for waiver of section 54.305 are not routinely granted because such requests require a high degree of analysis. See *United-Twin Valley Order*, 21 FCC Rcd at 10117, n. 45.

<sup>443</sup> See Appendix A for new rules.

<sup>444</sup> 47 C.F.R. § 54.305(b). This rule applies to high-cost loop support and local switching support. A carrier's acquired exchanges, however, may receive additional support pursuant to the Commission's “safety valve” mechanism for additional significant investments. See 47 C.F.R. § 54.305(d)-(f). Since 2005, safety valve support has ranged from an annual low of \$700,000 to a projected high of \$6.2 million for 2011. See 2010 Universal Service Monitoring Report at Table 3.8; USAC 2Q 2011 Filing, Appendices at HC01. A carrier acquiring exchanges also may be eligible to receive ICLS, which is not subject to the limitations set forth in section 54.305(b). See 47 C.F.R. § 54.902.

universal service support in deciding whether to purchase exchanges or merely to increase its share of high-cost universal service support.<sup>445</sup>

269. We proposed in the *USF/ICC Transformation NPRM* to eliminate the unintended consequence of the operation of section 54.305 that some rural incumbent LECs receive support pursuant to section 54.305 that would not otherwise receive support or would receive lesser support based on their own actual costs.<sup>446</sup>

270. *Discussion.* We find that the proposed minor revision to the rule will better effectuate the intent of section 54.305 that incumbent LECs not purchase exchanges merely to increase their high-cost universal service support and should not dissuade any transactions that are in the public interest. Therefore, effective January 1, 2012, any incumbent LEC currently and prospectively subject to the provisions of section 54.305, that would otherwise receive no support or lesser support based on the actual costs of the acquired exchanges, will receive the lesser of the support pursuant to section 54.305 or support based on the acquired exchanges' own costs.<sup>447</sup>

271. We note that above, we freeze all support under our existing high-cost support mechanisms on a study area basis for price cap carriers and their rate-of-return affiliates, at 2011 levels, effective January 1, 2012.<sup>448</sup> Our modification of the operation of section 54.305 is not intended to reduce support levels for those companies; they will receive frozen high-cost support equal to the amount of support each carrier received in 2011 in a given study area, adjusted downward as necessary to the extent local rates are below the specified urban rate floor.

## 9. Limits on Total per Line High-Cost Support

272. *Background.* In the *USF/ICC Transformation NPRM*, we proposed to adopt a \$3,000 per year cap on total support per line for all companies, both incumbent LECs and competitive ETCs, operating in the continental United States.<sup>449</sup> Although the current HCLS mechanism is capped in the aggregate, there is no cap on the amount of high-cost loop support an individual incumbent LEC study

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<sup>445</sup> See *Universal Service First Report and Order*, 12 FCC Rcd at 8942-43, para. 308. Prior to the adoption of section 54.305 of the Commission's rules, the Common Carrier Bureau had approved several study area waivers relying on purported minimal increases in universal service support, and later the acquiring carriers subsequently received significant increases in universal service support. For example, in 1990 the Bureau approved a study area waiver in order to permit Delta Telephone Company (Delta) to change its study area boundaries in conjunction with its acquisition of Sherwood Telephone Company (Sherwood). Delta stated in its petition for waiver that it did not currently receive universal service support while Sherwood only received \$468 for 1989, and Delta stated that the acquisition would not skew high cost support in Delta's favor. The Bureau concluded that the merging of the two carriers could not have a substantial impact on the high cost support program. After completion of the merger, Delta's support grew from \$83,000 in 1991 to \$397,000 in 1993. See *Delta Telephone Company, Waiver of the Definition of "Study Area" contained in Part 36, Appendix-Glossary, of the Commission's Rules*, AAD 90-20, Memorandum Opinion and Order, 5 FCC Rcd 7100 (Com. Car. Bur. 1990). In another example, in the US West and Gila River Telecommunications, Inc. (Gila River) study area waiver proceeding, Gila River's high-cost support escalated from \$169,000 to \$492,000 from 1992 to 1993. See *US West Communications and Gila River Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" contained in Part 36, Appendix-Glossary, of the Commission's Rules*, AAD 91-2, Memorandum Opinion and Order, 7 FCC Rcd 2161 (Com. Car. Bur. 1992).

<sup>446</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4633, para. 227.

<sup>447</sup> See Appendix A for the revised rule.

<sup>448</sup> See *supra* para. 128.

<sup>449</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4626, para. 208.

area may receive. Further, there is no limit on support either in the aggregate or for an individual incumbent LEC study area for ICLS and LSS.

273. For calendar year 2010, out of a total of approximately 1,442 incumbent LEC study areas receiving support, fewer than twenty incumbents received more than \$3,000 per line annually (*i.e.*, more than \$250 monthly) in high-cost universal service support; all of those study areas were served by rate-of-return companies.<sup>450</sup> In addition, two competitive ETCs received support in 2010 in excess of \$3,000 per line annually. We sought comment on whether requiring American consumers and businesses, whose contributions support universal service, to pay more than \$3,000 annually or more than \$250 per month for a single phone line is consistent with fiscally responsible universal service reform. A number of commenters supported the proposed cap, while the State members of the Joint Board suggested that support should be capped at a lower amount, \$100 per line per month instead of \$250.<sup>451</sup>

274. *Discussion.* After consideration of the record, we find it appropriate to implement responsible fiscal limits on universal service support by immediately imposing a presumptive per-line cap on universal service support for all carriers, regardless of whether they are incumbents or competitive ETCs. For administrative reasons, we find that the cap shall be implemented based on a \$250 per-line monthly basis rather than a \$3,000 per-line annual basis because USAC disburses support on a monthly basis, not on an annual basis. We find that support drawn from limited public funds in excess of \$250 per-line monthly (not including any new CAF support resulting from ICC reform) should not be provided without further justification.

275. This rule change will be phased in over three years to ease the potential impact of this transition.<sup>452</sup> From July 1, 2012 through June 30, 2013, carriers shall receive no more than \$250 per-line monthly plus two-thirds of the difference between their uncapped per-line amount and \$250. From July 1, 2013 through June 30, 2014, carriers shall receive no more than \$250 per-line monthly plus one-third of the difference between their uncapped per-line amount and \$250. Beginning July 1, 2014, carriers shall receive no more than \$250 per-line monthly.

276. The Rural Associations argue that a cap on total annual per-line high-cost support should not be imposed without considering individual circumstances and that if such a cap is imposed only on non-tribal companies located in the contiguous 48 states, about 12,000 customers would experience rate increases of \$9.24 to \$1,200 per month and the overall effect would reduce high-cost disbursements by

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<sup>450</sup> See *id.* at 4626, para. 209; 2010 Disbursement Analysis; USAC High-Cost Disbursement Data, <http://www.usac.org/hc/tools/disbursements/default.aspx> (USAC High-Cost Disbursement Tool).

<sup>451</sup> The State Members of the Universal Service Joint Board argue that satellite-based broadband service is generally available for about \$80 per month, therefore, a \$100 limit per high-cost location would allow for some terrestrial service to receive a subsidy higher than the prevailing retail price of satellite service. See State Members *USF/ICC Transformation NPRM* Comments at 58-59. Ad Hoc, the Massachusetts DTC, CRUSIR, COMPTTEL, CTIA, Florida Commission, and Hawaiian Telecom all support a per-line cap. See Ad Hoc *USF/ICC Transformation NPRM* Comments at 22-25; Massachusetts DTC *USF/ICC Transformation NPRM* Comments at 9-10; CRUSIR *USF/ICC Transformation NPRM* Comments at 7; COMPTTEL *USF/ICC Transformation NPRM* Comments at 30; CTIA *USF/ICC Transformation NPRM* Comments at 16; Florida Commission *USF/ICC Transformation NPRM* Comments at 8-9; Hawaiian Telecom *USF/ICC Transformation NPRM* Comments at 6. GCI states that support should be applied to “contiguous” states, not the “continental” United States. GCI *USF/ICC Transformation NPRM* Comments at 30-31. JSI states that the State Members recommendation to limit support at \$100 per month is also arbitrary and unfair because it does not address the facts of terrain and vegetation that preclude the areas from receiving satellite service. See JSI *USF/ICC Transformation NPRM* Reply at 6.

<sup>452</sup> ICORE states that a \$3,000 per-line cap should be phased in gradually. ICORE *USF/ICC Transformation NPRM* Comments at 10.

less than \$15 million.<sup>453</sup> The Rural Associations also point out while that it is reasonable to ask whether it makes sense for USF to support extremely high per-line levels going forward, the Commission must consider the consequences of imposing such a limit on companies with high costs based on past investments.<sup>454</sup>

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.

278. We also recognize that there may be legitimate reasons why certain companies have extremely high support amounts per line. For example, some of these extremely high-cost study areas exist because states sought to ensure a provider would serve a remote area. We estimate that the cap we adopt today will affect companies serving approximately 5,000 customers, many of whom live in extremely remote and high-cost service territories.<sup>455</sup> That is, all of the affected study areas total just 5,000 customers. Therefore, as suggested by the Rural Associations,<sup>456</sup> we will consider individual circumstances when applying the \$250 per-line monthly cap. Any carrier affected by the \$250 per-line monthly cap may file a petition for waiver or adjustment of the cap that would include additional financial data, information, and justification for support in excess of the cap using the process we set forth below.<sup>457</sup> We do not anticipate granting any waivers of undefined duration, but rather would expect carriers to periodically re-validate any need for support above the cap. We also note that even if a carrier can demonstrate the need for funding above the \$250 per-line monthly cap, they are only entitled to the amount above the cap they can show is necessary, not the amount they were previously receiving.

279. Absent a waiver or adjustment of the \$250 per-line monthly cap, USAC shall commence reductions of the affected carrier's support to \$250 per-line monthly six months after the effective date of these rules. This six month delay should provide an opportunity for companies to make operational changes, engage in discussions with their current lenders, and bring any unique circumstances to the Commission's attention through the waiver process. To reach the \$250 per-line cap, USAC shall reduce support provided from each universal support mechanism, with the exception of LSS, based on the relative amounts received from each mechanism.<sup>458</sup>

## 10. Elimination of Support in Areas with 100 Percent Overlap

280. *Background.* We noted in the *USF/ICC Transformation NPRM* that in many areas of the country, "universal service provides more support than necessary to achieve our goals" by "subsidizing a competitor to a voice and broadband provider that is offering service without government assistance."<sup>459</sup> To address this inefficiency, we sought comment on NCTA's proposal "to reduce the amount of universal

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<sup>453</sup> See Rural Associations *USF/ICC Transformation NPRM* Comments at 45-46.

<sup>454</sup> *Id.* at 47.

<sup>455</sup> The number of affected customers is after all other reforms we adopt today.

<sup>456</sup> See Rural Associations *USF/ICC Transformation NPRM* Comments at 45-46.

<sup>457</sup> See *infra* paras. 539-544.

<sup>458</sup> For example, if the per-line cap is \$250 and an incumbent LEC would have received, prior to the application of a cap, \$300, \$200, and \$100 (\$600 total) in HCLS, LSS, and ICLS, respectively, HCLS, and ICLS would each absorb 75 percent, and 25 percent, respectively, of the \$350 in excess of the per-line cap of \$250.

<sup>459</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4559, para. 7.



service support provided to carriers in those areas of the country where there is extensive, unsubsidized facilities-based voice competition and where government subsidies no longer are needed to ensure that service will be made available to consumers.”<sup>460</sup> In addition, in the *August 3<sup>rd</sup> Public Notice*, we sought comment on the suggestion in the RLEC Plan to reduce an incumbent’s support if another facilities-based provider proves that it provides sufficient voice *and* broadband service to at least 95 percent of the households in the incumbent’s study area without any support or cross-subsidy.<sup>461</sup>

281. *Discussion.* We now adopt a rule to eliminate universal service support where an unsubsidized competitor<sup>462</sup> – or a combination of unsubsidized competitors – offers voice and broadband service throughout an incumbent carrier’s study area, and seek comment on a process to reduce support where such an unsubsidized competitor offers voice and broadband service to a substantial majority, but not 100 percent of the study area. Providing universal service support in areas of the country where another voice and broadband provider is offering high-quality service without government assistance is an inefficient use of limited universal service funds. We agree with commenters that “USF support should be directed to areas where providers would not deploy and maintain network facilities absent a USF subsidy, and not in areas where unsubsidized facilities-based providers already are competing for customers.”<sup>463</sup> For this reason, we exclude from the CAF areas that are overlapped by an unsubsidized competitor (*see infra* Section VII.C). Likewise, we do not intend to continue to provide current levels of high-cost support to rate-of-return companies where there is overlap with one or more unsubsidized competitors.<sup>464</sup>

282. At the same time, we recognize that there are instances where an unsubsidized competitor offers broadband and voice service to a significant percentage of the customers in a particular study area (typically where customers are concentrated in a town or other higher density sub-area), but not to the remaining customers in the rest of the study area, and that continued support may be required to enable the availability of supported voice services to those remaining customers.<sup>465</sup> In those cases, we agree with the Rural Associations that there should be a process to determine appropriate support levels.

283. Accordingly, we adopt a rule to phase out all high-cost support received by incumbent rate-of-return carriers over three years in study areas where an unsubsidized competitor – or a combination of unsubsidized competitors – offers voice and broadband service at speeds of at least 4 Mbps downstream/1

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<sup>460</sup> *Id.* at 4674, para. 391 (citing NCTA Petition for Rulemaking at I; Universal Service Reform Act of 2010, H.R. 5828, 111th Cong. (2010)).

<sup>461</sup> RLEC Plan at 51-56.

<sup>462</sup> *See supra* para. 103.

<sup>463</sup> Sprint Nextel *USF/ICC Transformation NPRM* Comments at 34-35. Sprint Nextel further expressed concern that “If providers are willing and able to serve an area without support, then USF subsidies to the incumbents in those locales serve only to deter competition and/or allow the subsidized provider to earn artificially inflated profits.” *Id.* at 35; *see also* Coalition for Rational Universal Service and Intercarrier Compensation Reform *USF/ICC Transformation NPRM* at 9 (“As a general rule, subsidies should not be given in order to allow a subsidized carrier to run a competitor out of town.”); NCTA *USF/ICC Transformation NPRM* Comments at 12; CTIA *USF/ICC Transformation NPRM* Comments at 26-27.

<sup>464</sup> Cincinnati Bell *August 3 PN Comments* at 14 (“[T]he Commission should strive for consistency in its approach to universal service; if it is going to deny support to some areas that have cable broadband service, it should treat all such areas similarly.”).

<sup>465</sup> CenturyLink *USF/ICC Transformation NPRM* Comments at 35.

Mbps upstream, and with latency and usage limits that meet the broadband performance requirements described above,<sup>466</sup> for 100 percent of the residential and business locations in the incumbent's study area.

284. The FNPRM seeks comment on the methodology and data for determining overlap. Upon receiving a record on those issues, we direct the Wireline Competition Bureau to publish a finalized methodology for determining areas of overlap and to publish a list of companies for which there is a 100 percent overlap. In study areas where there is 100 percent overlap, we will freeze the incumbent's high-cost support at its total 2010 support, or an amount equal to \$3,000 times the number of reported lines as of year end 2010, whichever is lower,<sup>467</sup> and reduce such support over three years (i.e. by 33 percent each year).<sup>468</sup> In addition, in the FNPRM, we seek comment on a process for determining support in study areas with less than 100 percent overlap.

#### **11. Impact of These Reforms on Rate-of-Return Carriers and the Communities They Serve**

285. We agree with the Rural Associations that "there is ... without question a need to modify certain of the existing universal service mechanism to enhance performance and improve sustainability."<sup>469</sup> We take a number of important steps to do so in this Order, and we are careful to implement these changes in a gradual manner so that our efforts do not jeopardize service to consumers or investments made consistent with existing rules. It is essential that we ensure the continued availability and affordability of offerings in the rural and remote communities served by many rate-of-return carriers. The existing regulatory structure and competitive trends have placed many small carriers under financial strain and inhibited the ability of providers to raise capital.<sup>470</sup>

286. Today, we reaffirm our commitment to these communities. We provide rate-of-return carriers the predictability of remaining under the legacy universal service system in the near-term, while giving notice that we intend to transition to more incentive-based regulation in the near future.<sup>471</sup> We also provide greater certainty and a more predictable flow of revenues than the status quo through our intercarrier compensation reforms, and set a total budget to direct up to \$2 billion in annual universal service (including CAF associated with intercarrier compensation reform) payments to areas served by rate-of-return carriers. We believe that this global approach will provide a more stable base going forward for these carriers, and the communities they serve.

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<sup>466</sup> See *supra* Section VI.B.

<sup>467</sup> For this purpose, "total 2010 support" is the amount of support disbursed to carrier for 2010, without regard to prior period adjustments related to years other than 2010 and as determined by USAC on January 31, 2011.

<sup>468</sup> Consistent with our discussion above, we do not disturb any existing state voice COLR obligations, and therefore carriers must satisfy those voice requirements as required by their state. For those states that still maintain voice COLR obligations, we encourage them to review their respective regulations and policies in light of the changes we adopt here today and revisit the appropriateness of maintaining those obligations for entities that no longer receive either state or federal high-cost universal service funding and where competitive services are available to consumers. See *supra* para. 1100.

<sup>469</sup> See Rural Associations *USF/ICC Transformation NPRM* Comments at i.

<sup>470</sup> See, e.g., CoBank *USF/ICC Transformation NPRM* Comments at 3-5; Letter from Jonathan Adelstein, Rural Utilities Service, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, *et al.*, Attach. (July 29, 2011) (*RUS Letter*); Letter from C. Douglas Jarrett, Rural Telephone Finance Cooperative, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, *et al.* (Aug. 10, 2011).

<sup>471</sup> We seek comment in the FNPRM on the Rural Associations' proposal for a broadband-focused CAF and in particular ask how we could modify that proposal to incorporate appropriate incentives for efficient investment and operations. See Rural Associations *USF/ICC Transformation NPRM* Comments at 7-38; See *infra* Section XVII (Further Notice of Proposed Rulemaking).

287. Today's package of universal service reforms is targeted at eliminating inefficiencies and closing gaps in our system, not at making indiscriminate industry-wide reductions. Many of the rules addressed today have not been comprehensively examined in more than a decade, and direct funding in ways that may no longer make sense in today's marketplace. By providing an opportunity for a stable 11.25 percent interstate return for rate-of-return companies, regardless of the necessity or prudence of any given investment, our current system imposes no practical limits on the type or extent of network upgrades or investment. Our system provides universal service support to both a well-run company operating as efficiently as possible, and a company with high costs due to imprudent investment decisions, unwarranted corporate overhead, or an inefficient operating structure.

288. In this Order, we take the overdue steps necessary to address the misaligned incentives in the current system by correcting program design flaws, extending successful safeguards, ensuring basic fiscal responsibility, and closing loopholes to ensure our rules reward only prudent and efficient investment in modern networks. Today's reforms will help ensure rate-of-return carriers retain the incentive and ability to invest and operate modern networks capable of delivering broadband as well as voice services, while eliminating unnecessary spending that unnecessarily limits funding that is available to consumers in high-cost, unserved communities.

289. Because our approach is focused on rooting out inefficiencies, these reforms will not affect all carriers in the same manner or in the same magnitude. After significant analysis, including review of numerous cost studies submitted by individual small companies and cost consultants,<sup>472</sup> NECA and USAC data, and aggregated information provided by the Rural Utilities Service (RUS) on their current loan portfolio,<sup>473</sup> we are confident that these incremental reforms will not endanger existing service to consumers. Further, we believe strongly that carriers that invest and operate in a prudent manner will be minimally affected by this Order.

290. Indeed, based on calendar year 2010 support levels, our analysis shows that nearly 9 out of 10 rate-of-return carriers will see reductions in high-cost universal service receipts of less than 20 percent annually, and approximately 7 out of 10 will see reductions of less than 10 percent.<sup>474</sup> In fact, almost 34 percent of rate-of-return carriers will see no reductions whatsoever, and more than 12 percent of providers will see an increase in high-cost universal service receipts. This, coupled with a stabilized path for ICC, will provide the predictability and certainty needed for new investment.

291. Looking more broadly at all revenues, we believe that the overall regulatory and revenue predictability and certainty for rate-of-return carriers under today's reforms will help facilitate access to capital and efficient network investment. Specifically, it is critical to underscore that legacy high-cost support is but one of four main sources of revenues for rate-of-return providers: universal service

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<sup>472</sup> See, e.g., JSI *Ex Parte* (filed Mar. 29, 2011); Fred Williamson & Associates, Inc. *Ex Parte* (filed May 19, 2011). We note that many of the carriers or their consultants presented an analysis of the reforms as proposed in the NPRM, assuming that the Commission would adopt all of the proposals. Because the package of reforms we adopt today is more modest than originally proposed, with a number of reforms phased in over a period of time, the impact is much less significant than those commenters projected.

<sup>473</sup> RUS *Ex Parte* (filed Aug. 8, 2011).

<sup>474</sup> In order to analyze the impact of reforms, Commission staff estimated the dollar impact of each individual rule change on every cost company for which it had data, using the most recently available disbursement and cost data. Commission staff utilized data from both NECA and USAC. See e.g., National Exchange Carrier Assoc., Inc., Universal Service Fund Data: NECA Study Results, 2010 Report (filed Sept. 30, 2011); USAC High-Cost Disbursement Tool. Staff then summed the individual change in support amounts (positive or negative) across the individual programs to derive a company-specific net change, both in actual dollars and on a percentage basis. For calculations involving changes to HCLS, estimates did not take into account the effect of the shift in the national average cost per line resulting from all rule changes; actual impacts therefore could vary slightly.

revenues account for approximately 30 percent of the typical rate-of-return carrier's total revenues.<sup>475</sup> Today's action does not alter a provider's ability to collect regulated or unregulated end-user revenues, and comprehensively reforms the fourth main source of revenues, the intercarrier compensation system. Importantly, ICC reforms will provide rate-of-return carriers with access to a new explicit recovery mechanism in CAF, offering a source of stable and certain revenues that the current intercarrier system can no longer provide.<sup>476</sup> Taking into account these other revenue streams, and the complete package of reforms, we believe that rate-of-return carriers on the whole will have a stronger and more certain foundation from which to operate, and, therefore, continue to serve rural parts of America.

292. We are, therefore, equally confident that these reforms, while ensuring significant overall cost savings and improving incentives for rational investment and operation by rate-of-return carriers, will in general not materially impact the ability of these carriers to service their existing debt. Based on an analysis of the reform proposals in the Notice, RUS projects that the Times Interest Earned Ratio (TIER) for some borrowers could fall below 1.0, which RUS considers a minimum baseline level for a healthy borrower.<sup>477</sup> However, the package of reforms adopted in this Order is more modest than the set proposed in the Notice. In addition, companies may still have positive cash flow and be able to service their debt even with TIERs of less than 1.0.<sup>478</sup> Indeed of the 444 RUS borrowers in 2010, 75 (17 percent) were below TIER 1.0.<sup>479</sup> Moreover, whereas RUS assumed that all USF reductions directly impact borrowers' bottom lines, in fact we expect many borrowers affected by our reforms will be able to achieve operational efficiencies to reduce operating expenses, for instance, by sharing administrative or operating functions with other carriers, and thereby offset reductions in universal service support.

293. We, therefore, reject the sweeping argument that the rule changes we adopt today would unlawfully necessarily affect a taking.<sup>480</sup> Commenters seem to suggest that they are entitled to continued USF support as a matter of right. Precedent makes clear, however, that carriers have no vested property interest in USF. To recognize a property interest, carriers must "have a legitimate claim of entitlement to" USF support.<sup>481</sup> Such entitlement would not be established by the Constitution, but by independent sources of law.<sup>482</sup> Section 254 does not expressly or impliedly provide that particular companies are

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<sup>475</sup> See Western Telecommunications Alliance Comments in re NBP PN #19 (*Comment Sought on the Role of the Universal Service Fund and Intercarrier Compensation in the National Broadband Plan*, GN Docket No. 09-47, 09-51, 09-137, Public Notice, 24 FCC Rcd 13757 (WCB 2009) (*NBP PN #19*)) at 25, 27 (filed Dec. 7, 2009) (stating that for small rural LECs, high cost represents 30–40 percent of regulated revenues); RUS *Ex Parte* (filed Aug. 1, 2011), Attach. at slide 24 (stating that over 70 percent of RUS borrowers receive greater than 25 percent of operating revenues from USF).

<sup>476</sup> See *infra* section XII (Comprehensive Intercarrier Compensation Reform).

<sup>477</sup> RUS indicates that over a five-year horizon, it expects borrowers to maintain a minimum 1.25 TIER ratio. RUS *Ex Parte* (filed Aug. 1, 2011), Attach. at slides 18-21.

<sup>478</sup> *Id.* at slide 18. The RUS modeling assumed a percentage loss of USF support and then analyzed the impact on borrowers, but the analysis did not include the possibility that borrowers' profits could rise through increased revenues and profits from non-regulated services, or other possible sources of revenues, *e.g.*, by raising artificially low rates.

<sup>479</sup> *Id.* at slide 26.

<sup>480</sup> Alexicon *USF/ICC Transformation NPRM* Comments at 25-29; SureWest *USF/ICC Transformation NPRM* Reply at 2.

<sup>481</sup> *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

<sup>482</sup> *Id.*; see also *Members of the Peanut Quota Holders Assoc. v. U.S.*, 421 F.2d 1323, 1334 (Fed. Cir. 2005), *cert. denied*, 548 U.S. 904 (2006) (finding that congressional action amending peanut quota program to exclude prior beneficiaries from that program did not effect a takings because "peanut quota is entirely the product of a (continued...)").

entitled to ongoing USF support. Indeed, there is no statutory provision or Commission rule that provides companies with a vested right to continued receipt of support at current levels, and we are not aware of any other, independent source of law that gives particular companies an entitlement to ongoing USF support. Carriers, therefore, have no property interest in or right to continued USF support.<sup>483</sup>

294. Additionally, carriers have not shown that elimination of USF support will result in confiscatory end-user rates. To be confiscatory, government-regulated rates must be so low that they threaten a regulated entity's "financial integrity"<sup>484</sup> or "destroy the value" of the company's property.<sup>485</sup> Carriers face a "heavy burden" in proving confiscation as a result of rate regulation.<sup>486</sup> To the extent that any rate-of-return carrier can effectively demonstrate that it needs additional support to avoid constitutionally confiscatory rates, the Commission will consider a waiver request for additional support.<sup>487</sup> We will seek the assistance of the relevant state commission in review of such a waiver to the extent that the state commission wishes to provide insight based on its understanding of the carrier's activities and other circumstances in the state. We do not expect to routinely grant requests for additional support, but this safeguard is in place to help protect the communities served by rate-of-return carriers.

#### **E. Rationalizing Support for Mobility**

295. Mobile voice and mobile broadband services are increasingly important to consumers and to our nation's economy. Given the important benefits of and the strong consumer demand for mobile services, ubiquitous mobile coverage must be a national priority. Yet despite growth in annual funding (Continued from previous page) \_\_\_\_\_

government program unilaterally extending benefits to the quota holders, and nothing in the terms of the statute indicated that the benefits could not be altered or extinguished at the government's election").

<sup>483</sup> Moreover, even if we were to recognize a property interest in USF support, our action today would not result in a taking in circumstances such as these, where the "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central Transportation v. New York City*, 438 U.S. 104, 124 (1978); *see also Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 225 (1986). The "purpose of universal service is to benefit the customer, not the carrier." *Rural Cellular Association v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) (quoting *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 621 (5th Cir. 2000)). As we have made clear, our national goal is to advance broadband availability while preserving the voice and broadband service that exists today, and this objective would be achieved more effectively by revising our current rules and adjusting support amounts for particular recipients, balancing the principles set forth in section 254(b). The Commission has discretion to balance competing section 254(b) principles. *Qwest Communications Intern., Inc. v. FCC*, 298 F.3d 1222, 1234 (10<sup>th</sup> Cir. 2005) ("The FCC may exercise its discretion to balance the principles against one another when they conflict, but may not depart from them altogether to achieve some other goal."). Thus, the Commission may balance the principles posited in section 254(b)(3) ("Access to advanced telecommunications and information services should be provided in all regions of the Nation") and (b)(4) ("Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services" at rates that are reasonably comparable to urban rates) with the principle in section 254(b)(5) principle ("There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service"). Nothing in the Takings Clause or section 254 precludes the Commission from such reasoned decision making, even if it means taking support away from some current support recipients. The requirement that support should be "specific, predictable and sufficient" does not mean that support levels can never change and does not establish a right to the funding.

<sup>484</sup> *Illinois Bell Tel. Co. v. FCC*, 988 F.2d 1254, 1263 (D.C. Cir. 1993).

<sup>485</sup> *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989).

<sup>486</sup> *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944).

<sup>487</sup> *See infra* paras. 539-544.

for competitive ETCs of almost 1000 percent over the past decade—from less than \$17 million in 2001 to roughly \$1.22 billion in 2010<sup>488</sup>—there remain many areas of the country where people live, work, and travel that lack any mobile voice coverage, and still larger geographic areas that lack current generation mobile broadband coverage. To increase the availability of current generation mobile broadband, as well as mobile voice, across the country, universal service funding for mobile networks must be deployed in a more targeted and efficient fashion than it is today.

296. It is clear that the current system does not efficiently serve the nation. In 2008, the Commission concluded that rapid growth in support to competitive ETCs as a result of the identical support rule threatened the sustainability of the universal service fund.<sup>489</sup> Further, it found that providing the same per-line support amount to competitive ETCs had the consequence of encouraging wireless competitive ETCs to supplement or duplicate existing services while offering little incentive to maintain or expand investment in unserved or underserved areas.<sup>490</sup> As a consequence, the Commission adopted an interim state-by-state cap on high-cost support for competitive ETCs, subject to two exceptions, pending comprehensive high-cost universal service reform.<sup>491</sup>

297. The interim cap slowed the growth in competitive ETC funding, but it did not address where such funding is directed or whether there are better ways to achieve our goal of advancing mobility in areas where such service would not exist absent universal service support. Many areas are served by multiple wireless competitive ETCs that likely are competing with each other.<sup>492</sup> In other areas of the country, mobile coverage is lacking, and there may be no firms willing to enter the market, even at current support levels.

298. Today we adopt reforms that will secure funding for mobility directly, rather than as a side-effect of the competitive ETC system, while rationalizing how universal service funding is provided to

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<sup>488</sup> *Interim Cap Order*, 23 FCC Rcd at 8837-38, para. 6 (noting growth from \$17 million in 2001 to \$1.18 billion in 2007); *2010 Disbursement Analysis*.

<sup>489</sup> Section 54.307 of the Commission's rules, also known as the "identical support rule," provides competitive ETCs the same per-line amount of high-cost universal service support as the incumbent local exchange carrier serving the same area. 47 C.F.R. § 54.307.

<sup>490</sup> *Interim Cap Order*, 23 FCC Rcd at 8843-44, paras. 20-21.

<sup>491</sup> *Id.* at 8837, para. 5. Specifically, the Commission capped support for competitive ETCs in each state at the total amount of support for which all competitive ETCs serving the state were eligible to receive in March 2008, annualized. *Id.* at 8846, paras. 26-28. The *Interim Cap Order* included exceptions for competitive ETCs serving Tribal lands and Alaska Native regions ("covered locations") and for competitive ETCs submitting cost studies demonstrating their own high costs of providing service. *Id.* at 8848-49, paras. 31-33. The interim cap for competitive ETCs was set at \$1.36 billion. See Letter from Sharon Gillett, Chief, Wireline Competition Bureau, to Karen Majcher, USAC, WC Docket No. 05-337, DA 11-243 (dated Feb. 8, 2011). Actual disbursements to competitive ETCs in 2010 were approximately \$1.22 billion. *2010 Disbursement Analysis*. Actual competitive ETC disbursements vary from the interim cap amount for two reasons. First, true-ups and other out-of-period adjustments sometimes result in disbursements in a year other than the one against the payments apply for interim cap purposes. Second, some states have seen a reduction in demand for competitive ETC support since the cap was established and, as a result, total support disbursed is less than the interim cap amount.

<sup>492</sup> See Federal Communications Commission Response to United States House of Representatives Committee on Energy and Commerce, Universal Service Fund Data Request of June 22, 2011, Request 7: Study Areas with the Most Eligible Telecommunications Carriers (Table 1: Study Areas with the Most Eligible Telecommunications Carriers in 2010), available at <http://republicans.energycommerce.house.gov/Media/file/PDFs/2011usf/ResponsetoQuestion7.pdf>. (FCC Response to House Energy and Commerce Committee). Ten incumbent study areas have 11 or more competitive ETCs, albeit not necessarily serving overlapping service areas within the incumbent study areas. *Id.*

ensure that it is cost-effective and targeted to areas that require public funding to receive the benefits of mobility. While we proposed providing support to a single fixed or mobile service provider, many commenters supported the establishment of separate fixed and mobile programs.<sup>493</sup> As described above, we establish ubiquitous availability of mobile services as a universal service goal.<sup>494</sup>

299. To accomplish this goal, we establish the Mobility Fund. The first phase of the Mobility Fund will provide one-time support through a reverse auction, with a total budget of \$300 million, and will provide the Commission with experience in running reverse auctions for universal service support. We expect to distribute this support as quickly as feasible, with the goal of holding an auction in 2012, with support beginning to flow no later than 2013. As part of this first phase, we also designate an additional \$50 million for one-time support for advanced mobile services on Tribal lands, for which we expect to hold an auction in 2013. The second phase of the Mobility Fund will provide ongoing support for mobile service with the goal of holding the auction in the third quarter of 2013 and support disbursed starting in 2014, with an annual budget of \$500 million.<sup>495</sup> This dedicated support for mobile service supplements the other competitive bidding mechanisms under the Connect America Fund.<sup>496</sup>

300. In the remainder of this section, we establish Phase I of the Mobility Fund and the dedicated Tribal Mobility Fund, each providing for one-time support; establish the budget for Phase II of the Mobility Fund to provide ongoing support; and establish the transition from the identical support rule to these new dedicated funding mechanisms for mobility. In the FNPRM, we seek comment on specific proposals to determine and distribute ongoing support in Phase II of the Mobility Fund, including proposals to target dedicated funding to Tribal lands.

## **1. Mobility Fund Phase I**

### **a. Introduction and Background**

301. Millions of Americans live in communities where current-generation mobile service is unavailable, and millions more work in or travel through such areas. In order to help ensure the availability of mobile broadband across America, we establish the Mobility Fund. In the three decades since the Commission issued the first cellular telephone licenses, the wireless industry has continually expanded and upgraded its networks to the point where third generation (often called “advanced” or “3G”) mobile wireless services are now widely available.<sup>497</sup> Such services typically include both voice

<sup>493</sup> In the *USF/ICC Transformation NPRM*, we proposed moving to a long-term CAF that would provide ongoing support for a single mobile or fixed broadband provider in any given geographic area, but also sought comment on creating separate programs to support mobile and fixed services. *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4697-701, paras. 479-89. AT&T *USF/ICC Transformation NPRM* Comments at 87, 108; Mid-Rivers *USF/ICC Transformation NPRM* Reply at 14; Nebraska Commission *USF/ICC Transformation NPRM* Comments at 17; Rural Associations *USF/ICC Transformation NPRM* Comments at 83; RICA *USF/ICC Transformation NPRM* Comments, at 4; South Dakota Public Utilities Commission *USF/ICC Transformation NPRM* Reply at 5; TCA *USF/ICC Transformation NPRM* Comments, at 15-16; T-Mobile *USF/ICC Transformation NPRM* Comments at 2, 4-6; US Cellular *USF/ICC Transformation NPRM* Comments, at 10-11. See also *Joint Board 2007 Recommended Decision*, 22 FCC Rcd 20477 (recommending establishment of a separate Mobility Fund).

<sup>494</sup> See *supra* para. 53.

<sup>495</sup> See *infra* para. 481.

<sup>496</sup> See *supra* section VII.C.2.

<sup>497</sup> In this Order, we use the terms “current generation,” “3G,” and “advanced” interchangeably to refer to mobile wireless services that provide voice telecommunications service on networks that also provide data services such as Internet access. The meaning of “advanced” in this context is constantly evolving. We expect that some would include 4G today and that, in the near future, 4G and subsequent technologies also will be within the meaning of “advanced” mobile services.

telecommunications service and Internet access. However, significant mobility gaps remain a problem for residents, public safety first responders, businesses, public institutions, and travelers, particularly in rural areas. Such gaps impose significant disadvantages on those who live, work, and travel in these areas. Today's Order seeks to address these gaps.

302. The Mobility Fund builds on prior proposals for modernizing the structure and operation of the USF. It was the Federal-State Joint Board on Universal Service ("Joint Board") that first recognized the importance of directly addressing the infrastructure needs in areas unserved by mobile service, and in the 2007 *Recommended Decision*, the Joint Board recommended that the Commission establish a Mobility Fund.<sup>498</sup> In the *Recommended Decision*, the Joint Board acknowledged that the universal availability of mobile services was a national priority and proposed that a Mobility Fund be created to subsidize the costs of construction of new facilities in "unserved" areas where significant population density lacked wireless voice service.<sup>499</sup> The Joint Board also contemplated that funds would be available to construct facilities along roads and highways, to advance important public safety interests.<sup>500</sup> Finally, the Joint Board recommended that some funds be made available – at least for some limited period of time – to provide continuing operating subsidies to carriers where service is essential but where usage is so slight that there is not a business case to support ongoing operations, even with substantial support for construction.<sup>501</sup>

303. Following on the Joint Board's work, the *National Broadband Plan* recommended a Mobility Fund in connection with broader reforms of the USF.<sup>502</sup> The plan recommended targeted, one-time support for deployment of 3G infrastructure in order to bring all states to a minimum level of mobile service availability, without increasing the size of the USF.

304. In the *USF Reform NOI/NPRM*, the Commission sought comment on the use of a form of procurement auction to determine and target one-time subsidies for deployment of broadband-capable networks in areas unserved by such networks.<sup>503</sup> In the *Mobility Fund NPRM*, the Commission outlined a process by which it would solicit bids for support by providers willing to expand current generation wireless networks into areas without such service.<sup>504</sup>

305. Following the release of the *Mobility Fund NPRM*, the Wireless Bureau released a Public Notice seeking comment on a series of more detailed questions focused on how to facilitate service to Tribal lands.<sup>505</sup> The Public Notice proposed various mechanisms by which Tribal governments might help shape the outcome of an auction to bring mobile services to Tribal lands.

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<sup>498</sup> See *Recommended Decision*, 22 FCC Rcd at 20,482, paras. 16-18.

<sup>499</sup> *Id.* at 20,478, para. 4, 20,482, para. 16.

<sup>500</sup> *Id.* at 20,482, para. 16.

<sup>501</sup> *Id.* at 20,482 para. 16, 20,486, para. 38.

<sup>502</sup> National Broadband Plan at 146.

<sup>503</sup> *USF Reform NOI/NPRM*, 25 FCC Rcd at 6674-76, paras. 43-48.

<sup>504</sup> See, generally, *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, Notice of Proposed Rulemaking, 25 FCC Rcd 14,716 (2010) (*Mobility Fund NPRM*).

<sup>505</sup> *Further Inquiry into Tribal Issues Relating to Establishment of a Mobility Fund*, WT Docket No. 10-208, Public Notice, 26 FCC Rcd 5997 (Wireless Telecom. Bur. 2011) (*Tribal Mobility Fund Public Notice*).



**b. Overall Design of Mobility Fund Phase I****(i) Legal Authority**

306. We have discussed above the Commission's authority to provide universal service funding to support the provision of voice telephony services. We explained that, pursuant to our statutory authority, we may require that universal service support be used to ensure the deployment of broadband networks capable of offering not only voice telephony services, but also advanced telecommunications and information services, to all areas of the nation, as contemplated by the principles set forth in section 254(b) of the Act. In this section, we apply our legal analysis of our statutory authority to the establishment of Phase I and II of the Mobility Fund.<sup>506</sup> We note that multiple commenters support our authority to extend universal service support to providers of mobile services.<sup>507</sup>

307. As an initial matter, it is wholly apparent that mobile wireless providers offer "voice telephony services" and thus offer services for which federal universal support is available. Furthermore, wireless providers have long been designated as ETCs eligible to receive universal service support. Nonetheless, a number of parties responding to the *Mobility Fund NPRM* question the Commission's authority to establish the Mobility Fund as described below.<sup>508</sup> We reject those arguments for the reasons stated below.

308. First, we reject the argument that we may not support mobile networks that offer services other than the services designated for support under section 254. As we have already explained, under our longstanding "no barriers" policy, we allow carriers receiving high-cost support "to invest in infrastructure capable of providing access to advanced services" as well as supported voice services.<sup>509</sup> Moreover, section 254(e)'s reference to "facilities" and "services" as distinct items for which federal universal service funds may be used demonstrates that the federal interest in universal service extends not only to supported services but also the nature of the facilities over which they are offered. Specifically, we have an interest in promoting the deployment of the types of facilities that will best achieve the principles set forth in section 254(b) (and any other universal service principle that the Commission may adopt under section 254(b)(7)), including the principle that universal service program be designed to bring advanced telecommunications and information services to all Americans, at rates and terms that are comparable to the rates and terms enjoyed in urban areas. Those interests are equally strong in the

<sup>506</sup> The prior discussion of the Commission's legal authority to support networks capable of offering voice and broadband addresses some of the arguments commenters made in response to the *Mobility Fund NPRM*. For example, Cellular South contended in comments responding to the *Mobility Fund NPRM* that the proposal violated a statutory mandate to support competition together with universal service. See Cellular South et al. *Mobility Fund NPRM* Comments at 17-19. As noted above in the discussion of the Commission's general legal authority, our proposals today further both competition and universal service. See *supra* paras. 68-69.

<sup>507</sup> See, e.g., TIA *Mobility Fund NPRM* Comments at 2, 6-7; Verizon *Mobility Fund NPRM* Comments at 6-7; Verizon *Mobility Fund NPRM* Reply at 3, 12-13, and 15.

<sup>508</sup> Apart from the Commission's authority to establish a Mobility Fund, several parties also dispute the Commission's authority to fund it from reserve USF funds that were relinquished by Verizon Wireless and Sprint. See, e.g., MTPCS *Mobility Fund NPRM* Comments at 6-8; RCA *Mobility Fund NPRM* Comments at 11-12; USA Coalition *Mobility Fund NPRM* Comments at 25-26; US Cellular *Mobility Fund NPRM* Comments at 16-18; SouthernLINC *Mobility Fund NPRM* Reply at 5-6. We address and reject those arguments elsewhere. See *infra* Appendix F.

<sup>509</sup> *Rural Task Force Order*, 16 FCC Rcd at 11,322, para. 200 ("[U]se of support to invest in infrastructure capable of providing access to advanced services does not violate section 254(e), which mandates that support be used 'only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.' The public switched telephone network is not a single-use network. Modern network infrastructure can provide access not only to voice services, but also to data, graphics, video, and other services.") (footnote omitted).

wireless arena. We thus conclude that USF support may be provided to networks, including 3G and 4G wireless services networks, that are capable of providing additional services beyond supported voice services.<sup>510</sup>

309. For similar reasons, we reject arguments made by MetroPCS, NASUCA, and US Cellular that the Mobility Fund would impermissibly support an “information service;”<sup>511</sup> by Free Press and the Florida Commission that establishment of the Mobility Fund would violate section 254 because mobile data service is not a supported service;<sup>512</sup> and by various parties that section 254(c)(1) prohibits funding for services to which a substantial majority of residential customers do not subscribe.<sup>513</sup> All of these arguments incorrectly assume that the Mobility Fund will be used to support mobile data service as a supported service in its own right. To the contrary, the Mobility Fund will be used to support the provision of “voice telephony service” and the underlying mobile network. That the network will also be used to provide information services to consumers does not make the network ineligible to receive support; to the contrary, such use directly advances the policy goals set forth in section 254(b), our new universal service principle recommended by the Joint Board, as well as section 706.<sup>514</sup>

310. We also reject the argument that the Mobility Fund violates the principle in section 254(b)(5) that “[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.”<sup>515</sup> Commenters argue that non-recurring funding won in a reverse auction is not “predictable” because the final amount of support is not known in advance of the bidding or “sufficient” because non-recurring funding will not meet recurring costs.<sup>516</sup> We disagree. The terms “predictable” and “sufficient” modify “Federal and State mechanisms.” Here, our reverse auction rules establish a predictable mechanism to support universal service in that the carrier receiving support has notice of its rights and obligations before it undertakes to fulfill its universal service obligations.<sup>517</sup> Moreover, this interpretation of the statute was upheld by the Fifth Circuit’s decision in *Alenco Commc’ns v. FCC*.<sup>518</sup> In determining whether certain universal service distribution mechanisms were “predictable,” as required by section 254(b)(5), the *Alenco* court found that “the Commission reasonably

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<sup>510</sup> *Rural Task Force Order*, 16 FCC Rcd at 11,322, para. 199 (“[O]ur universal service policies should not inadvertently create barriers to the provision of access to advanced services.”).

<sup>511</sup> See MetroPCS *Mobility Fund NPRM* Comments at 4-5; NASUCA *Mobility Fund NPRM* Comments at 3; US Cellular *Mobility Fund NPRM* Comments at 6, 10. Cf. USA Coalition *Mobility Fund NPRM* Comments at 4 (“wireless networks are an integrated facility capable of providing both supported telecommunications services as well as information services.”).

<sup>512</sup> Free Press *Mobility Fund NPRM* Comments at 2; Florida Commission *Mobility Fund NPRM* Reply at 2-3.

<sup>513</sup> Free Press *Mobility Fund NPRM* Comments at 2; USA Coalition *Mobility Fund NPRM* Comments at 5-6, 8; Benton et al. *Mobility Fund NPRM* Reply at 3; USA Coalition *Mobility Fund NPRM* Reply at 7-8. Compare HITN *Mobility Fund NPRM* Reply at 3 (“majority of Americans do indeed have access to mobile broadband services”).

<sup>514</sup> 47 U.S.C. § 254(b). Because we are not designating mobility as a supported service, we need not concern ourselves with RICA’s argument that doing so could jeopardize existing support to incumbent LECs and wireline competitive ETCs not offering mobility. RICA *Mobility Fund NPRM* Reply at 3. RICA’s argument is premised on 47 U.S.C. § 214(e)(1)(A), which requires ETCs to offer all supported services throughout their service territory. *Id.*

<sup>515</sup> 47 U.S.C. § 254(b)(5).

<sup>516</sup> Cellular South et al. *Mobility Fund NPRM* Comments at 19; RTG *Mobility Fund NPRM* Comments at 5; USA Coalition *Mobility Fund NPRM* Reply at 6.

<sup>517</sup> See Verizon *Mobility Fund NPRM* Reply at 13.

<sup>518</sup> *Alenco Communications et al. v. FCC*, 201 F.3d 608 (5th Cir. 2000).

construed the predictability principle to require only predictable rules that govern *distribution* of subsidies....<sup>519</sup>

311. Our mechanism is also “sufficient.” The auction process is effectively a self-selecting mechanism: Bidders are presumed to understand that Mobility Fund Phase I will provide one-time support, that bidders will face recurring costs when providing service, and that they must tailor their bid amounts accordingly. We decline to interpret the “sufficiency” requirement so broadly as to require the Commission to guarantee that carriers who receive support make the correct business judgments in deciding how to structure their bids or their service offerings to consumers.

312. Cellular South contends that “by collecting USF contributions from all ETCs and awarding distributions to only a limited set of ETCs, support auctions would transform the Fund into an unconstitutional tax.”<sup>520</sup> Again, we disagree. As the Supreme Court has explained, “a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a ‘Bil[l] for raising Revenue’ within the meaning of the Origination Clause.”<sup>521</sup> This analysis clearly applies to the sections of the Telecommunications Act of 1996 authorizing the Universal Service Fund, including the Mobility Fund. Moreover, we conclude that the Fifth Circuit’s analysis of this issue with respect to paging carriers applies equally to all carriers. As that court explained: “universal service contributions are part of a particular program supporting the expansion of, and increased access to, the public institutional telecommunications network. Each paging carrier directly benefits from a larger and larger network and, with that in mind, Congress designed the universal service scheme to exact payments from those companies benefiting from the provision of universal service.”<sup>522</sup> Finally, as Verizon notes, there is always likely to be a disparity between the contributions parties make to the USF and the amounts that they receive from the USF.<sup>523</sup> Indeed, section 254(d) requires contributions from “every telecommunications carrier that provides interstate telecommunications services,” not just ETCs or funding recipients.<sup>524</sup>

## (ii) Size of Mobility Fund Phase I

313. *Background.* In the *Mobility Fund NPRM*, the Commission proposed to use \$100 million to \$300 million in USF high-cost universal service support to fund, on a one-time basis, the expansion of current-generation mobile wireless services through creation of the Mobility Fund.<sup>525</sup> The

<sup>519</sup> *Alenco*, 201 F.3d at 623 (emphasis added); see also *id.* at 622 (explaining that universal service support for high-cost loops was “predictable” because “[t]he methodology governing subsidy *disbursements* [wa]s plainly stated and made available to LECs.”) (emphasis added).

<sup>520</sup> Cellular South et al. *Mobility Fund NPRM* Comments at 16.

<sup>521</sup> *United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990).

<sup>522</sup> See *Texas Office of Public Utility Counsel et al. v. FCC*, 183 F.3d 393, 428 (5th Circ. 1999) (rejecting argument of paging carriers that collecting contributions from them for universal service violates the Origination Clause). The Fifth Circuit also concluded, in dicta, that contributions under the Universal Service Fund are fees and not taxes, for purposes of the Taxation Clause. *Id.* at n.52.

<sup>523</sup> Verizon *Mobility Fund NPRM* Reply at 13. There is no statutory or regulatory requirement that ETCs derive a benefit from the program equivalent to their contributions to USF. Moreover, USF contributions typically are collected by ETCs directly from consumers, as a separate line item, on consumers’ phone bills. As such, the benefits of USF rightly flow to consumers, as contemplated by section 254.

<sup>524</sup> 47 U.S.C. § 254(d). For the same reason, we disagree with Cellular South that auctions would be “inequitable and discriminatory” in violation of section 254(d). Cellular South et al. *Mobility Fund NPRM* Comments at 17. Nothing in that section suggests that contributors are entitled to USF disbursements.

<sup>525</sup> *Mobility Fund NPRM*, 25 FCC Red at 14,722, para. 13.

Commission noted that the ultimate impact of any amount of support would depend on a variety of factors, including the extent to which non-recurring funding makes it possible to offer service profitably in areas previously uneconomic to serve and the extent to which new customers adopt services newly made available.<sup>526</sup> The *Mobility Fund NPRM* sought comment on what amount was optimal to provide effective, targeted support to expand coverage within a relatively short timeframe to those areas without current-generation networks where build out of such networks may be accelerated with one-time assistance.<sup>527</sup>

314. *Discussion.* We conclude that \$300 million is an appropriate amount for one-time Mobility Fund Phase I support, and is consistent with our goal of swiftly extending current generation wireless coverage in areas where it is cost effective to do so with one-time support. We believe that there are unserved areas for which such support will be useful, and that competition among wireless carriers for support to serve these areas will be sufficient to ensure that the available funds are distributed efficiently and effectively. We agree with those commenters that suggest a one-time infusion of \$300 million will achieve significant benefits, while at the same time ensuring adequate universal service monies are available for other priorities, including broader reform initiatives to address ongoing support.<sup>528</sup> We also note that, consistent with a number of comments filed in response to the *Mobility Fund NPRM*,<sup>529</sup> we are deciding to provide significant ongoing support for mobile services through our Mobility Fund Phase II. We recognize that a number of commenters, in responding to the *Mobility Fund NPRM*, contend that the originally proposed range of \$100-\$300 million in one-time support for the Mobility Fund would not be sufficient to achieve ubiquitous deployment of mobile broadband.<sup>530</sup> We find, however, that \$300 million

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<sup>526</sup> *Id.* at 14,722, para. 14.

<sup>527</sup> *Id.*

<sup>528</sup> See, e.g., Verizon *Mobility Fund NPRM* Comments at 5; ACA *Mobility Fund NPRM* Reply at 4. See also CWA *Mobility Fund NPRM* Comments at 2-4 (limit one-time support to reserve USF support for more comprehensive reform); Windstream *Mobility Fund NPRM* Comments at 4-6 (Mobility Fund should serve as complement to CAF).

<sup>529</sup> See, e.g., Alaska Telephone *Mobility Fund NPRM* Comments at 2; CTIA *Mobility Fund NPRM* Comments at 6-11; ITTA *Mobility Fund NPRM* Comments at 3-4; RTG *Mobility Fund NPRM* Comments at 5-6; Texas Statewide *Mobility Fund NPRM* Comments at 6-7; TIA *Mobility Fund NPRM* Comments at 2-9; T-Mobile *Mobility Fund NPRM* Comments at 5; USA Coalition *Mobility Fund NPRM* Comments at 20-22; Alaska Governor *Mobility Fund NPRM* Reply at 2; CTIA *Mobility Fund NPRM* Reply at 4-5; GCI *Mobility Fund NPRM* Reply at 6; RCA *Mobility Fund NPRM* Reply at 4-5; SouthernLINC *Mobility Fund NPRM* Reply at 4; USA Coalition *Mobility Fund NPRM* Reply at 6, 9.

<sup>530</sup> See, e.g., AT&T *Mobility Fund NPRM* Comments at 2-3; New EA *Mobility Fund NPRM* Comments at 6; Indiana Commission *Mobility Fund NPRM* Comments at 6-7; Mid-Rivers *Mobility Fund NPRM* Comments at 4; Ohio Commission *Mobility Fund NPRM* Comments at 3; RCA *Mobility Fund NPRM* Comments at 9; RTG *Mobility Fund NPRM* Comments at 2; T-Mobile *Mobility Fund NPRM* Comments at 2, 6; USA Coalition *Mobility Fund NPRM* Comments at 20-24; Alaska Commission *Mobility Fund NPRM* Reply at 7-8. CTIA's 2011 *Mobility Study* finds that it would require \$7.8 billion of initial investment to ensure ubiquitous coverage of both HSPA and EvDO (3G) mobile broadband services, and \$21 billion of initial investment to ensure ubiquitous coverage of both LTE and WiMax (4G) mobile broadband services. We note that significant private investment is being made to deploy mobile wireless broadband, and conclude we should not, and cannot, structure our universal service support for mobility to displace private investment being used to expand coverage of 3G and 4G networks. Instead, our goal is to supplement that investment where and to the degree necessary. See CTIA-The Wireless Association, U.S. Ubiquitous Mobility Study, dated September 21, 2011, submitted in *ex parte* notification filed by the CTIA-The Wireless Association on September 22, 2011, in GN Docket No. 09-51, WC Docket Nos. 96-45, 05-337, and 10-90; WT Docket No. 10-208; and CC Docket No. 01-92 (*CTIA 2011 Mobility Study*).

should be sufficient to enable the deployment of 3G or better mobile broadband to many of the areas where such services are unavailable.<sup>531</sup>

**(iii) Basic Structure for Mobility Fund Phase I**

315. *Background.* Given the Commission's goals for the Mobility Fund, it proposed in the *Mobility Fund NPRM* not to adopt the structure of the USF's existing competitive ETC rules, which allow support for multiple providers in one area, but rather to provide support to no more than one entity in any given geographic area.<sup>532</sup> The Commission also proposed to adopt certain terms and conditions to minimize competitive concerns raised by certain wireless providers.<sup>533</sup>

316. *Discussion.* We decline to adopt the structure of the current competitive ETC rules, which provide support for multiple providers in an area. As discussed elsewhere, we are concluding that that structure has led to duplicative investment by multiple competitive ETCs in certain areas at the expense of investment that could be directed elsewhere, including areas that are not currently served. We therefore conclude that, as a general matter, the Commission should not award Mobility Fund Phase I support to more than one provider per area unless doing so would increase the number of units (road miles) served, as is possible with partially overlapping bids. We agree with numerous commenters that our priority in awarding USF support should be to expand service,<sup>534</sup> and that permitting multiple winners as a routine matter in any geographic area to serve the same pool of customers would drain Mobility Fund resources with limited corresponding benefits to consumers.<sup>535</sup> We note, however, that in certain limited circumstances, the most efficient use of resources may result in small overlaps in supported service. Thus, we delegate to the Bureaus, as part of the auctions procedures process, the question of the circumstances, if any, in which to allow overlaps in supported service to permit the widest possible coverage given the overall budget.<sup>536</sup>

317. Commenters that oppose our proposal maintain that it would unfairly deprive customers of the benefits of competition,<sup>537</sup> create barriers to entry,<sup>538</sup> and require the Commission to "hyper

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<sup>531</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4560-61, para. 10; see also National Broadband Plan at 149-150.

<sup>532</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,723, para. 15.

<sup>533</sup> *Id.* at 14,723, para. 15, 14,728, para. 36.

<sup>534</sup> See CenturyLink *Mobility Fund NPRM* Comments at 8; ITTA *Mobility Fund NPRM* Comments at 4-5; Indiana Commission *Mobility Fund NPRM* Comments at 4; Verizon *Mobility Fund NPRM* Reply at 16.

<sup>535</sup> See Verizon *Mobility Fund NPRM* Reply at 16. The *CTIA 2011 Mobility Study* provides an indication of how much more money could be required to support multiple providers. Specifically, the study found \$10 billion would be required to ensure 4G mobile broadband coverage using either LTE or WiMax technologies, but more than double that amount, \$21 billion, would be required to ensure 4G broadband coverage using both LTE and WiMax.

<sup>536</sup> See *infra* para. 420.

<sup>537</sup> See ACS *Mobility Fund NPRM* Comments at 5-6; ATA *Mobility Fund NPRM* Comments at 3; Cellular South et al. *Mobility Fund NPRM* Comments at 21-22; CTIA *Mobility Fund NPRM* Comments at 7-9; Sprint *Mobility Fund NPRM* Comments at 2; T-Mobile *Mobility Fund NPRM* Comments at 3, 7; US Cellular *Mobility Fund NPRM* Comments at 20-21. But see Verizon *Mobility Fund NPRM* Reply at 14 (competitive bidding would treat all market participants alike; "there will be no mystery to the application process or the criteria for selecting winning bidders.").

<sup>538</sup> See New EA *Mobility Fund NPRM* Comments at 4-5.

regulate” to protect against anti-competitive behavior.<sup>539</sup> Some assert that these presumed consequences violate express provisions of the Communications Act regarding universal service support.<sup>540</sup>

318. Many of the objections to the Commission’s authority assume that the Universal Service Fund’s existing competitive ETC rules, which allow support for multiple providers in one area, are the only way to fulfill the goals of the statute. We disagree with this premise. As Verizon notes, the statute’s goal is to expand availability of service to users.<sup>541</sup> It is certainly true that section 214(e) allows the states to designate more than one provider as an eligible telecommunications provider in any given area.<sup>542</sup> But nothing in the statute compels the states (or this Commission) to do so; rather, the states (and this Commission) must determine whether that is in the public interest. Likewise, nothing in the statute compels that every party eligible for support actually receive it.

319. We acknowledge that in the past the Commission concluded that universal service subsidies should be portable, and allowed multiple competitive ETCs to receive support in a given geographic area. Based on the experience of a decade, however, we conclude that this prior policy of supporting multiple networks may not be the most effective way of achieving our universal service goals. In this case, we choose not to subsidize competition through universal service in areas that are challenging for even one provider to serve.<sup>543</sup> Given that Mobility Fund Phase I seeks to expand the availability of current and next generation services, it will be used to offer services where no provider currently offers such service. We conclude that the public interest is best served by maximizing the expansion of networks into currently unserved communities given the available budget, which will generally result in providing support to no more than one provider in a given area.

320. We further note, however, that participation in Mobility Fund Phase I is conditioned on collocation and data roaming obligations designed to minimize anticompetitive behavior. We also require that recipients provide services with Mobility Fund Phase I support at reasonably comparable rates.<sup>544</sup> These obligations should help address the concerns of those that argue for continued support of multiple providers in a particular geographic area and further our goal to ensure the widest possible reach of Phase I of the Mobility Fund.

#### (iv) Auction To Determine Awards of Support

321. *Background.* In the *Mobility Fund NPRM*, the Commission proposed to use a competitive bidding mechanism to determine the entities that would receive support and the amount of support they would receive. That is, it proposed to award support based on the lowest per-unit bid amounts submitted in a reverse auction, subject to the constraint discussed above that there will be no more than one recipient per geographic area, so as to make the limited funds available go as far as possible.<sup>545</sup> The *Mobility Fund NPRM* sought comment on this approach generally and on particular

<sup>539</sup> See, e.g., US Cellular *Mobility Fund NPRM* Comments at 20-21.

<sup>540</sup> See RCA *Mobility Fund NPRM* Comments at 8; SouthernLINC *Mobility Fund NPRM* Reply at 3; NE Colorado *Mobility Fund NPRM* Reply at 6; US Cellular *Mobility Fund NPRM* Reply at 13.

<sup>541</sup> Verizon *Mobility Fund NPRM* Reply at 10 (“Nowhere in the USF policy goals listed in section 254(b) of the Act does it say that universal service programs should be designed to prop up multiple providers with government subsidies in areas that are prohibitively expensive for even one provider to serve.”).

<sup>542</sup> 47 U.S.C. § 214(e).

<sup>543</sup> See *infra* section VII.E.4. (Eliminating the Identical Support Rule); see also Verizon *Mobility Fund NPRM* Reply at 10, 16.

<sup>544</sup> See *infra* paras. 384-385.

<sup>545</sup> *Mobility Fund NPRM*, 25 FCC Red at 14,723, para. 16.

aspects of how such an auction might work. The Commission further proposed to give the Wireline Bureau and the Wireless Bureau discretion to determine specific auction procedures in a separate pre-auction proceeding, consistent with our approach in spectrum auctions.

322. *Discussion.* The goal of Mobility Fund Phase I is to extend the availability of mobile voice service on networks that provide 3G or better performance and to accelerate the deployment of 4G wireless networks in areas where it is cost effective to do so with one-time support. The purpose of the mechanism we choose is to identify those areas where additional investment can make as large a difference as possible in improving current-generation mobile wireless coverage. We adopt a reverse auction format because we believe it is the best available tool for identifying such areas – and associated support amounts – in a transparent, simple, speedy, and effective way. In such a reverse auction, bidders are asked to indicate the amount of one-time support they would require to achieve the defined performance standards for specified numbers of units in given unserved areas. We discuss later the details of the auction mechanism, including our proposal to award support to maximize the number of units covered given the funds available. Here, we conclude simply that a reverse auction is the best way to achieve our overall objective of maximizing consumer benefits given the available funds.

323. Objections to our proposal to use a competitive bidding mechanism largely challenge or misunderstand the goals of the instant proposal. GVNW, for example, argues that the Mobility Fund will not provide adequate support over the longer term. This fails to recognize that Mobility Fund Phase I is focused solely on identifying recipients that can extend coverage with one-time support.<sup>546</sup> Other commenters argue that our approach is unlikely to provide support for the areas that are the very hardest to cover, noting how important high-cost USF support is in these areas.<sup>547</sup> In this regard, we reiterate that Phase I has a limited and targeted purpose and is not intended to ensure that the highest cost areas receive support. Those issues are addressed separately in the sections of the Order discussing Mobility Fund Phase II and other aspects of CAF, as well as in the FNPRM adopted today.

324. Others contend that funding will be directed to areas that will be built out with private investment even without support.<sup>548</sup> To prevent funding from going to such areas, Windstream suggests that the Commission could require a certain level of private investment before any subsidy kicks in or include an assessment of revenue/expense forecasts as part of the selection process.<sup>549</sup> 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. As discussed below, we are also excluding from auction those areas where a provider has made a regulatory commitment to provide 3G or better wireless service, or has received a funding commitment from a federal executive department or agency in response to the carrier’s commitment to provide 3G or better service.<sup>550</sup> Taken together, we believe these measures provide sufficient safeguards to exclude funding for areas that would otherwise be built with private investment in the near term.

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<sup>546</sup> GVNW *Mobility Fund NPRM* Comments at 3-8.

<sup>547</sup> ACS *Mobility Fund NPRM* Comments at 3-4; ATA *Mobility Fund NPRM* Comments at 2-3; Alaska Commission *Mobility Fund NPRM* Reply at 4; Alaska Governor *Mobility Fund NPRM* Reply at 2.

<sup>548</sup> See, e.g., Free Press *Mobility Fund NPRM* Comments at 3; GCI *Mobility Fund NPRM* Comments at ii; RCA *Mobility Fund NPRM* Comments at 9; Windstream *Mobility Fund NPRM* Comments at 4-5; ACA *Mobility Fund NPRM* Reply at 5; Benton et al. *Mobility Fund NPRM* Reply at 4; GCI *Mobility Fund NPRM* Reply at 9.

<sup>549</sup> Windstream *Mobility Fund NPRM* Comments at 5-6.

<sup>550</sup> See *infra* paras. 341-342.

325. Other commenters object to our proposal to use an auction based on issues that are common to any competitive mechanism. The Blooston Rural Carriers, among others, argue that reverse auctions can lead to construction and equipment quality short-cuts due to cost cutting measures.<sup>551</sup> 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 meeting those requirements, which in turn is consistent with our objective to extend coverage for mobile services as much as possible given available funds.

326. We are unpersuaded by arguments that we should not conduct a reverse auction because larger carriers, with greater economies of scale or other potential advantages, will be able to bid more competitively than smaller providers.<sup>552</sup> 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. Some parties have contended that reverse auctions generally unduly harm small businesses or offer no benefits to federal agencies that make use of them, citing prior attempts to utilize reverse auctions in other contexts, such as Medicare.<sup>553</sup> The examples provided, however, illustrate issues in implementing specific reverse auction programs, rather than demonstrating that reverse auctions are inherently biased against small businesses.<sup>554</sup> Accordingly, we do not find that these examples demonstrate that small businesses are unable to meaningfully participate in a well-designed and executed reverse auction.

327. MTPCS and US Cellular advocate that the Commission take into account factors other than the lowest price, and consider factors such as quality of service, the existence of redundant connections, and availability of quality equipment.<sup>555</sup> The commenters do not, however, suggest how such metrics could be implemented in this context. Indeed, we conclude that, for purposes of Mobility Fund Phase I, the difficulty in appropriately weighting such differences in the service provided outweigh the benefits that might be gained from such an approach. Rather, we choose to focus on the more concrete and direct approach of adopting appropriate, uniform, minimum performance requirements applicable to all support recipients.

328. Finally, certain commenters object to the use of a reverse auction on the grounds that a reverse auction would provide support to at most one bidder in an area.<sup>556</sup> For reasons discussed above,

<sup>551</sup> Blooston *Mobility Fund NPRM* Comments at 2; Cellular South et al. *Mobility Fund NPRM* Comments at 12; GVNW *Mobility Fund NPRM* Comments at 8; RTG *Mobility Fund NPRM* Comments at 7.

<sup>552</sup> See, e.g., Blooston *Mobility Fund NPRM* Comments at 5-6; JCPES *Mobility Fund NPRM* Comments at 4-5; Mid-Rivers *Mobility Fund NPRM* Comments at 6; MTPCS *Mobility Fund NPRM* Comments at 4; RTG *Mobility Fund NPRM* Comments at 7-8; RCA *Mobility Fund NPRM* Reply at 9; RICA *Mobility Fund NPRM* Reply at 6.

<sup>553</sup> See Nex-Tech and Carolina West Wireless, *Ex Parte* Notice, December 8, 2010 (Redacted); Nex-Tech Wireless, Carolina West Wireless, and Cellular One of East Central Illinois, *Ex Parte* Notice, September 28, 2010 (Redacted); see also United States Government Accountability Office, Medicare, CMS Working To Address Problems from Round 1 of the Durable Medical Equipment Competitive Bidding Program, GAO-10-207, November 2009.

<sup>554</sup> For example, according to the Government Accountability Office (GAO), the primary problems with Round 1 of the Durable Medical Equipment Competitive Bidding program involved “poor timing and lack of clarity in bid submission information, a failure to inform all suppliers that losing bids could be reviewed, and an inadequate electronic bid submission system.” GAO Highlights, Highlights of GAO-10-27, Medicare, CMS Working to Address Problems from Round 1 of the Durable Medical Equipment Competitive Bidding Program, November 2009. Nonetheless, the GAO noted that competitive bidding “has the potential to produce considerable benefits, including reducing overall Medicare spending for [durable medical equipment].” *Id.*

<sup>555</sup> MTPCS *Mobility Fund NPRM* Comments at 4; US Cellular *Mobility Fund NPRM* Reply at 24.

<sup>556</sup> Cellular South et al. *Mobility Fund NPRM* Comments at 17, 21; RCA *Mobility Fund NPRM* Comments at 2-4; US Cellular *Mobility Fund NPRM* Comments at 20-22; NE Colorado Cellular *Mobility Fund NPRM* Reply at 1.



we have decided not to provide support routinely to more than one provider in an area, contrary to current provision of support to competitive ETCs.

329. *Delegation of Authority.* We also adopt our proposal to delegate to the Bureaus authority to administer the policies, programs, rules and procedures to implement Mobility Fund Phase I as established today. The only commenter addressing this particular point, T-Mobile, supported the delegation to the Wireless Bureau to provide useful flexibility in pre-auction preparation.<sup>557</sup> In addition to the specific tasks noted elsewhere, such as identifying areas eligible for Mobility Fund support and the number of units associated with each, this delegation includes all authority necessary to conduct a Mobility Fund Phase I auction and conduct program administration and oversight consistent with the policies and rules we adopt in this Order.<sup>558</sup>

#### (v) Identifying Unserved Areas Eligible for Support

330. In the *Mobility Fund NPRM*, the Commission proposed to identify unserved areas on a census block basis and offer support by census tracts, grouping together all unserved census blocks in the same tract for purposes of awarding support based on competitive bidding.<sup>559</sup> This proposal involves several related elements, including determining the geographic basis for identifying served and unserved areas, the coverage units associated with unserved geographic areas, and the minimum geographic basis on which unserved areas will be grouped when offered in bidding for Mobility Fund Phase I support. For the reasons discussed with respect to each element, we adopt the proposal in the *Mobility Fund NPRM*, with modifications. We will use road miles, rather than residential population, as the baseline for coverage units in each unserved area, and we delegate to the Bureaus, as part of the auctions procedures process, the question of whether to use a minimum area for bidding like census tracts, as we had proposed, or whether to provide for bidding on individual census blocks with the opportunity for package bidding on combinations of census blocks.

#### (a) Using Census Blocks to Identify Unserved Areas

331. *Background.* The Commission proposed to determine the availability of service at the census block level as the first step in identifying those areas that are eligible for Mobility Fund Phase I support.<sup>560</sup> The census block is the smallest geographic unit for which the Census Bureau collects and tabulates decennial census data. Determining the extent of current-generation mobile wireless services by census block should provide a very detailed picture of the availability of 3G mobile services.

332. *Discussion.* We will identify areas eligible for Mobility Fund Phase I support at the census block level. We believe a granular review will allow us to identify unserved areas with greater accuracy than if we used larger areas.<sup>561</sup> Although census blocks, particularly in rural areas, may include both served and unserved areas,<sup>562</sup> it is not feasible to identify unserved areas on a more granular level for Mobility Fund Phase I, since as noted, census blocks are the smallest unit for which the Census Bureau provides data. NTCH observes that reviewing service by census block will result in a larger absolute

<sup>557</sup> T-Mobile *Mobility Fund NPRM* Comments at 16.

<sup>558</sup> See *infra* paras. 337 and 353.

<sup>559</sup> *Mobility Fund NPRM*, 25 FCC Red at 14,724, para. 20.

<sup>560</sup> *Id.* at 14,724, para 21.

<sup>561</sup> T-Mobile *Mobility Fund NPRM* Comments at 10-11.

<sup>562</sup> See Letter from Bruce A. Olcott, Counsel to the State of Hawaii, to Hon. Julius Genachowski, Chairman, FCC, at 2, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51 (Oct. 19, 2011).

number of unserved areas than a review based on larger geographic areas,<sup>563</sup> but we do not believe this larger absolute number of unserved areas will unduly complicate administration of the fund.

**(b) Identifying Unserved Census Blocks**

**(i) Using American Roamer Data**

333. *Background.* The Commission further proposed to measure the availability of current-generation mobile wireless services by using American Roamer data identifying the geographic coverage of networks using EV-DO, EV-DO Rev A, and UMTS/HSPA.<sup>564</sup> The *Mobility Fund NPRM* sought comment on whether there are differences in the way that carriers report information to American Roamer that should affect our decision on this issue and whether possible alternative datasets exist for this purpose.<sup>565</sup>

334. *Discussion.* We conclude that American Roamer data is the best available choice at this time for determining wireless service at the census-block level. American Roamer data is recognized as the industry standard for the presence of service, although commenters note that the data may not be comprehensive and accurate in all cases.<sup>566</sup> We anticipate that the Bureaus will exercise their delegated authority to use the most recent American Roamer data available in advance of a Phase I auction in 2012. We note that, in so doing, they should use the data to determine the geographic coverage of networks using the technologies noted in the *Mobility Fund NPRM* (i.e., EV-DO, EV-DO Rev A, UMTS/HSPA) or better.<sup>567</sup>

335. Some commenters propose that the Commission rely instead on data provided for the National Broadband Map created pursuant to the American Recovery and Reinvestment Act, or on data previously submitted to the Commission on FCC Form 477, though the latter source would not reflect reporting by census block.<sup>568</sup> For future mobility-focused auctions, it may be possible to obtain information from state and Tribal governments to identify areas in need of support. In addition, it may soon be possible to rely, at least in part, on the data provided in connection with the National Broadband Map and FCC Form 477, depending on our anticipated reform to that data collection. Inconsistencies with respect to wireless services have been noted in the initial phase of data gathering for the National Broadband Map, however. Although we expect those discrepancies to be resolved as the project evolves over time,<sup>569</sup> we cannot now conclude that National Broadband Map data will be an appropriate source of data in time for a Mobility Fund Phase I auction.

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<sup>563</sup> NTCH *Mobility Fund NPRM* Comments at 3.

<sup>564</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,724, para. 22.

<sup>565</sup> *Id.* at 14,724-25, para. 23.

<sup>566</sup> AT&T *Mobility Fund NPRM* Comments at 9-10; Alaska Commission Reply at 11; Benton et al. Reply at 9; HITN Reply at 3-4; NE Colorado Cellular Reply at 9. *But see* Verizon *Mobility Fund NPRM* Comments at 16 (“Using American Roamer data for this purpose is sensible and . . . we are not aware of any other source that presents a viable alternative.”)

<sup>567</sup> Here, we make clear that in identifying unserved census blocks we will exclude census blocks that are served by 3G or better service. Better than 3G service would include any 4G technologies, including, for example, HSPA+ or LTE.

<sup>568</sup> California Commission *Mobility Fund NPRM* Comments at 12-14; Verizon *Mobility Fund NPRM* Comments at 16.

<sup>569</sup> *See 2011 Seventh Broadband Progress Report*, 26 FCC Rcd 8008, 8078-93, App. F.

336. Some commenters observe that American Roamer data relies on reporting by existing providers and therefore may tend to over-report the extent of existing coverage.<sup>570</sup> While we intend to be as accurate as possible in determining the extent of coverage, we recognize that perfect information is not available. We know of no data source that is more reliable than American Roamer, nor does the record reflect any other viable options. Moreover, to the extent that American Roamer data may reflect over-reporting of coverage, we note that this makes it less likely that we will mistakenly identify areas already served by 3G networks as unserved, and hence, less likely that we will assign support to cover areas that are not in fact unserved by our definition. Our objective is, of course, to identify unserved areas as accurately as possible.

337. Several commenters note that the potential for error is unavoidable and therefore advocate that some provision be made for outside parties to appeal or initiate a review of the initial coverage determination for a particular area.<sup>571</sup> We conclude that we will, within a limited timeframe only, entertain challenges to our determinations regarding unserved geographic areas for purposes of Mobility Fund Phase I. Specifically, we will make public a list of unserved areas as part of the pre-auction process and afford parties a reasonable opportunity to respond by demonstrating that specific areas identified as unserved are actually served and/or that additional unserved areas should be included. Our goal is to accelerate expanded availability of mobile voice service over current-generation or better networks by providing one-time support from a limited source of funds, and any more extended pre-auction review process might risk undue delay in making any support available. Providing for post-auction challenges would similarly inject uncertainty and delay into the process. We therefore conclude that it is important to provide finality prior to the auction with respect to the specific unserved census blocks eligible for support. Accordingly, the Bureaus will finalize determinations with respect to which areas are eligible for support in a public notice establishing final procedures for a Mobility Fund Phase I auction.

#### (ii) Other Service-Related Factors

338. *Background.* In the *Mobility Fund NPRM*, the Commission sought comment on whether factors other than existing mobile service, including the presence of voice and broadband services on non-mobile networks, should be considered in determining which census blocks are unserved and eligible for support.<sup>572</sup>

339. *Discussion.* After review of the record, we conclude that we will not consider the presence in a census block of voice or broadband services over non-mobile networks in determining which census blocks are unserved. As noted by commenters, mobile services provide benefits, consistent with, and in furtherance of the principles of section 254, not offered by fixed services.<sup>573</sup> The ability to communicate from any point within a mobile network's coverage area lets people communicate at times when they may need it most, including during emergencies. The fact that fixed communications may be available nearby does not detract from this critical benefit. Moreover, the Internet access provided by current and next generation mobile networks renders them qualitatively different from existing voice-only

<sup>570</sup> New EA *Mobility Fund NPRM* Comments at 5; Alaska Commission *Mobility Fund NPRM* Reply at 11; Benton et al. *Mobility Fund NPRM* Reply at 9; HITN *Mobility Fund NPRM* Reply at 3-4; NE Colorado *Mobility Fund NPRM* Reply at 9-10.

<sup>571</sup> AT&T *Mobility Fund NPRM* Comments at 9-10; Texas Statewide Coop *Mobility Fund NPRM* Comments at 6; WorldCall *Mobility Fund NPRM* Comments at 10. HITN cautions that we should require parties who seek to challenge that a specific area is unserved to provide empirical data rather than rely on advertising claims to support any such challenge. HITN *Mobility Fund NPRM* Reply at 4.

<sup>572</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,724-25, para. 23.

<sup>573</sup> WorldCall *Mobility Fund NPRM* Comments at 11-12.

mobile networks. Current and next generation networks offer the ability to tap resources well beyond the resources available through basic voice networks. Accordingly, in identifying blocks eligible for Mobility Fund support, we will not consider whether voice and/or broadband services are available using non-mobile technologies or pre-3G mobile wireless technologies.

340. Some commenters also suggest that the Commission prioritize support to those areas where there is no wireless service availability at all.<sup>574</sup> We share commenters' goal of expanding the availability of basic mobile services to all Americans. 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.

341. That said, to help focus Mobility Fund Phase I support toward unserved locations where it will have the most significant impact, we provide that support will not be offered in areas where, notwithstanding the current absence of 3G wireless service, any provider has made a regulatory commitment to provide 3G or better wireless service, or has received a funding commitment from a federal executive department or agency in response to the carrier's commitment to provide 3G or better wireless service.<sup>575</sup>

342. To implement this decision, we will require that all wireless competitive ETCs that receive USF high cost support, under either legacy or reformed programs, as well as all parties that seek Mobility Fund support, review the list of areas eligible for Mobility Fund support when published by the Commission and identify any areas with respect to which they have made a regulatory commitment to provide 3G or better wireless service or received a federal executive department or agency funding commitment in exchange for their commitment to provide 3G or better wireless service. We recognize that a regulatory commitment ultimately may not result in service to the area in question. Nevertheless, given the limited resources provided for Mobility Fund Phase I and the fact that the commitments were made in the absence of any support from the Mobility Fund, we conclude that it would not be an appropriate use of available resources to utilize Mobility Fund support in such areas.

### (iii) Using Centroid Method

343. *Background.* In the *Mobility Fund NPRM*, the Commission proposed to consider any census block as unserved, *i.e.*, eligible for support, if the American Roamer data indicates that the geometric center of the block – referred to as the centroid<sup>576</sup> – is not covered by networks using EV-DO, EV-DO Rev A, or UMTS/HSPA or better.<sup>577</sup> The Commission also sought comment on alternative approaches.<sup>578</sup>

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<sup>574</sup> See AT&T *Mobility Fund NPRM* Comments at 4; Free Press *Mobility Fund NPRM* Comments at 3; MetroPCS *Mobility Fund NPRM* Comments at 8; CWA *Mobility Fund NPRM* Reply at 4; RCA *Mobility Fund NPRM* Reply at 3-4; RICA *Mobility Fund NPRM* Reply at 2.

<sup>575</sup> Such federal funding commitments may have been made under, but are not limited to, the Broadband Technology Opportunities Program (BTOP) and Broadband Initiatives Program (BIP) authorized by the American Recovery and Reinvestment Act of 2009, P.L. 111-5, 123 Stat. 115 (ARRA).

<sup>576</sup> We use the term “centroid” to refer to the internal point latitude/longitude of a census block polygon. For more information, see U.S. Census Bureau, *Putting It All Together*, [http://lehd.did.census.gov/led/library/doc/PuttingItTogether\\_20100817.pdf](http://lehd.did.census.gov/led/library/doc/PuttingItTogether_20100817.pdf) (visited Nov. 4, 2011).

<sup>577</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,724, para. 22.

<sup>578</sup> *Id.* at 14,724-5, paras. 22-23.

344. *Discussion.* We conclude that employing the centroid method is relatively simple and straightforward, and will be an effective method for determining whether a block is uncovered. Some commenters support the Commission proposal to use the centroid method both as manageable and effective,<sup>579</sup> while others prefer the alternative proportional method described in the *Mobility Fund NPRM*.<sup>580</sup> Parties advocating for the alternative method assert that a proportional process will be more accurate.<sup>581</sup> More specifically, some note that although most census blocks are small, some can be large, particularly in low-density rural areas, and that coverage at the centroid might result, incorrectly, in the entirety of those large areas being deemed served.<sup>582</sup> While we acknowledge that advantages and disadvantages exist with both methods, we find that, on balance, the centroid method is the best approach for this purpose. We note that the Commission has consistently used the centroid method for determining coverage in other contexts, such as evaluating competition in the mobile wireless services industry, where it is also useful to have a clear and consistent methodology for determining whether a given area has coverage. Based on our experience in these contexts, we find the centroid method to be an administratively simple and efficient approach that, if used here, will permit us to begin distributing this support without undue delay. For these reasons, we will use the centroid method to determine which census blocks are unserved by 3G or better networks for purposes of Mobility Fund Phase I.

**(c) Offering Support for Unserved Areas by Census Block**

345. *Background.* The Commission proposed in the *Mobility Fund NPRM* to group unserved census blocks by larger areas – census tracts – as the minimum area for competitive bidding, since individual census blocks may be too small to serve as a viable basis for providing support.<sup>583</sup> The Commission therefore proposed to accept bids for support to expand coverage to all the unserved census blocks within a particular census tract and sought comment on that approach.<sup>584</sup>

346. *Discussion.* Upon review of the comments and further reflection, we determine that the census block should be the minimum geographic building block for defining areas for which support is provided. Using census blocks as the minimum geographic area gives the Commission and bidders more flexibility to tailor their bids to their business plans. Because census blocks are numerous and can be quite small, we believe that we will need to provide at the auction for the aggregation of census blocks for purposes for bidding. We delegate to the Bureaus, as part of the auctions procedures process, the task of deciding whether to provide a minimum area for bidding comprised of an aggregation of eligible census blocks (e.g., census tracts or block groups) or whether to permit bidding on individual census blocks and provide bidders with the opportunity to make “all-or-nothing” package bids on combinations of census blocks. Package bidding procedures could specify certain predefined packages,<sup>585</sup> or could provide

<sup>579</sup> AT&T *Mobility Fund NPRM* Comments at 10; Verizon *Mobility Fund NPRM* Comments at 16.

<sup>580</sup> Greenlining *Mobility Fund NPRM* Comments at 3. Cf. Mid-Rivers *Mobility Fund NPRM* Comments at 7; NTCH *Mobility Fund NPRM* Comments at 4.

<sup>581</sup> Greenlining *Mobility Fund NPRM* Comments at 3.

<sup>582</sup> Mid-Rivers *Mobility Fund NPRM* Comments at 7.

<sup>583</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,725, paras. 25-26. Census tracts generally have between 1,200 and 8,000 inhabitants and average about 4,000 inhabitants. Each census tract consists of multiple census blocks and every census block fits within a census tract. There are over 11 million census blocks nationwide.

<sup>584</sup> *Id.* at 14,725, para. 25. As discussed herein, a provider receiving support would be considered to cover a particular census block when it demonstrates compliance with the performance requirements adopted by the Commission, and not simply by covering the block’s centroid.

<sup>585</sup> See, e.g., *Auction of 700 MHz Band Licenses Scheduled for January 24, 2008; Notice and Filing Requirements, Minimum Opening Bids, Reserve Prices, Upfront Payments, and Other Procedures for Auctions 73 and 76*, Public (continued...)

bidders greater flexibility in defining their own areas, comprised of census blocks. However, we would not expect that any aggregation, whether predetermined by the Bureaus or defined by bidders, would exceed the bounds of one Cellular Market Area (CMA).<sup>586</sup>

347. In deciding this issue, we recognize that the unique circumstances raised by the large size of census areas in Alaska may require that bidding be permitted on individual census blocks, rather than a larger pre-determined area, such as a census tract or block group. In Alaska, the average census block is more than 50 times the size of the average census block in the other 49 states and the District of Columbia,<sup>587</sup> such that the large size of census areas poses distinctive challenges in identifying unserved communities and providing service.<sup>588</sup>

348. Few commenters address the minimum geographic building block issue directly. Those that do generally support the Commission's initial proposal to structure the auction to provide for bidding on census tracts that include unserved census blocks, although few took issue with the possibility of using census blocks as the basic building block.<sup>589</sup> Others propose alternatives, such as permitting carriers to define their own service areas in which they seek to bid.<sup>590</sup> Nearly all of the comments touching on the minimum geographic bidding area acknowledge the underlying goals of making a selection based on ease of administration, effective identification of unserved areas, and promoting the widest possible deployment of mobile services.

#### (d) Establishing Unserved Units

349. *Background.* In the *Mobility Fund NPRM*, the Commission proposed to use population as the base unit with which to compare unserved census blocks.<sup>591</sup> It also sought comment on taking into account characteristics such as road miles, traffic density, and/or community anchor institutions in determining the number of units in each unserved census block and asked how, if multiple characteristics were to be used, the various factors should be weighted.<sup>592</sup>

350. *Discussion.* After further consideration, we conclude that we will use a single characteristic, the number of linear road miles – rather than population – as the basis for calculating the number of units in each unserved census block. We base this decision on a number of factors. First, we find that requiring additional coverage of road miles more directly reflects the Mobility Fund's goal of

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Notice, 22 FCC Rcd 18,141, 18,179-81, paras. 138-144 (Wireless Telecom. Bur. 2007) (*700 MHz Auction Procedures Public Notice*).

<sup>586</sup> Cellular Market Areas (CMAs) are the areas in which the Commission initially granted licenses for cellular service. Cellular markets comprise Metropolitan Statistical Areas (MSAs) and Rural Service Areas (RSAs). See 47 C.F.R. § 22.909.

<sup>587</sup> 2010 census data indicates that the average census block size in Alaska is 14.7 square miles, while the average census block size in the other 49 states and the District of Columbia is .28 square miles.

<sup>588</sup> See ACS *Mobility Fund NPRM* Comments at 5; GCI *Mobility Fund NPRM* Comments at 4; Alaska Commission *Mobility Fund NPRM* Reply at 10.

<sup>589</sup> See, e.g., AT&T *Mobility Fund NPRM* Comments at 10-11; Greenlining Institute *Mobility Fund NPRM* Comments at 3; NTCH *Mobility Fund NPRM* Comments at 3-4; T-Mobile *Mobility Fund NPRM* Comments at 10-11; Verizon *Mobility Fund NPRM* Comments at 15; Windstream *Mobility Fund NPRM* Comments at 6.

<sup>590</sup> See ACS *Mobility Fund NPRM* Comments at 5; Alaska Commission *Mobility Fund NPRM* Reply at 11; see also Mid-Rivers *Mobility Fund NPRM* Comments at 6-7 (proposing the use of licensed coverage areas).

<sup>591</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,725, para. 27.

<sup>592</sup> *Id.*

extending current generation *mobile* services, as some commenters noted.<sup>593</sup> We also find that using road miles, rather than population, as a unit for bids and awards of support is more consistent with our decision to measure mobile broadband service based on drive tests and to require coverage of a specified percentage of road miles as described below.

351. Moreover, we believe that using per-road mile bids as a basis for awarding support implicitly will take into account many of the other factors that commenters argue are important – such as business locations, recreation areas, and work sites – since roads are used to access those areas.<sup>594</sup> And while traffic data might be superior to simple road miles as a measure of actual use, we have not found comprehensive and consistent traffic data across multiple states and jurisdictions nationwide. Because bidders are likely to take potential roaming and subscriber revenues into account when deciding where to bid for support under Mobility Fund Phase I, we believe that support will tend to be disbursed to areas where there is greater traffic, even without our factoring traffic into the number of road mile units.

352. Further, using road miles as the basic unit for the Mobility Fund Phase I will be relatively simple to administer, since standard nationwide data exists for road miles, as it does for population. In both cases, the data can be disaggregated to the census block level. Commenters that supported our proposal to use population as a unit did so largely based on its simplicity and its straightforward nationwide applicability, so that the logic of those commenters is consistent with our decision to use road miles instead.<sup>595</sup>

353. We note that the TIGER road miles data made available by the Census Bureau can be used to establish the road miles associated with each census block eligible for Mobility Fund Phase I support. TIGER data is comprehensive and consistent nationwide, and available at no cost. As with our standard for identifying census blocks that will be eligible for Phase I support, we anticipate that in the pre-auction process, the Bureaus will establish the road miles associated with each and identify the specific road categories considered – *e.g.*, interstate highways, etc. – to be consistent with our performance requirements and with our goal of extending coverage to the areas where people live, work, and travel.

**(e) Distributing Mobility Fund Phase I Support Among Unserved Areas**

354. *Background.* In the *Mobility Fund NPRM*, the Commission invited comment on distributing support among unserved areas nationwide and on various alternative methods for targeting support to a subset of unserved areas, such as states that significantly lag behind the level of 3G coverage generally available nationwide.<sup>596</sup> In particular, the Commission requested any insights commenters could provide regarding which of these alternatives would most effectively utilize the offered support to maximize the public benefits of expanded 3G coverage.<sup>597</sup> The Commission also sought comment on whether and how to prioritize support for unserved areas that currently lack any mobile wireless service.<sup>598</sup>

355. *Discussion.* As discussed elsewhere, we will create a separate Mobility Fund Phase I to support the extension of current generation wireless service in Tribal lands. For both general and Tribal

<sup>593</sup> WorldCall *Mobility Fund NPRM* Comments at 8; Mid-Rivers *Mobility Fund NPRM* Comments at 7.

<sup>594</sup> CTIA *Mobility Fund NPRM* Comments at 12; NTCH *Mobility Fund NPRM* Comments at 4.

<sup>595</sup> AT&T *Mobility Fund NPRM* Comments at 11; Verizon *Mobility Fund NPRM* Comments at 17.

<sup>596</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,726-27, para. 32.

<sup>597</sup> *Id.*

<sup>598</sup> *Id.*

Mobility Fund Phase I support, we also require providers seeking to serve Tribal lands to engage with the affected Tribal governments, where appropriate, and we provide a bidding credit for Tribally-owned and controlled providers seeking to serve Tribal lands with which they are associated.<sup>599</sup> Apart from these provisions, we conclude that we should not attempt to prioritize within the areas otherwise eligible for support from Phase I.

356. Commenters note a variety of factors that might be relevant to whether to prioritize some unserved areas over others, such as adoption rates and projected rates of population growth or decline.<sup>600</sup> Several commenters addressing this issue favor making support available on a consistent basis to all areas defined as unserved by mobile broadband.<sup>601</sup> Others take up the Commission's suggestion and propose prioritizing support for unserved areas lacking any mobile service.<sup>602</sup>

357. After careful consideration of these alternatives, we find that we will achieve the greatest amount of new coverage with Mobility Fund Phase I support if we impose no restrictions on the unserved areas that are eligible for the program, and allow all unserved areas to compete for funding on an equal footing. We conclude that making all unserved areas eligible for support and allowing the auction process to prioritize which areas can be served is most likely to achieve our goal of maximizing the number of units covered given the funds available.

**(vi) Public Interest Obligations**

**(a) Mobile Performance Requirements**

358. *Background.* In the *Mobility Fund NPRM*, the Commission proposed that Mobility Fund support be used to expand the availability of advanced mobile communications services comparable or superior to those provided by networks using HSPA or EV-DO, which are commonly available 3G technologies.<sup>603</sup> The Commission suggested that supported carriers would have to demonstrate that they provide services over a 3G network that supports voice and has achieved particular data rates under particular conditions, and sought comment on whether to require 4G instead.<sup>604</sup> The Commission also proposed that recipients be required to meet certain deployment milestones in each unserved census block

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<sup>599</sup> See *infra* paras. 489-490.

<sup>600</sup> Ohio Commission *Mobility Fund NPRM* Comments at 6-7.

<sup>601</sup> AT&T *Mobility Fund NPRM* Comments at 11-12; TechAmerica *Mobility Fund NPRM* Comments at 3; Verizon *Mobility Fund NPRM* Comments at 18.

<sup>602</sup> T-Mobile *Mobility Fund NPRM* Comments at 11.

<sup>603</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,728-29, para. 37. Universal service support may be provided for services based on widely available current generation technologies – or superior next generation technologies available at the same or lower costs – even though supported services could be based on earlier technologies. Technologies used to provide the services supported by universal service funds need not be technologies that are strictly limited to providing the particular services designated for support. See *Federal-State Joint Board on Universal Service*, Order and Order on Reconsideration, 18 FCC Rcd 15,090, 15,095-96, para. 13 (2003) (“We recognize that the network is an integrated facility that may be used to provide both supported and non-supported services. We believe that . . . our policy of not impeding the deployment of plant capable of providing access to advanced or high-speed services is fully consistent with the Congressional goal of ensuring access to advanced telecommunications and information services throughout the nation.”) (subsequent history omitted).

<sup>604</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,728-30, paras. 37, 40.



in a tract in order to remain qualified for the full amount of any Mobility Fund award.<sup>605</sup> In addition, the Commission sought comment on establishing appropriate coverage metrics.<sup>606</sup>

359. *Discussion.* This Order elsewhere provides an overview of the public interest obligations that must be met by all recipients of Connect America Fund support, including recipients of Mobility Fund support.<sup>607</sup> Recipients of Mobility Fund support, like all CAF support recipients, must offer voice service.<sup>608</sup> Likewise, all recipients of Mobility Fund support must offer standalone voice service to the public as a condition of support.<sup>609</sup> As the broader overview notes, however, specific broadband service requirements, unlike voice service requirements, vary for CAF recipients depending upon the particular public interest goal being met by the support provided.<sup>610</sup> Our objective for Mobility Fund Phase I is to provide support to expand current and next generation mobile services to areas without such services today. The voice and broadband services offered with support must be reasonably comparable to service available in urban areas.<sup>611</sup> We detail below the mobile broadband service public interest obligations that Mobility Fund recipients must meet to satisfy this requirement.<sup>612</sup>

360. 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. Numerous commenters concur with our proposal to require that supported networks meet or exceed a minimum standard for voice service and data rates established by reference to current generation services, *i.e.*, 3G services.<sup>613</sup> As noted in some comments, this approach is also consistent with permitting providers to provide 4G services instead.<sup>614</sup> Other commenters, however, argue that the Commission should support *only* 4G networks, contending that current generation networks will soon be obsolete, in light of the on-going roll-out of 4G.<sup>615</sup>

361. Recognizing the unavoidable variability of mobile service within a covered area, we proposed and are adopting performance standards that will adopt a strong floor for the service provided. Consequently, we expect that many users will receive much better service when, for example, accessing the network from a fixed location or when close to a base station. In light of this fact, and our decision to

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<sup>605</sup> *Id.* at 14,729, para. 39.

<sup>606</sup> *Id.* at 14,728, para. 34.

<sup>607</sup> *See supra* section VI. (Public Interest Obligations).

<sup>608</sup> *See id.*

<sup>609</sup> *See id.*

<sup>610</sup> *See id.*

<sup>611</sup> *See id.*

<sup>612</sup> We note that some parties contend that limiting support to one carrier per area will require undue regulation to protect the public interest, contrary to the Commission's efforts to minimize regulation. *See, e.g.*, Cellular South et al. *Mobility Fund NPRM* Comments at 19-20. We reject these arguments and find that the requirements set forth herein are consistent with the Commission's policy of regulating only to the extent necessary to serve the public interest.

<sup>613</sup> *See, e.g.*, Sprint *Mobility Fund NPRM* Comments at 8; Tech America *Mobility Fund NPRM* Comments at 3; T-Mobile *Mobility Fund NPRM* Comments at 12; Verizon *Mobility Fund NPRM* Comments at 20.

<sup>614</sup> Verizon *Mobility Fund NPRM* Comments at 20.

<sup>615</sup> Greenlining *Mobility Fund NPRM* Comments at 6-7; MetroPCS *Mobility Fund NPRM* Comments at 6; New EA *Mobility Fund NPRM* Comments at 9.

permit providers to elect whether to provide 3G or 4G service, we are adopting different speeds than originally proposed for those providing 3G, while retaining our original proposal for those that offer 4G. For purposes of meeting a commitment to deploy a 3G network, providers must offer mobile transmissions to and from the network meeting or exceeding an outdoor minimum of 200 kbps downstream and 50 kbps upstream to handheld mobile devices.

362. Recipients that commit to provide supported services over a network that represents the latest generation of mobile technologies, or 4G, must offer mobile transmissions to and from the network meeting or exceeding the following minimum standards: outdoor minimum of 768 kbps downstream and 200 kbps upstream to handheld mobile devices. As with the 3G speeds set forth above, we further specify that these data rates should be achievable in both fixed and mobile conditions, at vehicle speeds consistent with typical speeds on the roads covered. These minimum standards must be achieved throughout the cell area, including at the cell edge. Signal coverage satisfying these 4G standards will produce substantially faster speeds under conditions closer to the base station, very often exceeding the 4 Mbps downstream and 1Mbps upstream that have been proposed as minimum speeds for fixed broadband.

363. With respect to latency, in order to assure that recipients offer service that enables the use of real-time applications such as VoIP, we also require that round trip latencies for communications over the network be low enough for this purpose.

364. With respect to capacity, we decline at this time to adopt a specific minimum capacity requirement that supported providers must offer mobile broadband users. However, we emphasize that any usage limits imposed by a provider on its mobile broadband offerings supported by the Mobility Fund must be reasonably comparable to any usage limits for comparable mobile broadband offerings in urban areas.<sup>616</sup>

365. Recipients that elect to provide supported services over 3G networks will have two years to meet their requirements and those that elect to deploy 4G networks will have three years. At the end of the applicable period for build-out, providers will be obligated to provide the service defined above in the areas for which they receive support, over at least 75 percent of the road miles associated with census blocks identified as unserved by the Bureaus in advance of the Mobility Fund Phase I auction. The Commission delegates to the Bureaus the question of whether a higher coverage threshold should be required should the Bureaus permit bidding on individual census blocks. We note that a higher coverage threshold may be appropriate in such circumstances because bidders can choose the particular census blocks they can cover. Presumably, this would allow them to choose areas in which their coverage can be 95 to 100 percent, as suggested by the *Mobility Fund NPRM*.

366. Many commenters oppose requiring 100 percent coverage within areas identified as unserved for purposes of a Mobility Fund Phase I auction.<sup>617</sup> Commenters note that due to the relatively high expense of providing last mile coverage in difficult circumstances, requiring 100 percent coverage may dissuade parties from seeking support and expanding coverage.<sup>618</sup> Proposals to address this difficulty include permitting bidders to state the extent of the coverage that they will offer as a component of their bid for support.<sup>619</sup> A number of commenters support a coverage requirement of at least 95 percent

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<sup>616</sup> We note that this should not be interpreted to mean that the Commission intends to regulate usage limits, nor that the Commission is approving of or endorsing usage limits.

<sup>617</sup> ITTA *Mobility Fund NPRM* Comments at 11; MTPCS *Mobility Fund NPRM* Comments at 10; Verizon *Mobility Fund NPRM* Comments at 14.

<sup>618</sup> ITTA *Mobility Fund NPRM* Comments at 11.

<sup>619</sup> AT&T *Mobility Fund NPRM* Comments at 13, fn. 35; Verizon *Mobility Fund NPRM* Comments at 18.

but less than 100 percent, as discussed in the *Mobility Fund NPRM*.<sup>620</sup> Alternatively, some commenters suggest lower thresholds of coverage, e.g., 50 to 80 percent, as minimum requirements.<sup>621</sup>

367. Should the Bureaus choose to implement a coverage area requirement of less than 100 percent, a recipient will receive support only for those road miles actually covered and not for the full 100 percent of road miles of the census blocks or tracts for which it is responsible. For example, if a recipient covers 90 percent of the road miles in the minimum geographic area (and it meets the threshold), then that recipient will receive 90 percent of the total support available for that area. To the extent that a recipient covers additional road miles, it will receive support in an amount based on its bid per road mile up to 100 percent of the road miles associated with the specific unserved census blocks covered by a bid.<sup>622</sup>

368. In contrast to other support provided under CAF, support provided through Mobility Fund Phase I will be non-recurring. Consequently, we will not plan to modify the service obligations of providers that receive Phase I support.

#### (b) Measuring and Reporting Mobile Broadband

369. *Background.* In the *Mobility Fund NPRM*, the Commission proposed using data submitted from drive tests to measure whether recipients meet performance requirements.<sup>623</sup>

370. *Discussion.* As proposed in the *Mobility Fund NPRM*, we will require that parties demonstrate that they have deployed a network that covers the relevant area and meets their public interest obligations with data from drive tests.<sup>624</sup> The drive test data satisfying the requirements must be submitted by the deadline for providing the service.<sup>625</sup>

371. Several commenters acknowledge that the Commission is building on current industry practice in proposing to require drive tests for proof of deployment.<sup>626</sup> No commenters take issue with the particular data rates in the Commission's proposal, although some seek some leeway in meeting the standard, due to potential variability in conditions.<sup>627</sup> Others contend that simple self-certification should suffice for proof of deployment.<sup>628</sup> Some commenters contend that the Commission's proposal to measure data rates fails to measure rates in a manner that will reflect the end-to-end performance that matters to members of the public utilizing the access.<sup>629</sup>

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<sup>620</sup> T-Mobile *Mobility Fund NPRM* Comments at 11-12. Cf. TIA *Mobility Fund NPRM* Comments at 12.

<sup>621</sup> Verizon *Mobility Fund NPRM* Comments at 19.

<sup>622</sup> Accordingly, when reserving available support based upon those bids that are determined to be winning bids, the Commission will reserve an amount necessary to pay the support that the recipient would be entitled to in the event that it covered 100 percent of the road miles in the previously unserved census blocks.

<sup>623</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,729-30, para. 40.

<sup>624</sup> *Id.*

<sup>625</sup> We are also requiring recipients to submit drive test data to demonstrate they have met the 50 percent minimum coverage requirement required to receive the second payment of Mobility Fund Phase I support. See *infra* para. 466.

<sup>626</sup> See, e.g., AT&T *Mobility Fund NPRM* Comments at 17; Sprint *Mobility Fund NPRM* Comments at 9-10.

<sup>627</sup> TIA *Mobility Fund NPRM* Comments at 12. We note that ACS contends that drive tests are not feasible in Alaska because of lack of roads. ACS *Mobility Fund NPRM* Comments at 7. This contention may have had merit when we were considering drive tests as a means of measuring coverage provided to resident population. However, at least with respect to support that requires providers to cover road miles in the area rather than population, we conclude that ACS' objection regarding feasibility does not apply. See *supra* para. 350.

<sup>628</sup> Verizon *Mobility Fund NPRM* Comments at 21-22.

<sup>629</sup> GCI *Mobility Fund NPRM* Comments at 7.

372. GCI argues that our proposed requirement regarding drive tests demonstrating data speeds “to the network” considers only data speeds from towers to the mobile user and therefore could be satisfied by networks with insufficient “middle mile” capacity to deliver the same data speeds to and from the Internet.<sup>630</sup> We do not agree with GCI’s interpretation of the proposed rule but, in light of their interpretation, take this opportunity to clarify what “to the network” means for these purposes. “To the network” means to the physical location of core network equipment, such as the mobile switching office or the evolved packet core. We envision that a test server utilized to conduct drive tests will be at such a central location rather than at a base station, so that the drive test results take into account the effect of backhaul on communication speeds.

373. AT&T proposes that instead of requiring support recipients to meet fixed minimum requirements, we should “permit recipients to follow standard industry benchmarks (i.e., data rates should be no lower than x percent of the industry average).”<sup>631</sup> Such an approach would enable the relevant metrics to evolve along with industry practices. However, in the context of non-recurring funding, we believe that setting a clear and consistent measurement of service better achieves the public interest than allowing the measurement to change depending on industry practice.

374. CTIA argues against “overly burdensome performance requirements” and contends that providers’ performance is best measured by participation of new broadband customers in previously unserved areas and not by static metrics.<sup>632</sup> Expanding mobile coverage to new areas will benefit not only new customers in previously unserved areas but also customers in other areas who either want to communicate with those in the previously unserved area or travel through it. However, these benefits will depend on a minimum level of functional service in the newly covered area. We conclude that the public interest mandates that when public support is provided for a service, we should require that a minimum level of service be provided.

### (c) Collocation

375. *Background.* In the *Mobility Fund NPRM*, the Commission proposed to encourage future competition in the market for 3G or better services in geographic areas being supported by the Mobility Fund.<sup>633</sup> As some have observed, the incompatibility of existing 3G technologies, *e.g.*, CDMA and GSM, limits the benefits of an expanded network to users of the same technology.<sup>634</sup> Consequently, the Commission proposed that any new tower constructed to satisfy Mobility Fund performance obligations provide the opportunity for collocation and sought comment on whether to require any minimum number of spaces for collocation on any new towers and/or specify terms for collocation.<sup>635</sup>

376. *Discussion.* We will require that recipients of Mobility Fund support allow for reasonable collocation by other providers of services that would meet the technological requirements of the Mobility Fund on newly constructed towers that Mobility Fund recipients own or manage in the unserved area for which they receive support. This includes a duty: (1) to construct towers where reasonable in a manner that will accommodate collocations; and (2) to engage in reasonable negotiations on a not unreasonably discriminatory basis with any party that seeks to collocate equipment at such a site

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<sup>630</sup> *Id.*

<sup>631</sup> AT&T *Mobility Fund NPRM* Comments at 17.

<sup>632</sup> CTIA *Mobility Fund NPRM* Comments at 10.

<sup>633</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,728, para. 36.

<sup>634</sup> See *id.* at 14,723, para. 15. See also Alaska Telephone *Mobility Fund NPRM* Comments at 3; CTIA *Mobility Fund NPRM* Comments at 7-9.

<sup>635</sup> *Mobility Fund NPRM* at 14,728, para. 36.

in order to offer service that would meet the technological requirements of the Mobility Fund.<sup>636</sup> Furthermore, we prohibit Mobility Fund recipients from entering into arrangements with third parties for access to towers or other siting facilities wherein the Mobility Fund recipients restrict the third parties from allowing other providers to collocate on their facilities.<sup>637</sup> We conclude that these collocation requirements are in the public interest because they will help increase the benefits of the expanded coverage made possible by the Mobility Fund, by facilitating service that meets the requirements of the Mobility Fund by providers using different technologies.<sup>638</sup>

377. Commenters generally recognize that requiring collocation potentially will benefit competition.<sup>639</sup> While most commenters find a collocation requirement to be “acceptable” or even preferable, many also agree that the Commission should not specify a minimum number of spaces for collocation on new towers.<sup>640</sup> AT&T contends that the Commission should limit any collocation requirement to a requirement for good faith negotiation on a non-discriminatory basis without additional required terms.<sup>641</sup> We agree with commenters that attempting to specify collocation practices that are applicable in all circumstances may unduly complicate efforts to expand coverage, and thus decline to adopt more specific requirements for collocation by any specific number of providers or require any specific terms or conditions as part of any agreement for collocation.

**(d) Voice and Data Roaming<sup>642</sup>**

378. *Background.* In the *Mobility Fund NPRM*, the Commission also proposed that Mobility Fund recipients be required to provide data roaming on reasonable and not unreasonably discriminatory terms and conditions on the mobile broadband networks that are built through Mobility Fund support.<sup>643</sup>

379. *Discussion.* We will require that recipients of Mobility Fund support comply with the Commission’s voice and data roaming requirements on networks that are built through Mobility Fund support. Subsequent to the *Mobility Fund NPRM*, the Commission adopted rules that create a general mandate for data roaming.<sup>644</sup> Specifically, we require that recipients of Mobility Fund support provide roaming pursuant to section 20.12 of the Commission’s rules on networks that are built through Mobility Fund support.<sup>645</sup>

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<sup>636</sup> We do not require Mobility Fund recipients to permit collocation for other purposes.

<sup>637</sup> We recognize that many towers on which communications licenses locate their facilities are owned and managed by third parties, and we do not impose any affirmative obligations on the owners of such towers.

<sup>638</sup> We clarify that we do not require Mobility Fund recipients to favor providers of services that meet Mobility Fund requirements over other applicants for limited collocation spaces.

<sup>639</sup> PCIA *Mobility Fund NPRM* Comments at 1, 4; Sprint *Mobility Fund NPRM* Comments at 7. *But see* ITTA *Mobility Fund NPRM* Comments at 12-13 (“ITTA urges the Commission to maintain focus on the goal of extending coverage, a pursuit that should not be confused with expanding competition.”).

<sup>640</sup> AT&T *Mobility Fund NPRM* Comments at 15.

<sup>641</sup> *Id.*

<sup>642</sup> Commissioner McDowell does not join in this subsection and would not impose a data roaming requirement for the reasons stated in his dissenting statement in *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, 26 FCC Rcd 5411, 5483-84 (2011) (*Roaming Second Report and Order*).

<sup>643</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,728, para. 36.

<sup>644</sup> *See, generally, Roaming Second Report and Order*, 26 FCC Rcd 5411.

<sup>645</sup> 47 C.F.R. § 20.12.

380. Some commenters responding to the *Mobility Fund NPRM* contend that there is no need to adopt a data roaming requirement specifically for Mobility Fund recipients because our general data roaming rules already address the issue or that such a requirement is unrelated to the goals of the Mobility Fund.<sup>646</sup> We disagree. Our general policy of distributing federal universal service support to only one provider per area raises competitive issues for those providers not receiving funds. As a result, we believe it is appropriate to attach roaming conditions even though generally applicable requirements also exist. Making compliance with these rules a condition of universal service support will mean that violations can result in the withholding or clawing back of universal service support – sanctions based on the receipt of federal support – that would be in addition to penalties for violation of our generally applicable data roaming rules. Moreover, in addition to the sanctions that would apply to any party violating our general requirements, Mobility Fund recipients may lose their eligibility for future Mobility Fund participation as a consequence of any violation. Recipients shall comply with these requirements without regard to any judicial challenge thereto.

381. Other commenters contend that our roaming requirements will not mitigate the competitive advantage that recipients of Mobility Fund support receive from the additional coverage the funding supports.<sup>647</sup> In light of the public interest in expanding coverage, we conclude that our roaming requirements are sufficient to balance against any competitive advantage Mobility Fund recipients obtain.

382. Consistent with this Order, any interested party may file a formal or informal complaint using the Commission's existing processes if it believes a Mobility Fund recipient has violated our roaming requirements.<sup>648</sup> As noted, the Commission intends to address roaming-related disputes expeditiously.<sup>649</sup> The Commission also has the authority to initiate enforcement actions on its own motion.

#### (e) Reasonably Comparable Rates

383. *Background.* The Commission sought comment in the *Mobility Fund NPRM* on how to implement, in the context of the Mobility Fund, the statutory principle that supported services should be made available to consumers in rural, insular, and high-cost areas at rates that are reasonably comparable to rates charged for similar services in urban areas.<sup>650</sup> Given the absence of affirmative regulation of rates charged for commercial mobile services, as well as the rate practices and structures used by providers of such services, the Commission asked how parties might demonstrate that the rates they charge in areas where they receive support are reasonably comparable to rates charged in urban areas.<sup>651</sup> The Commission further sought input regarding an appropriate standard for “reasonably comparable” and “urban areas” in this context.<sup>652</sup>

384. *Discussion.* We will evaluate the rates for services offered with Mobility Fund Phase I support based on whether they fall within a reasonable range of urban rates for mobile service. The

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<sup>646</sup> AT&T *Mobility Fund NPRM* Comments at 15; Verizon *Mobility Fund NPRM* Comments at 19-20; CWA *Mobility Fund NPRM* Reply at 5.

<sup>647</sup> USA Coalition *Mobility Fund NPRM* Reply at 15.

<sup>648</sup> See, e.g., 47 C.F.R. § 20.12.

<sup>649</sup> *Roaming Second Report and Order*, 26 FCC Rcd at 5449-50, para. 77. As described in the roaming proceeding, Accelerated Docket procedures, including pre-complaint mediation, are among the various dispute resolution procedures available with respect to data roaming disputes. See *id.*, 47 C.F.R. § 1.730.

<sup>650</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,729, para. 38; 47 U.S.C. § 254(b)(3).

<sup>651</sup> *Mobility Fund NPRM* at 14,729, para. 38.

<sup>652</sup> *Id.*

record on this issue was mixed. Some commenters argue that the Commission should require support recipients to certify their compliance with section 254(b)(3), in expectation that nationwide pricing plans will tend to result in carriers offering reasonably comparable rates to those in urban areas.<sup>653</sup> Others propose that the Commission adopt a target for evaluating rates and require that providers offer rates within a particular range of that target figure.<sup>654</sup>

385. To implement the statutory principle regarding comparable rates while offering Mobility Fund Phase I support at the earliest time feasible, the Bureaus may develop target rate(s) for Mobility Fund Phase I before fully developing all the data to be included in a determination of comparable rates with respect to other Connect America Fund support. For Mobility Fund Phase I, we will require recipients to certify annually that they offer service in areas with support at rates that are within a reasonable range of rates for similar service plans offered by mobile wireless providers in urban areas.<sup>655</sup> Recipients' service offerings will be subject to this requirement for a period ending five years after the date of award of support. The Bureaus, under their delegated authority, may define these conditions more precisely in the pre-auction process. We will retain our authority to look behind recipients' certifications and take action to rectify any violations that develop.

### c. Mobility Fund Phase I Eligibility Requirements

386. The Commission proposed that to be eligible for Mobility Fund support, entities must (1) be designated as a wireless ETC pursuant to section 214(e) of the Communications Act, by the state public utilities commission ("PUC") (or the Commission, where the state PUC does not have jurisdiction to designate ETCs) in any area that it seeks to serve; (2) have access to spectrum capable of 3G or better service in the geographic area to be served; and (3) certify that it is financially and technically capable of providing service within the specified timeframe.<sup>656</sup> With a limited exception, discussed *infra*,<sup>657</sup> we adopt these requirements.

387. As noted elsewhere, we also adopt a two-stage application filing process for participants in the Mobility Fund Phase I auction, similar to that used in spectrum license auctions, which will, among other things, require potential Mobility Fund recipients to make disclosures and certifications establishing their eligibility. Specifically, in the pre-auction "short-form" application, a potential bidder will need to establish its eligibility to participate in the Mobility Fund Phase I auction and, in a post-auction "long-form" application, a winning bidder will need to establish its eligibility to receive support. Such an approach should provide an appropriate screen to ensure serious participation without being unduly burdensome. Below, we discuss these eligibility requirements and the timing of each.

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<sup>653</sup> AT&T *Mobility Fund NPRM* Comments at 15; Sprint *Mobility Fund NPRM* Comments at 9; T-Mobile *Mobility Fund NPRM* Comments at 12.

<sup>654</sup> Greenlining *Mobility Fund NPRM* Comments at 11; ITTA *Mobility Fund NPRM* Comments at 14; Sprint *Mobility Fund NPRM* Comments at 8-9.

<sup>655</sup> We note that Cellular South contends that providing support to one provider per area through the Mobility Fund will result in the supported carrier charging excessively high rates and therefore violates section 254. Cellular South et al. *Mobility Fund NPRM* Comments at 20-21. Given the rules being adopted in this Order, we disagree with Cellular South's factual premise and legal conclusion. The requirement we adopt with respect to reasonably comparable rates is one of the provisions that helps ensure that section 254 will not be violated.

<sup>656</sup> *Mobility Fund NPRM* at 14,731, para. 45.

<sup>657</sup> See *infra* para. 491, 47 C.F.R. § 54.1004(a).

(i) ETC Designation

388. *Background.* The Commission proposed to require that applicants be designated as wireless ETCs covering the relevant geographic area prior to participating in an auction.<sup>658</sup> As an alternative, the Commission asked commenters whether entities that have applied for designation as ETCs in the relevant area should be eligible to participate in an auction.<sup>659</sup> The Commission also sought broad comment on the ETC designation requirements of section 214(e), and how to best interpret all the interrelated requirements of that section in order to achieve the purposes of the Mobility Fund.<sup>660</sup>

389. *Discussion.* We generally adopt our proposal and require that Mobility Fund Phase I participants be ETCs prior to participating in the auction.<sup>661</sup> As a practical matter, this means that parties that seek to participate in the auction must be ETCs in the areas for which they will seek support at the deadline for applying to participate in the auction.

390. By statute, the states, along with the Commission, are empowered to designate common carriers as ETCs.<sup>662</sup> ETCs must satisfy various service obligations, consistent with the public interest. We decline to adopt new federal rules to govern the ETC designation process solely for purposes of designating entities to receive non-recurring support, as suggested by some commenters.<sup>663</sup> In light of the roughly comparable amounts of time required for the Commission and states to process applications to be designated as an ETC and the time required to move from the adoption of this R&O to the acceptance of applications to participate in a Mobility Fund Phase I auction, parties contemplating requesting new designations as ETCs for purposes of participating in the auction should act promptly to begin the process. The Commission will make every effort to process such applications in a timely fashion, and we urge the states to do likewise.

391. Many commenters request that the Commission eliminate or streamline many of the service obligations that apply to ETCs, on ground that these obligations are unrelated to the Mobility Fund and its immediate goals.<sup>664</sup> We do not see this as cause to set aside those obligations. The Mobility Fund will offer existing ETCs support to accelerate the expansion of coverage by current generation wireless networks within their designated service area as a means to meeting their ETC obligations. We are not, however, crafting an alternative to the USF but rather developing a mechanism to effectively use a portion of existing funds to promote the expansion of mobile voice service over current-generation (or better) network technology. Given that current ETCs already have their existing obligations throughout their service area, it would be a step backwards to relieve them of those obligations based on the receipt

<sup>658</sup> *Mobility Fund NPRM* at 14,731, para. 47.

<sup>659</sup> *Id.* at 14,732, para. 48. Pursuant to 47 U.S.C. § 214(e)(1) and 47 C.F.R. § 54.101(b), an ETC is obligated to provide all of the supported services defined in 47 C.F.R. § 54.101(a) throughout the area for which it has been designated an ETC. Therefore, an ETC must be designated (or have applied for designation) with respect to an area that includes area(s) on which it wishes to receive Mobility Fund support. Moreover, a recipient of Mobility Fund support will remain obligated to provide supported services throughout the area for which it is designated an ETC if that area is larger than the areas for which it receives Mobility Fund support.

<sup>660</sup> *Mobility Fund NPRM* at 14,732, para. 49.

<sup>661</sup> As discussed *infra*, we adopt a narrow exception to permit participation by Tribally-owned or controlled entities that have filed for ETC designation prior to the short-form application deadline. See *infra* para. 491, 47 C.F.R. § 54.1004(a).

<sup>662</sup> Generally, the states have primary jurisdiction to designate ETCs; the Commission designates ETCs where states lack jurisdiction. See 47 U.S.C. § 214(e).

<sup>663</sup> AT&T *Mobility Fund NPRM* Comments at 6-8; Sprint *Mobility Fund NPRM* Comments at 4-5.

<sup>664</sup> Sprint *Mobility Fund NPRM* Comments at 4-5.



of Mobility Fund support. Accordingly, we retain existing ETC requirements and obligations and move forward by adopting our proposal to require that parties be ETCs in the area in which they seek Mobility Fund support.<sup>665</sup>

392. Furthermore, with the narrow exception discussed *infra*, we decline to adopt the alternative of allowing parties to bid for support prior to being designated an ETC, provided they have an application for designation pending.<sup>666</sup> We believe this approach would inject uncertainties as to eligibility that could interfere with speedy deployment of networks by those that are awarded support, or disrupt the Mobility Fund auction. Moreover, requiring that applicants be designated as ETCs prior to a Mobility Fund Phase I auction may help ensure that the pool of bidders is serious about seeking support and meeting the obligations that receipt of support would entail.

### (ii) Access to Spectrum

393. *Background.* In order to participate in a Mobility Fund auction and receive support, the Commission proposed in the *Mobility Fund NPRM* that an entity must hold, or otherwise have access to, a Commission authorization to provide service in a frequency band that can support 3G or better services. The Commission sought comment on a number of questions relating to this proposed eligibility requirement.<sup>667</sup>

394. *Discussion.* We require that any applicant for a Mobility Fund Phase I auction have access to the necessary spectrum to fulfill any obligations related to support. Many commenters support this requirement.<sup>668</sup> Thus, those eligible for Mobility Fund Phase I support include all entities that, prior to an auction, hold a license authorizing use of appropriate spectrum, as discussed more fully below, in the geographic area(s) for which support is sought. As suggested by some commenters, we also conclude that the spectrum access requirement can be met by leasing appropriate spectrum, prior to an auction, covering the relevant geographic area(s).<sup>669</sup> We require that spectrum access through a license or leasing arrangement be in effect prior to auction for an applicant to be eligible for an award of support. We also require that whether an applicant claims required access to spectrum through a license or a lease, it must retain access for at least five years from the date of award of Phase I support.<sup>670</sup> For purposes of calculating term length, parties may include opportunities for license and/or lease renewal.

395. Further, we seek to facilitate participation by parties that may make their acquisition of license or their lease of spectrum access contingent on winning support from Mobility Fund Phase I. Accordingly, parties may satisfy the spectrum access requirement if they have acquired spectrum access, including any necessary renewal expectancy, that is contingent on their obtaining support in the auction. Other contingencies, however, will render the relevant spectrum access insufficient for the party to meet our requirements for participation.

396. We reject the suggestion of some commenters that we should use a substantially more relaxed standard that might allow entities to seek to acquire access to spectrum (as a licensee or lessee)

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<sup>665</sup> It is sufficient for purposes of an application to participate in the Mobility Fund Phase I auction that the applicant has received its ETC designation conditioned only upon receiving Mobility Fund Phase I support.

<sup>666</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,732, para. 48.

<sup>667</sup> *Id.* at 14,732-33, paras. 50-53.

<sup>668</sup> CenturyLink *Mobility Fund NPRM* Comments at 8-9; ITTA *Mobility Fund NPRM* Comments at 15-16; MetroPCS *Mobility Fund NPRM* Comments at 11; RTG *Mobility Fund NPRM* Comments at 11.

<sup>669</sup> Verizon *Mobility Fund NPRM* Comments at 24-25; RTG *Mobility Fund NPRM* Comments at 11.

<sup>670</sup> See 47 C.F.R. § 54.1003(b).

only after becoming a winning bidder.<sup>671</sup> For instance, New EA argues that limiting eligibility to only those carriers holding licenses would “reinforce[] incumbent control,” and asserts that a more liberal approach ought not to be problematic given that areas with no mobile broadband “typically have an abundance of fallow spectrum.”<sup>672</sup> We conclude, however, that failing to ensure spectrum access, on at least a conditional basis, prior to entering a Mobility Fund auction would be inconsistent with the serious undertakings implicit in bidding for support. We therefore require applicants to ensure that if they become winning bidders, they will have the spectrum to meet their obligations as quickly and successfully as possible.

397. As noted, in the *Mobility Fund NPRM*, the Commission proposed that entities seeking to receive support from the Mobility Fund must have access to spectrum capable of supporting the required services. The Commission noted that spectrum for use in Advanced Wireless Services, the 700 MHz Band, Broadband Radio Services, broadband PCS, or cellular bands should all be capable of 3G services, and asked if other spectrum bands would be appropriate.<sup>673</sup> The Commission also asked whether it should require that parties seeking support have access to a minimum amount of bandwidth and whether only paired blocks of bandwidth should be deemed sufficient. The few comments we received on these issues generally support requiring that auction participants demonstrate access to spectrum that is adequate to support the services demanded of Mobility Fund providers, but did not provide specifics on what that spectrum should be.<sup>674</sup>

398. T-Mobile noted that carriers with spectrum in lower bands would have an advantage over those with access to higher band spectrum due to propagation characteristics that may make it less costly to provide wireless broadband in rural areas using lower frequencies.<sup>675</sup> While we recognize that access to lower band spectrum, particularly sub-1 GHz spectrum, reduces the cost of build-out,<sup>676</sup> we disagree with T-Mobile that this is an “unfair” advantage in the context of the Mobility Fund. The Mobility Fund is designed to provide support in areas where it is cost effective to do so with the limited available funds. Thus, its ultimate goal is to maximize the number of units covered given the funds available.

399. We agree with commenters that advocate a simple approach to defining what spectrum will establish eligibility for the Mobility Fund. Therefore, we will require entities seeking to receive support from the Mobility Fund to certify that they have access to spectrum capable of supporting the required services. While we decline to restrict the frequencies applicants must use to be eligible for Mobility Fund Support, we note that there are certain spectrum bands that will not support mobile broadband (*e.g.*, paging service). As discussed below in connection with our discussion of application requirements, we will require that applicants identify the particular frequency bands and the nature of the access on which they assert their eligibility for support. We will assess the reasonableness of eligibility certifications based on information we will require be submitted in short- and long-form

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<sup>671</sup> See New EA *Mobility Fund NPRM* Comments at 5-6; NTCH *Mobility Fund NPRM* Comments at 7-8.

<sup>672</sup> New EA *Mobility Fund NPRM* Comments at 6, 8.

<sup>673</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,733, para. 53.

<sup>674</sup> ITTA *Mobility Fund NPRM* Comments at 15-16; TechAmerica *Mobility Fund NPRM* Comments at 3; T-Mobile *Mobility Fund NPRM* Comments at 14.

<sup>675</sup> T-Mobile *Mobility Fund NPRM* Comments at 9.

<sup>676</sup> See *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*, WT Docket No. 10-133, Fifteenth Report, 26 FCC Rcd 9664, 9834-35, para. 293 (2011) (*15th Annual Mobile Wireless Competition Report*).

applications. Should entities make this certification and not have access to the appropriate level of spectrum, they will be subject to the penalties described below.

**(iii) Certification of Financial and Technical Capability**

400. *Background.* In the *Mobility Fund NPRM*, the Commission sought comment on how best to determine if an entity has sufficient resources to satisfy Mobility Fund obligations.<sup>677</sup> The Commission also sought comment on a certification regarding an entity's technical capacity.<sup>678</sup> The Commission asked if we need to be specific as to the minimum showing required to make the certification, or whether we can rely on our post-auction performance requirements.<sup>679</sup>

401. *Discussion.* We will require that an applicant certify, in the pre-auction short-form application and in the post-auction long-form application, that it is financially and technically capable of providing 3G or better service within the specified timeframe in the geographic areas for which it seeks support. Given that Mobility Fund Phase I provides non-recurring support, applicants for Phase I funds need to assure the Commission that they can provide the requisite service without any assurance of ongoing support for the area in question after Phase I support has been exhausted.

402. Among commenters, there was no dispute that the Commission should require parties to be financially and technically capable of satisfying the performance requirements.<sup>680</sup> Some contend, however, that there is no need for financial or technical certifications given the requirements bidders must satisfy to qualify as ETCs and to participate in the Mobility Fund.<sup>681</sup> In contrast, one commenter urges that, even before bidding, the Commission should require applicants to submit details about the technology and the network they will use to satisfy Mobility Fund obligations.<sup>682</sup> Another draws a parallel between the Commission and investors, comparing requiring qualifications to due diligence.<sup>683</sup> One commenter proposes requiring applicants to demonstrate that they will bear a fixed percentage of the total costs of extending coverage.<sup>684</sup> Comments also argue against Commission review, suggesting that the Commission's expertise might not be adequate to make the determinations in the process of reviewing applications.<sup>685</sup>

403. We conclude that applicant certifications of qualifications are sufficient, both at the short and long-form application stage. In the context of our spectrum auctions, we have relied successfully on certifications to ensure certain regulatory and legal obligations have been met by the applicants. Notwithstanding the differences between the spectrum license and USF contexts, we conclude that such an approach is appropriate here as well. Taking the time to review the finances and technical capacities of all applicants, particularly at the short-form stage when there may be far more applicants than eventually will receive support, could result in a substantial delay in making Mobility Fund support available for very little gain.

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<sup>677</sup> *Mobility Fund NPRM* at 14,733, para. 54.

<sup>678</sup> *Id.*

<sup>679</sup> *Id.*

<sup>680</sup> AT&T *Mobility Fund NPRM* Comments at 9.

<sup>681</sup> T-Mobile *Mobility Fund NPRM* Comments at 14-15.

<sup>682</sup> AT&T *Mobility Fund NPRM* Comments at 9.

<sup>683</sup> ITTA *Mobility Fund NPRM* Comments at 16.

<sup>684</sup> MetroPCS *Mobility Fund NPRM* Comments at 9-10.

<sup>685</sup> New EA *Mobility Fund NPRM* Comments at 8.

404. Moreover, we elect not to require that Mobility Fund Phase I participants finance a fixed percentage of any build-out with non-Mobility Fund funds.<sup>686</sup> While requiring that Fund recipients put up a share of their own funds for a project may be an effective way to ensure that the recipient has sufficient stake in the project to effect its completion, we do not believe this requirement is needed in light of the other measures we adopt here.

405. Finally, requiring a certification of financial and technical capability is a real additional safeguard. Applicants making certifications to the Commission expose themselves to liability for false certifications. Applicants should take care to review their resources and their plans before making the required certification and be prepared to document their review, if necessary.

**(iv) Other Qualifications**

406. *Background.* 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 we should take to encourage smaller eligible parties to participate in the Mobility Fund.<sup>687</sup>

407. *Discussion.* We conclude that, with one exception, we will not impose any additional eligibility requirements to participation in the Mobility Fund. One commenter advocates barring Tier 1 carriers from participation,<sup>688</sup> while another contends that Verizon should not be allowed to participate, given that it already voluntarily relinquished the funds to be disbursed through the Mobility Fund.<sup>689</sup> Other commenters seek to limit eligibility to participate in the Mobility Fund based on other criteria such as labor relations and exclusive handset arrangements.<sup>690</sup>

408. We 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. We see no inconsistency in Verizon Wireless or Sprint relinquishing support previously provided under the identical support rule – ongoing support provided with no specific obligation to expand voice coverage where it was lacking – and seeking one-time support under new rules to expand voice and broadband service over current generation wireless networks to areas presently lacking such facilities.

409. We also decline to bar any particular class of parties out of concern that they might appear to be better positioned to win Mobility Fund support, for example due to their size. As we have done in the context of spectrum auctions, we expect that our general auction rules and the more detailed auction procedures to be developed on delegated authority for a specific auction will provide the basis for an auction process that will promote our objectives for the Mobility Fund and provide a fair opportunity for serious, interested parties to participate.

410. One commenter questions whether the Mobility Fund should be available to parties in particular areas if the party previously, *i.e.*, without respect to Mobility Fund support, indicated an

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<sup>686</sup> MetroPCS suggests that the Commission require a Mobility Fund recipient to demonstrate that it has the financial capacity to make a substantial matching investment by requiring it to contribute from its own funds, 75 percent of the project costs. In addition, MetroPCS would have us provide Mobility Fund support to a recipient only after the recipient has expended the full amount of its 75 percent share of the project funding, reasoning that such a requirement would provide incentive for the recipient to complete the project quickly. *MetroPCS Mobility Fund NPRM Comments* at 9-10.

<sup>687</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,733, para. 55.

<sup>688</sup> RTG *Mobility Fund NPRM Comments* at 11.

<sup>689</sup> RCA *Mobility Fund NPRM Reply* at 9-10.

<sup>690</sup> See CWA *Mobility Fund NPRM Reply* at 5; Blooston *Mobility Fund NPRM Comments* at 8-9.

intention to deploy wireless voice and broadband service in that area.<sup>691</sup> We conclude that this concern has merit and we will restrict parties from bidding for support in certain limited circumstances to assure that Mobility Fund Phase I support does not go to finance coverage that carriers would have provided in the near term without any subsidy. In particular, we will require an applicant for Mobility Fund Phase I support to certify that it will not seek support for any areas in which it has made a public commitment to deploy 3G or better wireless service by December 31, 2012. This restriction will not prevent a provider from seeking and receiving support for a geographic area where another carrier has announced such a commitment to deploy 3G or better, but it may conserve funds and avoid displacing private investment by making a carrier that made such a commitment ineligible for Mobility Fund Phase I support with respect to the identified geographic area(s). Because circumstances are more likely to change over a longer term, we do not agree that providers should be held to statements for any time period beyond December 31, 2012.<sup>692</sup>

**d. Reverse Auction Mechanism**

411. We adopt our proposal, discussed below, to establish program and auction rules for the Mobility Fund Phase I in this proceeding, to be followed by a process conducted by the Bureaus on delegated authority identifying areas eligible for support, and seeking comment on specific detailed auction procedures to be used, consistent with this Order.<sup>693</sup> This process will be initiated by the release of a Public Notice announcing an auction date, to be followed by a subsequent Public Notice specifying the auction procedures, including dates, deadlines, and other details of the application and bidding process.

**(i) Basic Auction Design**

412. *Background.* In the *Mobility Fund NPRM*, the Commission proposed to use a single-round sealed bid reverse auction to select awardees for Mobility Fund support, determine the areas that will receive support, and establish award amounts.<sup>694</sup> The Commission also sought comment on alternatives.

413. *Discussion.* We continue to believe that our proposal to use a single-round sealed bid format is most appropriate for Mobility Fund Phase I reverse auction, although we do not make a final determination here. In the context of our spectrum auctions, the question of whether to conduct bidding in one or more rounds is typically addressed in the pre-auction development of specific procedures and we conclude that we should do the same here.

414. A variety of commenters supported a format with more than one round of bidding.<sup>695</sup> MetroPCS supported a multi-round format to allow more informed bidding.<sup>696</sup> Verizon suggested that allowing 2-3 rounds of bidding would result in more competitive bidding, claiming that more rounds would reduce costs of the program in the long-run since bidders will be generally very conservative in their first-round bids.<sup>697</sup> NE Colorado Cellular commented that a single round auction would worsen industry concentration.<sup>698</sup> T-Mobile, however, supported our proposal to conduct a single-round auction,

<sup>691</sup> GCI *Mobility Fund NPRM* Comments at 9.

<sup>692</sup> *Id.*

<sup>693</sup> See *supra* para. 329.

<sup>694</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,734, para. 58.

<sup>695</sup> Commnet *Mobility Fund NPRM* Comments at 6; MetroPCS *Mobility Fund NPRM* Comments at 11-12; MTPCS *Mobility Fund NPRM* Comments at 11; Verizon *Mobility Fund NPRM* Comments at 25.

<sup>696</sup> MetroPCS *Mobility Fund NPRM* Comments at 11-12.

<sup>697</sup> Verizon *Mobility Fund NPRM* Comments at 25.

citing simplicity and lower costs for participants, and, in contrast to NE Colorado Cellular's position, claimed that such a format may improve smaller carriers' chances of winning Mobility Fund support.<sup>699</sup>

415. We are not convinced that multiple bidding rounds are needed in order for bidders to make informed bid decisions or submit competitive bids. A Mobility Fund Phase I auction provides a mechanism by which to identify whether, and if so, at what price, providers are willing to extend coverage over relatively small unserved areas in exchange for a one-time support payment – decisions that depend upon internal cost structures, private assessments of risk, and other factors related to the providers' specific circumstances. While uncertainty about many of these considerations must be taken into account when determining a bid amount, as when making other financial commitments, the bid amounts of other auction participants are unlikely to contain information that will affect significantly the bidder's own cost assessments and bid decisions. Nor do we agree that a single round auction for Mobility Fund Phase I support, as opposed to a multiple round format, would have an adverse effect on industry structure, as asserted by one commenter. For all these reasons, we would be inclined to implement our proposal to conduct Phase I auction using a single-round sealed bid format. Nevertheless, given that under our general approach to establishing auction procedures, this issue would typically be delegated to the Bureaus to consider in connection with establishing detailed auction procedures, we leave it to the Bureaus to implement a format with more than one round, if they deem it more appropriate.

#### (ii) Application Process

416. *Background.* The *Mobility Fund NPRM* sought comment on a proposal to use a two-stage application process similar to the one we use in spectrum license auctions. Parties interested in participating at auction would submit a "short-form" application providing basic ownership information and certifying as to its qualifications to receive support.<sup>700</sup> After the auction, we would conduct a more extensive review of the winning bidders' qualifications through "long-form" applications.<sup>701</sup>

417. *Discussion.* Consistent with record support, we adopt a two-stage application process described above, noting that our experience with such a process for spectrum licensing auctions has been positive, and balances the need to collect essential information with administrative efficiency.<sup>702</sup>

418. We adopt our proposals regarding the types of information bidders should be required to disclose in Mobility Fund auction short-form applications. Thus, we will require that each auction applicant provide information to establish its identity, including disclosure of parties with ownership interests, consistent with the ownership interest disclosure required in Part 1 of our rules for applicants for spectrum licenses, and any agreements the applicant may have relating to the support to be sought through the auction.<sup>703</sup> With respect to eligibility requirements relating to ETC designation and spectrum access, applicants will be required to disclose and certify their ETC status as well as the source of the spectrum they plan to use to meet Mobility Fund obligations in the particular area(s) for which they plan to bid. Specifically, applicants will be required to disclose whether they currently hold or lease the

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<sup>698</sup> NE Colorado Cellular *Mobility Fund NPRM* Reply at 1.

<sup>699</sup> T-Mobile *Mobility Fund NPRM* Comments at 16.

<sup>700</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,731, 14,734, paras. 46, 59.

<sup>701</sup> *Id.*

<sup>702</sup> Verizon *Mobility Fund NPRM* Comments at 25; T-Mobile *Mobility Fund NPRM* Comments at 16-19.

<sup>703</sup> See 47 C.F.R. §§ 1.21001(b), 54.1005(a)(1). Applicants will only be able to make minor modifications to their short-form applications. Major amendments, for example, changes in an applicant's ownership that constitute an assignment or transfer of control, will make the applicant ineligible to bid. See 47 C.F.R. § 1.21001(d)(4).

spectrum and whether such spectrum access is contingent on obtaining support in the auction. Applicants must have secured any Commission approvals necessary for the required spectrum access prior to submitting an auction application. Moreover, applicants will be required to certify that they will retain their access to the spectrum for at least five years from the date of award of support. We anticipate that the Bureaus will exercise their delegated authority to establish the specific form in which such information will be collected from applicants. We conclude that this approach strikes an appropriate balance in ensuring that entities are “legally, technically and financially qualified,”<sup>704</sup> as AT&T suggests, while minimizing undue burden on applicants and Commission staff.

### (iii) Bidding Process

419. *Background.* The *Mobility Fund NPRM* also sought comment on certain other aspects of the proposed bidding process, including the process used to determine winning bidders and maximize the available support.<sup>705</sup>

420. *Discussion.* We delegate authority to the Bureaus to administer the policies, programs, rules, and procedures we establish for Mobility Fund Phase I today and take all actions necessary to conduct a Phase I auction. We anticipate that the Bureaus will exercise this authority by conducting a pre-auction notice-and-comment process to establish the specific procedures for the auction. Such procedures will implement the general rule we adopt to enable the establishment of procedures for reviewing bids and determining winning bidders. The overall objective of the bidding in this context is to maximize the number of units to be covered in unserved areas given our overall budget for support. The Bureaus have discretion to adopt the best procedures to achieve this objective during the pre-auction process taking into account all relevant factors, including the implementation feasibility and the simplicity of bidder participation.

421. Several commenters address our proposal to base winning bids on the lowest per-unit bid amounts, expressing concern that it would marginalize rural areas<sup>706</sup> and suggesting instead that bids be evaluated by giving priority to the hardest-to-serve areas.<sup>707</sup> One commenter asserts that determining winners based on low bids would encourage the winner to do only the minimum required to meet service obligations.<sup>708</sup> We agree with these and other commenters’ concerns that there are areas that may not be good candidates for one-time support under Mobility Fund Phase I – and may be better served through other USF reform initiatives, such as Mobility Fund Phase II. We also recognize that some areas that benefit from Phase I support may eventually have been built out anyway, but we see significant benefit in accelerating that build-out. We disagree, however, with the suggestion that Mobility Fund Phase I would not serve rural areas generally; we believe that many rural areas will be able to benefit from Phase I support, although we acknowledge that support is not likely to be sufficient to reach the most remote areas. With respect to the concern that winners selected on the basis of a low bid will have little incentive to meet more than the minimum service obligations, we note that this issue arises regardless of selection criteria. Hence, in this R&O, we adopt performance requirements and enforcement procedures to ensure that Mobility Fund Phase I support is utilized as intended.

422. We also address here several additional aspects of the general framework for the bidding process on which we sought comment in the *Mobility Fund NPRM*.

<sup>704</sup> AT&T *Mobility Fund NPRM* Comments at 8-9.

<sup>705</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,735-37, paras. 63-74.

<sup>706</sup> ATA *Mobility Fund NPRM* Comments at 4.

<sup>707</sup> US Cellular *Mobility Fund NPRM* Comments at 10-11; RCA *Mobility Fund NPRM* Comments at 8-9; AT&T *Mobility Fund NPRM* Comments at 4.

<sup>708</sup> Texas Statewide Coop *Mobility Fund NPRM* Comments at 6-7.

423. *Maximum Bids and Reserve Prices.* The Commission proposed a rule in the *Mobility Fund NPRM* to provide for auction procedures that establish maximum acceptable per-unit bid amounts and reserve amounts, separate and apart from any maximum opening bids, and to provide that those reserves may be disclosed or undisclosed.<sup>709</sup>

424. Commenters are divided on the issue of whether reserve prices and maximum bids are needed or desired, and if implemented, how they should be determined, but none oppose our proposal to retain the discretion to establish such amounts. Some suggest that no reserve prices are necessary because we can rely on competition to discipline bids,<sup>710</sup> while others assume that we will base any reserve prices on estimated costs.<sup>711</sup> Another proposes that we conduct bidding on a regional basis, and base reserve prices for each region on the unserved populations in each region.<sup>712</sup> We adopt our proposed rule on reserve prices and anticipate that, as detailed procedures for a Mobility Fund Phase I auction are established during the pre-auction period, the Bureaus will consider these and other proposals with respect to reserve prices in light of the specific timing of and other circumstances related to the auction.

425. *Aggregating Service Areas and Package Bidding.* In the *Mobility Fund NPRM*, the Commission proposed a rule to provide for auction procedures that permit bidders to submit bids on packages of tracts, with any specific procedures to be determined as part of the pre-auction process.<sup>713</sup> The Commission also invited comment on the use of package bidding – in which a single bid is submitted to cover a group of areas – in the Mobility Fund, and specifically mentioned some ways of implementing limited package bidding.<sup>714</sup>

426. We received no comments specifically on our proposal to address issues related to package bidding in the process of establishing detailed auction procedures and will address issues relating to package bidding as part of the pre-auction process, which is consistent with the way we approach this issue for spectrum auctions.<sup>715</sup> Interested parties will have an opportunity to comment on the desirability of package bidding in the pre-auction process in connection with the determination of the minimum area for bidding.<sup>716</sup> Potential bidders will be able to provide input on whether specific package bidding procedures would allow them to formulate and implement bidding strategies to incorporate Mobility Fund Phase I support into their business plans and capture efficiencies, and on how well those procedures will facilitate the realization of the Commission's objectives for Mobility Fund Phase I.

427. *Refinements to the Selection Mechanism to Address Limited Available Funds.* In the *Mobility Fund NPRM*, the Commission proposed a rule that would provide the discretion to establish procedures in the pre-auction process to deal with the possibility that funds may remain available after the auction has identified the last lowest per-unit bid that does not assign support exceeding the total funds

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<sup>709</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,736, para. 66.

<sup>710</sup> AT&T *Mobility Fund NPRM* Comments at 18-19; T-Mobile *Mobility Fund NPRM* Comments at 17.

<sup>711</sup> Cellular South et al. *Mobility Fund NPRM* Comments at 22-23; NASUCA *Mobility Fund NPRM* Comments at 7.

<sup>712</sup> Verizon *Mobility Fund NPRM* Comments at 26-27.

<sup>713</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,736, paras. 67-68.

<sup>714</sup> *Id.*

<sup>715</sup> See 47 C.F.R. § 1.2103(b). See also, e.g., *Auction of 700 MHz Band Licenses Scheduled for January 16, 2008; Comment Sought on Competitive Bidding Procedures For Auction 73*, Public Notice, 22 FCC Rcd 15,004, 15,010-14, paras. 17-24 (Wireless Telecom. Bur. 2007); *700 MHz Auction Procedures Public Notice*, 22 FCC Rcd at 18,179-81, paras. 138-144.

<sup>716</sup> See *supra* para. 346.



available.<sup>717</sup> The Commission also proposed a rule to give discretion to address a situation where there are two or more bids for the same per-unit amount but for different areas (“tied bids”) and remaining funds are insufficient to satisfy all of the tied bids.<sup>718</sup>

428. We adopt our proposed rules to provide the Bureaus with discretion to develop appropriate procedures to address these issues during the pre-auction notice-and-comment process. These procedures shall be consistent with our objective of awarding support so as to maximize the number of units that will gain coverage in unserved areas subject to our overall budget for support.

429. *Withdrawn Bids.* In the *Mobility Fund NPRM*, the Commission proposed that, as in the case of spectrum auctions, it would establish a rule to provide for procedures for withdrawing provisionally winning bids.<sup>719</sup> We adopt the proposed rule on withdrawn bids, but as noted in the *Mobility Fund NPRM*, we do not expect the Bureaus to permit withdrawn bids, particularly if the Mobility Fund Phase I auction will be conducted in a single round. Furthermore, we address how we will deal with auction defaults below.<sup>720</sup>

430. *Preference for Tribally-Owned or Controlled Providers.* As we do for Tribal Mobility Fund Phase I, discussed below,<sup>721</sup> we adopt a 25 percent bidding credit for Tribally-owned or controlled providers that participate in a Mobility Fund Phase I auction. The preference would act as a “reverse” bidding credit that would effectively reduce the bid amount by 25 percent for the purpose of comparing it to other bids, thus increasing the likelihood that a Tribally-owned or controlled entity would receive funding. The preference would be available solely with respect to the eligible census blocks located within the geographic area defined by the boundaries of the Tribal land associated with the Tribal entity seeking support.

#### (iv) Information and Competition

431. In the *Mobility Fund NPRM*, the Commission proposed to prohibit applicants competing for support in the auction from communicating with one another regarding the substance of their bids or bidding strategies and to limit public disclosure of auction-related information as appropriate.<sup>722</sup> We adopt our proposed rules, which are similar to those used for spectrum license auctions. We anticipate that the Bureaus will seek comment during the pre-auction procedures process and decide on the details and extent of information to be withheld until the close of the auction.

#### (v) Auction Cancellation

432. The *Mobility Fund NPRM* proposed to provide discretion to delay, suspend, or cancel bidding before or after a reverse auction begins under a variety of circumstances, including natural disasters, technical failures, administrative necessity, or any other reason that affects the fair and efficient conduct of the bidding.<sup>723</sup> We received no comments on this proposal. Based on our experience with a similar rule for spectrum license auctions, we conclude that such a rule is necessary and adopt it here.

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<sup>717</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,736, para. 69.

<sup>718</sup> *Id.* at 14,736-37, para. 70.

<sup>719</sup> *Id.* at 14,737, paras. 72-74.

<sup>720</sup> *See infra* paras. 458-461.

<sup>721</sup> *See infra* para. 490.

<sup>722</sup> *Mobility Fund NPRM* at 14,737, para. 75.

<sup>723</sup> *Id.* at 14,737, para. 76.

**e. Post-Auction Long-Form Application Process**

433. After the auction has concluded, a winning bidder will be required to file a “long-form” application to qualify for and receive Mobility Fund support. Those applications will be subject to an in-depth review of the applicants’ eligibility and qualifications to receive USF support. Here, we discuss the long-form applications and the review process that will precede award of support from the Mobility Fund.

**(i) Long-Form Application**

434. *Background.* In the *Mobility Fund NPRM*, the Commission proposed that a winning bidder would be required to provide detailed information showing that it is legally, technically and financially qualified to receive support from the Mobility Fund.<sup>724</sup> The Commission sought comment on our proposal and on the specific information that winning bidders should be required to provide to make the required showings.<sup>725</sup>

435. *Discussion.* We adopt the long-form application process we proposed in the *Mobility Fund NPRM*. As we discuss above, we delegate to the Wireless and Wireline Bureaus responsibility for establishing the necessary FCC application form(s). RCA notes that “onerous” application requirements will deter smaller bidders, although it does not suggest that our specific proposals regarding the application process would be problematic.<sup>726</sup> We do not view the application process that we have outlined as “onerous,” nor do other commenters indicate that the proposals would be burdensome. Our experience with such a long-form application process for spectrum licensing auctions has been positive, balancing the need to collect essential information with administrative efficiency. Therefore, we adopt our proposal to require a post-auction long-form application as described below.

436. After bidding for Mobility Fund Phase I support has ended, the Commission will declare the bidding closed and identify and notify the winning bidders. Unless otherwise specified by public notice, within 10 business days after being notified that it is a winning bidder for Mobility Fund support, a winning bidder will be required to submit a long-form application. In the sections below, we address the information an applicant will be required to submit as part of the long-form application.

**(ii) Ownership Disclosure**

437. *Background.* In the *Mobility Fund NPRM*, we sought comment on the specific information that should be required at the long-form application stage sufficient to establish their ownership and control, as well as eligibility to receive support.<sup>727</sup>

438. *Discussion.* We will adopt for the Mobility Fund the existing ownership disclosure requirements in Part 1 of our rules that already apply to short-form applicants to participate in spectrum license auctions and long-form applicants for licenses in the wireless services.<sup>728</sup> Thus, an applicant for Mobility Fund support will be required to fully disclose its ownership structure as well as information regarding the real party- or parties-in-interest of the applicant or application.<sup>729</sup> Wireless providers that have participated in spectrum auctions will already be familiar with these requirements, and are likely to already have ownership disclosure information reports (FCC Form 602) on file with the Commission,

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<sup>724</sup> *Id.* at 14,739, paras. 79-81.

<sup>725</sup> *Id.*

<sup>726</sup> RCA *Mobility Fund NPRM* Comments at 9.

<sup>727</sup> *Mobility Fund NPRM* at 14,739-40, paras. 82-83.

<sup>728</sup> See, e.g., 47 C.F.R. § 1.2112(a). Because applicants for Mobility Fund Phase I support will not be applying for designated entity status, only subsection (a) of 47 C.F.R. § 1.2112 will be applicable.

<sup>729</sup> See 47 C.F.R. § 1.2112(a).

which may simply need to be updated. To minimize the reporting burden on winning bidders, we will allow them to use ownership information stored in existing Commission databases and update that ownership information as necessary.

**(iii) Eligibility To Receive Support**

439. *ETC Designation.* As noted, with the limited exception discussed *infra*, we require any entity bidding for Mobility Fund support to be designated an ETC prior to the Mobility Fund auction short-form application deadline.<sup>730</sup> A winning bidder will be required to submit with its long-form application appropriate documentation of its ETC designation in all of the areas for which it will receive support. In the event that a winning bidder receives an ETC designation conditioned upon receiving Mobility Fund support, it may submit documentation of its conditional designation, provided that it promptly submits documentation of its final designation after its long-form application has been approved but before any disbursement of Mobility Fund funds.

440. *Access to Spectrum.* Applicants for Mobility Fund support will also be required to identify the particular frequency bands and the nature of the access (*e.g.*, licenses or leasing arrangements) on which they assert their eligibility for support. Because not all spectrum bands are capable of supporting mobile broadband, and leasing arrangements can be subject to wide variety of conditions and contingencies, before an initial disbursement of support is approved, we will assess the reasonableness of these assertions.<sup>731</sup> Should an applicant not have access to the appropriate level of spectrum, it will be found not qualified to receive Mobility Fund support and will be subject to an auction default payment.<sup>732</sup>

**(iv) Project Construction**

441. *Background.* In the *Mobility Fund NPRM*, we proposed that a participant be required to submit with its long-form application a project schedule that identifies a variety of project milestones.<sup>733</sup>

442. *Discussion.* Consistent with record support, we conclude that a winning bidder's long-form application should include a description of the network it will construct with Mobility Fund support.<sup>734</sup> We will require carriers to specify on their long-form applications whether the supported project will qualify as either a 3G or 4G network, including the proposed technology choice and demonstration of technical feasibility. Applications should also include a detailed description of the network design and contracting phase, construction period, and deployment and maintenance period. We will also require applicants to provide a complete projected budget for the project and a project schedule and timeline. Recipients will be required to provide updated information in their annual reports and in the information they provide to obtain a disbursement of funds. In addition, as we do for Tribal Mobility Fund Phase I, discussed below, winning bidders of areas that include Tribal lands must comply with

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<sup>730</sup> See *supra* para. 730.

<sup>731</sup> We recognize that an applicant whose access to spectrum derives from a spectrum manager leasing arrangement pursuant to section 1.9020 of the Commission's rules may have a greater burden than other licensees and spectrum lessees to demonstrate through the execution of contractual conditions in its leasing arrangements that it has the necessary access to spectrum required to qualify for disbursement of Mobility Fund Phase I support. See, *e.g.*, 47 C.F.R. §§ 1.9010, 1.9020, 1.9030.

<sup>732</sup> See *infra* para. 458.

<sup>733</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,740, para. 84.

<sup>734</sup> AT&T *Mobility Fund NPRM* Comments at 9; T-Mobile *Mobility Fund NPRM* Comments at 19. Because the long-form application will be a public document, states will have access to this information for the ETCs that are within their jurisdiction.

Tribal engagement obligations to demonstrate that they have engaged Tribal governments in the planning process and that the service to be provided will advance the goals established by the Tribe.<sup>735</sup>

**(v) Financial Security and Guarantee of Performance**

443. *Background.* In the *Mobility Fund NPRM*, we asked whether a winning bidder should be required to post financial security as a condition to receiving Mobility Fund support to ensure that it has committed sufficient financial resources to meeting the program obligations associated with such support.<sup>736</sup>

444. *Discussion.* As discussed in greater detail below, we will require winning bidders for Mobility Fund support to provide us with an irrevocable stand-by Letter of Credit (“LOC”), issued in substantially the same form as set forth in the model Letter of Credit provided in Appendix N<sup>737</sup> by a bank that is acceptable to the Commission,<sup>738</sup> in an amount equal to the amount of support as it is disbursed, plus an additional percentage of the amount of support disbursed which shall serve as a default payment, which percentage will be determined by the Bureaus in advance of the auction.

445. We received few comments on the method by which we should secure our financial commitment. MetroPCS maintains that the Commission would benefit from requiring a performance bond, because it would allow third parties to evaluate and back the bidder’s business plan and ensure that the recipient actually builds what it promises.<sup>739</sup> It suggests that a performance bond is preferable to an LOC because the latter generally requires a deposit in the amount of the obligation, which “will detract from the money available to construct and operate the system.”<sup>740</sup> In contrast, MTPCS and T-Mobile believe that a posting of financial security is unnecessary.<sup>741</sup> MTPCS comments that, in the “unlikely event” a carrier becomes insolvent, another carrier would purchase and operate the system, whereas requiring an LOC “could fatally impair a company’s ability to obtain private or public markets funding” because “existing senior lenders who finance larger portions of a company’s assets and operations would insist upon retaining their primary status.”<sup>742</sup>

446. Although we recognize the benefit of requiring winning bidders to obtain a performance bond, we think an LOC will be more effective in this instance in ensuring that we achieve the Mobility Fund’s objectives, and we are reluctant to require winning bidders to undertake the expense of obtaining both instruments. A performance bond would have the advantage of providing a source of funds to complete build-out in the unserved area in the case of a recipient’s default. However, we must first be concerned with protecting the integrity of the USF funds disbursed to the recipient. Should a recipient default on its obligations under the Mobility Fund, our priority should be to secure a return of the USF funds disbursed to it for this purpose, so that we can reassign the support consistent with our goal to maximize the number of units covered given the funds available. We also recognize that a Mobility Fund

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<sup>735</sup> See *infra* para. 489.

<sup>736</sup> *Mobility Fund NPRM* at 14,740, para. 85.

<sup>737</sup> A Mobility Fund support recipient’s LOC must be issued in substantially the same form as our model LOC and, in any event, must be acceptable in all respects to the Commission.

<sup>738</sup> The rules we adopt today provide specific requirements for a bank to be acceptable to the Commission to issue the LOC. Those requirements vary for United States banks and non-U.S. banks. See 47 C.F.R. § 54.1007(a)(1).

<sup>739</sup> MetroPCS *Mobility Fund NPRM* Comments at 12-13.

<sup>740</sup> *Id.*

<sup>741</sup> MTPCS *Mobility Fund NPRM* Comments at 12; T-Mobile *Mobility Fund NPRM* Comments at 19.

<sup>742</sup> MTPCS *Mobility Fund NPRM* Comments at 12. MTPCS believes requiring performance bonds would likewise hinder applicants. *Id.* at 13.

recipient's failure to fulfill its obligations may impose significant costs on the Commission and higher support costs for USF. Therefore, we also conclude that it is necessary to adopt a default payment obligation for performance defaults. With these priorities in mind, we disagree with commenters suggesting that the posting of financial security is unnecessary or that in the event of the insolvency of the recipient of Mobility Fund support, we should rely on whichever carrier eventually purchases the recipient's system. Moreover, companies who have existing lenders regularly use LOCs in the normal course of operating their businesses and are able to maintain multiple forms of financing, thus, we give little credence to the suggestion that this requirement could fatally impair a company's ability to obtain private or public market funding.

447. Consistent with our goal of using the LOC to protect the government's interest in the funds it disburses in Mobility Fund Phase I, we will require winning bidders to obtain an LOC in an amount equal to the amount of support it receives plus an additional percentage of the amount of support disbursed to safeguard against costs to the Commission and the USF. The precise amount of this additional percentage will not exceed 20 percent and will be determined by the Bureaus as part of its process for establishing the procedures for the auction. Thus, before an application for Mobility Fund support is granted and funds are disbursed, we will require the winning bidder to provide an LOC in the amount of the first one-third of the support associated with the unserved census tract that will be disbursed upon grant of its application, plus the established additional default payment percentage. Before a participant receives the second third of its total support, it will be required to provide a second letter of credit or increase the initial LOC to correspond to the amount of that second support payment such that LOC coverage will be equal to the total support amount plus the established default payment percentage. The LOC(s) will remain open and must be renewed to secure the amounts disbursed as necessary until the recipient has met the requirements for demonstrating coverage and final payment is made. This approach will help to reduce the costs recipients incur for maintaining the LOCs, because they will only have to maintain LOCs in amounts that correspond to the actual USF funds as they are being disbursed.

448. Consistent with the purpose of the LOC, we will require recipients to maintain the LOC in place until at least 120 days after they have completed their supported expansion to unserved areas and received their final payment of Mobility Fund Phase I support. Under the terms of the LOC, the Commission will be entitled to draw upon the LOC upon a recipient's failure to comply with the terms and conditions upon which USF support was granted. The Commission, for example, will draw upon the LOC when the recipient fails to meet its required deployment milestone(s).<sup>743</sup> Failure to satisfy essential terms and conditions upon which USF support was granted or to ensure completion of the supported project, including failure to timely renew the LOC, will be deemed a failure to properly use USF support and will entitle the Commission to draw the entire amount of the LOC. Failure to comply will be evidenced by a letter issued by the Chief of either the Wireless Bureau or Wireline Bureau or their designees, which letter, attached to an LOC draw certificate, shall be sufficient for a draw on the LOC.<sup>744</sup> In addition, a recipient that fails to comply with the terms and conditions of the Mobility Fund support it is granted could be disqualified from receiving additional Mobility Fund support or other USF support.<sup>745</sup>

449. In the *Mobility Fund NPRM*, the Commission sought comment on the relative merits of performance bonds and LOCs and the extent to which performance bonds, in the event of the bankruptcy

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<sup>743</sup> Parties receiving support are required to cover at least 75 percent of the designated units in the unserved census blocks, as a condition of support. *See supra* para. 365.

<sup>744</sup> While such letter may not foreclose an appeal or challenge by the recipient, it will not prevent a draw on the LOC.

<sup>745</sup> *See* 47 C.F.R. §§ 54.1006(f), 54.1007(c)(1).

of the recipient of Mobility Fund support, might frustrate our goal of ensuring timely build-out of the network.<sup>746</sup> We think an LOC will better serve our objective of minimizing the possibility that Mobility Fund support becomes property of a recipient's bankruptcy estate for an extended period of time, thereby preventing the funds from being used promptly to accomplish the Mobility Fund's goals. It is well established that an LOC and the proceeds thereunder are not property of a debtor's estate under section 541 of Title 11 of the United States Code (the "Bankruptcy Code").<sup>747</sup> In a proper draw upon an LOC, the issuer honors a draft under the LOC from its own assets and not from the assets of the debtor who caused the letter of credit to be issued.<sup>748</sup> Because the proceeds under an LOC are not property of the bankruptcy estate, absent extreme circumstances such as fraud, neither the LOC nor the funds drawn down under it are subject to the automatic stay provided by the Bankruptcy Code. This is an additional reason for our decision to require recipients of Mobility Fund support to provide LOCs rather than performance bonds.

450. In the long-form application filing, we will require each winning bidder to submit a commitment letter from the bank issuing the LOC.<sup>749</sup> The winning bidder will, however, be required to have its LOC in place before it is authorized to receive Mobility Fund Phase I support and before any Mobility Fund Phase I support is disbursed. Further, at the time it submits its LOC, a winning bidder will be required to provide an opinion letter from legal counsel clearly stating, subject only to customary assumptions, limitations and qualifications, that in a proceeding under Bankruptcy Code, the bankruptcy court would not treat the LOC or proceeds of the LOC as property of winning bidder's bankruptcy estate, or the bankruptcy estate of any other bidder-related entity requesting issuance of the LOC, under section 541 of the Bankruptcy Code.<sup>750</sup>

451. We will not limit the LOC requirement to a subset of bidders that fail to meet certain criteria, such as a specified minimum credit rating, a particular minimum debt to equity ratio, or other minimum capital requirements.<sup>751</sup> We think that such criteria would require a level of financial analysis of applicants that is likely to be more complex and administratively burdensome than is warranted for a program that will provide one-time support, and could result in undue delay in funding and deployment of service. Moreover, limiting the LOC requirement to bidders below a certain level of capitalization would likely disproportionately burden small business entities, even though small entities are often less able to sustain the additional cost burden of posting financial security while still being able to compete with larger entities.

#### (vi) Other Funding Restrictions

452. *Background.* In the *Mobility Fund NPRM*, the Commission sought comment on whether participants who receive support from the Mobility Fund should be barred from receiving funds for the same activity under any other federal program, including, for example, federal grants, awards, or loans.<sup>752</sup>

453. *Discussion.* While we agree with commenters that Mobility Fund recipients might benefit if they were able to leverage resources from other federal programs, we must also take care to

<sup>746</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,741-42, paras. 88, 94.

<sup>747</sup> 11 U.S.C. § 541; see also, e.g., *Kellog v. Blue Quail Energy, Inc.*, 831 F.2d 586, 589 (5<sup>th</sup> Cir. 1987).

<sup>748</sup> *Kellog*, 831 F.2d at 589.

<sup>749</sup> The commitment letter will at a minimum provide the dollar amount of the LOC and the issuing bank's agreement to follow the terms and conditions of the Commission's model LOC, found in Appendix N.

<sup>750</sup> 11 U.S.C. § 541.

<sup>751</sup> See *Mobility Fund NPRM*, 25 FCC Rcd at 14,740, para. 85.

<sup>752</sup> *Id.* at 14,741, para. 89.

ensure that USF funds are put to their most efficient and effective use. Therefore, as noted elsewhere, we will exclude all areas from the Mobility Fund where, prior to the short-form filing deadline, any carrier has made a regulatory commitment to provide 3G or better service, or has received a funding commitment from a federal executive department or agency in response to the carrier's commitment to provide 3G or better service.<sup>753</sup> ITTA believes the Commission should not bar Mobility Fund recipients from receiving funding from other Federal programs, since recipients "should enjoy the benefit of leveraging multiple resources."<sup>754</sup> As we noted in the *Mobility Fund NPRM*, however, our intention is to direct funding to those places where deployment of mobile broadband is otherwise unlikely.<sup>755</sup>

#### (vii) Post-Auction Certifications

454. *Background.* In the *Mobility Fund NPRM*, the Commission sought comment on a number of possible certifications that we might require of a winning bidder to receive Mobility Fund support.<sup>756</sup>

455. *Discussion.* We adopt our proposal regarding post-auction certifications. Prior to receiving Mobility Fund support, an applicant will be required in its long-form application to certify to the availability of funds for all project costs that exceed the amount of support to be received from the Mobility Fund and certify that they will comply with all program requirements.

456. As discussed above, recipients of Mobility Fund support are required by statute to offer services in rural areas at rates that are reasonably comparable to those charged to customers in urban areas.<sup>757</sup> Accordingly, our post-auction long-form certifications will include a certification that the applicant will offer services in rural areas at rates that are reasonably comparable to those charged to customers in urban areas.

#### (viii) Auction Defaults

457. *Background.* In the *Mobility Fund NPRM*, the Commission sought comment on the procedures that we should apply to a winning bidder that fails to submit a long-form application by the established deadline.<sup>758</sup>

458. *Discussion. Auction Default Payments.* We will impose a default payment on winning bidders that fail to timely file a long-form application. We also conclude that such a payment is appropriate if a bidder is found ineligible or unqualified to receive Mobility Fund support, its long-form application is dismissed for any reason, or it otherwise defaults on its bid or is disqualified for any reason after the close of the auction.<sup>759</sup>

459. In its comments, T-Mobile advocates the imposition of a significant payment obligation for the withdrawal of a bid after the Mobility Fund auction closes "to discourage manipulation of the

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<sup>753</sup> Such federal funding commitments may have been made under, but are not limited to, the Broadband Technology Opportunities Program (BTOP) and Broadband Initiatives Program (BIP) authorized by the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (ARRA). See *CenturyLink Mobility Fund NPRM Comments* at 9; *NTCH Mobility Fund NPRM Comments* at 8 (supporting exclusion of areas that received federal loan or grant funding).

<sup>754</sup> ITTA *Mobility Fund NPRM Comments* at 17.

<sup>755</sup> See *Mobility Fund NPRM*, 25 FCC Rcd at 14,721-22, paras. 11, 14.

<sup>756</sup> *Id.* at 14,741, para. 90.

<sup>757</sup> See 47 U.S.C. § 254(b)(3).

<sup>758</sup> *Mobility Fund NPRM* at 14,739, para. 81.

<sup>759</sup> See 47 U.S.C. §§ 154(i), 254(d).

bidding process or disruption of the distribution of support.”<sup>760</sup> We agree that adoption of some measure, in addition to dismissal of any late-filed application, is needed to ensure that auction participants fulfill their obligations and do not impose significant costs on the Commission and the USF. Our competitive bidding rules for spectrum license auctions provide that if, after the close of an auction, a winning bidder defaults on a payment obligation or is disqualified, the bidder is liable for a default payment.<sup>761</sup> The Wireless Bureau in advance of each spectrum license auction as part of the process for establishing the procedures for the auction sets the precise percentage to be applied in calculating the default payment.

460. Here, too, failures to fulfill auction obligations may undermine the stability and predictability of the auction process, and impose costs on the Commission and higher support costs for USF. In the case of a reverse auction for USF support, we think a default payment is appropriate to ensure the integrity of the auction process and to safeguard against costs to the Commission and the USF. We leave it to the Bureaus to consider methodologies for determining such a payment. We recognize that the size of the payment and the method by which it is calculated may vary depending on the procedures established for the auction, including auction design. In advance of the auction, the Bureaus will determine whether a default payment should be a percentage of the defaulted bid amount or should be calculated using another method, such as basing the amount on differences between the defaulted bid and the next best bid(s) to cover the same number of road miles as without the default. If the Bureaus establish a default payment to be calculated as a percentage of the defaulted bid, that percentage will not exceed 20 percent of the total amount of the defaulted bid. However it is determined, agreeing to that payment in event of a default will be a condition for participating in bidding. The Bureaus may determine prior to bidding that all participants will be required to furnish a bond or place funds on deposit with the Commission in the amount of the maximum anticipated default payment. A winning bidder will be deemed to have defaulted on its bid under a number of circumstances if it withdraws its bid after the close of the auction, it fails to timely file a long form application, it is found ineligible or unqualified to receive Mobility Fund Phase I support, its long-form application is dismissed for any reason, or it otherwise defaults on its bid or is disqualified for any reason after the close of the auction. In addition to being liable for an auction default payment, a bidder that defaults on its bid may be subject to other sanctions, including but not limited to disqualification from future competitive bidding for USF support.<sup>762</sup>

461. We distinguish here between a Mobility Fund auction applicant that defaults on its winning bid and a winning bidder whose long-form application is approved but subsequently fails or is unable to meet its minimum coverage requirement or demonstrate an adequate quality of service that complies with Mobility Fund requirements. In the latter case of a recipient’s performance default, in addition to being liable for a performance default payment, the recipient will be required to repay the Mobility Fund all of the support it has received and, depending on the circumstances involved, could be disqualified from receiving any additional Mobility Fund or other USF support.<sup>763</sup> As we have discussed above, we may obtain its performance default payment and repayment of a recipient’s Mobility Fund support by drawing upon the irrevocable stand-by letter of credit that recipients will be required to provide in the full amount of support received.

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<sup>760</sup> T-Mobile *Mobility Fund NPRM* Comments at 17.

<sup>761</sup> This payment consists of a deficiency portion, which would not be applicable in this context, plus an additional payment equal to between 3 and 20 percent. See *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, Report and Order, 21 FCC Rcd 891, 903-04, paras. 30-32 (2006).

<sup>762</sup> See 47 C.F.R. § 1.21004(c).

<sup>763</sup> See 47 C.F.R. § 54.1006(f).



462. Undisbursed Support Payments. We received no comments on the disposition of Mobility Fund support for which a winning bidder does not timely file a long-form application. We anticipate that when a winning bidder defaults on its bid or is disqualified for any reason after the close of the auction, the funds that would have been provided to such an applicant will be used in a manner consistent with the purposes of the Universal Service program.

**f. Accountability and Oversight**

463. In the *Mobility Fund NPRM* the Commission sought comment on issues relating to the administration, management and oversight of the Mobility Fund. On a number of these issues we adopt uniform requirements that will apply to all recipients of high-cost and CAF support, including recipients of Mobility Fund Phase I support. Recipients of Phase I support will be subject generally to the reporting, audit, and record retention requirements that are discussed in the Accountability and Oversight section of this Order. We discuss below certain aspects of support disbursement, and the annual reporting and record retention requirements that will apply specifically to Mobility Fund Phase I.

**(i) Disbursing Support Payments**

464. *Background.* In the *Mobility Fund NPRM*, the Commission sought comment on our proposal to disburse support payments in one-third increments.<sup>764</sup> We received four comments reflecting a wide range of views. On one end, AT&T supports withholding the disbursement of all funds until the winning bidder certifies that it is providing the supported service throughout its designated service area.<sup>765</sup> AT&T suggests, in the alternative, disbursing one-third of the support amount once the Commission selects a provider's bid and the remaining two-thirds after completion of construction and after the selected bidder certifies that it is offering the supported service throughout its designated service area.<sup>766</sup> The Florida Commission supports the proposal set forth in the *Mobility Fund NPRM* (i.e., the one-third payment structure) "because it places the burden on carriers seeking support to demonstrate progress towards achieving the program objectives."<sup>767</sup> Verizon urges the Commission to give recipients at least 50 percent of their support upfront because in the areas targeted by the Mobility Fund, the upfront investment costs to deploy infrastructure will be significant.<sup>768</sup> Finally, T-Mobile supports disbursing the "bulk" of the Mobility Fund support when the application is granted, given difficulty in obtaining private financing in high cost areas.<sup>769</sup>

465. *Discussion.* Mobility Fund Phase I support will be provided in three installments. This approach strikes the appropriate balance between advancing funds to expand service and assuring that service is actually expanded.

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<sup>764</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,742, para. 92.

<sup>765</sup> AT&T *Mobility Fund NPRM* Comments at 20. AT&T believes this approach is "the safest course" because it will "protect against half-completed, useless networks" as well as "guarantee bidders live up to their commitments" and "best protect consumers." *Id.*

<sup>766</sup> *Id.* AT&T adds that a second disbursement at the 50 percent coverage benchmark makes little sense because that "threshold corresponds neither to a provider's costs nor to how it deploys a network, where it may take many months to reach 50 percent but only a short time thereafter to reach 100 percent coverage." *Id.*

<sup>767</sup> Florida Commission *Mobility Fund NPRM* Reply at 4.

<sup>768</sup> Verizon *Mobility Fund NPRM* Comments at 28.

<sup>769</sup> T-Mobile *Mobility Fund NPRM* Comments at 19. T-Mobile adds that, if a winning bidder fails to follow its projected build-out, it should be "required to repay any support it received [plus interest and other fines or assessments], and its affiliates should be help responsible if the bidder fails to meet its obligations." *Id.*

466. Specifically, each party receiving support will be eligible to receive from USAC a disbursement of one-third of the amount of support associated with any specific census block once its long-form application for support is granted. Although we are not adopting an interim deployment milestone requirement, we will allow support recipients to demonstrate coverage as a basis for receiving a second support payment for an unserved area prior to completion of the project. Thus, a recipient will be eligible to receive the second third of its total support when it files a report demonstrating it has met 50 percent of its minimum coverage requirement for the census block(s) deemed unserved.<sup>770</sup> While we realize that some carriers might incur higher up front project costs prior to actually being in a position to commence the provision of service to the targeted area, after the initial payment of one-third of the support amount, we will not disburse support without proof of coverage. Disbursing support based on the construction expenses incurred by the carrier instead of on actual service to an unserved area would be contrary to the Mobility Fund's objective of spurring deployment of new mobile wireless service. For this reason, to qualify for the second installment of support, a recipient will be required to demonstrate it has met 50 percent of its minimum coverage requirement using the same drive tests that will be used to analyze network coverage to provide proof of deployment at the end of the project to receive its final installment of support. The report a recipient files for this purpose will be subject to review and verification before support is disbursed. We note that input from states on recipients' filed reports could be very helpful to this process.

467. A party will receive the remainder of its support after filing with USAC a report with the required data that demonstrates that it has deployed a network covering at least the required percent of the relevant road miles in the unserved census block(s). This data will be subject to review and verification before the final support payment for an unserved area is disbursed to the recipient. A party's final payment would be the difference between the total amount of support based on the road miles of unserved census blocks actually covered, *i.e.*, a figure between the required percent and 100 percent of the road miles, and any support previously received.

468. Because we will disburse at least some support to qualifying applicants in advance of fulfilling their service obligations, we recognize some risk of lost funds to parties that ultimately fail to meet those obligations. However, to minimize that risk, we are requiring participants to maintain their letter(s) of credit in place until after they have completed their supported network construction and received their final payment of Mobility Fund Phase I support. In addition, we will require participants to certify that they are in compliance with all requirements for receipt of Mobility Fund Phase I support at the time that they request disbursements.

469. As we explain above,<sup>771</sup> our purpose in this proceeding is to aggressively extend coverage, and recipients will not be allowed to receive Mobility Fund support if they fail to cover at least the required percentage of the road miles in the unserved census blocks for which they received support. Accordingly we decline the suggestion to adopt a level of service that falls short of the required percentage of coverage for which we would allow the recipient to offset its liability for repayment, because doing so would be inconsistent with our objective.<sup>772</sup>

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<sup>770</sup> Because we propose below to delegate jointly to the Wireless Bureau and the Wireline Bureau the authority to determine the method and procedures by which parties submit documents and information required to receive Mobility Fund support, we do not propose here specific filing procedures for these reports.

<sup>771</sup> See *supra* para. 28.

<sup>772</sup> Verizon *Mobility Fund NPRM* Comments at 18-19.

(ii) Annual Reports

470. *Background.* The Commission proposed in the *Mobility Fund NPRM* that parties receiving Mobility Fund support be required to file annual reports with the Commission demonstrating the coverage provided with support from the Mobility Fund for five years after qualifying for support.<sup>773</sup> The proposed reports were to include maps illustrating the scope of the area reached by new services, the population residing in those areas (based on Census Bureau data and estimates), and information regarding efforts to market the service to promote adoption among the population in those areas. In addition, annual reports were to include all drive test data that the party receives or makes use of, whether the tests were conducted pursuant to Commission requirements or any other reason.

471. *Discussion.* We will adopt our proposal with some minor modifications. To the extent that a recipient of Mobility Fund support is a carrier subject to other existing or new annual reporting requirements under section 54.313 of our rules based on their receipt of universal service support under another high cost mechanism, it will be permitted to satisfy its Mobility Fund Phase I reporting requirements by filing a separate Mobility Fund annual report or by including this additional information in a separate section of its other annual report filed with the Commission.<sup>774</sup> Mobility Fund recipients choosing to fulfill their Mobility Fund reporting requirements in an annual report filed under section 54.313 must, at a minimum, file a separate Mobility Fund annual report notifying us that the required information is included the other annual report.

472. Based on our decision to define unserved units based on the linear road miles associated with unserved census blocks, we will require that a Mobility Fund Phase I recipient provide annual reports that include maps illustrating the scope of the area reached by new services, the population residing in those areas (based on Census Bureau data and estimates), and the linear road miles covered. In addition, annual reports must include all coverage test data for the supported areas that the party receives or makes use of, whether the tests were conducted pursuant to Commission requirements or any other reason. Further, annual reports will include any updated project information including updates to the project description, budget and schedule. We would welcome state input on these aspects of the annual reports of Mobility Fund Phase I recipients.

473. Because we do not impose any marketing requirements other than the advertising requirements to which designated ETCs are already subject, we do not require that annual reports include information on marketing efforts.

474. Few commenters addressed the proposal regarding annual reports. One party notes a discrepancy between the proposal set forth in the discussion in the *Mobility Fund NPRM* (and described above) and the text of the proposed rules regarding the number of years for which annual reports would be required.<sup>775</sup> Verizon suggests requiring reports from winning bidders until the project dollars are invested.<sup>776</sup> We clarify here and in the final rules that the proposal we adopt requires filing of annual reports on the use of Mobility Fund support as described for five years after the winning bidder is authorized to receive Mobility Fund support.

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<sup>773</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,731, para. 44.

<sup>774</sup> See *infra* paras. 576-614.

<sup>775</sup> AT&T *Mobility Fund NPRM* Comments at 16-17. The proposed rule section 54.1005(a) in the *Mobility Fund NPRM* stated that annual reports would be submitted for ten years. *Mobility Fund NPRM*, 25 FCC Rcd at 14,753.

<sup>776</sup> Verizon *Mobility Fund NPRM* Comments at 27.

**(iii) Record Retention**

475. *Background.* In the *Mobility Fund NPRM*, the Commission sought comment on what records Mobility Fund recipients should be required to retain related to their participation in the Fund.<sup>777</sup> We proposed that the record retention requirements for recipients of support apply to all agents of the recipient, and any documentation prepared for or in connection with the recipient's Mobility Fund Phase I support.<sup>778</sup> We also proposed a five-year period for record retention, consistent with the rules we previously adopted for those receiving other universal service high cost support.<sup>779</sup>

476. *Discussion.* Elsewhere in this Order, we adopt revised requirements that extend the record retention period to ten years for all recipients of high-cost and CAF support, including recipients of Mobility Fund Phase I.<sup>780</sup> We find that the new retention period will be adequate to facilitate audits of Mobility Fund program participants, with one clarification regarding the required retention period.<sup>781</sup>

477. We received two comments on this issue. Sprint suggests that all reporting and certification requirements should sunset within three years after expenditure of the support dollars received.<sup>782</sup> T-Mobile favors a period of five years for retention of records associated with Mobility Fund support.<sup>783</sup> In view of the record retention requirements we adopt for recipients of other USF high-cost and CAF support, we believe it is reasonable to apply the same retention period to recipients of Mobility Fund support.

478. We clarify, however, that for the purpose of the Mobility Fund program, the ten-year period for which records must be maintained will begin to run only after a recipient has received its final payment of Mobility Fund support. That is, because recipients will receive Mobility Fund support in up to three installments, but recipients that ultimately fail to deploy a network that meets our minimum coverage and performance requirements or otherwise fail to meet their Mobility Fund public interest obligations will be liable for repayment of all previously disbursed Mobility Fund support, we will require recipients to retain records for ten years from the receipt of the final disbursement of Mobility Fund funds.

**2. Service to Tribal Lands**

479. In the *Mobility Fund NPRM*, the Commission acknowledged the relatively low level of telecommunications deployment on Tribal lands and the distinct challenges in bringing connectivity to these areas.<sup>784</sup> The Commission observed that communities on Tribal lands have historically had less

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<sup>777</sup> *Mobility Fund NPRM*, 25 FCC Red at 14,743-44, paras. 98-100.

<sup>778</sup> *Id.* at 14,744, para. 99. We further proposed that beneficiaries be required to make all such documents and records that pertain to them, contractors, and consultants working on behalf of the beneficiaries, available to the Commission's Office of Managing Director, Wireless Bureau, Wireline Bureau, and Office of Inspector General, the USF Administrator, and their auditors. *Id.*

<sup>779</sup> *Id.* at 14,744, para. 100. See 47 C.F.R. § 54.202(e) (2007). Cf. the five-year limitation on imposition of forfeitures for violations of section 220(d) of the Act. 47 C.F.R. § 1.80(c)(2).

<sup>780</sup> See *infra* para. 620.

<sup>781</sup> See *infra* para. 621; 47 C.F.R. § 54.320(b) ("All eligible telecommunications carriers shall retain all records required to demonstrate to auditors that the support received was consistent with the universal service high-cost program rules. This documentation must be maintained for at least ten years from the receipt of funding.").

<sup>782</sup> Sprint *Mobility Fund NPRM* Comments at 10.

<sup>783</sup> T-Mobile *Mobility Fund NPRM* Comments at 13, 20.

<sup>784</sup> *Mobility Fund NPRM*, 25 FCC Red at 14,727, para. 33. See *supra* note 197.

access to telecommunications services than any other segment of the population.<sup>785</sup> The *Mobility Fund NPRM* also noted that Tribal lands are often in rural, high-cost areas, and present distinct obstacles to the deployment of broadband infrastructure.<sup>786</sup> The Commission observed that greater financial support therefore may be needed in order to ensure the availability of broadband in Tribal lands.<sup>787</sup> In light of the Commission's unique government-to-government relationship with Tribes and the distinct challenges in bringing communications services to Tribal lands, the Commission also noted that a more tailored approach regarding Mobility Fund support for Tribal lands may be beneficial.<sup>788</sup>

480. In April 2011, the Wireless Bureau released a Public Notice seeking comment on specific proposals that could be used in the context of a Mobility Fund to address Tribal issues.<sup>789</sup> The Public Notice sought comment on establishing: (1) possible requirements for engagement with Tribal governments prior to auction; (2) a possible preference for Tribally-owned and controlled providers; and (3) a possible mechanism to reflect Tribal priorities for competitive bidding. The Public Notice also sought comment on the timing of any Tribal Mobility Fund auction.

**a. Tribal Mobility Fund Phase I**

481. We adopt our proposal to establish a separate Tribal Mobility Fund Phase I to provide one-time support to deploy mobile broadband to unserved Tribal lands,<sup>790</sup> which have significant telecommunications deployment and connectivity challenges.<sup>791</sup> We anticipate that an auction will occur as soon as feasible after a general Mobility Fund Phase I auction, providing for a limited period of time in between so that applicants that may wish to participate in both auctions may plan and prepare for a Tribal Phase I auction after a general Phase I auction.<sup>792</sup> Our decision to establish a Tribal Mobility Fund Phase I stems from the Commission's policy regarding "Covered Locations,"<sup>793</sup> and represents our commitment to Tribal lands, including Alaska. We agree with the Alaska Commission that "[a] separate fund would indeed direct support to many areas that currently lag behind the nation in provisioning of advanced wireless services."<sup>794</sup> We allocate \$50 million from universal service funds reserves for Tribal Mobility Fund Phase I, separate and apart from the \$300 million we are allocating for the general Mobility Fund

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<sup>785</sup> *Mobility Fund NPRM* at 14,727, para. 33.

<sup>786</sup> *Id.*

<sup>787</sup> *Id.*

<sup>788</sup> *Id.*

<sup>789</sup> See, generally, *Tribal Mobility Fund Public Notice*, 26 FCC Rcd 5997.

<sup>790</sup> Some carriers request a separate funding mechanism for insular areas. See, e.g., PR Wireless *Mobility Fund NPRM* Comments at 1-5. Because these areas generally do not face the same level of deployment challenges as Tribal lands, we decline to create a separate component of the Mobility Fund for them.

<sup>791</sup> *Mobility Fund NPRM*, 25 FCC Rcd at 14,727, para. 33. See, e.g., Alaska Commission *Mobility Fund NPRM* Reply at 2 (explaining that "there are more than 200 remote rural locations with low populations that are accessible only by air, water or snowmobile").

<sup>792</sup> We are mindful of commenters' views that a "separate track" should not be a "slow track," and believe that conducting a Tribal Mobility Fund Phase I auction shortly after concluding the general Mobility Fund Phase I auction will ensure that Tribal lands are not disadvantaged. See NPM and NCAI *Mobility Fund NPRM* Comments at 11-12.

<sup>793</sup> As discussed *supra*, the Commission adopted the Covered Locations exemption in 2008, in recognition that many Tribal lands have low penetration rates for basic telephone. *High-Cost Universal Service Support* et al, WC Docket No. 05-337, CC Docket No.96-45, Order, 23 FCC Rcd 8834, 8848, para. 32 (2008).

<sup>794</sup> Alaska Commission *Mobility Fund NPRM* Reply at 12.

Phase I. Providers in Tribal lands will be eligible for both the general and Tribal Mobility Fund Phase I auctions. Consistent with the approach we took with the general Mobility Fund Phase I, we delegate to the Bureaus authority to administer the policies, programs, rules and procedures to implement Tribal Mobility Fund Phase I as established today.

482. We determine that allocating \$50 million from universal service fund reserves to support the deployment of mobile broadband to unserved Tribal lands is necessary, separate and apart from the \$300 million we are allocating for Mobility Fund Phase I, because of special challenges involved in deploying mobile broadband on Tribal lands. As we have previously observed, various characteristics of Tribal lands may increase the cost of entry and reduce the profitability of providing service, including: “(1) The lack of basic infrastructure in many tribal communities; (2) a high concentration of low-income individuals with few business subscribers; (3) cultural and language barriers where carriers serving a tribal community may lack familiarity with the Native language and customs of that community; (4) the process of obtaining access to rights-of-way on tribal lands where tribal authorities control such access; and (5) jurisdictional issues that may arise where there are questions concerning whether a state may assert jurisdiction over the provision of telecommunications services on tribal lands.”<sup>795</sup> Commenters confirm that the particular challenges in deploying telecommunications services on Tribal lands remain.<sup>796</sup> As discussed below, there are areas where \$50 million in one-time support will help to extend the availability of mobile voice and broadband services.

483. We further observe that promoting the development of telecommunications infrastructure on Tribal lands is consistent with the Commission’s unique trust relationship with Tribes. As we recognized previously, “by increasing the total number of individuals, both Indian and non-Indian, who are connected to the network within a tribal community the value of the network for tribal members in that community is greatly enhanced.”<sup>797</sup> By structuring the support to benefit Tribal lands, rather than attempting to require wireless providers to distinguish between Tribal and non-Tribal customers, we will “reduc[e] the possible administrative burdens associated with implementation of the enhanced federal support, [and] eliminate a potential disincentive to providing service on Tribal lands.”<sup>798</sup>

484. Support for Tribal lands generally will be awarded on the same terms and subject to the same rules as general Mobility Fund Phase I support.<sup>799</sup> We find, however, that in some instances a more tailored approach is appropriate. For example, we adopt modest revisions to our general rules for establishing appropriate coverage units. We also adopt Tribal engagement requirements and preferences that reflect our unique relationship with Tribes. We believe that these measures should provide meaningful support to expand service to unserved areas in a way that acknowledges the unique characteristics of Tribal lands and reflects and respects Tribal sovereignty. As discussed below, we also

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<sup>795</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12,208, 12,226, para. 32 (2000) (*USF Twelfth Report and Order*).

<sup>796</sup> See *Gila River Mobility Fund NPRM* Comments at 3-4; *NNTRC Mobility Fund NPRM* Reply at 2; *NPM and NCAI Mobility Fund NPRM* Comments at 4-5; *Smith Bagley April 18 PN* Comments at 3; *Standing Rock April 18 PN* Comments at 2-6.

<sup>797</sup> *USF Twelfth Report and Order*, 15 FCC Rcd at 12,225, para. 29.

<sup>798</sup> *Id.* at 12,225-26, para. 31.

<sup>799</sup> We incorporate by reference the eligible geographic area, provider eligibility, public interest obligations, auction and post-auction processes, and program management and oversight measures established for Phase I of the Mobility Fund. To address concerns raised by commenters regarding the performance challenges posed by the reliance on satellite backhaul in Alaska, we clarify that funds may be used to construct or upgrade middle mile facilities. See *ACS Mobility Fund NPRM* Comments at 8; *GCI Mobility Fund NPRM* Comments at 2-3.

propose an ongoing support mechanism for Tribal lands in Phase II of the Mobility Fund, as well as a separate Connect America Fund mechanism to reach the most remote areas, including Tribal lands.

485. *Size of Fund.* We dedicate \$50 million in one-time support for the Tribal Mobility Fund Phase I, which should help facilitate mobile deployment in unserved areas on Tribal lands. This amount is in addition to the \$300 million to be provided under the general Mobility Fund Phase I, for which qualifying Tribal lands would also be eligible, and is in addition to the up to \$100 million in ongoing support being dedicated to Tribal lands in the Tribal Mobility Fund Phase II.<sup>800</sup> We believe that a one-time infusion of \$50 million through the Tribal Mobility Fund can make a difference in expanding the availability of mobile broadband in Tribal lands unserved by 3G. The \$50 million in one-time support we allocate today is approximately 25 percent of the ongoing support awarded to competitive ETCs serving Covered Locations in 2010. The more targeted nature of this support will enhance the impact of this significant one-time addition to current support levels. At the same time, this funding level is consistent with our commitment to fiscal responsibility and the varied objectives we have for our limited funds, including our proposals for ongoing support for mobile services as established below. We also observe that, although \$50 million reflects a smaller percentage of total Mobility Fund support than suggested by some commenters,<sup>801</sup> the \$300 million we adopt today is at the upper end of our proposed range and, thus, \$50 million is roughly equivalent to what many commenters suggested. On balance, we believe that there is an opportunity for entities to obtain meaningful support – both through the Tribal and general Mobility Fund Phase I auctions, in addition to the ongoing support mechanisms – in order to accelerate mobile broadband deployment on Tribal lands.

486. *Mechanism To Award Support.* Consistent with our general approach to awarding Phase I support, to maximize consumer benefits we generally will award support to one provider per qualifying area by reverse auction and will only award support to more than one provider per area where doing so would allow us to cover more total units given the budget constraint.<sup>802</sup> We recognize that some commenters suggested alternative mechanisms for awarding support to Tribal lands. These included a procurement model under which Tribes would solicit bids for service,<sup>803</sup> a scoring mechanism the Commission could use to evaluate proposals according to certain criteria (generally reflective of need),<sup>804</sup> and a process to give Tribal carriers first priority in receiving funds.<sup>805</sup>

487. We agree that it is essential to award support in a way that respects and reflects Tribal needs. To that end, and as discussed below, we adopt Tribal engagement obligations to ensure that needs are identified and appropriate solutions are developed. We also adopt a bidding credit for Tribally-owned

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<sup>800</sup> See *infra* para. 494.

<sup>801</sup> See, e.g., Gila River *Mobility Fund NPRM* Comments at 7 (recommending 20 percent allocation of one-time Mobility Fund to Tribal lands); NTTA *Mobility Fund NPRM* Comments at 7 (recommending up to 30 percent allocation); NPM and NCAI *Mobility Fund NPRM* Comments at 8 (recommending 33 percent allocation).

<sup>802</sup> We note that in certain limited circumstances, depending on the bidding at auction, allowing small overlaps in support could result in greater overall coverage.

<sup>803</sup> NTTA *Mobility Fund NPRM* Comments at 14-15; NTTA *April 18 PN* Comments at 7-8.

<sup>804</sup> Standing Rock Sioux *April 18 PN* Comments at 5-7.

<sup>805</sup> NPM and NCAI *Mobility Fund NPRM* Comments at 11. Several commenters note that the Commission should also undertake efforts to identify spectrum to more effectively serve Tribal lands. See Gila River *Mobility Fund NPRM* Comments at 11-12; NPM and NCAI *Mobility Fund NPRM* Comments at 6; NTTA *Mobility Fund NPRM* Comments at 4. We note that we have raised those issues in the *Spectrum over Tribal Lands* proceeding, and recognize that proceeding's importance. See *Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands*, WT Docket No. 11-40, Notice of Proposed Rulemaking, 26 FCC Rcd 2623 (2011) (*Spectrum over Tribal Lands NPRM*).

or controlled providers seeking to expand service on their Tribal lands. At the same time, we remain committed to our goal of awarding support in a fiscally responsible manner and targeting support to locations where it is most likely to make a difference. We are concerned that none of the alternatives suggested thus far would provide an effective means to maximize the impact of our limited budget to expand service as far as possible on unserved Tribal lands. In addition, we are committed to awarding funds openly, transparently, and fairly. We believe that any subjective mechanism to assess the merits of various proposals or any mechanism that would provide an absolute priority to Tribes that have established their own communications service provider is less likely to promote these objectives. Accordingly, we conclude that a reverse auction mechanism, together with the Tribal engagement and preferences we adopt below, would best achieve our goals in expanding service to Tribal lands in a respectful, fair, and fiscally responsible manner.

488. *Establishing Unserved Units.* For purposes of determining the number of unserved units in a given geographic area, we conclude that for a Tribal Phase I auction, a population-based metric is more appropriate than road miles, which will be used in a general Mobility Fund Phase I auction.<sup>806</sup> While road miles generally best reflect the value of mobility, there are compelling concerns raised here that warrant a different approach in the context of Tribal lands. We are sensitive to concerns raised by Tribes that mobile wireless deployment to date on Tribal lands has largely centered along major highways and has, unlike other rural deployments, ignored population centers and community anchor institutions.<sup>807</sup> Moreover, we observe that infrastructure generally is less developed on Tribal lands, particularly in Alaska.<sup>808</sup> While we note that the stringent coverage requirement we incorporate here will help to mitigate the concern that these patterns could continue in Mobility-Fund-supported areas, we find that, taken together, this concern still suggests that a population-based metric is more appropriate for Tribal lands.

#### **b. Tribal Engagement Obligation**

489. Throughout this proceeding, commenters have repeatedly stressed the essential role that Tribal consultation and engagement plays in the successful deployment of mobile broadband service.<sup>809</sup> We agree. For both the general and Tribal Mobility Fund Phase I auctions, we encourage applicants seeking to serve Tribal lands to begin engaging with the affected Tribal government as soon as possible but no later than the submission of its long-form.<sup>810</sup> Moreover, any bidder winning support for areas within Tribal lands must notify the relevant Tribal government no later than five business days after being identified by Public Notice as such a winning bidder. Thereafter, at the long-form application stage, in annual reports, and prior to any disbursement of support from USAC, Mobility Fund Phase I winning

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<sup>806</sup> In light of this conclusion, we note that the “drive tests” used to demonstrate coverage supported by Tribal Mobility Fund Phase I may be conducted by means other than in automobiles on roads. Providers may demonstrate coverage of an area with a statistically significant number of tests in the vicinity of residences being covered. Moreover, equipment to conduct the testing can be transported by off-road vehicles, such as snow-mobles or other vehicles appropriate to local conditions.

<sup>807</sup> See, e.g., NPM and NCAI *Mobility Fund NPRM* Comments at 7-8; Benton et al. *Mobility Fund NPRM* Reply at 11.

<sup>808</sup> See, e.g., ACS *Mobility Fund NPRM* Comments at 2-3; Gila River *Mobility Fund NPRM* Comments at 3-4; NPM and NCAI *Mobility Fund NPRM* Comments at 5.

<sup>809</sup> See, e.g., NPM and NCAI *Mobility Fund NPRM* Comments at 8-9; Navajo Commission *Mobility Fund NPRM* Reply at 4; Twin Houses *April 18 PN* Comments at 1-3, 6.

<sup>810</sup> We note, however, that any such engagement must be done consistent with our auction rules prohibiting certain communications during the competitive bidding process.



bidders will be required to comply with the general Tribal engagement obligations discussed *infra* in Section IX.A.<sup>811</sup>

**c. Preference for Tribally-Owned or Controlled Providers**

490. Consistent with record evidence<sup>812</sup> and Commission precedent,<sup>813</sup> we adopt a preference for Tribally-owned or controlled providers<sup>814</sup> seeking general or Tribal Mobility Fund Phase I support. The preference will act as a “reverse” bidding credit that will effectively reduce the bid amount of a qualified Tribally owned- or controlled provider by a designated percentage for the purpose of comparing it to other bids, thus increasing the likelihood that Tribally-owned and controlled entities will receive funding. The preference will be available with respect to the eligible census blocks located within the geographic area defined by the boundaries of the Tribal land associated with the Tribal entity seeking support. While commenters generally support a preference for Tribally-owned and controlled providers, we received no comment on the appropriate size of a bidding credit. We note that, in the spectrum auction context, the Commission typically awards small business bidding credits ranging from 15 to 35 percent, depending on varying small business size standards.<sup>815</sup> We believe that a bidding credit in that range would further Tribal self-government by increasing the likelihood that the bid would be awarded to a Tribal entity associated with the relevant Tribal land, without providing an unfair advantage over substantially more cost-competitive bids. Accordingly we adopt a 25 percent bidding credit.<sup>816</sup>

**d. ETC Designation for Tribally-Owned or Controlled Entities**

491. To afford Tribes an increased opportunity to participate at auction, in recognition of their interest in self-government and self-provisioning on their own lands, we will permit a Tribally-owned or controlled entity that has an application for ETC designation pending at the relevant short-form application deadline to participate in an auction to seek general and Tribal Mobility Fund Phase I support for eligible census blocks located within the geographic area defined by the boundaries of the Tribal land associated with the Tribe that owns or controls the entity. We note that allowing such participation at auction in no way prejudices the ultimate decision on a Tribally-owned or controlled entity’s ETC designation and that support will be disbursed only after it receives such designation.<sup>817</sup>

**e. Tribal Priority**

492. We conclude that further comment is warranted before we would move forward with a Tribal priority process that would afford Tribes “priority units” to allocate to areas of particular

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<sup>811</sup> See *infra* Section IX.A.

<sup>812</sup> See NTTA *April 18 PN* Comments at 11; So Cal TDV *April 18 PN* Comments at 2; Twin Houses *April 18 PN* Comments at 3.

<sup>813</sup> See, e.g., *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, MB Docket No. 09-52, First Report and Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 1583, 1587-97, paras. 7-27 (2010) (*Rural Radio R&O and FNPRM*); see also *Spectrum over Tribal Lands NPRM*, 26 FCC Rcd at 2635-37, paras. 35-40.

<sup>814</sup> Eligible entities include Tribes or tribal consortia, and entities majority owned or controlled by Tribes. *Rural Radio R&O and FNPRM*, 25 FCC Rcd at 1587, para. 7. Currently there are eight Tribally-owned and controlled providers.

<sup>815</sup> See 47 C.F.R. § 1.2110(f).

<sup>816</sup> See also *infra* para. 1166 (seeking comment on a proposal to adopt a similar credit for Mobility Fund Phase II).

<sup>817</sup> A Tribally-owned or controlled entity that does not obtain and provide the required ETC designation will not be entitled to any support payments and may ultimately be in default in accordance with the rules. See 47 C.F.R. § 54.1005(b)(3)(v); 47 C.F.R. § 1.21004.

importance to them.<sup>818</sup> As noted below, we are seeking additional input on this proposal in the context of the Tribal Mobility Fund Phase II. In the meantime, we believe that the Tribal engagement obligations we adopt here, combined with build-out obligations, will ensure that Tribal needs are met in bringing service to unserved Tribal communities in the Mobility Fund Phase I.

### 3. Mobility Fund Phase II

493. In addition to Phase I of the Mobility Fund, we also establish today Phase II of the Mobility Fund, which will provide ongoing support for mobile services in areas where such support is needed. As noted above, millions of Americans live in communities where current-generation mobile service is unavailable or where current-generation mobile service is available only with universal service support, and millions more work in or travel through such areas. Whereas Mobility Fund Phase I will provide one-time funding for the expansion of current and next generation mobile networks, here, we establish Phase II of the Mobility Fund in recognition of the fact that there are areas in which offering of mobile services will require ongoing support. We adopt a budget for Phase II below and seek further comment on the details of Phase II in the FNRPM accompanying this Order.

494. We designate \$500 million annually for ongoing support for mobile services, to be distributed in Phase II of the Mobility Fund. Of this amount, we anticipate that we would designate up to \$100 million to address the special circumstances of Tribal lands. We set a budget of \$500 million to promote mobile broadband in these areas, where a private sector business case cannot be met without federal support. Although the budget for fixed services exceeds the budget for mobile services, we note that today significantly more Americans have access to 3G mobile coverage than have access to residential broadband via fixed wireless, DSL, cable, or fiber.<sup>819</sup> We expect that as 4G mobile service is rolled out, this disparity will persist – private investment will enable the availability of 4G mobile service to a larger number of Americans than will have access to fixed broadband with speeds of at least 4 Mbps downstream and 1 Mbps upstream.<sup>820</sup>

495. In 2010, wireless ETCs other than Verizon Wireless and Sprint received \$921 million in high-cost support. Under 2008 commitments to phase down their competitive ETC support, Verizon Wireless and Sprint have already given up significant amounts of the support they received under the identical support rule, and there is nothing in the record showing that either carrier is reducing coverage or shutting down towers even as this support is eliminated. Nor is there anything in the record that suggests AT&T or T-Mobile would reduce coverage or shut down towers in the absence of ETC support. We therefore find that it reasonable to assume that the four national carriers will maintain at least their existing coverage footprints even if the support they receive today is phased out. In 2010, \$579 million flowed to regional and small carriers, *i.e.*, carriers other than the four nationwide providers.<sup>821</sup> Of this \$579 million, we know in many instances that this support is being provided to multiple wireless carriers in the same geographic area.<sup>822</sup> We also note that the State Members of the Federal State Joint Board on

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<sup>818</sup> See discussion *infra*; see also *Tribal Mobility Fund Public Notice*, 26 FCC Rcd at 5998-99.

<sup>819</sup> See *15th Annual Mobile Wireless Competition Report*, 26 FCC Rcd at 9742-43, paras. 120-122. See also *2011 Seventh Broadband Progress Report*, 26 FCC Rcd at 8049-51, App. B.

<sup>820</sup> *15th Annual Mobile Wireless Competition Report*, 26 FCC Rcd at 9736-41, paras. 109-116 and Table 11.

<sup>821</sup> See *2010 Disbursement Analysis*.

<sup>822</sup> Federal Communications Commission Response to United States House of Representatives Committee on Energy and Commerce, Universal Service Fund Data Request of June 22, 2011, Request 7: Study Areas with the Most Eligible Telecommunications Carriers (Table 1: Study Areas with the Most Eligible Telecommunications Carriers in 2010), (*Waxman Report*) available at <http://republicans.energycommerce.house.gov/Media/file/PDFs/2011usf/ResponsetoQuestion7.pdf>.

Universal Service have proposed that the Commission establish a dedicated Mobility Fund that would provide \$50 million in the first year, \$100 million in the second year, and then increase by \$100 million each year until support reaches \$500 million annually.<sup>823</sup> Thus, we believe that our \$500 million annual budget will be sufficient to sustain and expand the availability of mobile broadband. We anticipate as well that mobile providers may also be eligible for support in CAF Phase II in areas where price cap carriers opt not to accept the state-level commitment, in addition to Mobility Fund Phase II support.

496. We recognize that some small proportion of geographic areas may be served by a single wireless ETC, which might reduce coverage if it fails to win ongoing support within our \$500 million budget. But the current record does not persuade us that the best approach to ensure continuing service in those instances is to increase our overall \$500 million budget. Rather, we have established a waiver process as discussed below, that a wireless ETC may use to demonstrate that additional support is needed for its customers to continue receiving mobile voice service in areas where there is no terrestrial mobile alternative.<sup>824</sup>

497. Of the \$500 million, we set aside up to \$100 million for a separate Tribal Mobility Fund, for the same reasons we articulated with respect to the Tribal Mobility Fund Phase I. In addition, we acknowledge that many Tribal lands require ongoing support in order to provide service and therefore designate a substantial level of funding to ensure that these communities are not left behind. We observe that this amount is roughly equivalent to the amount of funding currently provided to Tribal lands in the lower 48 states and in Alaska, excluding support awarded to study areas that include the most densely populated communities in Alaska.<sup>825</sup>

#### 4. Eliminating the Identical Support Rule

498. *Background.* Section 54.307 of the Commission's rules, also known as the "identical support rule," provides competitive ETCs the same per-line amount of high-cost universal service support as the incumbent local exchange carrier serving the same area.<sup>826</sup> As shown below, the identical support rule's primary role has been to support mobile services, although the Commission did not identify that purpose when it adopted the rule.<sup>827</sup>

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<sup>823</sup> State Joint Board May 2, 2011 Comments at 68-73 (proposing that this support be provided through grants awarded by States on a project-specific basis to fund 50 percent of the debt cost of new construction, with the grants to be paid over ten years).

<sup>824</sup> See *infra* Section VII.G.

<sup>825</sup> See NECA and USAC Data, USF Data Under USAC Memo of Understanding (Appendix C), CETCAnalysisMOU5Extract.XLS, at [http://transition.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/Monitor/CETCAnalysisMOU5Extract.XLS](http://transition.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Monitor/CETCAnalysisMOU5Extract.XLS) (listing initial competitive ETC support payments by month and by incumbent local exchange carrier study area).

<sup>826</sup> 47 C.F.R. § 54.307. In adopting the identical support rule, the Commission assumed that competitive ETCs would be competitive LECs (*i.e.*, wireline telephone providers) competing directly with incumbent LECs for particular customers. See *Universal Service First Report and Order*, 12 FCC Rcd at 8932, para. 286. Based on this assumption, the Commission concluded that high-cost support should be portable – *i.e.*, that support would follow the customer to the new LEC when the customer switched service providers. *Id.* at 8932-33, paras. 287-88. The Commission planned that eventually all support would be provided based on forward-looking economic cost estimates and not based on the incumbents' embedded costs. *Id.* at 8932, paras. 287. The Commission did not contemplate the complementary role that mobile service would play in the years ahead.

<sup>827</sup> See *Universal Service First Report and Order*, 12 FCC Rcd at 8944-45 paras. 311-13. As discussed in paragraph 501, wireline competitive ETCs received only \$23 million out of \$1.2 billion disbursed to competitive ETCs in 2010. *2010 Disbursement Analysis*.

499. In the NPRM, we sought comment on eliminating the identical support rule as we establish better targeted mechanisms to support mobility.<sup>828</sup>

500. The Federal-State Joint Board on Universal Service urged the Commission to eliminate the identical support rule in 2007, and the state members recently reiterated that viewpoint in this proceeding.<sup>829</sup> In the current proceeding, a broad cross-section of stakeholders have advocated eliminating the identical support rule.<sup>830</sup>

501. In 2010, 446 competitive ETCs, owned by 212 holding companies, received funding under the identical support rule.<sup>831</sup> Aside from Verizon Wireless, which agreed in 2008 to give up its competitive ETC high-cost support as a condition of obtaining Commission approval of a transfer of control, the largest competitive ETC recipient by holding company in 2010 was AT&T, which received \$289 million.<sup>832</sup> Last year, about \$611 million went to one of the four national wireless providers, representing approximately 50 percent of competitive ETC support disbursed in 2010. The remaining \$602 million was disbursed to the other 208 competitive ETC holding companies. Of this, approximately \$23 million was disbursed to wireline competitive ETCs.

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<sup>828</sup> See American Cable Ass'n *USF/ICC Transformation NPRM* Comments at 18-19; Comcast *USF/ICC Transformation NPRM* Comments at 15; Iowa Utilities Board *USF/ICC Transformation NPRM* Comments at 9-10; Moss Adams *USF/ICC Transformation NPRM* Comments at 14; Rural Associations *USF/ICC Transformation NPRM* Comments at 57; Windstream *USF/ICC Transformation NPRM* Comments at 30-32; see also *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4677-78 paras. 403-07.

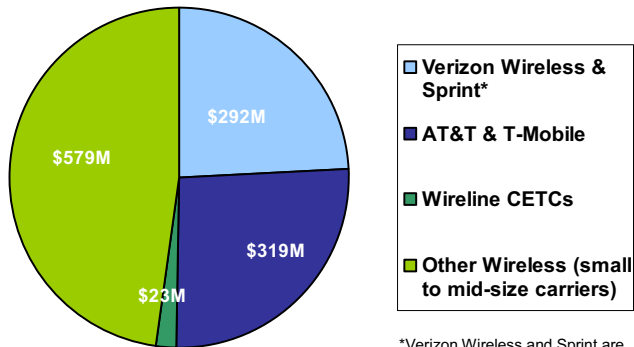
<sup>829</sup> See *Joint Board 2007 Recommended Decision*, 22 FCC Rcd at 20491-94, paras. 55-68; State Joint Board Members *USF/ICC Transformation NPRM* Comments at 10.

<sup>830</sup> See Verizon & Verizon Wireless *USF/ICC Transformation NPRM* Comments at 47-50; AT&T *USF/ICC Transformation NPRM* Comments at 90, 107; CenturyLink *USF/ICC Transformation NPRM* Comments at 30, 35; Windstream *USF/ICC Transformation NPRM* Comments at 30-32; Florida Public Service Commission *USF/ICC Transformation NPRM* Comments at 10-11; NASUCA *USF/ICC Transformation NPRM* Comments at 46-47. Several commenters supported retaining the identical support rule for some carriers, in some places, or with adjustments, but not as it currently exists for all competitive ETCs. See ACS *USF/ICC Transformation NPRM* Comments at 21 (proposing per-line freeze); Cox *USF/ICC Transformation NPRM* Comments at 10-11 & n.14 (proposing to retain identical support for wireline competitive ETCs until CAF is implemented); GCI *USF/ICC Transformation NPRM* Comments at 30 (proposing to retain identical support for Covered locations); Docomo Pacific et al *USF/ICC Transformation NPRM* Comments at 14-15 (proposing to retain identical support in U.S. Territories).

<sup>831</sup> Actual disbursements in 2010 were \$1.22 billion. *2010 Disbursement Analysis*; USAC High-Cost Disbursement Tool. These amounts include disbursements to Verizon Wireless and Sprint that USAC now is in the process of reclaiming pursuant to the *Corr Wireless Order*. *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Request for Review of Decision of Universal Service Administrator by Corr Wireless Communications, LLC*, WC Docket No. 05-337, CC Docket No. 96-45, 25 FCC Rcd 12854, 12859-63, paras. 14-22 (2010) (*Corr Wireless Order*).

<sup>832</sup> *2010 Disbursement Analysis*; USAC High-Cost Disbursement Tool.

## Total 2010 CETC Funding



Total : \$1.2B

\*Verizon Wireless and Sprint are already subject to voluntary phase-down of high-cost competitive ETC support.

502. *Discussion.* We eliminate the identical support rule. Based on more than a decade of experience with the operation of the current rule and having received a multitude of comments noting that the current rule fails to efficiently target support where it is needed, we reiterate the conclusion that this rule has not functioned as intended.<sup>833</sup> As described in more detail below, identical support does not provide appropriate levels of support for the efficient deployment of mobile services in areas that do not support a private business case for mobile voice and broadband. Because the explicit support for mobility we adopt today will be designed to appropriately target funds to such areas, the identical support rule is no longer necessary or in the public interest.

503. The Commission anticipated that universal service support would be driven to the most efficient providers as they captured customers from the incumbent provider in a competitive marketplace. It originally expected that growth in subscribership to a competitive ETC's services would necessarily result in a reduction in subscribership to the incumbent's services. Instead, the vast majority of competitive ETC support has been attributable to the growing role of wireless in the United States. Overwhelmingly, high-cost support for competitive ETCs has been distributed to wireless carriers providing mobile services.<sup>834</sup> Although nearly 30 percent of households nationwide have cut the cord and have only wireless voice service, many households subscribe to both wireline voice service and wireless voice service.<sup>835</sup> Moreover, because households typically have multiple mobile phones, wireless competitive ETCs have been able to receive multiple subsidies for the same household. Although the

<sup>833</sup> *Interim Cap Order*, 23 FCC Rcd at 8843-44, paras. 19-20. See also *supra* note 826.

<sup>834</sup> USAC estimates that 95 to 97 percent of high-cost support to competitive ETCs is provided to wireless carriers. High-Cost Program Quarterly Statistics, "High-Cost Support Distribution by Wireless & Wireline CETCs, 1998-1Q2011" available at <http://www.usac.org/about/universal-service/fund-facts/fund-facts-high-cost-quarterly-program-statistics.aspx>

<sup>835</sup> Blumberg & Luke, Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July – December 2010, CDC Division of Health Interview Statistics, National Center for Health Statistics (rel. June 8, 2011) available at [www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201106.pdf](http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201106.pdf).

expansion of wireless service has brought many benefits to consumers, the identical support rule was not designed to efficiently provide appropriate levels of support for mobility.

504. The support levels generated by the identical support rule bear no relation to the efficient cost of providing mobile voice service in a particular geography. In areas where the incumbent's support per line is high, a competitive ETC will receive relatively high levels of support per line, while it would receive markedly less support in an adjacent area with the same cost characteristics, if the incumbent there is receiving relatively little support per line. This makes little sense. Demographics, topography, and demand by travelers for mobile coverage along roads, as opposed to residences, are considerations that may create different business cases for fixed vs. mobile voice services in different areas, with a resulting effect on the level of need for subsidization.<sup>836</sup> As a result of these and other differences in cost and revenue structures, the per-line amounts received by competitive ETCs are a highly imperfect approximation of the amount of subsidy necessary to support mobile service in a particular geographic area and such structures have simply missed the mark.

505. Given the way the identical support rule operates, wireless competitive ETCs often do not have appropriate incentives for entry. Some areas with per-line support amounts that are relatively high may be attracting multiple competitive ETCs, each of which invests in its own duplicative infrastructure. Indeed, many areas have four or more competitive ETCs providing overlapping service.<sup>837</sup> These areas may be attracting investment that could otherwise be directed elsewhere, including areas that are not currently served. Conversely, in some areas the subsidy provided by the identical support rule may be too low, so that no competitive ETCs seek to serve the area, resulting in inadequate mobile coverage.

506. Moreover, today, competitive ETC support is calculated, and lines are reported, according to the billing address of the subscriber.<sup>838</sup> Although the identical support rule provides a per-line subsidy for each competitive ETC handset in service, the customer need not use the handset at the billing address in order to receive support. Indeed, mobile competitive ETCs may receive support for some customers that rarely use their handsets in high-cost areas, but typically use their cell phones on highways and in towns or other places in which coverage would be available even without support.<sup>839</sup> As currently constructed, the rule fails to ensure that facilities are built in areas that actually lack coverage.<sup>840</sup>

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<sup>836</sup> See *OBI Broadband Availability Gap*; see also Rural Associations *USF/ICC Transformation NPRM* Comments at 57 (“[d]ifferent network technologies provide different service functionalities and entail different construction, operating and maintenance costs”).

<sup>837</sup> Most of Puerto Rico, including San Juan, is served by four or more competitive ETCs receiving support. See Universal Service Administrative Company, Federal Universal Service Support Mechanism Fund Size Projections for Fourth Quarter 2011, filed Aug. 2, 2011, at Apps. HC10, HC19. Similarly, four or more competitive ETCs are designated to serve much of Mississippi and Alabama, including sizable communities such as Jackson, Birmingham, and Huntsville, and along the Interstate highways and other major roadways of the state. *Id.* at App. HC21. See also *FCC Response to House Energy and Commerce Committee*, Table 1.

<sup>838</sup> 47 C.F.R. § 54.307(b).

<sup>839</sup> Conversely, some carriers have recognized that the use of billing addresses does not accurately represent the costs of serving their customers who reside in low-cost areas but use their mobile phones in remote areas, such as oil fields. See *Arctic Slope Tel. Ass’n Cooperative, Inc.*, Petition for Waiver of the Federal Communications Commissions Rules Concerning the Administration of the Universal Service Fund, CC Docket No. 96-45 (filed Jan. 31, 2008); Letter from John Nakahata, Counsel to General Communications, Inc., to Dana Shaffer, FCC, filed January 26, 2009 (proposing alternative methods of locating customers for high-cost universal service purposes).

<sup>840</sup> We acknowledge that ETC designations typically create build-out requirements for wireless carriers that are designated ETCs. See Mississippi PSC *USF/ICC Transformation NPRM* Comments at 4-6. However, we believe that federal support to advance our goal of achieving universal availability of mobile voice and broadband should (continued...)

507. We reject contentions that competitive ETCs serving certain types of areas should be exempted from elimination of the identical support rule.<sup>841</sup> For example, a number of commenters from Alaska suggest that Alaska should be excluded altogether from today's reforms, and that high-cost support should generally continue in Alaska at existing levels with redistribution of that support within the state.<sup>842</sup> We appreciate and recognize that Alaska faces uniquely challenging operating conditions, and agree that national solutions may require modification to serve the public interest in Alaska. We do not, however, believe that the Alaskan proposals ultimately best serve the interest of Alaskan consumers. We believe that the package of reforms adopted in the Order targeting funding for broadband and mobility, eliminating duplicative support, and ensuring all mechanisms provide incentives for prudent and efficient network investment and operation is the best approach for all parts of the Nation, including Alaska.

508. That said, it is important to ensure our approach is flexible enough to take into account the unique conditions in places like Alaska, and we make a number of important modifications to the national rules, particularly with respect to public interest obligations,<sup>843</sup> the Mobility Funds,<sup>844</sup> and competitive ETC phase down,<sup>845</sup> to account for those special circumstances, such as its remoteness, lack of roads, challenges and costs associated with transporting fuel, lack of scalability per community, satellite and backhaul availability, extreme weather conditions, challenging topography, and short construction season. Further, to the extent specific proposals have a disproportionate or inequitable impact on any carriers (wireline or wireless) serving Alaska, we note that we will provide for expedited treatment of any related waiver requests for all Tribal and insular areas.<sup>846</sup> We believe this approach, on balance, provides the benefits of our national approach while taking into account the unique operating conditions in some communities. Analogous proposals to maintain existing wireline and wireless support levels in other geographic areas, including the U.S. Territories and other Tribal lands, suffer the same infirmities as the proposals related to Alaska,<sup>847</sup> and are also rejected.

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provide direct incentives for the achievement of our goals, aligning support payments with deployment and coverage.

<sup>841</sup> See GCI *USF/ICC Transformation NPRM* Comments at 30 (proposing to retain identical support for Covered locations); Smith Bagley *USF/ICC Transformation NPRM* Comments at 9 (proposing to retain identical support for Covered Locations); Docomo Pacific et al *USF/ICC Transformation NPRM* Comments at 14-15 (proposing to retain identical support in Territories); ACS *USF/ICC Transformation NPRM* Comments at 21 (proposing "improved" identical support frozen on a per-line basis); Alaska Rural August 29 *USF/ICC Transformation NPRM* Comments at 7-11; National Tribal Telecom Ass'n *USF/ICC Transformation NPRM* Comments at 49; MTPCS *USF/ICC Transformation NPRM* Comments at 7-8; MTPCS & Viaero *USF/ICC Transformation NPRM* Comments at 22-24; IT&E *USF/ICC Transformation NPRM* Reply at 2. Nonetheless, as described below, *see infra* paras. 529-531, we delay the phase-down of identical support for certain competitive ETCs serving remote areas of Alaska and for Standing Rock Telecommunications, a Tribally owned competitive ETC, by two years. During that interim, the identical support rule will continue to apply in those areas, albeit subject to constraints. The identical support rule will be fully eliminated in all areas when the delayed phase-down begins.

<sup>842</sup> GCI *USF/ICC Transformation NPRM* Comments at 30; ACS *USF/ICC Transformation NPRM* Comments at 21; Alaska Rural August 3 *PN* Comments at 7-11.

<sup>843</sup> See *supra* para. 101.

<sup>844</sup> See *supra* paras. 481-492, 497.

<sup>845</sup> See *infra* paras. 529-531.

<sup>846</sup> See *infra* para. 544.

<sup>847</sup> See, e.g., Smith Bagley *USF/ICC Transformation NPRM* Comments at 9; National Tribal Telecom Ass'n *USF/ICC Transformation NPRM* Comments at 49; MTPCS *USF/ICC Transformation NPRM* Comments at 7-8; (continued...)

509. We note that the elimination of the identical support rule applies also to competitive ETCs providing fixed services, including competitive wireline service providers. The reforms we adopt elsewhere in the Order are designed to achieve nearly ubiquitous broadband deployment. In those states where the incumbent price cap carrier declines to make a state-level commitment to build broadband in exchange for model-based support, all competitive ETCs will have the opportunity to compete to provide supported services. In other areas, where the incumbent service providers will be responsible for achieving the universal service goals, we find it would not be in the public interest to provide additional support to carriers providing duplicative services. In addition, in areas where unsubsidized providers have built out service, no carrier – incumbent or competitive – will receive support, placing all providers on even footing.<sup>848</sup>

510. We reject any arguments that we may not eliminate the identical support rule because doing so would prevent some carriers from receiving high-cost support. Section 254 does not mandate the receipt of support by any particular carrier. Rather, as the Commission has indicated and the courts have agreed, the “purpose of universal service is to benefit the customer, not the carrier.”<sup>849</sup> ETCs are not entitled to the expectation of any particular level of support, or even any support, so long as the level of support provided is sufficient to achieve universal service goals. As explained above, we find that the identical support rule does not provide an amount to any particular carrier that is reasonably calculated to be sufficient but not excessive for universal service purposes.

511. For all of these reasons, we find the identical support rule does not effectively serve the Commission’s goals, and we eliminate the rule effective January 1, 2012.

## 5. Transition of Competitive ETC Support to CAF

512. *Background.* In the NPRM, we proposed to transition all existing support for competitive ETCs to a new CAF program over a five-year period.<sup>850</sup> In the alternative, we proposed to transition existing support to the new CAF program over a five-year period, but to allow individual competitive ETCs to make either rules-based or waiver-based showings that would permit them to continue to receive support until the new CAF program had been implemented.<sup>851</sup> We also sought comment on GCI’s proposal that any transition of competitive ETC support to the CAF include an exception for competitive ETCs serving Tribal lands and Alaska Native regions (“covered locations”).<sup>852</sup>

513. *Discussion.* We transition existing competitive ETC support to the CAF, including our reformed system for supporting mobile service over a five-year period beginning July 1, 2012. We find that a transition is desirable in order to avoid shocks to service providers that may result in service disruptions for consumers. Several commenters supported longer transition periods, but we do not find their arguments compelling.<sup>853</sup> We understand that current recipients would prefer a slower, longer

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Docomo Pacific et al. *USF/ICC Transformation NPRM* Comments at 14-15; IT&E *USF/ICC Transformation NPRM* Reply at 2.

<sup>848</sup> See *supra* para. 170.

<sup>849</sup> *Rural Cellular Association v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) (quoting *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 621 (5th Cir. 2000)). See also *supra* para. 293.

<sup>850</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4640-42, paras. 246-49.

<sup>851</sup> *Id.* at paras. 250-55.

<sup>852</sup> *Id.* at para. 259.

<sup>853</sup> See RTG *USF/ICC Transformation NPRM* Comments at 4, 10; United States Cellular *USF/ICC Transformation NPRM* Comments at 15; USA Coalition at 22. Some commenters urged immediate elimination of competitive ETC funding. XO Communications *USF/ICC Transformation NPRM* Comments at 38-39; RICA *USF/ICC* (continued...)



transition that provides them with more universal service revenues under the current system. We find, however, that a five-year transition will be sufficient for competitive ETCs that are currently receiving high-cost support to adjust and make necessary operational changes to ensure that service is maintained during the transition.

514. Moreover, during this period, competitive ETCs offering mobile wireless services will have the opportunity to bid in the Mobility Fund Phase I auction in 2012 and participate in the second phase of the Mobility Fund in 2013. Competitive ETCs offering broadband services that meet the performance standards described above will also have the opportunity to participate in competitive bidding for CAF support in areas where price cap companies decline to make a state-level broadband commitment in exchange for model-determined support, as described above, in 2013. With these new funding opportunities, many carriers, including wireless carriers, could receive similar or even greater amounts of funding after our reforms than before, albeit with that funding more appropriately targeted to the areas that need additional support.

515. For the purpose of this transition, we conclude that each competitive ETC's baseline support amount will be equal to its total 2011 support in a given study area, or an amount equal to \$3,000 times the number of reported lines as of year-end 2011, whichever is lower.<sup>854</sup> Using a full calendar year of support to set the baseline will provide a reasonable approximation of the amount that competitive ETCs would currently expect to receive, absent reform, and a natural starting point for the phase-down of support.

516. In addition, we limit the baseline to \$3,000 per line in order to reflect similar changes to our rules limiting support for incumbent wireline carriers to \$3,000 per line per year.<sup>855</sup> As discussed above, the per-line amounts received by competitive ETCs are a highly imperfect approximation of the amount of subsidy necessary to support mobile service in a particular geographic area. There is no indication in the record before us that competitive ETCs need support in excess of \$3,000 per line to maintain existing service pending transition to the Mobility Fund. Moreover, if we did not apply the \$3,000 per line limit to the baseline amount for competitive ETCs, their baselines could, in some circumstances, be much higher than the amount that they would have been permitted had we retained the identical support rule going forward, due to other changes that may lower support for the incumbent carrier.

517. Because the amount of Mobility Fund Phase II support provided will be designed to provide a sufficient level of support for a mobile carrier to provide service, we find there is no need for any carrier receiving Mobility Fund Phase II support to also continue receiving legacy support. Therefore, any such carrier will cease to be eligible for phase-down support in the first month it is eligible to receive support pursuant to the Mobility Fund Phase II. The receipt of support pursuant to Mobility Fund Phase I will not impact a carrier's receipt of support under the phase-down. Similarly, the receipt of support pursuant to

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*Transformation NPRM* Comments at 11-15 (proposing immediate elimination of identical support rule, but support based on own costs); *see also* NASUCA *USF/ICC Transformation NPRM* Comments at 45 (proposing immediate elimination of IAS for competitive ETCs); Sprint Nextel *USF/ICC Transformation NPRM* Comments at 34 (proposing 3-year phase-down); Verizon *USF/ICC Transformation NPRM* Comments at 49-50 (proposing immediate 40 percent reduction).

<sup>854</sup> For the purpose of this transition, "total 2011 support" is the amount of support disbursed to a competitive ETC for 2011, without regard to prior period adjustments related to years other than 2011 and as determined by USAC on January 31, 2012.

<sup>855</sup> *See supra* paras. 272-279. For the purpose of applying the \$3,000 per line limit, USAC shall use the average of lines reported by a competitive ETC pursuant to line count filings required for December 31, 2010, and December 31, 2011. This will provide an approximation of the number of lines typically served during 2011.

Mobility Fund Phase II for service to a particular area will not affect a carrier's receipt of phase-down support in other areas.<sup>856</sup>

518. We note that, pursuant to section 214(e) of the Act, competitive ETCs are required to offer service throughout their designated service areas.<sup>857</sup> This requirement remains in place, even as support provided pursuant to the identical support rule is phased down. A competitive ETC may request modification of its designated service area by petitioning the entity with the relevant jurisdictional authority.<sup>858</sup> In considering such petitions, the Commission will examine how an ETC modification would affect areas for which there is no other mobile service provider, and we encourage state commissions to do the same.

519. Competitive ETC support per study area will be frozen at the 2011 baseline, and that monthly baseline amount will be provided from January 1, 2012 to June 30, 2012. Each competitive ETC will then receive 80 percent of its monthly baseline amount from July 1, 2012 to June 30, 2013, 60 percent of its baseline amount from July 1, 2013, to June 30, 2014, 40 percent from July 1, 2014, to June 30, 2015, 20 percent from July 1, 2015, to June 30, 2016, and no support beginning July 1, 2016. We expect that the Mobility Fund Phase I auction will occur in 2012, and that ongoing support through the Mobility Fund Phase II will be implemented by 2013, with \$500 million expressly dedicated to mobility. If the Mobility Fund Phase II is not operational by June 30, 2014, we will halt the phase-down of support until it is operational.<sup>859</sup> We will similarly halt the phase-down of support for competitive ETCs serving Tribal lands if the Mobility Fund Phase II for Tribal lands has not been implemented at that time. We anticipate that any temporary halt of the phase-down would be accompanied by additional mobile broadband public interest obligations, to be determined.<sup>860</sup>

520. We note that Verizon Wireless and Sprint will continue to be subject to the phase-down commitments they made in the November 2008 merger Orders.<sup>861</sup> Consistent with the process we set forth in the *Corr Wireless Order*, their specific phase downs will be applied to the revised rules of general applicability we adopt today.<sup>862</sup> As a result, each carrier will have its baseline support calculated based on

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<sup>856</sup> In the FNPRM, we seek comment on whether competitive ETCs providing fixed service should be subject to a similar rule to the extent they win CAF Phase II support. See *infra* paras. 1095-1097.

<sup>857</sup> 47 U.S.C. § 214(e). We seek comment on issues related to ETC service areas in the attached Further Notice. See *infra* paras. 1089-1120.

<sup>858</sup> 47 U.S.C. §§ 214(e)(2), (6). A competitive ETC may also be required to seek redefinition of a rural telephone company's service area in some instances. 47 U.S.C. § 214(e)(5).

<sup>859</sup> We estimate that this would stabilize competitive ETC phase-down support at approximately \$600 million annually.

<sup>860</sup> The temporary halt will apply to wireline competitive ETCs as well as competitive ETCs providing mobile services. As noted above, see *supra* para. 501, wireline competitive ETCs receive a relatively small portion of total competitive ETC support and developing administrative procedures to separately address wireline competitive ETCs would be unduly administratively burdensome.

<sup>861</sup> *Applications of Celco 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); *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).

<sup>862</sup> *Corr Wireless Order*, 25 FCC Rcd at 12589-61, paras. 14-17. The *Corr Wireless Order* provided Sprint and Verizon Wireless each with two options regarding how the merger commitments would be applied. Option A (continued...)

disbursements, with a 20 percent reduction applied beginning July 1, 2012. Sprint, which elected Option A described in the *Corr Wireless Order*, will, in 2012, have an additional reduction applied as necessary to reduce its support to 20 percent of its 2008 baseline amount. Verizon Wireless, which elected Option B, will, in 2012, have an 80 percent reduction applied to the support it would otherwise receive. In 2013, neither carrier will receive phase down support, consistent with the commitments. To the extent that they qualify by remaining ETCs or obtaining ETC designations and agreeing to the obligations imposed on all Mobility Fund recipients, they will be permitted to participate in Mobility Fund Phases I and II.<sup>863</sup>

521. In determining this transition process, we also considered (a) applying the reduction factors to each state's interim cap amount, or (b) converting each competitive ETC's baseline amount to a per-line amount, to which the reduction factor would be applied. We reject these alternatives because they would provide less certainty regarding support amounts for competitive ETCs during the transition and would create greater administrative burdens and complexity. Under the first alternative, an individual competitive ETC's support would continue to be affected by line counts, support calculations and relinquishments for other, unrelated carriers within the state. Under the second alternative, a competitive ETC's support would fluctuate based on line growth or loss. We believe, on balance, that the additional certainty to all competitive ETCs and the administrative efficiencies for USAC of freezing study area support as the baseline, particularly at a time when considerable demands will be placed on USAC to implement an entirely new support mechanism, outweigh the potential negative impact to any individual competitive ETCs that otherwise might receive greater support amounts during the transition to the CAF. In addition, competitive ETCs will be relieved of the obligation to file quarterly line counts, which will reduce their administrative burden as well.

522. In the NPRM, we sought comment on whether exceptions to the phase down or other modified transitions should be permitted for some carriers.<sup>864</sup> Although we adopt limited exceptions for some remote parts of Alaska described below and for one Tribally-owned carrier whose ETC designation was modified after release of the *USF-ICC Transformation NPRM*, we decline to adopt any general exceptions to our transition. Although some commenters have argued that broad exceptions will be needed, they did not generally provide the sort of detailed data and analysis that would enable us to develop a general rule for which carriers would qualify.<sup>865</sup> The purpose of the phase down is to avoid unnecessary consumer disruption as we transition to new programs that will be better designed to achieve universal service goals, especially with respect to promoting investment in and deployment of mobile service to areas not yet served. We do not wish to encourage further investment based on the inefficient subsidy levels generated by the identical support rule. We conclude that phasing down and transitioning existing competitive support will not create significant or widespread risks that consumers in areas that

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established a fixed baseline support amount to which a specified reduction factor would be applied each year during the phasedown. After calculating the carrier's support pursuant to the Commission's rules, the carrier's support is reduced pursuant to the merger commitment only if the support exceeds the reduced baseline. *Id.* Under Option B, the carrier's baseline floats each quarter, based on the amount of support it is eligible to receive pursuant to the Commission's rules, and the specified reduction factor is applied to that support amount. Sprint elected Option A and Verizon Wireless elected Option B.

<sup>863</sup> See *supra* paras. 386-410.

<sup>864</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4640-42, paras. 250-55.

<sup>865</sup> See RTG *USF/ICC Transformation NPRM* Comments at 11; see also NASUCA *USF/ICC Transformation NPRM* Comments at 46 (arguing that fixed rules would be subject to abuse, but waivers may be necessary).

currently have service, including mobile service, will be left without any viable mobile service provider serving their area.<sup>866</sup>

523. We will, however, consider waiver requests on a case-by-case basis.<sup>867</sup> Consistent with the phase-down support's purpose of protecting existing service during the transition to the Mobility Fund programs, we would not find persuasive arguments that waivers are necessary in order to expand deployment and service offerings to new areas. We anticipate that future investment supported with universal service support will be provided pursuant to the new programs.

524. The Commission will carefully consider all requests for waiver of the phase down that meet the requirements described above. We expect that those requests will not be numerous. We note that two of the four nationwide carriers – Verizon Wireless and Sprint – have already given up significant amounts of the support they received under the identical support rule, and there is no indication in the record before us that those companies have turned off towers as a consequence of relinquishing their support.

525. We note that the transition we adopt here will include those carriers currently receiving support under the Covered Locations exception to the interim cap and those carriers that have sought to take advantage of the own-costs exception to the cap.<sup>868</sup> In adopting the Covered Locations exception to the funding cap in the 2008 *Interim Cap Order*, we recognized that penetration rates for basic telephone service on Tribal lands<sup>869</sup> were lower than for the rest of the Nation, and we concluded that competitive ETCs serving those areas were not merely providing complementary services.<sup>870</sup> Under this exception, competitive ETCs serving Tribal lands have operated without a cap, and have benefited from significant funding increases. Indeed, support provided for service in Covered Locations has nearly doubled, from an estimated \$72 million in 2008 to an estimated \$150 million in 2011, while competitive ETC high-cost support for the remainder of the nation was frozen.<sup>871</sup>

526. We note that a significant numbers of supported lines under the Covered Locations exception are in larger cities in Alaska where multiple competitive ETCs often serve the same area.<sup>872</sup> The result is that a significant amount of support in Alaska is provided to competitive ETCs serving the three largest Alaskan cities, Anchorage, Fairbanks, and Juneau.<sup>873</sup>

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<sup>866</sup> As described, *supra* para. 509, we think any loss of service is particularly unlikely with respect to consumers served by competitive ETCs providing *fixed* services – e.g., wireline competitive ETCs – because the incumbent LEC in the area served by the competitive carrier is required to provide voice service throughout its service territory.

<sup>867</sup> See *infra* paras. 539-544.

<sup>868</sup> See *Interim Cap Order*, 23 FCC Rcd at 8848-49, para. 31-33.

<sup>869</sup> Covered Locations were defined in the *Interim Cap Order* to include tribal lands or Alaska Native regions as those terms are defined in section 54.400(e) of the Commission's rules. See 47 C.F.R. 54.400(e) (tribal lands or Alaska Native regions are "any federally recognized Indian tribe's reservation, pueblo, or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments.").

<sup>870</sup> See *Interim Cap Order*, 23 FCC Rcd at 8848, para. 32.

<sup>871</sup> See High-Cost Program Quarterly Statistics, "Covered Locations Study Area Support" available at <http://usac.org/about/universal-service/fund-facts-charts/Covered-Locations-Study-Area-Support.pdf>.

<sup>872</sup> Universal Service Administrative Company, Federal Universal Service Support Mechanism Fund Size Projections For First Quarter 2012, filed Nov. 2, 2011, at App. HC19. Fifty-nine percent of competitive ETC lines in Alaska are in three study areas that include Anchorage, Juneau, and Fairbanks. *Id.* In each of those study areas, at least three competitive ETCs receive funding today.

<sup>873</sup> Twenty percent of 2010 high-cost competitive ETC disbursements in Alaska were distributed to competitive ETCs serving the Anchorage, Fairbanks, and Juneau study areas alone. Competitive ETC Support by Incumbent (continued...)

527. The interim cap—along with its exceptions—was intended to be in place only until the Commission adopted comprehensive reforms to the high-cost program.<sup>874</sup> We adopt those reforms today. It is therefore appropriate, as we transition away from the identical support rule and the interim cap to a new high-cost support mechanism, including for mobile services, that this transition should begin for all competitive ETCs, including those that previously received uncapped support under exceptions to the interim cap.

528. With respect to Covered Locations, we recognize the significant strides that competitive ETCs have made in Covered Locations in the last two years, and that more still must be done to support expanded mobile coverage on Tribal lands. But, as with the rest of the Nation, we conclude that the most effective way to do so will be through mechanisms that specifically and explicitly target support to expand coverage in Tribal lands where there is no economic business case to provide mobile service, not through the permanent continuation of the identical support rule.<sup>875</sup> Our newly created Mobility Funds will provide dedicated funding to Tribal lands in a manner consistent with the policy objectives underlying our Covered Locations policy to continue to promote deployment in these communities.

529. We therefore lift the Covered Locations exception, and conclude that those carriers serving Tribal lands will be subject to the national five-year transition period. We find persuasive, however, arguments that carriers serving remote parts of Alaska,<sup>876</sup> including Alaska Native villages, should have a slower transition path in order to preserve newly initiated services and facilitate additional investment in still unserved and underserved areas during the national transition to the Mobility Funds.<sup>877</sup> Over 50 remote communities in Alaska have no access to mobile voice service today, and many remote Alaskan communities have access to only 2G services.<sup>878</sup> While carriers serving other parts of Alaska will be subject to the national five-year transition period, we are convinced a more gradual approach is warranted for carriers in remote parts of Alaska. Specifically, in lifting the Covered Locations exception, we delay the beginning of the five-year transition period for a two-year period for remote areas of Alaska. As a result, we expect that ongoing support through the Mobility Fund Phase II, including the Tribal Mobility Fund Phase II, will be implemented prior to the beginning of the five-year transition period in July 2014

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Study Area by Month as Provided by USAC (Attach. C Report 5, submitted pursuant to Memorandum of Understanding between Federal Communications Commission and the Universal Service Administrative Company), available at <http://transition.fcc.gov/web/iatdineca.html>.

<sup>874</sup> See *Interim Cap Order*, 23 FCC Rcd at 8834, para. 1.

<sup>875</sup> See *supra* paras. 481-492, 497.

<sup>876</sup> For purposes of this Order, we treat as remote areas of Alaska all areas other than the study areas, or portions thereof, that include the three major cities in Alaska with over 30,000 in population, Anchorage, Juneau, and Fairbanks. See <http://quickfacts.census.gov/qfd/states/02/0224230.html>. With respect to Anchorage, we exclude the ACS of Anchorage study area (SAC 613000) as well as Eagle River Zones 1 and 2 and Chugiak Zones 1 and 2 of the Matanuska Telephone Association study area (SAC 613015). For Fairbanks, we exclude zone 1 of the ACS of Fairbanks (SAC 613008), and for Juneau, we exclude the ACS Alaska - Juneau study area (SAC 613012). We note that ACS and GCI concur that the study areas, or portions thereof, that include these three cities are an appropriate proxy for non-remote areas of Alaska. See Letter from John Nakahata, counsel to General Communications, Inc., to Marlene H. Dortch, Secretary, FCC (filed Oct. 21, 2011) (GCI/ACS Oct. 21 Letter). There is no evidence on the record that any accommodation is necessary to preserve service or protect consumers in these larger Alaskan communities.

<sup>877</sup> GCI/ACS Oct. 21 Letter.

<sup>878</sup> *Id.* at 2.

for remote parts of Alaska, providing greater certainty and stability for carriers in these areas.<sup>879</sup> During this two-year period, we establish an interim cap for remote areas of Alaska<sup>880</sup> for high-cost support for competitive ETCs, which balances the need to control the growth in support to competitive ETCs in uncapped areas and the need to provide a more gradual transition for the very remote and very high-cost areas in Alaska to reflect the special circumstances carriers and consumers face in those communities.<sup>881</sup>

530. In addition, we adopt a limited exception to the phase-down of support for Standing Rock Telecommunications, Inc. (Standing Rock), a Tribally-owned competitive ETC that had its ETC designation modified within calendar year 2011 for the purpose of providing service throughout the entire Standing Rock Sioux Reservation.<sup>882</sup> We recognize that Tribally-owned ETCs play a vital role in serving their communities, often in remote, low-income, and unserved and underserved regions. We find that a tailored approach in this particular instance is appropriate because of the unique federal trust relationship we share with federally recognized Tribes,<sup>883</sup> which requires the federal government to adhere to certain fiduciary standards in its dealings with Tribes.<sup>884</sup> In this regard, the federal government has a longstanding policy of promoting Tribal self-sufficiency and economic development, as embodied in various federal statutes.<sup>885</sup> As an independent agency of the federal government, “the Commission recognizes its own general trust relationship with, and responsibility to, federally recognized Tribes.”<sup>886</sup> In keeping with this recognition, the Commission has previously taken actions to aid Tribally-owned

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<sup>879</sup> As noted above, carriers in remote areas of Alaska may not receive phase-down support in any area in which they receive support pursuant to either component of Mobility Fund Phase II. See *supra* para. 517. Further, we note that the halt of the phase-down described above would apply to remote areas of Alaska as well. See *supra* para. 519.

<sup>880</sup> This cap will be modeled on the state-by-state interim cap that has been in place under the *Interim Cap Order*. 23 FCC Rcd at 8846, paras. 26-28. Specifically, the interim cap for remote areas of Alaska will be set at the total of all competitive ETC’s baseline support amounts in remote areas of Alaska using the same process described above. See *supra* paras. 515-516. On a quarterly basis, USAC will calculate the support each competitive ETC would have received under the frozen per-line support amount as of December 31, 2011 capped at \$3000 per year, and then, if necessary, calculate a state reduction factor to reduce the total amount down to the cap amount for remote areas of Alaska. Specifically, USAC will compare the total amount of uncapped support to the interim cap for remote areas of Alaska. Where the total uncapped support is greater than the available support amount, USAC will divide the interim cap support amount by the total uncapped amount to yield the reduction factor. USAC will then apply the reduction factor to the uncapped amount for each competitive ETC within remote areas of Alaska to arrive at the capped level of high-cost support. If the uncapped support is less than the available capped support amount, no reduction will be required.

<sup>881</sup> See *supra* paras. 507-508.

<sup>882</sup> See *Telecommunications Carriers Eligible for Universal Service Support; Standing Rock Telecommunications, Inc. Petition for Designation as an Eligible Telecommunications Carrier; Petition of Standing Rock Telecommunications, Inc. to Redefine Rural Service Area; Petition for Reconsideration of Standing Rock Telecommunications, Inc.’s Designation as an Eligible Telecommunications Carrier on the Standing Rock Sioux Reservation*, WC Docket No. 09-197, Memorandum Opinion and Order on Reconsideration, 26 FCC Rcd 9160 (2011) (*Standing Rock Final ETC Designation Order*).

<sup>883</sup> See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (citations omitted).

<sup>884</sup> See, e.g., *United States v. Mitchell*, 463 U.S. 206 (1983).

<sup>885</sup> See, e.g., *The Indian Financing Act of 1974*, 25 U.S.C. § 1451(1974); *The Indian Self-Determination and Education Assistance Act of 1975*, 25 U.S.C. § 450 (1975); *The Indian Civil Rights Act of 1968*, 25 U.S.C. § 1301 (1968).

<sup>886</sup> *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, 16 FCC Rcd 4078, 4080-81 (2000) (*Tribal Policy Statement*).

companies, which are entities of their Tribal governments and instruments of Tribal self-determination.<sup>887</sup> For example, we have adopted licensing procedures to increase radio station ownership by Tribes and Tribally-owned entities through the use of a “Tribal Priority.”<sup>888</sup>

531. A limited exception to the phase-down of competitive ETC support will give Standing Rock, a nascent Tribally-owned ETC that was designated to serve its entire Reservation and the only such ETC to have its ETC designation modified since release of the *USF-ICC Transformation NPRM* in February 2011, the opportunity to ramp up its operations in order to reach a sustainable scale to serve consumers in its service territory. We find that granting a two-year exception to the phase-down of support to this Tribally-owned competitive ETC is in the public interest. For a two-year period, Standing Rock will receive per-line support amounts that are the same as the total support per line received in the fourth quarter of this year. We adopt this approach in order to enable Standing Rock to reach a sustainable scale so that consumers on the Reservation can realize the benefits of connectivity that, but for Standing Rock, they might not otherwise have access to.<sup>889</sup>

532. We conclude that carriers that have sought to take advantage of the “own-costs” exception to the existing interim cap on competitive ETC funds should not be exempted from the phase down of support. The “own costs” exception was intended to exempt carriers filing their own cost data from the interim cap to the extent their costs met an appropriate threshold.<sup>890</sup> Because we are transitioning away from support based on the identical support rule and toward new high-cost support mechanisms, we see no reason to continue to make the exception available going forward.<sup>891</sup>

#### F. Connect America Fund in Remote Areas

533. In this section, we establish a budget for CAF support in remote areas. This reflects our commitment to ensuring that Americans living in the most remote areas of the nation, where the cost of deploying wireline or cellular terrestrial broadband technologies is extremely high, can obtain affordable broadband through alternative technology platforms such as satellite and unlicensed wireless. As the National Broadband Plan observes, the cost of providing service is typically much higher for terrestrial networks in the hardest-to-serve areas of the country than in less remote but still rural areas.<sup>892</sup> Accordingly, we have exempted the most remote areas, including fewer than 1 percent of all American homes, from the home and business broadband service obligations that otherwise apply to CAF

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<sup>887</sup> See *Improving Communications Services for Native Nations*, CG Docket No. 11-41, Notice of Inquiry, 26 FCC Rcd 2672, 2677-78 (2011) (*Native Nations NOI*) (“Emphasizing the historic federal trust relationship between itself and the Tribes, and the ability of the Commission to create the Tribal Priority based on the constitutional classification of Tribes as governmental entities, the Commission limited eligibility for the Tribal Priority to Tribes and entities majority owned by Tribes and proposing to serve Tribal lands.”) (citing *Policies To Promote Rural Radio and To Streamline Allotment and Assignment Procedures*, MB Docket No. 09-52, First Report and Order and Notice of Proposed Rulemaking, 25 FCC Rcd 1583, 1590, 1596) (*Rural Radio First Report and Order*)).

<sup>888</sup> *Rural Radio First Report and Order*, 25 FCC Rcd at 1587-88.

<sup>889</sup> According to its most recently reported line counts, Standing Rock reported serving only 808 lines. See Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for First Quarter 2012, at Apps. HC19, HC20 (filed Nov. 2, 2011).

<sup>890</sup> *Interim Cap Order*, 23 FCC Rcd at 8848, para. 31. See also *id.* at 8850, para. 36 & n.108 (noting that the interim cap would go into effect immediately, but that the exceptions would go into effect only after approval of the relevant reporting requirements by the Office of Management and Budget).

<sup>891</sup> The Commission will address pending petitions filed pursuant to the own-cost exception in a separate proceeding.

<sup>892</sup> See National Broadband Plan at 138; OBI, Broadband Availability Gap at 6.

recipients.<sup>893</sup> By setting aside designated funding for these difficult-to-serve areas, however, and by modestly relaxing the broadband performance obligations associated with this funding to encourage its use by providers of innovative technologies like satellite and fixed wireless, which may be significantly less costly to deploy in these remote areas, we can ensure that those who live and work in remote locations also have access to affordable broadband service.

534. Although we seek further comment on the details of distributing dedicated remote-areas funding in the Further Notice of Proposed Rulemaking accompanying this Order, we set as the budget for this funding at least \$100 million annually. Our choice of budget necessarily involves the reasonable exercise of predictive judgment, rather than a precise calculation: Many of the innovative, lower-cost approaches to serving hard to reach areas continue to evolve rapidly; we are not setting the details of the distribution mechanism in this Order; and we are balancing competing priorities for funding. Nevertheless, we conclude that a budget of at least \$100 million per year is likely to make a significant difference in ensuring meaningful broadband access in the most difficult-to-serve areas.

535. We note in this regard that some remote areas in rural America already have broadband that meets the performance requirements we establish above, and we do not envision that the dedicated funding we establish with this budget would be available in those areas. For example, the CQBAT model relied on by the ABC Plan predicts that there are 1.2 million residential and business locations where the forward-looking cost of wireline broadband service is greater than \$256 per month, and that of these, only approximately 670,000 locations are unserved by any terrestrial broadband.<sup>894</sup>

536. Based on the RUS's prior experience with dedicated satellite funding to remote areas, we are confident that a budget of at least \$100 million could make a significant difference in expanding availability of affordable broadband service at such locations. Satellite broadband is already available to most households and small businesses in remote areas,<sup>895</sup> and is likely to be available at increasing speeds over time,<sup>896</sup> but current satellite services tend to have significantly higher prices to end-users than terrestrial fixed broadband services, and include substantial up-front installation costs.<sup>897</sup> To help overcome these barriers in the RUS's BIP satellite program, supported providers received a one-time

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<sup>893</sup> As described above, we have excluded from carriers' broadband service obligations in price-cap territories all areas where the model-estimated cost to serve a location is above an "extremely high cost" threshold. For rate-of-return areas, we may adopt a similar approach once the CAF model is finalized. In the meantime, rate-of-return carriers are required to extend broadband on reasonable request. *See supra* section VII.D.2. (Public Interest Obligations of Rate-of-Return Carriers).

<sup>894</sup> Of the remainder, some areas already have broadband meeting our performance requirements, while other areas have some form of basic broadband that does not yet meet those requirements. *See* Letter from Mike Lieberman, AT&T, Michael D. Saperstein, Jr., Frontier, Jeffrey S. Lanning, CenturyLink, Maggie McCready, Verizon, Michael T. Skrivan, Fairpoint Communications, Frank Schueneman, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. (filed Sept. 28, 2011).

<sup>895</sup> While such funding will be available to community anchor institutions, we observe that community anchor institutions in rural America often are located near the more densely populated area in a given county – the small town, the county seat, and so forth – which are less likely to be extremely high cost areas.

<sup>896</sup> *See, e.g.*, Satellite Broadband Providers (DISH, EchoStar, Hughes, ViaSat, WildBlue) Joint Comments at 10-11; ViaSat Comments at 2-3, 5; Satellite Broadband Providers (DISH, EchoStar, Hughes, ViaSat, WildBlue) Joint Reply Comments at 3.

<sup>897</sup> We seek comment below in the FNPRM on how and whether Remote Areas Fund support should be allocated to defray the higher startup costs for satellite services. *See infra* paras. 1269-1271.



upfront payment per location to offer service for at least one year at a reduced price.<sup>898</sup> There has been substantial consumer participation in this program, with providers estimating that they would be able to provide service to approximately 424,000 people at the reduced rates.<sup>899</sup> Were the FCC to take a similar approach in distributing the \$100 million we set aside for remote areas funding, we could, in principle, provide a one-time sign-up subsidy to *almost all* of the estimated 670,000 remote, terrestrially-unserved locations within 4 years.<sup>900</sup>

537. We emphasize that this calculation is only illustrative. For one, we do not anticipate restricting the technology that can be used for remote area support. To the contrary, we seek to encourage maximum participation of providers able to serve these most difficult to reach areas. In addition, the Commission may choose to disburse funding for remote areas in ways that either increase or decrease the dollars per supported customer, as compared to the RUS program. For example, the Commission may choose to provide ongoing support, in addition to or instead of a one-time subsidy, or we may adopt a means-tested approach to reducing the cost of service in remote areas, to target support to those most in need. We seek comment on each of these approaches in the Further Notice.

538. Notwithstanding this uncertainty, however, the record before us is sufficient for us to conclude that a budget of at least \$100 million falls within a reasonable initial range for a program targeted at innovative broadband technologies in remote areas. We expect to revisit this decision over time, and will adjust support levels as appropriate.

#### **G. Petitions for Waiver**

539. During the course of this proceeding, various parties, both incumbents and competitive ETCs, have argued that reductions in current support levels would threaten their financial viability, imperiling service to consumers in the areas they serve.<sup>901</sup> We cannot, however, evaluate those claims absent detailed information about individualized circumstances, and conclude that they are better handled in the course of case-by-case review. Accordingly, we permit any carrier negatively affected by the universal service reforms we take today to file a petition for waiver that clearly demonstrates that good cause exists for exempting the carrier from some or all of those reforms, and that waiver is necessary and in the public interest to ensure that consumers in the area continue to receive voice service.

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<sup>898</sup> Generally, providers must offer their Basic Service Package for no more \$50 per month for at least one year, with no length of service requirements. Certain exceptions apply to the extent a provider is offering a Basic Service Package for \$40 or less/month or for Expanded or Commercial Service Packages. In addition, providers must provide customer premise equipment (CPE) at no cost. *See* Broadband Initiatives Program, Request for Proposals. Federal Register 75 (7 May 2010) 25185-25195.

<sup>899</sup> Spacenet, Inc., Echostar XI Operating LLC, Hughes Network Systems, and WildBlue Communications were awarded \$100 million in grant funds, with approximately 424,000 people standing to benefit nationwide. *See* Rural Utility Service, Press Release, *Satellite Awards, Broadband Initiatives Program* (Oct. 20, 2010) available at <http://www.rurdev.usda.gov/supportdocuments/BIPSatelliteFactSheet10-20-10.pdf>.

<sup>900</sup> The CQBAT model relied on by the ABC plan indicates that there are approximately 670,000 remote, terrestrially-unserved locations. *See supra* note 894. The average number of people per household in the U.S. is 2.59, indicating that there are approximately 1,735,300 people living in remote locations. *See* U.S. Census Bureau, Current Population Survey, 2010 Annual Social and Economic (ASEC) Supplement, Table AVG1 (last visited Oct. 28, 2011) available at <http://www.census.gov/population/socdemo/hh-fam/cps2010/tabAVG1.xls>. Thus, if we took an approach similar to the RUS BIP, only 39,300 people (or approximately 15,000 households) would not have received a one time subsidy at the end of four years.

<sup>901</sup> *See, e.g.,* Kansas Rural Independent Telephone Companies, et al. *August 3 PN Comments* at 2; RCA USF/ICC *Transformation Comments* at 22; Moss Adams LLP *USF/ICC Transformation Comments* at 4-9; Utah Public Service Commission *USF/ICC Transformation Comments* at 2.

540. We do not, however, expect to grant waiver requests routinely, and caution petitioners that we intend to subject such requests to a rigorous, thorough and searching review comparable to a total company earnings review. In particular, we intend to take into account not only all revenues derived from network facilities that are supported by universal service but also revenues derived from unregulated and unsupported services as well.<sup>902</sup> The intent of this waiver process is not to shield companies from secular market trends, such as line loss or wireless substitution. Waiver would be warranted where an ETC can demonstrate that, without additional universal service funding, its support would not be “sufficient to achieve the purposes of [section 254 of the Act].”<sup>903</sup> In particular, a carrier seeking such waiver must demonstrate that it needs additional support in order for its customers to continue receiving voice service in areas where there is no terrestrial alternative. We envision granting relief only in those circumstances in which the petitioner can demonstrate that the reduction in existing high-cost support would put consumers at risk of losing voice services, with no alternative terrestrial providers available to provide voice telephony service using the same or other technologies that provide the functionalities required for supported voice service.<sup>904</sup> We envision granting relief only in those circumstances in which the petitioner can demonstrate that the reduction in existing high-cost support would put consumers at risk of losing voice services, with no alternative terrestrial providers available to provide voice telephony service to consumers using the same or other technologies that provide the functionalities required for supported voice service. We will also consider whether the specific reforms would cause a provider to default on existing loans and/or become insolvent. For mobile providers, we will consider as a factor specific showings regarding the impact on customers, including roaming customers, if a petitioner is the only provider of CDMA or GSM coverage in the affected area.

541. Petitions for waiver must include a specific explanation of why the waiver standard is met in a particular case.<sup>905</sup> Conclusory assertions that reductions in support will cause harm to the carrier or make it difficult to invest in the future will not be sufficient.

542. In addition, petitions must include all financial data and other information sufficient to verify the carrier’s assertions, including, at a minimum, the following information:

- Density characteristics of the study area or other relevant geographic area including total square miles, subscribers per square mile, road miles, subscribers per road mile, mountains, bodies of water, lack of roads, remoteness, challenges and costs associated with transporting fuel, lack of scalability per community, satellite and backhaul availability, extreme weather conditions, challenging topography, short construction season or any other characteristics that contribute to the area’s high costs.

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<sup>902</sup> See Comcast August 3 PN Comments at 18-19.

<sup>903</sup> 47 U.S.C. 254(e)

<sup>904</sup> We do not require petitioners to demonstrate that satellite voice service is unavailable in the area at issue. The record before us does not conclusively establish that, at this time, satellite voice services (which typically involve higher latencies than terrestrial services) provide the same consumer benefits as terrestrial voice services. As satellite services evolve, we may revisit this issue.

<sup>905</sup> Generally, the Commission may waive its rules for good cause shown. See 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission’s rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.

- Information regarding existence or lack of alternative providers of voice and whether those alternative providers offer broadband.
- (For incumbent carriers) How unused or spare equipment or facilities is accounted for by providing the Part 32 account and Part 36 separations category this equipment is assigned to.
- Specific details on the make-up of corporate operations expenses such as corporate salaries, the number of employees, the nature of any overhead expenses allocated from affiliated or parent companies, or other expenses.
- Information regarding all end user rate plans, both the standard residential rate and plans that include local calling, long distance, Internet, texting, and/or video capabilities.
- (For mobile providers) A map or maps showing (1) the area it is licensed to serve; (2) the area in which it actually provides service; (3) the area in which it is designated as a CETC; (4) the area in which it is the sole provider of mobile service; (5) location of each cell site. For the first four of these areas, the provider must also submit the number of road-miles, population, and square miles. Maps shall include roads, political boundaries, and major topographical features. Any areas, places, or natural features discussed in the provider's waiver petition shall be shown on the map.
- (For mobile providers) Evidence demonstrating that it is the only provider of mobile service in a significant portion of any study area for which it seeks a waiver. A mobile provider may satisfy this evidentiary requirement by submitting industry-recognized carrier service availability data, such as American Roamer data, for all wireless providers licensed by the FCC to serve the area in question. If a mobile provider claims to be the sole provider in an area where an industry-recognized carrier service availability data indicates the presence of other service, then it must support its claim with the results of drive tests throughout the area in question. In the parts of Alaska or other areas where drive testing is not feasible, a mobile provider may offer a statistically significant number of tests in the vicinity of locations covered. Moreover, equipment to conduct the testing can be transported by off-road vehicles, such as snow-mobles or other vehicles appropriate to local conditions. Testing must examine a statistically meaningful number of call attempts (originations) and be conducted in a manner consistent with industry best practices. Waiver petitioners that submit test results must fully describe the testing methodology, including but not limited to the test's geographic scope, sampling method, and test set-up (equipment models, configuration, etc.). Test results must be submitted for the waiver petitioner's own network and for all carriers that the industry-recognized carrier service availability data shows to be serving the area in which the petitioner claims to be the only provider of mobile service.
- (For mobile providers). Revenue and expense data for each cell site for the three most recent fiscal years. Revenues shall be broken out by source: end user revenues, roaming revenues, other revenues derived from facilities supported by USF, all other revenues. Expenses shall be categorized: expenses that are directly attributable to a specific cell site, network expenses allocated among all sites, overhead expenses allocated among sites. Submissions must include descriptions the manner in which shared or common costs and corporate overheads are allocated to specific cell sites. To the extent that a mobile provider makes arguments in its waiver petition based on the profitability of specific cell sites, petitioner must explain why its cost allocation methodology is reasonable.
- (For mobile providers) Projected revenues and expenses, on cell-site basis, for 5 years, with and without the waiver it seeks. In developing revenue and expense projections, petitioner should assume that it is required to serve those areas in which it is the sole provider for the

entire five years and that it is required to fulfill all of its obligations as an ETC through December 2013.

- A list of services other than voice telephone services provided over the universal service supported plant, e.g., video or Internet, and the percentage of the study area's telephone subscribers that take these additional services.
- (For incumbent carriers) Procedures for allocating shared or common costs between incumbent LEC regulated operations, competitive operations, and other unregulated or unsupported operations.
- Audited financial statements and notes to the financial statements, if available, and otherwise unaudited financial statements for the most recent three fiscal years. Specifically, the cash flow statement, income statement and balance sheets. Such statements shall include information regarding costs and revenues associated with unregulated operations, e.g., video or Internet.
- Information regarding outstanding loans, including lender, loan terms, and any current discussions regarding restructuring of such loans.
- Identification of the specific facilities that will be taken out of service, such as specific cell towers for a mobile provider, absent grant of the requested waiver.
- For Tribal lands and insular areas, any additional information about the operating conditions, economic conditions, or other reasons warranting relief based on the unique characteristics of those communities.

543. Failure to provide the listed information shall be grounds for dismissal without prejudice. In addition to the above, the petitioner shall respond and provide any additional information as requested by Commission staff. We will also welcome any input that the relevant state commission may wish to provide on the issues under consideration, with a particular focus on the availability of alternative unsubsidized voice competitors in the relevant area and recent rate-setting activities at the state level, if any.

544. We delegate to the Wireline Competition and Wireless Telecommunications Bureaus the authority to approve or deny all or part of requests for waiver of the phase-down in support adopted herein. Such petitions will be placed on public notice, with a minimum of 45 days provided for comments and reply comments to be filed by the general public and relevant state commission. We direct the Bureaus to prioritize review of any applications for waiver filed by providers serving Tribal lands and insular areas, and to complete their review of petitions from providers serving Tribal lands and insular areas within 45 days of the record closing on such waiver petitions.

#### **H. Enforcing the Budget for Universal Service**

545. As previously noted, we have established an annual budget for the high-cost portion of the USF of no more than \$4.5 billion for the next six years, which will include all support disbursed under legacy high-cost mechanisms as they are phased out as well as support under new mechanisms, including the CAF access replacement mechanism discussed more fully below.<sup>906</sup> In this section, we address administrative issues regarding the implementation of that budget target.

546. Specifically, we adopt a framework that will permit the universal service fund to accumulate reserves in the near term to be used to facilitate the transition to the CAF and to fund one-time universal service expenses, such as the Mobility Fund Phase I, without causing undesirable volatility in the

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<sup>906</sup> See *infra* section XIII.

contribution factor. To do this, we amend section 54.709(b), giving the Commission greater flexibility to direct USAC to manage collections to mitigate fluctuations in the contribution factor. Using this new flexibility, we then provide instruction to USAC to set quarterly demand filings so that consumers collectively do not contribute more than \$4.5 billion on an annual basis to support service in rural and high cost areas. We also provide instructions to USAC for winding down the existing broadband reserve account established pursuant to the *Corr Wireless Order*.

## 1. Creating New Flexibility To Manage Fluctuations in Demand

547. *Background.* In the *Corr Wireless Order*, the Commission, among other actions, created a temporary reserve account in the Universal Service Fund for the purpose of funding future universal service program changes without causing undue volatility in the contribution factor.<sup>907</sup> The Commission accomplished this through two actions. First, it instructed USAC, in its quarterly contribution factor demand filing, to forecast high-cost demand by competitive ETCs at the full amount of the interim cap on competitive ETC support, even if forecasted demand would otherwise be lower.<sup>908</sup> Second, the Commission waived section 54.709(b) of its rules, which would otherwise require USAC to reduce its forecasted demand in a subsequent quarter by an amount equal to any excess contributions received.<sup>909</sup> Pursuant to the waiver, the Commission instructed USAC not to make such prior period adjustments as they relate to competitive ETC support for a period of 18 months and to instead place the funds in a reserve account.<sup>910</sup> The eighteen-month waiver is due to expire on February 3, 2012. In addition to providing these instructions and waiving section 54.709(b), the Commission also sought comment on amending section 54.709(b) to permit it to provide alternative instructions to USAC in the future without waiving the rule.<sup>911</sup>

548. *Discussion.* We adopt the proposed amendment to section 54.709(b) to permit the Commission to instruct USAC to take alternative action with regard to prior period adjustments when making its quarterly demand filings. Currently, the section requires that excess contributions received in a quarter “will be carried forward to the following quarter.”<sup>912</sup> We amend the rule to add paragraph 54.709(b)(1), which shall read, “The Commission may instruct USAC to treat excess contributions in a manner other than as prescribed in paragraph (b). Such instructions may be made in the form of a Commission Order or a Public Notice released by the Wireline Competition Bureau. Any such Public Notice will become effective fourteen days after release of the Public Notice, absent further Commission action.”

549. Permitting the Commission to modify its current treatment of excess contributions as necessary on a case-by-case basis will permit it to better manage the effects of one-time and seasonal events that may create undue volatility in the contribution factor. Programmatic changes, one-time distributions of support (such as Mobility Fund Phase I), and other transitional processes will likely cause

<sup>907</sup> *Corr Wireless Order*, 25 FCC Rcd at 12862 paras. 20-22.

<sup>908</sup> *Id.* at 12862 para. 21.

<sup>909</sup> *Id.* at 12862-63 para. 22.

<sup>910</sup> *Id.*

<sup>911</sup> *Id.* at 12863-64 paras. 25-26. In that NPRM, the Commission also sought comment on a modification to its rules governing the interim cap on competitive ETC support. *Id.* at para. 24. The Commission adopted the rule – reducing the interim cap amount when a competitive ETC relinquishes its ETC status – in a subsequent Order. *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Request for Review of Decision of Universal Service Administrator by Corr Wireless Communications, LLC*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 25 FCC Rcd 18146 (2010).

<sup>912</sup> 47 C.F.R. § 54.709(b).

the quarterly funding demands to fluctuate considerably until the transitions are complete, similarly to how large, unforecasted one-time contributions have caused significant fluctuations in the past.<sup>913</sup> The ability to provide specific, case-by-case instructions will allow the Commission to smooth the effects of such events on the contribution factor, rendering it more predictable for the consumers who ultimately pay for universal service.

550. In response to the NPRM seeking comment on whether to modify section 54.709(b), some commenters raise questions about whether section 254 of the Act provides the Commission the authority to establish a broadband reserve fund intended to make disbursements according to rules that were, at the time, not yet adopted.<sup>914</sup> As RICA put it, section 254 requires carriers to contribute to the “specific, predictable, and sufficient mechanisms established (not *to be* established) by the Commission to preserve and advance Universal Service.”<sup>915</sup> Verizon, similarly, suggests that section 254’s reference to “‘specific’ and ‘predictable’ USF programs and support—and contributions collected for ‘established’ universal service mechanisms—counsels against reserving support for mechanisms that do not yet exist.”<sup>916</sup> Nevertheless, for the reasons set forth below, we conclude that a broadband reserve account is consistent with section 254 of the Act.

551. Section 254(d) of the Act provides:

TELECOMMUNICATIONS CARRIER CONTRIBUTION.—Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier’s telecommunications activities are limited to such an extent that the level of such carrier’s contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.<sup>917</sup>

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<sup>913</sup> See, e.g., *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid Calling Card Services*, WC Docket Nos. 03-133 and 05-68, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826, 4836-37 paras. 30-33 (2005) (ordering AT&T to restate revenues by an estimated \$160 million for universal service purposes).

<sup>914</sup> See Comments of Verizon and Verizon Wireless, WC Docket No. 05-337, CC Docket No. 96-45, at 5 (filed Oct. 5, 2010) (Verizon Corr Comments); Comments of Rural Telecommunications Group, Inc., WC Docket No. 05-337, CC Docket No. 96-45, at 3-5 (filed Oct. 7, 2010); Comments of Rural Independent Competitive Alliance, WC Docket No. 05-337, CC Docket No. 96-45, at 5 (filed Oct. 7, 2010) (RICA Corr Comments); Reply Comments of CTIA, WC Docket No. 05-337, CC Docket No. 96-45, at 8 (filed Oct. 21, 2010). In any event, that is not the case here. As set forth below, the temporary reserve was used to support the E-rate inflation adjustment in FY 2010, and will be used to fund Phase I of the Mobility Fund and CAF Phase I established by this Order. See *infra* paras. 564-567. Other commenters supported the Commission’s determination to create the reserve fund. See Comments of Free Press at 4 (filed Oct. 7, 2010) (“The Commission’s proposed implementation timetable for USF reform is appropriately aggressive. Under this timetable, it makes sense to keep the contribution factor stable by holding reserves as the Connect America Fund is designed and implemented.”). See also Comments of the Public Utilities Commission of Ohio at 6-7 (filed Oct. 7, 2010); Comments of Telephone Association of Maine at 2 (filed Oct. 7, 2010).

<sup>915</sup> RICA Corr Comments at 5 (emphasis in original).

<sup>916</sup> Verizon Corr Comments at 5.

<sup>917</sup> 47 U.S.C. § 254(d).

552. We do not read this language as limiting the Commission’s authority to require contributions only to support specific mechanisms that are already established at the time the contributions are required, for several reasons.

553. Broadly speaking, we understand section 254(d) to be directed to explaining *who* must contribute to the Federal universal service mechanisms—specifically, telecommunications carriers that provide interstate telecommunications services, unless exempted by the Commission, as well as other providers of interstate telecommunications if the Commission determines the public interest so requires.<sup>918</sup> The reference in section 254(d) to “the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service” is not, as these commenters suggest, a limitation on what kinds of mechanisms—*i.e.*, already-established mechanisms—will be supported; it is instead a reference to language in section 254(b), which directs the Commission (as well as the Joint Board) to be guided by several principles in establishing universal service policies, including the principle that “[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.” In other words, it merely requires that contributions under section 254 are to be used to support the Federal mechanisms that are established under section 254.

554. We also find that commenters’ argument is unpersuasive given the grammatical construction of the relevant section of the law. In the phrase “mechanisms established by the Commission,” the clause “established by the Commission” functions as an adjectival phrase identifying which mechanisms are funded through section 254(d). Specifically, the mechanisms funded by section 254(d) are the mechanisms “established by the Commission” consistent with the principles of section 254(b) (that they be specific, predictable, and sufficient). When used in this way, the word “established” is not a word in the past tense; it is not a word that signifies any particular tense at all.<sup>919</sup> Commenters who read the word “established” as signifying the past tense are, we conclude, improperly reading “already” into the phrase, so that it would read “mechanisms already established by the Commission.” Congress could have written the statute that way, but it did not. Admittedly, Congress could have written the statute in yet other ways that would have made clearer that these commenters’ concerns are misplaced. But that indicates only that the statute is amenable to various interpretations. And for the reasons explained here, we conclude our interpretation is the better reading of the statute.

555. These commenters’ view also raises troubling questions of interpretation, which we believe Congress did not intend. That is, under these commenters’ reading of the statute, contributions may only

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<sup>918</sup> Our understanding, in addition to being the most natural reading of the statute, is also consistent with the legislative history. See S. Conf. Rep. 104-230 at 131 (noting that section 254(d) “requires that all telecommunications carriers providing interstate telecommunications services shall contribute to the preservation and advancement of universal service.”).

<sup>919</sup> The D.C. Circuit has repeatedly held that where (as here) a statutory phrase is “simply an adjectival phrase, not a verbal phrase indicating the past tense,” the phrase “allows alternative temporal readings.” See *United States Dep’t of the Treasury v. FLRA*, 960 F.2d 1068, 1072 (D.C. Cir. 1992) (the phrase “adversely affected” could reasonably be construed by FLRA to refer to future as well as past adverse effects); see also *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1013 (D.C. Cir. 1999) (the statutory phrase “payments made” could reasonably be read to mean not just “payments that *have been* made,” but also “payments *to be* made”); *Administrators of Tulane Educ. Fund v. Shalala*, 987 F.2d 790, 796 (D.C. Cir. 1993) (the phrase “recognized as reasonable” in the Medicare Act “does not tell us whether Congress means to refer the Secretary to action already taken or to give directions on actions about to be taken”). See generally *Transitional Hospitals Corp. of Louisiana, Inc. v. Shalala*, 222 F.3d 1019, 1027-28 (D.C. Cir. 2000) (citing these cases with approval). The Supreme Court has endorsed the same principle of statutory construction. See *Regions Hospital v. Shalala*, 522 U.S. 448, 458 (1998) (the phrase “recognized as reasonable” in the Medicare Act is ambiguous; it could refer to “costs the Secretary (1) *has* recognized as reasonable for 1984 ... cost-reimbursement purposes, or (2) *will* recognize as reasonable as a base for future ... calculations”).

be collected to fund a mechanism that has already been established. Broadly speaking, all of the rule changes that the Commission has implemented since the 1996 Act, including those adopted in this Order, have been to effectuate the general statutory directive that consumers should have access to telecommunication and information services in rural and high cost areas. As such, the entire collection of rules can be viewed as the “high-cost mechanism,” and the specific existing programs, as well as the Connect America Fund that we establish today, are part of that high-cost mechanism.

556. To read the statute in any other way would create significant administrative issues that we cannot believe Congress would have intended. How would the Commission—or a court—decide whether a modified mechanism is a new, not-yet-established mechanism (which could not provide support until new funds are collected for it), or whether the modifications are minor enough such that the mechanism, although different, is still the mechanism that was already established? We do not believe that Congress intended either the Commission or a court to be required to wrestle with such questions, which serve no obvious congressional purpose. Alternatively, any change, no matter how minor, could transform the mechanism into one that was not-yet-established. Interpreting the statute in that way would similarly serve no identifiable congressional purpose, but would serve only to slow down and complicate reforms to support mechanisms that the Commission determines are appropriate to advance the public interest.<sup>920</sup> Significantly in this regard, Congress in section 254 specifically contemplated that universal service programs would change over time;<sup>921</sup> reading the statute the way these commenters suggest would add unnecessary burdens to that process.

## 2. Setting Quarterly Demand to Meet the \$4.5 Billion Budget

557. *Background.* In the *USF-ICC Transformation NPRM*, the Commission sought comment on setting an overall budget for the CAF such that the sum of the CAF and any existing high-cost support mechanisms (however modified in the future) in a given year are equal to current funding levels. The Commission noted its commitment to controlling the size of the federal universal service fund.<sup>922</sup>

558. In response, a broad cross-section of interested stakeholders, including consumer groups, state regulators, current recipients of funding, and those that do not currently receive funding, agreed that the Commission should establish a budget for the overall high-cost program, with many urging the Commission to set that budget at \$4.5 billion per year.<sup>923</sup> Some argue that we should adopt a hard cap to ensure that budget is not exceeded.<sup>924</sup>

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<sup>920</sup> For example, it is not clear whether such a reading of the statute would require the Commission to segregate Universal Service Fund contributions received before and after a rule change, so as to prevent disbursements of pre-reform contributions based on the new rules.

<sup>921</sup> See 47 U.S.C. § 254(b)(7), (c)(1)-(2).

<sup>922</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4679-81, paras. 412-14.

<sup>923</sup> State Members *USF/ICC Transformation NPRM* Comments at 11 (proposing to limit fund size to current amount in 2010); Letter from Walter B. McCormick, Jr., United States Telecom Ass’n, Robert S. Quinn, Jr., Senior Vice President—Federal Regulatory, AT&T, Melissa Newman, Vice President—Federal Regulatory Affairs, CenturyLink, Michael T. Skrivan, Vice President—Regulatory, FairPoint Communications, Kathleen Q. Abernathy, Chief Legal Officer and Executive Vice President—Regulatory and Government Affairs, Frontier, Kathleen Grillo, Senior Vice President—Federal Regulatory Affairs, Verizon, Michael D. Rhoda, Senior Vice President—Government Affairs, Windstream, Shirley Bloomfield, Chief Executive Officer, National Telecommunications Cooperative Association, John Rose, President, OPASTCO, Kelly Worthington, Executive Vice President, Western Telecommunications Alliance, to Chairman Genachowski, Commissioner Copps, Commissioner McDowell, and Commission Clyburn, at 2 (filed Jul. 29, 2011). (Submitted attached to Letter from Jonathan Banks, USTelecom, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92; WC Docket Nos. 05-337, 07-135, 10-90; GN Docket No. 09-51; CC Docket No. 96-45; WC Docket No. 06-122; CC Docket Nos. 99-200, 96-98, 99-68; WC Docket No. (continued...))



559. *Discussion.* As described above, we conclude that for years 2012-2017, contributions to fund high-cost support mechanisms should not exceed \$4.5 billion on an annualized basis.<sup>925</sup> Various parties have submitted proposed budgets into the record suggesting that the Commission could maintain an overall \$4.5 billion annual budget by collecting that amount in the near term, projecting that actual demand will be lower than that amount, and using those funds in subsequent quarters to address actual demand that exceeds \$1.125 billion.<sup>926</sup> We are persuaded that, on balance, it would be appropriate to provide greater flexibility to USAC to use past contributions to meet future program demand so that we can implement the Connect America Fund in a way that does not cause dramatic swings in the contribution factor. We now set forth our general instructions to USAC on how to implement our \$4.5 billion budget target.

560. First, beginning with the quarterly demand filing for the first quarter of 2012, USAC should forecast total high-cost universal service demand as no less than \$1.125 billion, *i.e.*, one quarter of the annual high-cost budget.<sup>927</sup> To the extent that USAC forecasts demand will actually be higher than that amount, USAC should reflect that higher forecast in its quarterly demand filing.<sup>928</sup> USAC should no longer forecast total competitive ETC support at the original interim cap amount, as previously instructed,<sup>929</sup> but should forecast competitive ETC support subject to the rules we adopt today.<sup>930</sup>

561. Second, consistent with the newly revised section 54.709(b) of our rules, we instruct USAC not to make prior period adjustments related to high-cost support if actual contributions exceed demand. Excess contributions shall instead be credited to a new Connect America Fund reserve account, to be used as described below.

562. Third, beginning with the second quarter of 2012, we direct USAC to use the balances accrued in the CAF reserve account to reduce high-cost demand to \$1.125 billion in any quarter that would otherwise exceed \$1.125 billion.

563. We expect the reforms we adopt today to keep annual contributions for the CAF and any existing high-cost support mechanisms to no more than \$4.5 billion. And through the use of incentive-based rules and competitive bidding, the fund could require less than \$4.5 billion to achieve its goals in future years. However, if actual program demand, exclusive of funding provided from the CAF or *Corr*

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04-36 at 4 (filed July 29, 2011)) (Joint Letter) (proposing \$4.5 billion); ABC Plan, Attach. 1, at 1-2 (proposing \$4.5 billion).

<sup>924</sup> NCTA *USF/ICC Transformation NPRM* Comments at 4.

<sup>925</sup> See *supra* paras. 121-126. The Commission's budget for contributions includes all contributions that support disbursements to the various high-cost programs. However, actual disbursements may exceed this amount as the Commission disburses funds from the reserve account created in the *Corr Wireless Order*. 25 FCC Rcd at 12862, para. 20. See also *infra* paras. 564-567 (providing direction to USAC relating to the *Corr Wireless Order* reserve account).

<sup>926</sup> ABC Plan, Attach. 1, at 1-2.

<sup>927</sup> Recognizing that USAC will submit its first quarter 2012 demand filing on October 31, 2011, we direct USAC to file an updated high-cost demand filing upon the effective date of these rules.

<sup>928</sup> If high-cost demand actually exceeds \$1.125 billion, no additional funds will accumulate in the reserve account for that quarter and, consistent with our third instruction below, the reserve account will be used to constrain the high-cost demand in the contribution factor.

<sup>929</sup> See *Corr Wireless Order*, 25 FCC Rcd at 12862 para. 21.

<sup>930</sup> Specifically, USAC shall forecast competitive ETC demand as set by the frozen baseline per study area as of year end 2011, as adjusted by the phase-down in the relevant time period. See *supra* paras. 512-532.

*Wireless* reserve accounts, for CAF and existing high-cost mechanisms exceed an annualized \$4.5 billion over any consecutive four quarters, this situation will automatically trigger a process to bring demand back under budget. Specifically, immediately upon receiving information from USAC regarding actual quarterly demand, the Wireline Competition Bureau will notify each Commissioner and publish a Public Notice indicating that program demand has exceeded \$4.5 billion over the last four quarters. Then, within 75 days of the Public Notice being published, the Bureau will develop options and provide to the Commissioners a recommendation and specific action plan to immediately bring expenditures back to no more than \$4.5 billion.

### 3. Drawing Down the *Corr Wireless* Reserve Account

564. *Background.* As noted above, pursuant to the *Corr Wireless Order*, the Commission instructed USAC to place certain excess contributions associated primarily with the Verizon Wireless and Sprint phase-down commitments in a broadband reserve account over a period of 18 months, ending in February 2012<sup>931</sup> We intend to allow the waiver to lapse at that time, without any further extensions or early termination.

565. *Discussion.* In order to wind down the current broadband reserve account, we provide the following instructions to USAC.

566. First, we direct USAC to utilize \$300 million in the *Corr Wireless* reserve account to fund commitments that we anticipate will be made in 2012 to recipients of the Mobility Fund Phase I to accelerate advanced mobile services.<sup>932</sup> We also direct USAC to use the remaining funds and any additional funding necessary for Phase I of the CAF for price cap carriers in 2012.<sup>933</sup> Those actions together should exhaust the *Corr Wireless* reserve account.<sup>934</sup>

567. Second, we instruct USAC not to use the *Corr Wireless* reserve account to fund inflation adjustments to the e-rate cap for the current 2011 funding year.<sup>935</sup> Inflation adjustments to the e-rate cap for Funding Year 2011 and future years shall be included in demand projections for the e-rate program.

## VIII. ACCOUNTABILITY AND OVERSIGHT

568. The billions of dollars that the Universal Service Fund disburses each year to support vital communications services come from American consumers and businesses, and recipients must be held accountable for how they spend that money. This requires vigorous ongoing oversight by the Commission, working in partnership with the states, Tribal governments, where appropriate, and U.S. Territories, and the Fund administrator, USAC.<sup>936</sup> This section reforms the framework for that ETC

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<sup>931</sup> The Commission directed USAC to “reserve any reclaimed funds as a fiscally responsible down payment on proposed broadband universal service reforms, as recommended in the National Broadband Plan.” *Corr Wireless Order*, 25 FCC Rcd at 12862, para. 20.

<sup>932</sup> See *supra* paras. 28, 313-314, 493-497.

<sup>933</sup> See *supra* Section VII.C.1.

<sup>934</sup> While we expect funding for Mobility Fund Phase I to be committed in 2012, those funds are not likely to be disbursed in 2012; rather, funding will be disbursed over a two or three-year period, as recipients meet deployment milestones.

<sup>935</sup> *Schools and Libraries Universal Service Support Mechanism; A National Broadband Plan for Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, 25 FCC Rcd 18762, 18781-82 para. 38 (2010). The current funding year (2011) runs from July 1, 2011, to June 30, 2012.

<sup>936</sup> Because the Connect America Fund, including the Mobility Fund, are part of the Universal Service Fund, we conclude that USAC shall administer these new programs under the terms of its current appointment as Administrator, subject to all existing Commission rules and orders applicable to the Administrator. USAC engages (continued...)

oversight.<sup>937</sup> We establish a uniform national framework for information that ETCs must report to their respective states and this Commission, while affirming that states will continue to play a critical role overseeing ETCs that they designate. We modify and extend our existing federal reporting requirements to all ETCs, whether designated by a state or this Commission, to reflect the new public interest obligations adopted in this Order. We simplify and consolidate our existing certification requirements and adopt new certifications relating to the public interest obligations adopted in this Order. We address consequences for failure to meet program rules. We also clarify our record retention rules, describe the audit process we have implemented in conjunction with the Fund's administrator, and clarify USAC's and our ability to obtain all data relevant to calculations of support amounts.

#### **A. Uniform Framework for ETC Oversight**

569. First, we discuss the need for a uniform national oversight framework, implemented as a partnership between the Commission and the states, U.S. Territories, and Tribal governments, where appropriate. Second, we describe the specific reporting requirements that are part of that uniform framework. Third, we amend our rules relating to the annual certifications ETCs must make to confirm that they use "support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."<sup>938</sup>

##### **1. Need for Uniform Standards for Accountability and Oversight**

570. *Background.* Pursuant to section 214(e), the states designate common carriers over which they have jurisdiction as ETCs, and this Commission designates common carriers as ETCs in those instances where the state lacks jurisdiction.<sup>939</sup> An important component of accountability and oversight is the information that companies seeking designation to become ETCs are required to provide in order to obtain designation, and then must file annually thereafter.

571. In 2005, the Commission adopted requirements governing federal ETC designations and encouraged the states to adopt similar requirements.<sup>940</sup> Since that time, a number of states have amended their state-specific rules for ETCs to more closely conform to the rules for federally-designated ETCs. Nonetheless, variation remains in what information is annually reported to state commissions as well as the oversight processes followed by individual state commissions.<sup>941</sup> Under our current rules, states

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in frequent consultation with the Commission. Today, under the Memorandum of Understanding with USAC, the Commission's Wireline Competition Bureau is the USF Administrator's primary point of contact regarding USF policy questions, including without limitation questions regarding the applicability of rules, orders, and directives, unless otherwise specified. 2008 FCC-USAC MOU at paragraph III.B.3. Personnel from other Bureaus and Offices, including the Office of Managing Director (OMD), the Enforcement Bureau, and the Office of the Inspector General assist with various aspects of management and oversight of the USF and USAC. We hereby designate the Wireless Telecommunications Bureau as a point of contact, in addition to the Wireline Competition Bureau, on policy matters relating to Universal Service Fund administration.

<sup>937</sup> For purposes of this section, "ETCs" refers only to those ETCs receiving the types of support provided for in this Order. It does not refer to ETCs receiving disbursements from the low-income program.

<sup>938</sup> 47 U.S.C. § 254(e)

<sup>939</sup> 47 U.S.C. § 214(e)

<sup>940</sup> *Matter of Federal-State Joint Board on Universal Service*, Report and Order, 20 FCC Rcd 6371 (2005) (ETC Designation Order).

<sup>941</sup> 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 31-34 (June 2008) (GAO High-Cost Report).

annually certify to this Commission that support is being used for its intended purpose by state-designated ETCs.<sup>942</sup> Failure by a state to make such certification for a particular ETC results in a loss of support for that ETC.<sup>943</sup>

572. In the *USF-ICC Transformation NPRM*, we sought comment generally on the role of the states in preserving and advancing universal service, and whether and how to modify existing ETC requirements to achieve our reform objectives.<sup>944</sup> Subsequently, in the *August 3<sup>rd</sup> PN*, we sought more focused comment on “specific illustrative areas where the states could work in partnership with the Commission in advancing universal service, subject to a uniform national framework.”<sup>945</sup>

573. *Discussion.* A uniform national framework for accountability, including unified reporting and certification procedures, is critical to ensure appropriate use of high-cost support and to allow the Commission to determine whether it is achieving its goals efficiently and effectively.<sup>946</sup> Therefore, we now establish a national framework for oversight that will be implemented as a partnership between the Commission and the states, U.S. Territories, and Tribal governments, where appropriate.<sup>947</sup> As set forth more fully in the subsections immediately following, this national framework will include annual reporting and certification requirements for all ETCs receiving universal funds—not just federally-designated ETCs—which will provide federal and state regulators the factual basis to determine that all USF recipients are using support for the intended purposes, and are receiving support that is sufficient, but not excessive. We have authority to require all ETCs to comply with these national requirements as a condition of receiving federal high-cost universal service support.

574. We clarify that the specific reporting and certification requirements adopted below are a floor rather than a ceiling for the states. In section 254(f), Congress expressly permitted states to take action to preserve and advance universal service, so long as not inconsistent with the Commission’s

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<sup>942</sup> 47 C.F.R. §§ 54.313 and 54.314. Federally-designated ETCs make such certifications directly to the Commission.

<sup>943</sup> 47 C.F.R. §§ 54.313(c) and 54.314(d).

<sup>944</sup> *USF/ICC Transformation NPRM* at 4585, 4587-88, paras. 84, 88.

<sup>945</sup> *Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, WC Docket No. 10-90 et al., Public Notice, 26 FCC Rcd 11112, 11115, para. 5 (Wireline Comp. Bur. 2011).

<sup>946</sup> For purposes of this Section VIII, our references to ETCs include those ETCs that receive high-cost support pursuant to legacy high-cost programs and CAF programs adopted in this Order. It does not generally include ETCs that receive support solely pursuant to Mobility Fund Phase I, which has separate reporting obligations, discussed above in Section VII.E.. Where the requirements discussed in this section also apply to ETCs receiving only Phase I Mobility Fund support, we specifically state so. In the FNPRM, we seek comment on alternative reporting requirements for Mobility Fund support to reflect basic differences in the nature and purpose of the support provided for mobile services. See XVII.H.

<sup>947</sup> Numerous commenters support a continued state oversight role. See, e.g., Connecticut PURA *USF/ICC Transformation NPRM* Comments at 7-8; DC Commission *August 3 PN* Comments at 3; Delaware Commission *August 3 PN* Comments at 2-3; Virginia Commission *August 3 PN* Comments at 3; South Dakota Commission *August 3 PN* Further Comments at 3-4; Montana Commission *August 3 PN* Reply Comments at 8; North Dakota Commission *August 3 PN* Reply Comments at 2; Kansas Commission *August 3 PN* Reply Comments at 24-25; NARUC *August 3 PN* Further Comments at 4; NASUCA *August 3 PN* Comments at 87-88; Nebraska Companies *August 3 PN* Comments at 33-37; ITTA *August 3 PN* Comments at 5; Greenlining *August 3 PN* Comments at 7. But see ABC Plan, Attach. 5 at 60 (proposing exclusive federal designation and oversight of broadband providers).

universal service rules.<sup>948</sup> The statute permits states to adopt additional regulations to preserve and advance universal service so long as they also adopt state mechanisms to support those additional substantive requirements.<sup>949</sup> Consistent with this federal framework, state commissions may require the submission of additional information that they believe is necessary to ensure that ETCs are using support consistent with the statute and our implementing regulations, so long as those additional reporting requirements do not create burdens that thwart achievement of the universal service reforms set forth in this Order.

575. We note, however, that one benefit of a uniform reporting and certification framework for ETCs is that it will minimize regulatory compliance costs for those ETCs that operate in multiple states. ETCs should be able to implement uniform policies and procedures in all of their operating companies to track, validate, and report the necessary information. Although we adopt a number of new reporting requirements below, we conclude that the critical benefit of such reporting – to ensure that statutory and regulatory requirements associated with the receipt of USF funds are met – outweighs the imposition of some additional time and cost on individual ETCs to make the necessary reports. Under this uniform framework, ETCs will provide annual reports and certifications regarding specific aspects of their compliance with public interest obligations to the Commission, USAC, and the relevant state commission, relevant authority in a U.S. Territory, or Tribal government, as appropriate by April 1 of each year. These annual reporting requirements should provide the factual basis underlying the annual section 254(e) certification by the state commission (or ETC in the case of federally designated ETCs) by October 1 of every year that support is being used for the intended purposes.

## 2. Reporting Requirements

576. *Background.* In 2005, the Commission adopted section 54.209, which requires federally-designated ETCs to submit an annual report to the Commission including: a progress report on their five-year build-out plans; data and explanatory text concerning outages, unfulfilled requests for service, complaints received; and certifications of compliance with applicable service quality and consumer protection standards<sup>950</sup> and of the ability to function in emergency situations.

577. As noted above, since the Commission adopted the annual reporting requirements, a number of states have established similar reporting obligations for ETCs within their jurisdiction.<sup>951</sup> The 2008

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<sup>948</sup> See 47 U.S.C. § 254(f) (“A state may adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service. \* \* \* A state may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.”).

<sup>949</sup> *Id.*

<sup>950</sup> 47 C.F.R. § 54.209.

<sup>951</sup> See, e.g., Michigan Commission *USF/ICC Transformation NPRM* Comments at 4 (Michigan Public Service Commission requires ETCs to provide information each year in connection with renewal of their designations; Mississippi Commission *USF/ICC Transformation NPRM* Comments at 5-6; Missouri Commission *USF/ICC Transformation NPRM* Comments at 5 (stating that Missouri’s rules regarding, among other things, annual certification filings “were based, to an extent, on the FCC’s recommended guidelines” but are more stringent than the federal rules); N.M. Admin. Code § 17.11.27.8; GAO High-Cost Report at 33.

GAO High-Cost Report noted, however, that states have different requirements for the information they collect from carriers regarding how they use high-cost program funds.<sup>952</sup>

578. In the *USF/ICC Transformation NPRM*, we sought comment on how the annual reporting requirements should be modified as we transition to the Connect America Fund.<sup>953</sup> We proposed to collect data from recipients on deployment, pricing, and adoption for both voice and broadband services. We also proposed to collect financial information from all recipients.

579. *Discussion.* We take several steps to harmonize and update annual reporting requirements. We extend current reporting requirements for voice service to all ETCs, and we adopt uniform broadband reporting requirements for all ETCs. We also adopt rules requiring the reporting of financial and ownership information to assist our discharge of statutory requirements.

580. First, we extend the current federal annual reporting requirements to all ETCs, including those designated by states.<sup>954</sup> These requirements will now be located in new section 54.313.<sup>955</sup> Specifically, we conclude that all ETCs must include in their annual reports the information that is currently required by section 54.209(a)(1)-(a)(6) – specifically, a progress report on their five-year build-out plans; data and explanatory text concerning outages; unfulfilled requests for service; complaints received; and certifications of compliance with applicable service quality<sup>956</sup> and consumer protection standards and of the ability to function in emergency situations.<sup>957</sup> We conclude that it is necessary and appropriate to obtain such information from all ETCs, both federal- and state-designated, to ensure the continued availability of high-quality voice services and monitor progress in achieving our broadband goals and to assist the FCC in determining whether the funds are being used appropriately. As we said at the time we adopted these requirements for federally-designated ETCs, these reporting requirements ensure that ETCs comply with the conditions of the ETC designation and that universal service funds are used for their intended purposes.<sup>958</sup> They also help prevent carriers from seeking ETC status for purposes unrelated to providing rural and high-cost consumers with access to affordable telecommunications and information services.<sup>959</sup> Accordingly, we now conclude that these requirements should serve as a baseline requirement for all ETCs.

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<sup>952</sup> 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 31 (June 2008) (GAO High-Cost Report).

<sup>953</sup> *USF/ICC Transformation NPRM* 4692-93, para. 459.

<sup>954</sup> Most commenters addressing the issue support the extension of reporting requirements to all recipients of high-cost support. See, e.g., IUB *USF/ICC Transformation NPRM* Comments at 8; U.S. Cellular *USF/ICC Transformation NPRM* Comments at 42; NASUCA *USF/ICC Transformation NPRM* Comments at 40.

<sup>955</sup> As discussed in section VIII.A.3. below, we are eliminating current section 54.313. Recipients of high-cost support, including CAF support, will now report pursuant to new section 54.313 rather than current section 54.209. Section 54.209, which applies to the various universal service mechanisms, sets forth reporting and certification requirements for entities designated as ETCs by the Commission. 47 C.F.R. § 54.209. Lifeline-only ETCs, however, will remain subject to section 54.209.

<sup>956</sup> If ETCs are complying with any voluntary code (e.g., the voluntary code of conduct concerning “bill shock” or the CTIA Consumer Code for Wireless Service), they should so indicate in their reports.

<sup>957</sup> We do, however, modify subparagraph (a)(3), regarding unfulfilled requests for service, to require carriers to provide that information broken out separately for voice and broadband.

<sup>958</sup> ETC Designation Order, para. 68.

<sup>959</sup> ETC Designation Order, para. 70.

581. All ETCs that receive high-cost support will file the information required by new section 54.313 with the Commission, USAC, and the relevant state commission, relevant authority in a U.S. Territory, or Tribal government, as appropriate.<sup>960</sup> Section 54.313 reports will be due annually by April 1, beginning on April 1, 2012.<sup>961</sup> We will also require that an officer of the company certify to the accuracy of the information provided and make the certifications required by new section 54.313, with all certifications subject to the penalties for false statements imposed under 18 U.S.C. § 1001.<sup>962</sup>

582. Second, we incorporate new reporting requirements described below to ensure that recipients are complying with the new broadband public interest obligations adopted in this Order, including broadband public interest obligations associated with CAF ICC.<sup>963</sup> This information must be included in annual section 54.313 reports filed with Commission, USAC, and the relevant state commission, relevant authority in a U.S. Territory, or Tribal government, as appropriate. However, some of the new elements are tied to new public interest obligations that will be implemented in 2013 or a subsequent year and, therefore, they need not be included until that time, as detailed below.

583. Competitive ETCs whose support is being phased down will not be required to submit any of the new information or certifications below related solely to the new broadband public interest obligations, but must continue to submit information or certifications with respect to their provision of voice service.<sup>964</sup>

584. We delegate to the Wireline Competition Bureau and Wireless Telecommunication Bureaus the authority to determine the form in which recipients of support must report this information.

585. Speed and latency. Starting in 2013, we will require all ETCs to include the results of network performance tests conducted in accordance with the requirements of this Order and any further requirements adopted after consideration of the record received in response to the FNPRM.<sup>965</sup> Additionally, in the calendar year no later than three years after implementation of CAF Phase II, price cap recipients must certify that they are meeting all interim speed and latency milestones, including the 4 Mbps/1 Mbps speed standard required by Section VII.C.1. of this Order. In the calendar year no later than five years after implementation of CAF Phase II, those price cap recipients must certify that they are meeting the default speed and latency standards applicable at the time.<sup>966</sup>

586. Capacity. Starting in 2013, we require all ETCs to include a self-certification letter certifying that usage capacity limits (if any) for their services that are subject to the broadband public interest standard associated with the type of funding they are receiving are reasonably comparable to usage capacity limits for comparable terrestrial residential fixed broadband offerings in urban areas, as set

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<sup>960</sup> USAC will review such information as appropriate to inform its ongoing audit program, in depth data validations, and related activities.

<sup>961</sup> We delegate authority to the Wireline Competition Bureau to modify the initial filing deadline as necessary to comply with the requirements of the Paperwork Reduction Act.

<sup>962</sup> We already require recipients and beneficiaries of universal service support to make certifications subject to the penalties available under 18 U.S.C. § 1001. *See, e.g.*, FCC Form 470; FCC Form 471; FCC Form 492A; FCC Form 507, FCC Form 508; FCC Form 509; FCC Form 525.

<sup>963</sup> Section XIII.

<sup>964</sup> As discussed in Section VII.E.4., competitive ETCs are required to offer service throughout their designated service areas, even as support provided pursuant to the identical support rule is phased down.

<sup>965</sup> Section VI.B.2.

<sup>966</sup> Section VI.B.

forth in the Public Interest Obligations sections above. ETCs will also be required to report on specific capacity requirements (if any) in conjunction with reporting of pricing of their broadband offerings that meet our public interest obligations, as discussed below.

587. Build-out/Service. Recognizing that existing five-year build out plans may need to change to account for new broadband obligations set forth in this Order, we require all ETCs to file a new five-year build-out plan in a manner consistent with 54.202(a)(1)(ii) by April 1, 2013. Under the terms of new section 54.313(a), all ETCs will be required to include in their annual 54.313 reports information regarding their progress on this five-year broadband build-out plan beginning April 1, 2014. This progress report shall include the number, names, and addresses of community anchor institutions to which the ETCs newly offer broadband service.<sup>967</sup> As discussed above, we expect ETCs to use their support in a manner consistent with achieving universal availability of voice and broadband. Incumbent carriers, both rate-of-return and price cap, should make certifications to that effect beginning April 1, 2013 for the 2012 calendar year.

588. In addition, all ETCs must supply the following information:

(a) Rate-of-Return Territories. We require all rate-of-return ETCs receiving support to include a self-certification letter certifying that they are taking reasonable steps to offer broadband service meeting the requirements established above throughout their service area,<sup>968</sup> and that requests for such service are met within a reasonable amount of time. As noted above, these carriers must also notify the Commission, USAC, and the relevant state commission, relevant authority in a U.S. Territory, or Tribal government, as appropriate, of all unfulfilled requests for broadband service meeting the 4 Mbps/1 Mbps standard we establish as our initial CAF requirement, and the status of such requests.

(b) Price Cap Territories. We require all ETCs receiving CAF support in price cap territories based on a forward-looking cost model to include a self-certification letter certifying that they are meeting the interim deployment milestones as set forth in the Public Interest Obligations section above and that they are taking reasonable steps to meet increased speed obligations that will exist for a specified number of supported locations before the expiration of the five-year term for CAF Phase II funding. ETCs that receive CAF support awarded through a competitive process will also be required to file such self-certifications, subject to any modifications adopted pursuant to the FNPRM below.

589. In addition, as discussed above, price cap ETCs will be able to elect to receive CAF Phase I incremental funding under a transitional distribution mechanism prior to adoption and implementation of an updated forward-looking broadband-focused cost model for CAF Phase II. As a condition of receiving such support, those companies will be required to deploy broadband to a certain number of unserved locations within three years, with deployment to no fewer than two-thirds of the required number of locations within two years and to all required locations within three years after filing their notices of acceptance. As of that time, carriers must offer broadband service of at least 4 Mbps downstream and 1 Mbps upstream, with latency sufficiently low to enable the use of real-time communications, including VoIP, and with usage limits, if any, that are reasonably comparable to those in urban areas. As noted above, no later than 90 days after being informed of its eligible incremental support amount, each price cap ETC must provide notice to the Commission and to the relevant state commission, relevant authority in a U.S. Territory, or Tribal government, as appropriate, identifying the areas, by wire center and census block, in which the carrier intends to deploy broadband to meet this obligation, or stating that the carrier declines to accept incremental support for that year.

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<sup>967</sup> “Community anchor institutions” is defined above. *See supra* note 37.

<sup>968</sup> *See supra* Section VII.D.2.



590. The carrier must also certify that (1) deployment funded by CAF Phase I incremental support will occur in areas shown as unserved by fixed broadband on the National Broadband Map that is most current at that time, and that, to the best of the carrier's knowledge, are unserved by fixed broadband with a minimum speed of 768 kbps downstream and 200 kbps upstream, and that, to the best of the carrier's knowledge, are, in fact, unserved by fixed broadband at those speeds; and (2) the carrier's current capital improvement plan did not already include plans to deploy broadband to that area within three years, and that CAF Phase I support will not be used to satisfy any merger commitment or similar regulatory obligation.<sup>969</sup> In addition, carriers must certify that: (1) within two years after filing a notice of acceptance, they have deployed to no fewer than two-thirds of the required number of locations; and (2) within three years after filing a notice of acceptance, they have deployed to all required locations and that they are offering broadband service of at least 4 Mbps downstream and 1 Mbps upstream, with latency sufficiently low to enable the use of real-time communications, including VoIP, and with usage limits, if any, that are reasonably comparable to those in urban areas. These certifications must be included in the first annual report due following the year in which the carriers reach the required milestones.

591. In addition, price cap carriers that receive frozen high-cost support will be required to certify that they are using such support in a manner consistent with achieving universal availability of voice and broadband.<sup>970</sup> Specifically, in the 2013 certification, all price cap carriers receiving frozen high-cost support must certify to the Commission, the relevant state commission, relevant authority in a U.S. Territory, and to any affected Tribal government that they used such support in a manner consistent with achieving the universal availability of voice and broadband. In the 2014 certification, all price cap carriers receiving frozen high-cost support must certify that at least one-third of the frozen-high cost support they received in 2013 was used 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.<sup>971</sup> In the 2015 certification, carriers must certify that at least two-thirds of the frozen high-cost support the carrier received in 2014 was used in such fashion, and for 2016 and subsequent years, carriers must certify that all frozen high-cost support they received in the previous year was used in such fashion. These certifications must be included in the carriers' annual reports due April 1 of each year. Price cap companies that receive CAF ICC also are obligated to certify that they are using such support for building and operating broadband-capable networks used to offer their own retail service in areas substantially unserved by an unsubsidized competitor.

592. Price. We require all ETCs to submit a self-certification that the pricing of their voice services is no more than two standard deviations above the national average urban rate for voice service, which will be specified annually in a public notice issued by the Wireline Competition Bureau. This certification requirement begins April 1, 2013, to cover 2012.

593. ETCs receiving only Mobility Fund Phase I support will self-certify annually that they offer service in areas with support at rates that are within a reasonable range of rates for similar service plans offered by mobile wireless providers in urban areas. ETCs receiving any other support will submit a self-certification that the pricing of their broadband service is within a specified reasonable range. That range will be established and published as more fully described in Section VI.B.3. above for recipients of high-

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<sup>969</sup> See *supra* Section VII.C.1.

<sup>970</sup> A carrier must certify that with respect to the frozen high cost support dollars subject to this obligation, a substantial portion went to areas without an unsubsidized competitor.

<sup>971</sup> See Section VI.B.a. above. We note that this obligation applies to carriers, regardless of whether or not they accept CAF Phase I incremental support.

cost and CAF support, other than Mobility Fund Phase I.<sup>972</sup> This certification requirement begins April 1, 2013, to cover 2012.

594. ETCs must also report pricing information for both voice and broadband offerings. They must submit the price and capacity range (if any) for the broadband offering that meets the relevant speed requirement in their annual reporting. In addition, beginning April 1, 2012, subject to PRA approval, all incumbent local exchange company recipients of HCLS, frozen high-cost support, and CAF also must report their flat rate for residential local service to USAC so that USAC can calculate reductions in support levels for those carriers with R1 rates below the specified rate floor, as established above.<sup>973</sup> Carriers may not request confidential treatment for such pricing and rate information.

595. Financial Reporting. We sought comment on requiring all ETCs to provide financial information, including balance sheets, income statements, and statements of cash flow.

596. Upon consideration of the record, we now adopt a less burdensome variation of this proposal.<sup>974</sup> We conclude that it is not necessary to require submission of such information from publicly traded companies, as we can obtain such information directly for SEC registrants. Likewise, we conclude at this time it is not necessary to require the filing of such information by recipients of funding determined through a forward-looking cost model or through a competitive bidding process, even if those recipients are privately held. We expect that a model developed through a transparent and rigorous process will produce support levels that are sufficient but not excessive, and that support awarded through competitive processes will be disciplined by market forces. The design of those mechanisms should drive support to efficient levels.

597. We emphasize, however, that we may request additional information on a case-by-case basis from all ETCs, both private and public, as necessary to discharge our universal service oversight responsibilities.<sup>975</sup>

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<sup>972</sup> See Section VII.E.1.

<sup>973</sup> See Section VII.D.5.

<sup>974</sup> Several commenters supported requiring financial disclosures. See, e.g., CWA *USF/ICC Transformation NPRM* Comments at 20; NASUCA *USF/ICC Transformation NPRM* Comments at 86; WISPA *USF/ICC Transformation NPRM* Comments at 10. Another party asserts, however, that “it is not clear whether these burdensome requirements would be necessary to serve any public policies related to administration of the universal service fund.” Cellular One and Viaero *USF/ICC Transformation NPRM* Comments at 29. Although WISPA supports financial disclosures, it asserts that such disclosures should be limited to financial information related to the recipients’ CAF activities. See WISPA *USF/ICC Transformation NPRM* Comments at 10. We disagree, as we conclude that it is appropriate to understand the overall finances of privately-held rate-of-return carriers receiving support, as discussed below, to ensure that universal service subsidies are not subsidizing unregulated operations.

<sup>975</sup> We note that a number of states already require carriers to file financial information with state commissions. Most of those states require that telecommunications providers file financial information including, at a minimum, income statements and, in most instances, balance sheets. See, e.g., Georgia Pub. Serv. Comm’n Rule 515-3-1-.04(1); [http://www.psc.state.ga.us/telecom/compliance\\_memo.pdf](http://www.psc.state.ga.us/telecom/compliance_memo.pdf); Hawaii Public Utilities Commission Rule 6-80-91; <http://psc.mt.gov/Docs/AnnualReports/forms/2009TelephoneAnnualReport.pdf>; Wash. Code 480-120-382 and 480-120-385; <http://www.lpsc.org/teleannualreports.aspx>; Mississippi Code § 77-3-79; <http://www.mpus.ms.gov/utility/telecomm/forms.html>; <http://www.psc.state.ne.us/home/NPSC/forms/Online/Communications.2004.12.31.Annual%20Report%20Compliance%20Form.pdf>; <http://www.bpu.state.nj.us/bpu/pdf/telecopdfs/TelcoAr.pdf>. Montana and Nebraska both require that accounts be kept in accordance with Part 32 of the Commission’s rules. See <https://psc.mt.gov/Docs/AnnualReports/forms/2009TelephoneUtilityCoversheetandTOC.pdf>; 291 Neb. Code § 002.24B. New Jersey requires its telecommunications carriers to maintain their accounts in accordance with either (continued...)

598. For privately-held rate-of-return carriers that continue to receive support based in part on embedded costs, we adopt a more limited reporting requirement, beginning in 2012. We require all privately-held rate-of-return carriers receiving high-cost and/or CAF support to file with the Commission, USAC, and the relevant state commission, relevant authority in a U.S. Territory, or Tribal government, as appropriate beginning April 1, 2012, subject to PRA approval, a full and complete annual report of their financial condition and operations as of the end of their preceding fiscal year, which is audited and certified by an independent certified public accountant in a form satisfactory to the Commission, and accompanied by a report of such audit. The annual report shall include balance sheets, income statements, and cash flow statements along with necessary notes to clarify the financial statements. The income statements shall itemize revenue by its sources.

599. The ETCs subject to this new requirement are all already subject to the Uniform System of Accounts, which specifies how required financial information shall be maintained in accordance with Part 32 of the Commission's rules. Because Part 32 of our rules already requires incumbent carriers to break down accounting by study area, it should provide an accurate picture of how recipients are using the high-cost support they receive in particular study areas. Additionally, Part 32 provides a uniform system of accounting that allows for an accurate comparison among carriers. ETCs that receive loans from the Rural Utility Service (RUS) are already required to provide RUS with annual financial reports maintained in accordance with Part 32. We will allow these carriers to satisfy their financial reporting obligation by simply providing electronic copies of their annual RUS reports to the Commission, which should not impose any additional burden. All other rate-of-return carriers, in their initial filing after adoption of this Order, shall provide the required financial information as kept in accordance with Part 32 of the Commission's rules.

600. We delegate to the Wireline Competition Bureau the authority to resolve all other questions regarding the appropriate format for carriers' first financial filing following this Order, as well as the authority to set the format for subsequent reports. We may in future years implement a standardized electronic filing system, and we also delegate to the Wireline Competition Bureau the task of establishing an appropriate format for transmission of this information.

601. We do not expect privately held ETCs will face a significant burden in producing the financial disclosures required herein because such financial accounting statements are normally prepared in the usual course of business.<sup>976</sup> In particular, because incumbent LECs are already required to maintain their accounts in accordance with Part 32,<sup>977</sup> the required disclosures are expected to impose minimal new burdens. Indeed, for the many carriers that already provide Part 32 financial reports to RUS, there will be no additional burden.

602. Finally, we conclude that these carriers' financial disclosures should be made publicly available. The only comment we received on this issue came from NASUCA, which strongly urged the Commission to require public disclosure of all financial reports.<sup>978</sup> NASUCA rightly observed that recipients of high-cost and/or CAF support receive extensive public funding, and therefore the public has

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Part 32 of the Commission's rules or Generally Accepted Accounting Principles. *See* <http://www.bpu.state.nj.us/bpu/pdf/telecopdfs/TelcoAr.pdf>.

<sup>976</sup> *See* Comments of John Staurulakis, Inc., GN Docket Nos. 10-90, 09-51, WC Docket No. 05-337 (filed July 12, 2010), at 10 (noting that "independent audit firms review the financial records of virtually all rate-of-return regulated RLECs on an annual basis").

<sup>977</sup> 47 C.F.R. § 32.11(a).

<sup>978</sup> *See* NASUCA *USF/ICC Transformation NPRM* Comments at 86.

a legitimate interest in being able to verify the efficient use of those funds.<sup>979</sup> Moreover, by making this information public, the Commission will be assisted in its oversight duties by public interest watchdogs, consumer advocates, and others who seek to ensure that recipients of support receive funding that is sufficient but not excessive.

603. Ownership Information. All recipients of funding today are required to obtain FCC registration numbers to do business with the Commission, and are assigned Study Area Codes by USAC to receive high-cost funding. We now adopt a rule requiring all ETCs to report annually the company's holding company, operating companies, affiliates, and any branding (a "dba," or "doing-business-as company" or brand designation). In addition, filers will be required to report relevant universal service identifiers for each such entity by Study Area Codes. This will help the Commission reduce waste, fraud, and abuse and increase accountability in our universal service programs by simplifying the process of determining the total amount of public support received by each recipient, regardless of corporate structure. Such information is necessary in order for the Commission to ensure compliance with various requirements adopted today that take into account holding company structure.<sup>980</sup> For purposes of this requirement, affiliated interests shall be reported consistent with section 3(2) of the Communications Act of 1934, as amended.<sup>981</sup>

604. Tribal Engagement. ETCs serving Tribal lands must include in their reports documents or information demonstrating that they have meaningfully engaged Tribal governments in their supported areas.<sup>982</sup> The demonstration must document that they had discussions that, at a minimum, included: (1) a needs assessment and deployment planning with a focus on Tribal community anchor institutions; (2) feasibility and sustainability planning; (3) marketing services in a culturally sensitive manner; (4) rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and (5) compliance with Tribal business and licensing requirements.<sup>983</sup>

605. Elimination of Certain Data Reporting Requirements. Finally, as discussed above,<sup>984</sup> we are eliminating LSS and IAS as standalone support mechanisms. This obviates the need for reporting requirements specific to 54.301(b) and 54.802 of our rules (and 54.301(e) after December 31, 2012).<sup>985</sup>

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<sup>979</sup> See NASUCA *USF/ICC Transformation NPRM* Comments at 86.

<sup>980</sup> See Sections VII.C.1. and VII.D.10. above and Section XIII below. We note that on occasion, we receive congressional requests for information regarding receipt of high-cost funding at the holding-company level. Letter from Fred Upton, Chairman, House Committee on Energy and Commerce, Henry A. Waxman, Ranking Member, House Committee on Energy and Commerce, Greg Walden, Chairman, House Subcommittee on Communications and Technology, Anna G. Eshoo, Ranking Member, House Subcommittee on Communications and Technology, to Julius Genachowski, Chairman, FCC, (June 22, 2011)

<sup>981</sup> 47 U.S.C. § 153(2) ("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.").

<sup>982</sup> See Section IX.A. below.

<sup>983</sup> Tribal business and licensing requirements include business practice licenses that Tribal and non-Tribal business entities, whether located on or off Tribal lands, must obtain upon application to the relevant Tribal government office or division to conduct any business or trade, or deliver any goods or services to the Tribes, Tribal members, or Tribal lands. These include certificates of public convenience and necessity, Tribal business licenses, master licenses, and other related forms of Tribal government licensure.

<sup>984</sup> See Sections VII.C.1. and VII.D.7. above.

<sup>985</sup> Section 54.301(b), which applies to LSS, requires an ILEC designated as an ETC and serving a study area with 50,000 or fewer access lines to "provide the Administrator with the projected total unseparated dollar amount (continued...)"

606. Overall, we think that the changes to the reporting requirements do not impose an undue burden on ETCs and that the benefits outweigh any burdens. Given the extensive public funding these entities receive, the expanded goals of the program, and the need for greater oversight, as noted by the GAO, it is prudent to impose narrowly tailored reporting requirements focused on the information that will demonstrate compliance with statutory requirements and our implementing rules. These specific reporting requirements are tailored to ensure that ETCs are complying with their public interest obligations and using support for the intended purposes, as required by section 254(e) of the Act. Where possible, we are minimizing burdens by requiring certifications in lieu of collecting data, and by allowing the filing of reports already prepared for other government agencies in lieu of new reports. Moreover, we are eliminating some of the existing requirements, which will reduce burdens for some ETCs. Finally, to the extent ETCs currently provide information either to their state or to the Commission, they will not bear any significant additional burden in now also providing copies of such information to the other regulatory body.<sup>986</sup>

### 3. Annual Section 254(e) Certifications

607. *Background.* As noted above, section 254(e) requires that a carrier shall use “support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”<sup>987</sup> The Commission currently requires states to annually certify with respect to ETCs they designate that this statutory requirement is met in order to receive HCLS, SVS, SNA, HCMS, or LSS.<sup>988</sup> States take different approaches in how they develop a factual basis to support this certification, however.<sup>989</sup> Federally-designated ETCs are required to make an annual certification directly to this Commission in order to receive HCLS, SVS, SNA, HCMS, LSS, IAS, or ICLS,<sup>990</sup> but the Commission has not specified what factual basis must support such certifications. GAO found inconsistencies in the certification process among states and questioned whether such certifications enabled program administrators to fully assess whether carriers are appropriately using high-cost program support.<sup>991</sup> In the Notice, we sought comment on how to harmonize certifications and ensure that they are meaningful.<sup>992</sup>

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assigned to each account listed below for the calendar year following each filing.” 47 C.F.R. § 54.301(b). Section 54.301(e) requires carriers subject to 54.301(b) to submit historical data to the Administrator to allow the Administrator to calculate a true-up adjustment for the preceding year. 47 C.F.R. § 54.301(e). Section 54.802, which applies to IAS, requires ETCs providing service within an area served by a price cap LEC to file quarterly line-count data, as well as certain other information, with the Fund Administrator. 47 C.F.R. § 54.802.

<sup>986</sup> See Cellular One and Viaero *USF/ICC Transformation NPRM* Comments at 30.

<sup>987</sup> 47 U.S.C. § 254(e).

<sup>988</sup> 47 C.F.R. §§ 54.313 (non-rural carriers), 54.314 (rural carriers).

<sup>989</sup> For example, the Michigan Public Service Commission requires ETCs to provide information each year in connection with renewal of their designations. See Michigan Commission *USF/ICC Transformation NPRM* Comments at 4. And as stated in the GAO High-Cost Report, “[s]tates most frequently require carriers to submit affidavits that future support will be used for its intended purpose; plans for quality, coverage, or capacity improvements; and evidence that past support was used for its intended purposes.” GAO High-Cost Report at 33.

<sup>990</sup> 47 C.F.R. §§ 54.313 (non-rural carriers), 54.314 (rural carriers), 54.809 (IAS), 54.904 (ICLS)

<sup>991</sup> GAO High-Cost Report at 38.

<sup>992</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4696, para. 475.

608. *Discussion.* We modify our rules to streamline and improve ETCs' annual certification requirements.

609. First, we require that states – and entities not falling within the states' jurisdiction (i.e., federally-designated ETCs) – certify that all federal high-cost and CAF support was used in the preceding calendar year and will be used in the new calendar year only for the provision, maintenance, and upgrading of facilities and services for which the support is intended, regardless of the rule under which that support is provided. This corrects a defect in our current rules, which require only a certification with respect to the coming year.<sup>993</sup> The certifications required by new section 54.314 will be due by October 1 of each year, beginning with October 1, 2012. The certification requirement applies to all recipients of high-cost and CAF support, including those that receive only Phase I Mobility Fund support.

610. Second, we maintain states' ongoing role in annual certifications. Several commenters take the position that responsibility for ensuring USF recipients comply with their public interest obligations should remain with the states.<sup>994</sup> As discussed above, we agree that the states should play an integral role in assisting the Commission in monitoring compliance, consistent with an overarching uniform national framework.<sup>995</sup> States will continue to certify to the Commission that support is used by state-designated ETCs for the intended purpose, which is modified to include the provision, maintenance, and upgrading of facilities capable of delivering voice and broadband services to homes, businesses and community anchor institutions.<sup>996</sup>

611. Under our reformed rules, as before, some recipients of support may be designated by the Commission rather than the states. States are not required to file certifications with the Commission with respect to carriers that do not fall within their jurisdiction. However, consistent with the partnership between the Commission and the states to preserve and enhance universal service, and our recognition that states will continue to be the first place that consumers may contact regarding consumer protection issues, we encourage states to bring to our attention issues and concerns about all carriers operating within their boundaries, including information regarding non-compliance with our rules by federally-designated ETCs. We similarly encourage Tribal governments, where appropriate, to report to the Commission any concerns about non-compliance with our rules by all recipients of support operating on Tribal lands. Any such information should be provided to the Wireline Competition Bureau and the Consumer & Governmental Affairs Bureau. Through such collaborative efforts, we will work together to ensure that consumer interests are appropriately protected.

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<sup>993</sup> Current sections 54.313 and 54.314 of our rules provide that states “must file an annual certification with the Administrator and the Commission stating that all federal high-cost support provided to such carriers within that State will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.” 47 C.F.R. §§ 54.313(a) and 54.314(a).

<sup>994</sup> See State Members *USF/ICC Transformation NPRM* Comments at 140; Frontier *USF/ICC Transformation NPRM* Comments at 25; Nebraska Commission *USF/ICC Transformation NPRM* Comments at 16; Kansas Commission *USF/ICC Transformation NPRM* Comments at 24, 27; Missouri Commission *USF/ICC Transformation NPRM* Comments at 5, 9-11; Washington Commission *USF/ICC Transformation NPRM* Comments at 4-6; Greenlining *USF/ICC Transformation NPRM* Comments at 10.

<sup>995</sup> The State Members noted that the basic model of requiring states to make annual certifications is sound, but should be updated to include the new provider of last resort duties assigned to broadband providers. State Members Comments at 140. Another commenter supported federal standards “so states that exercise authority over ETCs have the ability to gather information from ETCs ensuring USF support is being used appropriately.” Missouri Commission *USF/ICC Transformation NPRM* Comments at 9.

<sup>996</sup> 47 C.F.R. §§ 54.313 and 54.314.

612. Third, we clarify that we expect a rigorous examination of the factual information provided in the annual section 54.313 reports prior to issuance of the annual section 254(e) certifications. Because the underlying reporting requirements for recipients of Mobility Fund Phase I support differ from the reporting requirements for ETCs receiving other high-cost support, Mobility Fund Phase I recipients' certifications will be based on the factual information they provide in the annual reports they file pursuant to section 54.1009 of the Mobility Fund rules.<sup>997</sup> We expect that states (or the ETC if the state lacks jurisdiction) will use the information reported in April of each year for the prior calendar year in determining whether they can certify that carriers' support has been used and will be used for the intended purposes. In light of the public interest obligations we adopt in this Order, a key component of this certification will now be that support is being used to maintain and extend modern networks capable of providing voice and broadband service. Thus, for example, if a state commission determines, after reviewing the annual section 54.313 report, that an ETC did not meet its speed or build-out requirements for the prior year, a state commission should refuse to certify that support is being used for the intended purposes. In conjunction with such review, to the extent the state has a concern about ETC performance, we welcome a recommendation from the state regarding prospective support adjustments or whether to recover past support amounts.<sup>998</sup> As discussed more fully below, failure to meet all requirements will not necessarily result in a total loss of support, to the extent we conclude, based on a review of the circumstances, that a lesser reduction is warranted. Likewise, we will look at ETCs' annual 54.313 reports to verify certifications by ETCs (in instances where the state lacks jurisdiction) that support is being used for the intended purposes.<sup>999</sup>

613. Fourth, we streamline existing certifications. Today, we have two different state certification rules, one for rural carriers and one for non-rural carriers. There is no substantive difference between the existing certification rules for the two classes of carriers, and as a matter of administrative convenience, we consolidate all certifications into a single rule. Moreover, because the net effect of the changes that we are implementing to our high-cost programs is, as a practical matter, to shift the focus from whether a company is classified as "rural" versus "non-rural" to whether a company receives all support through a forward-looking model or competitive process or, instead, based in part on embedded costs,<sup>1000</sup> it does not make sense to maintain separate certification rules for "rural" and "non-rural" carriers. We see no substantive difference in the certifications that should be made. Thus, we eliminate the certification requirements currently found in sections 54.313 and 54.314 of our rules<sup>1001</sup> and implement new rule 54.314.

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<sup>997</sup> Because ETCs of Mobility Fund Phase I support that receive support pursuant to other high-cost mechanisms are subject to the reporting requirements of new section 54.313, those companies' certifications will be based on the factual information in the annual reports they file pursuant to both new section 54.313 and section 54.1009 of the Mobility Fund rules.

<sup>998</sup> This should help address the concern of the State Members of the Federal-State Joint Board on Universal Service that, under the annual certification process as it exists today, "a State has only one remedy, denial of certification." State Members *USF/ICC Transformation NPRM* Comments at 140.

<sup>999</sup> ETC Designation Order, 20 FCC Rcd at 6402, para. 72 ("If a review of the data submitted by an ETC indicates that the ETC is no longer in compliance with the Commission's criteria for ETC designation, the Commission may suspend support disbursements to that carrier or revoke the carrier's designation as an ETC. Likewise, as the Joint Board noted, state commissions possess the authority to rescind ETC designations for failure of an ETC to comply with the requirements of section 214(e) of the Act or any other conditions imposed by the state.").

<sup>1000</sup> See Section VII.C.1. above.

<sup>1001</sup> Current section 54.313 requires certifications with regard to support pursuant to sections 54.309 and 54.311. 47 C.F.R. § 54.313. Current section 54.314's requirements pertain to support pursuant to sections 54.301, 54.305, and 54.307, as well as part 36, subpart F. 47 C.F.R. § 54.314.

614. Finally, we also eliminate carriers' separate certification requirements for IAS and ICLS. As discussed above, we are eliminating IAS as a standalone support mechanism, and this obviates the need for IAS-specific certifications.<sup>1002</sup> Although ICLS will remain in place for some carriers, those carriers will certify compliance through new section 54.314. However, to ensure there is no gap in coverage, those carriers will file a final certification under section 54.904 due June 30, 2012, covering the 2012-13 program year. Thus, by this Order, we eliminate section 54.809 and, effective July 2013, section 54.904 of our rules.<sup>1003</sup> And as discussed in section VII.C.1. above, we also eliminate section 54.316 of our rules, relating to rate comparability.<sup>1004</sup>

#### **B. Consequences for Non-Compliance with Program Rules**

615. *Background.* In the *USF/ICC Transformation NPRM*, we sought comment on proposed consequences for a Fund recipient's failure to fulfill its public interest obligations.<sup>1005</sup> We also sought comment on whether we should reduce or suspend universal support payments for non-compliance with the various reporting requirements.<sup>1006</sup> Under our existing rules, companies lose support if the state (or the ETC, in the case of federally designated ETCs) fails to file the required certifications or information, such as the annual reports required by current section 54.209.<sup>1007</sup>

616. *Discussion.* Effective enforcement is necessary to ensure that the reforms we make in this Order achieve their intended goal.<sup>1008</sup> Our existing rules already have self-effectuating mechanisms to incent prompt filing of requisite certifications and information necessary to calculate support amounts, as companies lose support to the extent such information is not provided in a timely fashion.<sup>1009</sup> While we need such information to ensure that support is being used for the intended purposes, consistent with section 254(e) of the Act, we also need to ensure that such certifications, which will be based upon the certifications and information provided in the new section 54.313 annual reports, adequately address all areas of material non-compliance with program obligations.

617. We believe that in the majority of cases involving repeated failures to timely file certifications or data, the Commission's existing enforcement procedures and penalties will adequately deter noncompliance with the Commission's rules, as herein amended, regarding high-cost and CAF

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<sup>1002</sup> See Section VII.C.1. above.

<sup>1003</sup> Sections 54.809 and 54.904 require carriers receiving IAS and ICLS support, respectively, to file a certification stating that all such support "will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 C.F.R. §§ 54.809 and 54.904.

<sup>1004</sup> Section 54.316 requires that states certify as to rate comparability for areas served by non-rural carriers. 47 C.F.R. § 54.316.

<sup>1005</sup> *USF/ICC Transformation NPRM* at ¶ 153.

<sup>1006</sup> *USF/ICC Transformation NPRM* at ¶ 466.

<sup>1007</sup> 47 C.F.R. § 54.209(b).

<sup>1008</sup> See Greenlining *USF/ICC Transformation NPRM* Comments at 9. We received almost no comments on this issue. Those we did receive were largely conclusory and provided no specifics as to appropriate penalties or remedies. See, e.g., CWA *USF/ICC Transformation NPRM* Comments at 20; Greenlining *USF/ICC Transformation NPRM* Comments at 10.

<sup>1009</sup> Under current rules, certifications are due by October. If a carrier files late, but on or before January 1, the carrier will receive support for Q2, Q3 and Q4. If a carrier files late, but on or before April 1, the carrier will receive support for Q3 and Q4. If the carrier files late, but on or before July 1, the carrier will receive support for Q4. If a carrier files after July 1, the carrier will not receive any support for that year. See 47 C.F.R. §§ 54.209(b), 54.313(d), 54.314(d).



support.<sup>1010</sup> We adopt the provisions of section 54.209(b) in new section 54.313, which provides for reductions in support for failing to file the reports required by section 54.209(a) in a timely fashion, and extend those provisions to all recipients of high-cost support.<sup>1011</sup> We also adopt new section 54.314, which provides for a similar reduction in support for the late filing of annual certifications that the funds received were used in the preceding calendar year and will be used in the coming calendar year only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.<sup>1012</sup> Our rules also provide for debarment of those convicted of or found civilly liable for defrauding the high-cost support program,<sup>1013</sup> and we emphasize that those rules apply with equal force to CAF, including the Mobility Fund Phase I.

618. To further ensure that the recipients of existing high-cost and/or CAF support use those funds for the purposes for which they are provided, we create a rule that entities receiving such support will receive reduced support should they fail to fulfill their public interest obligations, such as by failing to meet deployment milestones, to provide broadband at the speeds required by this Order, or to provide service at reasonably comparable rates.<sup>1014</sup> This is consistent with the suggestions of the State Members of the Federal-State Joint Board on Universal Service,<sup>1015</sup> who further note that revoking a carrier's ETC designation is too blunt an instrument.<sup>1016</sup> We agree that revoking a carrier's ETC status is not an appropriate consequence for noncompliance, except in the most egregious circumstances.<sup>1017</sup> In the FNPRM, we seek comment on appropriate enforcement options for partial non-performance. We do not rule out the option of revoking an ETC's status, but we seek comment on what circumstances would justify such a remedy and what alternatives might be appropriate in other circumstances. We delegate to the Wireline Competition Bureau and Wireless Telecommunications Bureau the task of implementing reductions in support based on the record received in response to the FNPRM.

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<sup>1010</sup> See 47 C.F.R. § 1.80. See also 47 C.F.R. § 1.80, Note to para. (b)(4), "Guidelines for Assessing Forfeitures" (Forfeiture Guidelines). The Forfeiture Guidelines provide base forfeiture amounts for certain specified violations. However, those base amounts are subject to adjustment based on the factors set forth in section 1.80(b)(4) and in Section II of the Forfeiture Guidelines. Thus, the Commission has assessed forfeitures of \$50,000 per violation for a carrier's failure to timely file Forms 499A and 499Q because of the programmatic importance of such filings and the impact a carrier's failure to file has on other carriers' contribution obligations. See, e.g., *ADMA Telecom, Inc.*, Forfeiture Order, 26 FCC Rcd 4152, 4155, paras. 9-10 (2011); *Globalcom, Inc.*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 3479, 3486, para. 17 (2010); *Globecom, Inc.*, Order of Forfeiture, 21 FCC Rcd 4710, 4720, ¶¶ 26-28 (2006); *InPhonic, Inc.*, Notice of Apparent Liability of Forfeiture and Order, 20 FCC Rcd 13277, 13287, ¶ 26 (2005).

<sup>1011</sup> For each quarter the filing is late, the carrier loses support for an additional quarter. 47 C.F.R. § 54.209(b).

<sup>1012</sup> Current sections 54.313 and 54.314, both of which are being replaced by new section 54.314, provide for this same reduction in support. See 47 C.F.R. §§ 54.313(d), 54.314(d). As with section 54.209(b), the carrier loses support for one quarter for each quarter the filing is late. *Id.*

<sup>1013</sup> 47 C.F.R. § 54.8.

<sup>1014</sup> See Section XVII.G. below.

<sup>1015</sup> State Members *USF/ICC Transformation NPRM* Comments at 62 (Step 7 of the multi-step penalty framework in the proposed "Provider of Last Resort Fund" would "reduce[] support if the ETC fails to meet specific build-out requirements or to provide adequate service quality").

<sup>1016</sup> See State Members *USF/ICC Transformation NPRM* Comments at 140.

<sup>1017</sup> At least one commenter contended that recipients who fail to deploy should face "significant penalties," such as asset seizure. See *ACA USF/ICC Transformation NPRM* Comments at 32.

### C. Record Retention

619. *Background.* Without proper documentation, it is impossible to conduct effective audits and assessments of high-cost or CAF recipients. In 2007, the Commission adopted a five-year record retention requirement for recipients of high-cost support.<sup>1018</sup> In the *USF/ICC Transformation NPRM*, we sought comment on whether those record retention requirements are adequate to facilitate audits of program recipients or whether additional requirements are needed in light of the changed responsibilities and expectations for Fund recipients called for in this Order. No commenters addressed this issue.

620. *Discussion.* We find that the current record retention requirements, although adequate to facilitate audits of program participants, are not adequate for purposes of litigation under the False Claims Act,<sup>1019</sup> which can involve conduct that relates back substantially more than five years. Thus, we revise our record retention requirements to extend the retention period to ten years.

621. Additionally, we believe our record retention requirements need clarification. The current record retention requirements appear in section 54.202(e) of the Commission's rules.<sup>1020</sup> Section 54.202 is entitled: "Additional requirements for Commission designation of eligible telecommunications carriers."<sup>1021</sup> Subsections (a) through (d) of that section apply, by their terms, only to ETCs designated under section 214(e)(6) of the Act – i.e., ETCs designated by the Commission rather than by the states.<sup>1022</sup> Subsection (e), however, is not so limited.<sup>1023</sup> Indeed, the Commission intended the requirements of section 54.202(e) to apply to all recipients of high-cost support.<sup>1024</sup> To fully support our ongoing oversight, the record retention requirements must apply to all recipients of high-cost and CAF support. Thus, by this Order, we amend our rules by re-designating section 54.202(e) as new section 54.320 to clarify that these ten-year record retention requirements apply to all recipients of high-cost and CAF support.<sup>1025</sup> To ensure access to documents and information needed for effective ongoing oversight, we include in new section 54.320 a requirement that all documents be made available upon request to the Commission and any of its Bureaus or offices, the Administrator, and their respective auditors.

### D. USAC Oversight Process

622. *Background.* In the *USF/ICC Transformation NPRM*, we sought comment on ways to improve USAC's audit process to reduce improper payments and assess risks. We received only one set of comments addressing this issue.<sup>1026</sup>

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<sup>1018</sup> See 47 C.F.R. § 54.202(e).

<sup>1019</sup> 31 U.S.C. §§ 3729–33. Under the False Claims Act, carriers receiving funds under fraudulent pretenses may be held liable for a civil penalty of between \$5,000 and \$10,000, plus treble damages. 31 U.S.C. § 3729(a)(1).

<sup>1020</sup> See 47 C.F.R. § 54.202(e).

<sup>1021</sup> See 47 C.F.R. § 54.202.

<sup>1022</sup> See 47 C.F.R. § 54.202(a)–(d).

<sup>1023</sup> See 47 C.F.R. § 54.202(e).

<sup>1024</sup> See *Matter of Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, Report and Order, 22 FCC Rcd 16372, 16383–84, para. 24 (2007).

<sup>1025</sup> As noted in Section VII.E.f.iii. above, Mobility Fund Phase I recipients will be required to retain documentation for at least ten years after the date on which the company receives its final disbursement of Mobility Fund Phase I support.

<sup>1026</sup> See COMPTTEL *USF/ICC Transformation NPRM* Comments at 21 ("One critical action that the Commission should take immediately to strengthen its audit processes ... is to ensure that the audits are completed on a timely (continued...)")

623. *Discussion.* As noted in the *USF/ICC Transformation NPRM*, audits are an essential tool for the Commission and USAC to ensure program integrity and to detect and deter waste, fraud, and abuse.<sup>1027</sup> In the *USF/ICC Transformation NPRM*, we discussed the concerns expressed by the GAO in 2008 regarding, among other things, the audit process that existed at the time.<sup>1028</sup> The *USF/ICC Transformation NPRM* also acknowledged USAC's December 2010 Final Report,<sup>1029</sup> which detailed the findings of the audits conducted at the direction of the Commission's Office of Inspector General.<sup>1030</sup>

624. As directed by the Commission's Office of the Managing Director, USAC now has two programs in place to safeguard the Universal Service Fund – the Beneficiary/Contributor Compliance Audit Program (BCAP) and Payment Quality Assurance (PQA) program.<sup>1031</sup> We created these programs, in conjunction with USAC, in order to address the shortcomings of the audit processes discussed in the GAO High-Cost Report and USAC's December 2010 Final Report. The PQA program was launched in August 2010,<sup>1032</sup> and the first round of BCAP audits were announced on December 1, 2010. OMD oversees USAC's implementation of both programs.<sup>1033</sup>

625. Audits done pursuant to BCAP are intended to: (1) ensure that recipients of USF support are in compliance with the Commission's rules; (2) prevent, detect, and deter waste, fraud, and abuse; (3) recover funds for rule violations; and (4) ensure equitable contributions to the USF. These compliance audits will also verify the accuracy of the underlying data,<sup>1034</sup> thus addressing one of the concerns expressed by the GAO,<sup>1035</sup> the State Members of the Federal-State Joint Board on Universal Service, and Comptel.<sup>1036</sup>

626. Unlike BCAP, the PQA program does not involve audits.<sup>1037</sup> Rather, it provides for reviews specifically designed to assess estimated rates of improper payments, thereby supporting Improper  
(Continued from previous page) \_\_\_\_\_

basis and that timely efforts are made to recover improper payments.”). We did, however, receive comments supporting our ability to audit recipients. See, e.g., WISPA *USF/ICC Transformation NPRM* Comments at 10-11.

<sup>1027</sup> *USF/ICC Transformation NPRM* at ¶ 471.

<sup>1028</sup> *USF/ICC Transformation NPRM* at ¶ 469. See GAO High-Cost Report at 34-36.

<sup>1029</sup> *USF/ICC Transformation NPRM* at ¶¶ 472-73.

<sup>1030</sup> See *Universal Service Administrative Company, Final Report and Statistical Analysis of the 2007-08 Federal Communications Commission Office of Inspector General High-Cost Program Beneficiary Audits* (Dec. 15, 2010), available at <http://www.fcc.gov/omd/usf-letters2011.html> (December 2010 USAC Compliance Report).

<sup>1031</sup> See Letter from Steven VanRoekel, FCC, to Scott Barash, USAC (Feb. 12, 2010), available at <http://www.fcc.gov/omd/usac-letters/2010/021210-ipia.pdf> (Feb. 12, 2010 USAC Letter) (directing USAC to separate its two audit objectives into distinct programs – one focused on Improper Payments Information Act (IPIA) assessment and the second on auditing compliance with all four USF programs.)

<sup>1032</sup> See USAC 2010 Annual Report at 5. This report may be found at: <http://www.usac.org/about/governance/annual-reports/2010.html>.

<sup>1033</sup> See Feb. 12, 2010 USAC Letter.

<sup>1034</sup> See <http://www.usac.org/hc/about/understanding-audits.aspx>.

<sup>1035</sup> GAO High-Cost Report at 37.

<sup>1036</sup> State Members *USF/ICC Transformation NPRM* Comments at 55; COMPTTEL *USF/ICC Transformation NPRM* Comments at 20-21. We received no other comments in response to our request for comment on how to improve the data validation process to correct the weakness identified by GAO.

<sup>1037</sup> See <http://www.usac.org/fund-administration/about/program-integrity/pqa-faqs.aspx>.

Payments Information Act (IPIA) requirements. The PQA reviews measure the accuracy of USAC payments to applicants, evaluate the eligibility of program applicants, and involve high-level testing of information obtained from program participants. USAC tailors the scope of procedures to ensure reasonable costs while still meeting IPIA requirements. These reviews occur in four-month cycles, with USAC conducting 20-60 assessments of high-cost recipients per cycle.<sup>1038</sup>

627. To assist program participants, USAC has information about BCAP and the PQA program available on its website.<sup>1039</sup> In addition to BCAP and the PQA program, USAC conducts outreach training events as well as individual outreach activities via phone, e-mail, video-conference, or in person.<sup>1040</sup> USAC also has outreach products on its website, including video tutorials.<sup>1041</sup> USAC has also “enhanced internal controls and data gathering to gain greater visibility into payment operations, calibrated audit and audit follow-up activities to gain greater certainty about beneficiary support, and modernized information technology systems to achieve greater efficiencies and improve reporting capabilities.”<sup>1042</sup>

628. We direct USAC to review and revise the BCAP and PQA programs to take into account the changes adopted in this Order. We direct USAC to annually assess compliance with the new requirements established for recipients, including for recipients of CAF Phase I and Phase II. For CAF Phase I, we establish above a requirement that companies have completed build-out to two-thirds of the requisite number of locations within two years. We direct USAC to assess compliance with this requirement for each holding company that receives CAF Phase I funds. ETCs that receive CAF Phase I funding should ensure that their underlying books and records support the assertion that assets necessary to offer broadband service have been placed in service in the requisite number of locations. We also direct USAC to test the accuracy of certifications made pursuant to our new reporting requirements. Any oversight program to assess compliance should be designed to ensure that management is reporting accurately to the Commission, USAC, and the relevant state commission, relevant authority in a U.S. Territory, or Tribal government, as appropriate, and should be designed to test some of the underlying data that forms the basis for management’s certification of compliance with various requirements. This list is not intended to be exhaustive, but rather illustrative of the modifications that USAC should make to its existing oversight activities. We direct USAC to submit a report to WCB, WTB, and OMD within 60 days of release of this Order proposing changes to the BCAP and PQA programs consistent with this Order.

629. To assist USAC’s audit and review efforts, we clarify in new section 54.320 that all ETCs that receive high-cost support are subject to random compliance audits and other investigations to ensure compliance with program rules and orders.<sup>1043</sup>

#### **E. Access to Cost and Revenue Data**

630. *Background.* Although USAC is the USF Administrator, high-cost universal service data collection responsibilities are divided between USAC and NECA. In the *USF/ICC Transformation NPRM*, we noted that NECA collects data for the high-cost loop support program, while USAC collects

<sup>1038</sup> See <http://www.usac.org/fund-administration/about/program-integrity/pqa-faqs.aspx>.

<sup>1039</sup> See <http://www.usac.org/hc/about/understanding-audits.aspx>; <http://www.usac.org/fund-administration/about/program-integrity/pqa-program.aspx>.

<sup>1040</sup> See <http://www.usac.org/about/resource-room/individual-outreach/>.

<sup>1041</sup> See <http://www.usac.org/hc/tools/video-tutorials.aspx>.

<sup>1042</sup> December 2010 USAC Compliance Report.

<sup>1043</sup> This includes audits and investigations conducted by the Commission and its Bureaus and Offices.

data for the remaining components of the high-cost program. As a result of this division, certain information that is relevant to administration of universal service, including validation of universal service payments, is not routinely provided to USAC. For example, because NECA is responsible for Part 36 Subpart F-Universal Service Fund (HCLS) data collection under the Commission's current rules, NECA analyzes the cost data, performs certain calculations, and then transmits that information to USAC for use in determining HCLS payments to rural carriers, but USAC does not have access to the underlying Part 36 data that carriers submit to NECA.

631. Similarly, section 54.901 of the Commission's rules requires USAC to calculate ICLS support as the difference between the common line revenue requirement and the sum of end-user common line charges and certain other revenues.<sup>1044</sup> Yet NECA calculates the common line revenue requirement and submits the results of its analysis to USAC; USAC does not have access to the underlying information that carriers submit to NECA. In order for USAC to validate ICLS payments to rate-of-return carriers, USAC must request from NECA underlying cost study information and supporting documentation for SLC revenues (residence and single line business and multiline business), uncollectibles, end user ISDN port revenue, and special access revenues.

632. Moreover, the Commission does not routinely receive from NECA and USAC all data used to calculate high-cost payments. Accordingly, in the NPRM, we sought comment on ways to increase the flow of information, including to improve the data validation process to ensure that the funds are used "to advance modern networks capable of providing broadband and voice services."<sup>1045</sup>

633. *Discussion.* We take two steps to facilitate the exchange of information needed to administer and oversee universal service programs. First, we modify our rules to clarify that USAC has a right to obtain – at any time and in any unaltered format – all cost and revenue submissions and related information that carriers submit to NECA that is used to calculate payments under any of the existing programs and any new programs, including the new CAF ICC (access replacement) support.

634. Second, we modify our rules to ensure that the Commission has timely access to relevant data. Specifically, we require that USAC (and NECA to the extent USAC does not directly receive such information from carriers) provide to the Commission upon request all underlying data collected from ETCs to calculate payments under current support mechanisms – specifically, HCLS, ICLS, LSS, SNA, SVS, HCMS and IAS – as well as to calculate CAF payments. This includes information or data underlying existing and future analyses that USAC uses to determine the amount of federal universal service support disbursed in the past or the future, including the new CAF.

635. We anticipate that NECA and USAC will submit summary filings to the Commission on a regular basis, and we delegate to the Wireline Competition Bureau authority to determine the format and timing of such summary filings, but we emphasize that USAC and NECA must timely provide any underlying data upon request. We also modify our rules to require rate-of-return carriers to submit to the Commission upon request a copy of all cost and revenue data and related information submitted to NECA for purposes of calculating intercarrier compensation and any new CAF payments resulting from intercarrier compensation reform adopted in this Order.<sup>1046</sup>

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<sup>1044</sup> See 47 C.F.R. § 54.901.

<sup>1045</sup> *USF/ICC Transformation NPRM* at ¶¶ 467, 476.

<sup>1046</sup> See Section XIII.

**IX. ADDITIONAL ISSUES****A. Tribal Engagement**

636. The deep digital divide that persists between the Native Nations of the United States and the rest of the country is well-documented.<sup>1047</sup> Many residents of Tribal lands lack not only broadband access, but even basic telephone service.<sup>1048</sup> Throughout this reform proceeding, commenters have repeatedly stressed the essential role that Tribal consultation and engagement play in the successful deployment of service on Tribal lands.<sup>1049</sup> For example, the National Tribal Telecommunications Association, the National Congress of American Indians, and the Affiliated Tribes of Northwest Indians have stressed the importance of measures to “specifically support and enhance tribal sovereignty, with emphasis on consultation with Tribes.”<sup>1050</sup>

637. We agree that engagement between Tribal governments and communications providers either currently providing service or contemplating the provision of service on Tribal lands is vitally important to the successful deployment and provision of service. We, therefore, will require that, at a minimum, ETCs to demonstrate on an annual basis that they have meaningfully engaged Tribal governments in their supported areas.<sup>1051</sup> At a minimum, such discussions must include: (1) a needs assessment and deployment planning with a focus on Tribal community anchor institutions; (2) feasibility and sustainability planning; (3) marketing services in a culturally sensitive manner; (4) rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and (5) compliance with Tribal business and licensing requirements.<sup>1052</sup> In requiring Tribal engagement, we do not seek to supplant the Commission’s own ongoing obligation to consult with Tribes on a government-to-government basis, but instead recognize the important role that all parties play in expediting service to Tribal lands. As discussed above, support recipients will be required to submit to the Commission and appropriate Tribal government officials an annual certification and summary of their

<sup>1047</sup> See, e.g., *Native Nations NOI*, 26 FCC Rcd at 2673, para. 1; *Spectrum over Tribal Lands NPRM*, 26 FCC Rcd at 2624-25, paras. 1-5; *National Broadband Plan* at 152.

<sup>1048</sup> *Native Nations NOI*, 26 FCC Rcd at 2673, para. 1; see also *Extending Wireless Telecommunications Services to Tribal Lands*, WT Docket No. 99-266, Report and Order and Further Notice of Proposed Rule Making, 15 FCC Rcd 11794, 11798 (2000) (“By virtually any measure, communities on Tribal lands have historically had less access to telecommunications services than any other segment of the population.”); *National Broadband Plan* at 152, Box 8-4.

<sup>1049</sup> See, e.g., Letter from National Tribal Telecommunications Association (NTTA), National Congress of American Indians (NCAI), and Affiliated Tribes of Northwest Indians (ATNI) to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed Oct. 20, 2011); Letter from James E. Dunstan, counsel for the Navajo Nation Telecommunications Regulatory Commission, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. (filed Oct. 24, 2011); *Native Public Media Mobility Fund NPRM* Comments at 8-9; Navajo Commission *Mobility Fund NPRM* Reply Comments at 3; Twin Houses *Mobility Fund Tribal Public Notice* Comments.

<sup>1050</sup> Letter from National Tribal Telecommunications Association (NTTA), National Congress of American Indians (NCAI), and Affiliated Tribes of Northwest Indians (ATNI) to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed Oct. 20, 2011).

<sup>1051</sup> As discussed, *infra*, we note that additional engagement obligations would apply in the context of bidding for, and receiving, Mobility Fund support.

<sup>1052</sup> Tribal business and licensing requirements include business practice licenses that Tribal and non-Tribal business entities, whether located on or off Tribal lands, must obtain upon application to the relevant Tribal government office or division to conduct any business or trade, or deliver any goods or services to the Tribes, Tribal members, or Tribal lands. These include certificates of public convenience and necessity, Tribal business licenses, master licenses, and other related forms of Tribal government licensure.

compliance with this Tribal government engagement obligation.<sup>1053</sup> Carriers failing to satisfy the Tribal government engagement obligation would be subject to financial consequences, including potential reduction in support should they fail to fulfill their engagement obligations.<sup>1054</sup> We envision that the Office of Native Affairs and Policy (“ONAP”), in coordination with the Wireline and Wireless Bureaus, would utilize their delegated authority to develop specific procedures regarding the Tribal engagement process as necessary.

## **B. Interstate Rate of Return Prescription**

638. In the *USF-ICC Transformation Notice*, the Commission sought comment on whether to initiate a proceeding to represcribe the authorized interstate rate of return for rate-of-return carriers if it determines that such carriers should continue to receive high-cost support under a modified rate-of-return system.<sup>1055</sup> The Commission has not revisited the current 11.25 percent rate of return for over 20 years. Several commenters supported our proposal to initiate a represcription proceeding.<sup>1056</sup> Others offered comments on how the Commission should proceed in the event it does initiate such a proceeding.<sup>1057</sup> We, therefore, conclude that the Commission should represcribe the authorized interstate rate of return for rate-of-return carriers, and we initiate that represcription process today. In the FNPRM, we propose that the interstate rate of return should be adjusted to ensure that it more accurately reflects the true cost of capital today. Based on our preliminary analysis and record evidence, we believe the current rate of return of 11.25 percent is no longer consistent with the Act and today’s financial conditions. In this Order, we find good cause to waive certain procedural requirements in the Commission’s rules relating to rate represcriptions to streamline and modernize this process to align it with the current Commission practice.

### **1. Represcription**

639. Section 205(a) of the Act authorizes the Commission, on an appropriate record, to prescribe just and reasonable charges of common carriers.<sup>1058</sup> The Commission last adjusted the authorized rate of return in 1990, reducing it from 12 percent to 11.25 percent.<sup>1059</sup> In 1998, the Commission initiated a proceeding to represcribe the authorized rate of return for rate-of-return carriers.<sup>1060</sup> However, in the *MAG Order*, the Commission terminated that prescription proceeding.<sup>1061</sup>

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<sup>1053</sup> Appropriate Tribal government officials are elected or duly authorized government officials of federally recognized American Indian Tribes and Alaska Native Villages. In the instance of the Hawaiian Home Lands, this engagement must occur with the State of Hawaii Department of Hawaiian Home Lands and Office of Hawaiian Affairs.

<sup>1054</sup> We direct the Office of Native Affairs and Policy (ONAP), in coordination with the Bureaus, to develop best practices regarding the Tribal engagement process to help facilitate these discussions.

<sup>1055</sup> *USF-ICC Transformation Notice*, 26 FCC Rcd at 4692, para. 456.

<sup>1056</sup> See, e.g., CTIA *USF/ICC Transformation NPRM* Comments at 28 (“And the permitted rate of return unquestionably must be reduced from the current 11.25 percent level.”).

<sup>1057</sup> See, e.g., Pennsylvania PUC *August 3 PN* Comments at 19; N.E. Colorado Cellular *August 3 PN* Comments at 1, 17-8; Surewest Communications *USF/ICC Transformation NPRM* Comments at 18.

<sup>1058</sup> 47 U.S.C. §§ 201(b), 205(a).

<sup>1059</sup> *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, CC Docket No. 89-624, Order, 5 FCC Rcd 7507 (1990) (*1990 Prescription Order*).

<sup>1060</sup> *Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, CC Docket No. 98-166, Notice Initiating a Prescription Proceeding and Notice of Proposed Rulemaking, 13 FCC Rcd 20561 (1998) (*1998 Prescription Notice*).

Given the time that has elapsed since the authorized rate of return was last prescribed, and the major changes that have occurred in the market since then, we find that the authorized interstate rate of return should be reviewed and begin that process, seeking the information necessary to prescribe a new rate of return.<sup>1062</sup>

640. The Commission's rules provide that the trigger for a new prescription proceeding is satisfied if the monthly average yields on ten-year United States Treasury securities remain, for a consecutive six month period, at least 150 basis points above or below the average of the monthly average yields in effect for the consecutive six month period immediately prior to the effective date of the current prescription.<sup>1063</sup> The monthly average yields for the past six months have been over 450 basis points below the monthly average yields in the six months immediately prior to the last prescription.<sup>1064</sup> Our trigger is easily satisfied, and we initiate the represcription now.

## 2. Procedural Requirements

641. Section 205(a) requires the Commission to give "full opportunity for hearing" before prescribing a rate.<sup>1065</sup> However, a formal evidentiary hearing is not required under section 205,<sup>1066</sup> and we have on multiple occasions prescribed individual rates in notice and comment rulemaking proceedings.<sup>1067</sup> Although we have found it useful in the past to impose somewhat more detailed requirements in rate of return prescription proceedings, we have expressly rejected the proposition that we could not "lawfully use simple notice and comment procedures to prescribe the rate of return authorized for LEC interstate access services."<sup>1068</sup> Accordingly, in the FNPRM we initiate a new rate of return prescription proceeding using notice and comment procedures, and on our own motion, we waive certain existing procedural rules to facilitate a more efficient process.

(Continued from previous page) \_\_\_\_\_

<sup>1061</sup> See *MAG Order*, 16 FCC Rcd at 19701, para. 208.

<sup>1062</sup> See *infra* XVII.C.

<sup>1063</sup> 47 C.F.R. § 65.101.

<sup>1064</sup> See 10-Year Treasury Constant Maturity Rate (GS10), Federal Reserve Bank of St. Louis (*available at* <http://research.stlouisfed.org/fred2/series/GS10>) (last visited Oct. 21, 2011).

<sup>1065</sup> 47 U.S.C. § 205(a).

<sup>1066</sup> In *AT&T v. FCC*, for example, the Second Circuit made clear that because section 205 does not require a hearing "on the record," the Administrative Procedures Act (APA) does not require a full evidentiary hearing in section 205 prescription proceedings. 572 F.2d 17, 21-23 (2d Cir. 1978). Moreover, the court found that the language of section 205(a) itself did not impose greater hearing requirements than the APA – concluding that AT&T "may not complain that it had anything less than a 'full opportunity' to be heard" after receiving, in the context of the particular proceeding on review, three rounds of comments. 572 F.2d at 22.

<sup>1067</sup> See, e.g., *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, paras. 75-87 (1997), *aff'd* *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8<sup>th</sup> Cir. 1998) (prescribing new limits on subscriber line charges for non-primary residential and multi-line business lines); *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962, paras. 58, 70-75 (2000), *aff'd in pertinent part*, *Texas Office of Pub. Util. Counsel*, 265 F.3d 313 (5<sup>th</sup> Cir. 2001) (prescribing revised ceilings on subscriber line charges).

<sup>1068</sup> *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, 6814, para. 55 (1995) (*Rate of Return Streamlined Rules R&O*). See generally *id.*, 10 FCC Rcd at 6814-15, paras. 55-57 (citing case law establishing that the "full opportunity for hearing" language of section 205 does not mandate "trial-type procedures in addition to, or instead of, notice and comment procedures").



642. The Commission's current interstate rate of return represcription rules in Part 65 contemplate a streamlined paper hearing process.<sup>1069</sup> These procedural rules are more specific and detailed than the Commission's rules for filing comments, replies, and written *ex parte* presentations in permit-but-disclose proceedings. The Part 65 rules require that:

- an original and four copies of all submissions must be filed with the Secretary (rule 65.103(d)),
- all participants in the proceeding state in their initial pleading whether they wish to receive service of documents filed in the proceeding (rule 65.100(b)), and filing parties must serve copies of their submissions (other than initial submissions) on all participants who properly so requested (rule 65.103(e)),
- parties may file "direct case submissions, responses, and rebuttals," with direct case submissions due 60 days after the beginning of the proceeding, responses due 60 days thereafter, and rebuttals due 21 days thereafter (rule 65.103(b)),
- direct case submissions and responses are subject to a 70-page limit, and rebuttals to a 50-page limit (rule 65.104(a)-(c)),
- parties must file copies of all information (such as financial analysts' reports) that they relied on in preparing their submissions (rule 65.105(a)), and
- parties may file written interrogatories and discovery requests directed at any other party's submissions, and the submitting parties may oppose those requests (rule 65.105(b)-(f)).

643. We find good cause to waive some of these procedural requirements on our own motion.<sup>1070</sup> We find that these procedures would be onerous and are not necessary to ensure adequate public participation. For instance, there is no need for parties to file an original plus four copies of submissions with the Secretary.<sup>1071</sup> The Commission recently revised its rules to encourage electronic filing of comments and replies whenever technically feasible, and to require that *ex parte* submissions be filed electronically unless doing so poses a hardship.<sup>1072</sup> Given the vast improvements to the electronic filing system, and the usual practice now of many parties to file documents electronically rather than on paper, we see no reason to require the submission of paper copies. Rather, parties to this proceeding may comply with our usual procedures in permit-but-disclosure proceedings.<sup>1073</sup> Pleadings other than *ex parte* submissions may be filed electronically or may be filed on paper with the Secretary's office. If they are filed on paper, the original and one copy should be provided.

644. The Part 65 rules also contemplate that all parties to the proceeding will be served with copies of all other parties' submissions.<sup>1074</sup> Again, this is no longer necessary. Before the greater and

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<sup>1069</sup> 47 C.F.R. Part 65; *Rate of Return Streamlined Rules R&O*, 10 FCC Rcd at 6812-15, paras. 51-57.

<sup>1070</sup> 47 C.F.R. § 1.3; see also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990).

<sup>1071</sup> 47 C.F.R. § 65.103(d).

<sup>1072</sup> 47 C.F.R. § 1.1206(b)(2)(i); *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Report and Order, 26 FCC Rcd 1594, 1596 para. 6 (2011) (encouraging the migration to electronic filing).

<sup>1073</sup> Our rules already designate rate prescription proceedings under section 205 as permit-but-disclose for *ex parte* purposes. 47 C.F.R. § 1.1206(a)(10).

<sup>1074</sup> 47 C.F.R. §§ 65.100(b), 65.103(e).

more accepted use of electronic filing, service may have been a reasonable requirement to assure timely distribution of relevant materials. However, our electronic filing system generally makes filings available within 24 hours, and the vast majority of parties have access to these materials via the Internet. We, therefore, find that service is not required, and we waive the requirement. Any party that wishes to receive an electronic notification when new documents are filed in the proceeding may subscribe to an RSS feed, available from ECFS.

645. In addition, we waive the specific filing schedule contained in section 65.103(b) of the Commission's rules so that comments may be filed pursuant to the pleading cycle adopted for sections XVII.A-K of the FNPRM. We also find the page limits applicable to rate represetion proceedings to be inappropriate here. Lastly, we waive the requirement in section 65.301 that the Commission publish in this notice the cost of debt, cost of preferred stock, and capital structure computed under our rules, because, as detailed in the FNPRM,<sup>1075</sup> the data set necessary to calculate those formulas is no longer collected by the Commission. We seek comment in the FNPRM on those calculations and the related data and methodology issues.

### C. Pending Matters

646. We also deny four pending high-cost matters currently pending before the Commission: two petitions for reconsideration of the *Corr Wireless Order*;<sup>1076</sup> Puerto Rico Telephone Company, Inc.'s petition to reconsider our decision declining to adopt a new high-cost support mechanism for non-rural insular carriers;<sup>1077</sup> and Verizon Wireless's Petition for Reconsideration of the Wireline Competition Bureau's letter directing the USAC to implement certain caps on high-cost universal service support for two companies, known as the "company-specific caps."<sup>1078</sup>

### D. Deletion of Obsolete Universal Service Rules and Conforming Changes to Existing Rules

647. As part of comprehensive reform, we make conforming changes to delete obsolete rules from the Code of Federal Regulations. Specifically, we eliminate our rules governing Long Term Support, which the Commission eliminated as a discrete support program in the *MAG Order*, and Interim Hold Harmless Support for Non-Rural Carriers, which addressed non-rural carriers' transition from high-cost loop support to high-cost model support.<sup>1079</sup> Because these rules are obsolete, we find good cause to delete them without notice and comment.<sup>1080</sup> We also make conforming changes to existing rules to ensure they are consistent with changes made in this Order.<sup>1081</sup>

## X. OVERVIEW OF INTERCARRIER COMPENSATION

648. In this section, we comprehensively reform the intercarrier compensation system to bring substantial benefits to consumers, including reduced rates for all wireless and long distance customers, more innovative communications offerings, and improved quality of service for wireless consumers and consumers of long distance services. The reforms also improve the fairness and efficiency of subsidies

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<sup>1075</sup> See *infra*. Section XVII.C.

<sup>1076</sup> See Appendix F.

<sup>1077</sup> See Appendix D.

<sup>1078</sup> See Appendix E.

<sup>1079</sup> 47 C.F.R. §§ 54.303, 311.

<sup>1080</sup> 5 U.S.C. 553(b)(3)(B).

<sup>1081</sup> See Appendix A.

flowing to high-cost rural areas, and promote innovation by eliminating barriers to the transformation of today's telephone networks into the all-IP broadband networks of the future. The existing intercarrier compensation system—built on geographic and per-minute charges and implicit subsidies—is fundamentally in tension with and a deterrent to deployment of all IP networks. And the system is eroding rapidly as demand for traditional telephone service falls, with consumers increasingly opting for wireless, VoIP, texting, email, and other phone alternatives. Falling demand has led to rising access rates for smaller rural carriers, fueling wasteful arbitrage schemes and prompting costly compensation disputes.

649. To address these issues, we first take immediate action to curtail two of the most prevalent arbitrage activities today, access stimulation and phantom traffic. These schemes involve service providers exploiting loopholes in our rules and ultimately cost consumers hundreds of millions of dollars annually.

650. Next, we launch long-term intercarrier compensation reform by adopting bill-and-keep as the ultimate uniform, national methodology for all telecommunications traffic exchanged with a LEC. We make clear that states will continue to play a vital role within this framework, particularly in the context of negotiated interconnection agreements, arbitrating interconnection disputes under the section 251/252 framework, and defining the network “edge” for bill-and-keep.

651. We begin the transition to bill-and-keep with terminating switched access rates, which are the main source of arbitrage today. We provide for a measured, gradual transition to a bill-and-keep methodology for these rates, and adopt a recovery mechanism that provides carriers with certain and predictable revenue streams. We also begin the process of reforming originating access and other rate elements by capping all interstate rates and most intrastate rates as of the effective date of the rules adopted pursuant to this Order.

652. This Order also makes clear the prospective payment obligations for VoIP traffic and adopts a transitional intercarrier compensation framework for VoIP. In addition, we clarify certain aspects of CMRS-LEC compensation to reduce disputes and address existing ambiguity. We also make clear our expectation that carriers will negotiate in good faith in response to requests for IP-to-IP interconnection for the exchange of voice traffic.

653. Finally, in the Further Notice of Proposed Rulemaking (FNPRM), we seek comment on the transition and recovery mechanism for rate elements not reduced as part of this Order, including originating access and certain common and dedicated transport. We also seek comment on ways to implement our expectation of good faith negotiations for IP-to-IP interconnection for the exchange of voice traffic, ways to promote IP-to-IP interconnection, as well as other implementation issues for the bill-and-keep end state.

654. Our reforms will bring numerous and significant benefits to consumers. As with past intercarrier compensation reforms, we anticipate savings from intercarrier compensation payments will result in more robust wireless service, more innovative offerings, and cost savings to consumers. Our proposed gradual reduction of intercarrier charges and movement to a bill-and-keep methodology will significantly increase the efficiency of long distance and local calling, and of other services more generally. Indeed, we estimate, based on conservative assumptions, that once our ICC reform is complete, mobile and wireline phone consumers stand to gain benefits worth over \$1.5 billion dollars per year.<sup>1082</sup>

655. In addition, our reforms will promote the nation's transition to IP networks, creating long-term benefits for consumers, businesses, and the nation. The convergence of data, voice, video, and text in networks based upon IP supports the Internet as an open platform for innovation, investment, job

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<sup>1082</sup> See *infra* Appendix I.

creation, economic growth, competition, and free expression.

## **XI. MEASURES TO ADDRESS ARBITRAGE**

### **A. Rules To Reduce Access Stimulation**

656. In this section, we adopt revisions to our interstate switched access charge rules to address access stimulation. Access stimulation occurs when a LEC 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. The 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. The shared revenues received by the service provider cover its costs, and it therefore may not need to, and typically does not, assess a separate charge for the service it is offering. Meanwhile, the wireless and interexchange carriers (collectively IXC) paying the increased access charges are forced to recover these costs from all their customers, even though many of those customers do not use the services stimulating the access demand.

657. Access stimulation schemes work because when LECs enter traffic-inflating revenue-sharing agreements, they are currently not required to reduce their access rates to reflect their increased volume of minutes. The combination of significant increases in switched access traffic with unchanged access 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.<sup>1083</sup> Consistent with the approach proposed in the *USF/ICC Transformation NPRM*, we adopt a definition of access stimulation that includes two conditions. If a LEC meets those conditions, the LEC generally must reduce its interstate switched access tariffed rates to the rates of the price cap LEC in the state with the lowest rates, which are presumptively consistent with the Act.<sup>1084</sup> This will reduce the extent to which IXC customers that do not use the stimulating services are forced to subsidize the customers that do use the services.

658. Based on the record received in response to the single-pronged trigger proposed in the *USF/ICC Transformation NPRM*, we modify our approach from defining an access stimulation trigger to defining access stimulation. The access stimulation definition we adopt now has two conditions: (1) a revenue sharing condition, revised slightly from the proposal in the *USF/ICC Transformation NPRM*; and (2) an additional traffic volume condition, which is met where the LEC either: (a) has a three-to-one interstate terminating-to-originating traffic ratio in a calendar month; or (b) has had more than a 100 percent growth in interstate originating and/or terminating switched access MOU in a month compared to the same month in the preceding year. If both conditions are satisfied, the LEC generally must file revised tariffs to account for its increased traffic.

659. Adoption of the definition of access stimulation with two conditions will facilitate enforcement of the new access stimulation rules in instances where a LEC meets the conditions for access stimulation but does not file revised tariffs. In particular, IXCs will be permitted to file complaints based on evidence from their traffic records that a LEC has exceeded either of the traffic measurements of the second condition, i.e., that the second condition has been met. If the IXC filing the complaint makes this

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<sup>1083</sup> 47 U.S.C. § 201(b), which provides that “[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . . .” See *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Notice of Proposed Rulemaking, 22 FCC Rcd 17989, 17995-96, para. 14 (*Access Stimulation NPRM*).

<sup>1084</sup> See *infra* Appendix A, Section 61.26(g).

showing, the burden will shift to the LEC to establish that it has not met the access stimulation definition and therefore that it is not in violation of our rules. This burden-shifting approach will enable IXC's to bring complaints based on their own traffic data, and will help the Commission to identify circumstances where a LEC may be in violation of our rules.

660. We conclude that these revised interstate access rules are narrowly tailored to minimize the costs of the rule revisions on the industry, while reducing the adverse effects of access stimulation and ensuring that interstate access rates are at levels presumptively consistent with section 201(b) of the Act.

## 1. Background

661. In the *USF/ICC Transformation NPRM*, we proposed that carriers that have entered into a revenue sharing arrangement be required to refile their interstate switched access tariffs to reflect a rate more consistent with their volume of traffic. For rate-of-return LECs, the rate would be adjusted to account for new demand and any increase in costs. For competitive LECs, that rate would be benchmarked to that of the BOC in the state, or, if there was no BOC in the state, to the largest incumbent LEC in the state. We also sought comment on alternative approaches.<sup>1085</sup>

## 2. Discussion

### a. Need for Reform to Address Access Stimulation

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, as required by section 201(b) of the Act. Commenters agree that the interstate switched access rates being charged by access stimulating LECs do not reflect the volume of traffic associated with access stimulation.<sup>1086</sup> As a result, access stimulating LECs realize significant revenue increases and thus inflated profits that almost uniformly make their interstate switched access rates unjust and unreasonable.

663. Access stimulation imposes undue costs on consumers, inefficiently diverting capital away from more productive uses such as broadband deployment.<sup>1087</sup> When access stimulation occurs in locations that have higher than average access charges, which is the predominant case today, the average per-minute cost of access and thus the average cost of long-distance calling is increased.<sup>1088</sup> Because of the rate integration requirements of section 254(g) of the Act, long-distance carriers are prohibited from passing on the higher access costs directly to the customers making the calls to access stimulating entities.<sup>1089</sup> Therefore, all customers of these long-distance providers bear these costs, even though many of them do not use the access stimulator's services, and, in essence, ultimately support businesses designed to take advantage of today's above-cost intercarrier compensation rates.<sup>1090</sup>

<sup>1085</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4757-70, paras. 635-670.

<sup>1086</sup> See, e.g., Free Conferencing Corporation Section XV Comments at 26; ZipDX Section XV Comments at 5.

<sup>1087</sup> See 47 U.S.C. § 1302.

<sup>1088</sup> See, e.g., AT&T Section XV Comments at 7-8, 11-12.

<sup>1089</sup> 47 U.S.C. § 254(g). IXCs charge averaged rates for long-distance calls pursuant to the rate integration policy. To the extent that its average access costs are increased, the costs are spread among all customers of the IXC.

<sup>1090</sup> See, e.g., AT&T Section XV Comments at 7. Some parties argue that IXCs are profitable overall or they would eliminate their "all you can eat" pricing plans. See, e.g., Bluegrass Section XV Comments at 8-9; Free Conferencing Corporation Section XV Comments at 24-25. Whether the IXC's revenues for a call are more or less than its cost of terminating the call is not at issue. The question is whether just and reasonable rates are being charged for the provision of interstate switched access services. See 47 U.S.C. § 201(b).

664. The record indicates that a significant amount of access traffic is going to LECs engaging in access stimulation. TEOCO estimates that the total cost of access stimulation to IXC's has been more than \$2.3 billion over the past five years.<sup>1091</sup> Verizon estimates the overall costs to IXC's to be between \$330 and \$440 million per year, and states that it expected to be billed between \$66 and \$88 million by access stimulators for approximately two billion wireline and wireless long-distance minutes in 2010.<sup>1092</sup> Other parties indicate that payment of access charges to access stimulating LECs is the subject of large numbers of disputes in a variety of forums.<sup>1093</sup> When carriers pay more access charges as a result of access stimulation schemes, the amount of capital available to invest in broadband deployment and other network investments that would benefit consumers is substantially reduced.<sup>1094</sup>

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. For example, conference calling provider ZipDX indicates that, by not engaging in access stimulation, it is at a disadvantage vis-à-vis competitors that engage in access stimulation.<sup>1095</sup> Providers of conferencing services, like ZipDX, are recovering the costs of the service, such as conference bridges, marketing, and billing, from the user of the service rather than, as explained above in the case of access stimulators, spreading those costs across the universe of long-distance subscribers.<sup>1096</sup> As a result, the services offered by “free” conferencing providers that leverage arbitrage opportunities put companies that recover the cost of services from their customers at a distinct competitive disadvantage.

666. Several parties claim that access stimulation offers economic development benefits, including the expansion of broadband services to rural communities and tribal lands.<sup>1097</sup> Although expanding broadband services in rural and Tribal lands is important, we agree with other commenters that how access revenues are used is not relevant in determining whether switched access rates are just and reasonable in accordance with section 201(b).<sup>1098</sup> In addition, excess revenues that are shared in access

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<sup>1091</sup> See TEOCO, ACCESS STIMULATION BLEEDS CSPs OF BILLIONS, at 5 (TEOCO Study), *attached to* Letter from Glenn Reynolds, Vice President – Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135 (filed Oct. 18, 2010).

<sup>1092</sup> See Letter from Donna Epps, Vice President-Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, at 1 (filed Oct. 12, 2010).

<sup>1093</sup> See, e.g., Bluegrass Section XV Comments at 28-29.

<sup>1094</sup> See, e.g., AT&T Section XV Comments at 3; USTelecom Section XV Comments at 6-8.

<sup>1095</sup> Letter from David Frankel, CEO, ZipDX, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, at 1, 3 (filed Nov. 26, 2010).

<sup>1096</sup> See Testimony of David Frankel, Founder, ZipDX, at the April 6, 2011, WCB Workshop at 25 (“[Zip DX] pay[s] interstate compensation charges as part of [our] wholesale arrangements with our underlying service providers”), *available at* <http://webapp01.fcc.gov/ecfs/document/view?id=7021340998>.

<sup>1097</sup> See, e.g., Free Conferencing Corporation Section XV Comments at 6-7 (the revenues that LECs generate from traffic on their networks allow those carriers to invest in building out their networks with no federal financial support); Global Section XV Comments at 8 (revenues from competitive conferencing services help further investment in rural infrastructure, thereby promoting development).

<sup>1098</sup> See, e.g., NASUCA and NJ Rate Counsel Section XV Comments at 11-12; Sprint Section XV Reply at 1-2; Statement of Iowa Utilities Board Member Krista Tanner at the April 6, 2011 Workshop, at 61 (“[I]t doesn’t matter what the traffic is for. It doesn’t matter what you do with your reasonable profits.”). The Commission is considering a wide range of issues related to improving communications services for Native Nations. See *generally Improving Communications Services for Native Nations*, CG Docket No. 11-41, Notice of Inquiry, 26 FCC Red 2672 (2011).

stimulation schemes provide additional proof that the LEC's rates are above cost. Moreover, Congress created an explicit universal service fund to spur investment and deployment in rural, high cost, and insular areas, and the Commission is taking action here and in other proceedings to facilitate such deployment.<sup>1099</sup>

**(i) Access Stimulation Definition**

667. We adopt a definition to identify when an access stimulating LEC must refile its interstate access tariffs at rates that are presumptively consistent with the Act. After reviewing the record, we make a few changes to the *USF/ICC Transformation NPRM* proposal, including defining access stimulation as occurring when two conditions are met. The first condition is that the LEC has entered into an access revenue sharing agreement, and we clarify what types of agreements qualify as "revenue sharing." The second condition is met where 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. We adopt these changes to ensure that the access stimulation definition is not over-inclusive and to improve its enforceability.

668. *Definition of a Revenue Sharing Agreement.* Many parties agree that the use of the revenue sharing arrangement trigger alone as proposed in the *USF/ICC Transformation NPRM* would be reasonable to reduce access stimulation,<sup>1100</sup> and other parties argue the existence of a revenue sharing arrangement should be used in conjunction with another condition.<sup>1101</sup> However, the use of a revenue sharing approach alone was criticized by some as being ambiguous, circular, or a poor indicator of access stimulation.<sup>1102</sup> Other parties found the definition of revenue sharing to be over-inclusive and/or under-inclusive.<sup>1103</sup> Several commenters offered suggestions on how to revise the definitional language.<sup>1104</sup>

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<sup>1099</sup> See *supra* Sections VI and VII; see also, e.g., *Implementation of Section 224 of the Act; A National Broadband Plan For Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5319, para. 178 (2011) (*2011 Pole Attachment Order*).

<sup>1100</sup> See, e.g., CenturyLink Section XV Comments at 39-40; Global Section XV Comments at 12 ("appropriately tailored step that strikes a proper balance between the Commission's policy concerns and the legitimate business practices of carriers"); Omnitel and Tekstar Section XV Comments at 12-13. But see Beehive Section XV Comments at 5-7; EarthLink Section XV Comments at 13-16; HyperCube Section XV Comments at 4; Free Conferencing Corporation Section XV Comments at 2-3, 12-13.

<sup>1101</sup> See, e.g., AT&T Section XV Comments at 18-20; Leap Wireless and Cricket Section XV Comments at 6-7.

<sup>1102</sup> See, e.g., ZipDX Section XV Comments at 5; EarthLink Section XV Comments at 13-14; RNK Section XV Comments at 10-11 (will generate more disputes); Letter from Edward A. Yorkgitis, Jr., Counsel to Omnitel Communications, Inc and Tekstar Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, at 2 (filed May 9, 2011) (Omnitel and Tekstar May 9, 2011 *Ex Parte* Letter).

<sup>1103</sup> See, e.g., Rural Associations Section XV Comments at 32-36; PAETEC et al. Section XV Comments at 21.

<sup>1104</sup> See, e.g., ZipDX Section XV Comments at 5 (proposing a revised definition to read: "Access revenue sharing occurs when a rate-of-return ILEC or CLEC enters in an agreement with another party (including an affiliate) that results in the aggregate fees owed to the ILEC or CLEC by the other party decreasing as the volume of access-fee-generating traffic attributable to that other party increases (including to the point that the other party is receiving a net payment from the ILEC or CLEC."); HyperCube Section XV Comments at 10 (proposing to distinguish wholesale sharing agreements from retail agreements and exclude wholesale agreements from the definition of revenue sharing); Omnitel and Tekstar May 9, 2011 *Ex Parte* Letter, Attach. at 1 (proposing a revised definition to read: "Access revenue sharing occurs when a rate-of-return ILEC or a CLEC enters into an agreement that will result in a net payment over the course of the agreement to the other party (including affiliates) to the agreement, in which payment by the rate-of-return ILEC or CLEC is tied to the billing or collection of access charges from (continued...)")

669. After reviewing the record, we clarify the scope of the access revenue sharing agreement condition of the new access stimulation definition. The access revenue sharing condition of the access stimulation definition we adopt herein is met when a rate-of-return LEC or a 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 of form, provided by the rate-of-return LEC or competitive LEC to the other party to the agreement shall be taken into account.”<sup>1105</sup>

670. This rule focuses on revenue sharing that would result in a net payment to the other entity over the course of the agreement<sup>1106</sup> arising from the sharing of access revenues.<sup>1107</sup> We intend the net payment language to limit the revenue sharing definition in a manner that, along with the traffic measurements discussed below, best identifies the revenue sharing agreements likely to be associated with access stimulation and thus those cases in which a LEC must refile its switched access rates. Revenue sharing may include payments characterized as marketing fees or other similar payments that result in a net payment to the access stimulator. However, this rule does not encompass typical, widely available, retail discounts offered by LECs through, for example, bundled service offerings.

671. Some commenters assert that the proposed definition of access revenue sharing arrangements was over-inclusive and/or under-inclusive.<sup>1108</sup> We believe that the net payment language, combined with either the terminating-to-originating traffic ratio or the traffic growth requirement, sufficiently limits the scope of the revenue sharing definition by narrowing the number of carriers that could be subject to the trigger. HyperCube argues that the Commission should exclude wholesale services from the definition of revenue sharing agreements.<sup>1109</sup> We find HyperCube’s proposal unpersuasive because the sharing of access revenues is involved and thus should be covered if the second

(Continued from previous page) —————

interexchange carriers. When determining whether there is a net payment under this rule, all payment, discounts, credits, services, features and functions, and other items of value, regardless of form, given by the rate-of-return ILEC or CLEC to the other party in connection with the shall be taken into account.”).

<sup>1105</sup> See *infra* Appendix A.

<sup>1106</sup> The use of “over the course of the agreement” does not preclude an IXC from filing a complaint if the traffic measurement condition is met. The agreement is to be interpreted in terms of what the anticipated net payments would be over the course of the agreement.

<sup>1107</sup> We clarify that patronage dividends paid by cooperatives generally do not constitute revenue sharing as contemplated by this definition. See Rural Associations Section XV Comments at 33-34. However, a cooperative, like other LECs, could structure payments in a manner to engage in revenue sharing that would cause it to meet the definition as discussed herein.

<sup>1108</sup> See, e.g., PAETEC et al. Section XV Comments at 21 (claiming that the net payor test is both over- and under-inclusive because it targets the wrong factor—unreasonable traffic spikes in high-access-cost areas is more a function of the portability of the traffic than the direction or amount of net payments); Rural Associations Section XV Comments at 32-36 (claiming that the Commission must distinguish between situations where traffic levels are artificially inflated and situations where traffic increases as a result of legitimate economic activity); HyperCube Section XV Comments at 4 (claiming that the revenue sharing definition is over-inclusive because it would encompass wholesale revenue sharing arrangements that HyperCube believes are in the public interest by promoting a competitive environment, rather than focusing on end-user stimulation).

<sup>1109</sup> HyperCube Section XV Comments at i, 4.



condition of the definition is met.<sup>1110</sup> 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.<sup>1111</sup> As part of that tariff filing, an officer of the LEC must certify that it has terminated the revenue sharing agreement(s).

672. Several parties have urged us to declare revenue sharing to be a violation of section 201(b) of the Act.<sup>1112</sup> Other parties argue that the Commission should prohibit the collection of switched access charges for traffic sent to access stimulators.<sup>1113</sup> Many commenters, on the other hand, assert that revenue sharing is a common business practice that has been endorsed in some situations by the Commission.<sup>1114</sup> As proposed in the *USF/ICC Transformation NPRM*, we do not declare revenue sharing to be a *per se* violation of section 201(b) of the Act.<sup>1115</sup> A ban on all revenue sharing arrangements could be overly broad,<sup>1116</sup> and no party has suggested a way to overcome this shortcoming. Nor do we find that parties have demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases. We note that the access stimulation rules we adopt today are part of our comprehensive intercarrier compensation reform. That reform will, as the transition unfolds, address remaining incentives to engage in access stimulation.

673. A few parties argue that the Commission explicitly approved revenue sharing in the *CLEC Access Charge Reconsideration Order* when it found that commission payments from competitive LECs to generators of toll-free traffic, such as hotels and universities, did not create any incentives for the individuals who use those facilities to place excessive or fraudulent calls.<sup>1117</sup> That case is inapposite. The Commission there was responding to IXC assertions in connection with 8YY calling and the Commission noted that it did not appear that the payments would affect calling patterns because the commissions did not create any incentive for those actually placing the calls to artificially inflate their 8YY traffic.<sup>1118</sup> By contrast, when access traffic is being stimulated, the party receiving the shared revenues has an economic incentive to increase call volumes by advertising the stimulating services widely.

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<sup>1110</sup> In all events, HyperCube states that it is already benchmarking to the rates of the BOC in its service areas and thus would likely be unaffected by the rules adopted here, even though we are departing from the BOC rates as the benchmark and using the lowest price cap rate in the state. *Id.* at 3.

<sup>1111</sup> See Bluegrass Section XV Comments at 19.

<sup>1112</sup> See, e.g., CenturyLink Section XV Comments at 33-34, 53 (sharing of revenues is unreasonable practice under section 201(b)); XO Section XV Comments at 44; USTelecom Section XV Comments at 10; AT&T Section XV Comments at 12-13.

<sup>1113</sup> See, e.g., AT&T Section XV Comments at 12-15; Sprint Section XV Comments at 20; CenturyLink Section XV Comments at 34-35 (Billing IXC for tariffed access charges for traffic delivered to business partner instead of end user violates most LECs' access tariffs and FCC rules.).

<sup>1114</sup> See, e.g., HyperCube Section XV Comments at 7-8 (Commission should not ban revenue sharing agreements that are invisible to the calling party, such as HyperCube, and therefore do not stimulate the calling party to place additional calls.).

<sup>1115</sup> See, e.g., Cablevision and Charter Section XV Comments at 13-14; Free Conferencing Corporation Section XV Comments at 30; Neutral Tandem Section XV Comments at 5.

<sup>1116</sup> See, e.g., *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9142-43, para. 70 (2004) (*CLEC Access Charge Reform Reconsideration Order*); *AT&T's Private Payphone Commission Plan*, ENF-87-19, Memorandum Opinion and Order, 7 FCC Rcd 7135 (1992).

<sup>1117</sup> PAETEC et al. Section XV Comments at 27; EarthLink Section XV Comments at 19-20.

<sup>1118</sup> See *CLEC Access Charge Reform Reconsideration Order*, 19 FCC Rcd at 9142-43, para. 70.

674. Several parties ask that we address the potential for LECs to attempt to evade the prohibition on access stimulation by integrating high call volume operations within the same corporate entity as the LEC, rather than providing those services through contracts with third parties or affiliates, so that it is able to characterize this arrangement as something other than a revenue sharing agreement.<sup>1119</sup> In particular, CenturyLink argues that revenue sharing in the access stimulation context, however structured, violates section 254(k) of the Act because terminating switched access is a monopoly service and the conferencing services are competitive.<sup>1120</sup> The rules adopted here pursuant to sections 201 and 202 of the Act address conferencing services being provided by a third party, whether affiliated with the LEC or not.<sup>1121</sup> Section 254(k) would apply to a LEC's operation of an access stimulation plan within its own corporate organization. In that context, as we have found in other proceedings, terminating access is a monopoly service.<sup>1122</sup> The conferencing activity, as portrayed by the parties engaged in access stimulation, would be a competitive service.<sup>1123</sup> Thus, the use of non-competitive terminating access revenues to support competitive conferencing service within the LEC operating entity would violate section 254(k) and appropriate sanctions could be imposed.

675. *Addition of a Traffic Measurement Condition.* After reviewing the record, we agree that it is appropriate to include a traffic measurement condition in the definition of access stimulation.<sup>1124</sup> Accordingly, in addition to requiring the existence of a revenue sharing agreement, we add a second condition to the definition requiring that a LEC: "has either an interstate terminating-to-originating traffic ratio of at least 3:1 in a calendar month, or has had more than a 100 percent growth in interstate originating and/or terminating switched access MOU in a month compared to the same month in the preceding year."<sup>1125</sup> The addition of a traffic measurement component to the access stimulation definition creates a bright-line rule that responds to record concerns about using access revenue sharing alone. We conclude that these measurements of switched access traffic of all carriers exchanging traffic with the LEC reflect the significant growth in traffic volumes that would generally be observed in cases where access stimulation is occurring and thus should make detection and enforcement easier. Carriers paying switched access charges can observe their own traffic patterns for each of these traffic measurements and file complaints based on their own traffic patterns. Thus, this will not place a burden on LECs to file traffic reports, as some proposals would.<sup>1126</sup>

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<sup>1119</sup> See, e.g., Level 3 Section XV Comments at 5; Verizon Section XV Comments at 43-44.

<sup>1120</sup> CenturyLink Section XV Comments at 43-50. In relevant part, section 254(k) provides that "[a] telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition." 47 U.S.C. § 254(k).

<sup>1121</sup> Free Conferencing Corporation, on the other hand, argues that using revenue sharing as a trigger discriminates in favor of vertically integrated companies, such as AT&T and Verizon, where the conference calling provider and the LEC collecting access charges are part of the same overall enterprise. Free Conferencing Corporation Section XV Comments at 26-27; see also Global Section XV Comments at 11-12. This argument is unpersuasive for the reasons stated in paragraph 666 *supra*.

<sup>1122</sup> See *CLEC Access Charge Order*, 16 FCC Rcd at 9935, para. 30.

<sup>1123</sup> See, e.g., Free Conferencing Corporation Section XV Comments at 1, 17; Global Section XV Comments at 9.

<sup>1124</sup> See, e.g., AT&T Section XV Comments at 18-20; ITTA Section XV Comments at 25; Verizon Section XV Comments at 44.

<sup>1125</sup> See *infra* Appendix A.

<sup>1126</sup> See Letter from Henry Goldberg, Counsel for Free Conferencing Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, GN Docket No. 09-51, CC Docket No. 01-92, Attach. at 7 (filed July 8, 2011) (Free Conferencing Corporation July 8, 2011 *Ex Parte* Letter).

676. The record offers support for both a terminating-to-originating traffic ratio<sup>1127</sup> and a traffic growth factor.<sup>1128</sup> The Commission adopted a 3:1 ratio in its 2001 *ISP-Remand Order* to address a similar arbitrage scheme based on artificially increasing reciprocal compensation minutes.<sup>1129</sup> Further, the Wireline Competition Bureau employed a 100 percent traffic growth factor as a benchmark in a tariff investigation to address the potential that some rate-of-return LECs might engage in access stimulation after having filed tariffs with high switched access rates.<sup>1130</sup> In each case, the approach was largely successful in identifying and reducing the practice.

677. We conclude that the use of a terminating-to-originating traffic ratio in conjunction with a traffic growth factor as alternative traffic measures addresses the shortcomings of using either component separately. A few parties argue that carriers can game the terminating-to-originating traffic ratio component by simply increasing the number of originating MOU.<sup>1131</sup> The traffic growth component protects against this possibility because increasing the originating access traffic to avoid tripping the 3:1 component would likely mean total access traffic would increase enough to trip the growth component. The terminating-to-originating traffic ratio component will capture those current access stimulation situations that already have very high volumes that could otherwise continue to operate without tripping the growth component. For example, a LEC that has been engaged in access stimulation for a significant period of time would have a high terminating traffic volume that, under a traffic growth factor alone, could continue to expand its operations, possibly avoiding the condition entirely by controlling its terminating traffic. Because these alternative traffic measurements are combined with the requirement that an access revenue sharing agreement exist, we reduce the risk that the terminating-to-originating traffic ratio or traffic growth components of the definition could be met by legitimate changes in a LEC's calling patterns. The combination of these two traffic measurements as alternatives is preferable to either standing alone, as some parties have urged.<sup>1132</sup> A terminating-to-originating traffic ratio or traffic growth condition alone could prove to be overly inclusive by encompassing LECs that had realized access traffic

<sup>1127</sup> See, e.g., CTIA Section XV Comments at 7-9; Sprint Section XV Comments at 8-9, 18-20; Ohio Commission Section XV Comments at 15; Time Warner Cable Section XV Comments at 15-16; Leap Wireless and Cricket Section XV Comments at 6-7.

<sup>1128</sup> See, e.g., XO Section XV Comments at 41-43; RNK Section XV Comments at 11-12; Cox Section XV Comments at 13; NASUCA and NJ Rate Counsel Section XV Comments at 10.

<sup>1129</sup> See *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9183, para. 70 (2001) (subsequent history omitted) (*ISP Remand Order*). There, as here, reciprocal compensation rates were sufficiently high that many competitive LECs found it profitable to target and serve ISP customers who were large recipients of local traffic, since dial-up Internet customers would place calls to their ISP with lengthy hold times. This practice led to significant traffic imbalances, with competitive LECs seeking substantial amounts in reciprocal compensation payments from other LECs.

<sup>1130</sup> See *Investigation of Certain 2007 Annual Access Tariffs*, WC Docket No. 07-184, WCB/Pricing No. 07-10, Order Designating Issues for Investigation, 22 FCC Rcd 16109, 16120, para. 28 (WCB 2007) (*Designation Order*). The *Designation Order* identified two safe harbor provisions that would allow the affected carriers to avoid the investigation if the carrier either: (1) elected to return to the NECA pool; or (2) added language to its tariff that would commit to the filing of a revised tariff if the filing carrier experienced a 100 percent increase in monthly demand when compared to the same month in the prior year. *Id.*

<sup>1131</sup> See, e.g., Letter from Henry Goldberg, Counsel for Free Conferencing Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, GN Docket No. 09-51, CC Docket No. 01-92, Attach. at 8 (filed May 26, 2011); Letter from Norina Moy, Director, Government Affairs, Sprint, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, at 4-7 (filed June 15, 2011).

<sup>1132</sup> See, e.g., XO Section XV Comments at 46; RNK Section XV Comments at 12 (50 percent increase over the previous six months would create a rebuttable presumption of being engaged in access stimulation).

growth through general economic development, unaided by revenue sharing. Such situations could include the location of a customer support center in a new community without any revenue sharing arrangement, or a new competitive LEC that is experiencing substantial growth from a small base.<sup>1133</sup>

678. We decline to adopt a condition based on absolute MOU per line, either on a stand-alone basis or in conjunction with a revenue sharing condition, as suggested by several parties.<sup>1134</sup> Under these proposals, if a LEC's MOUs per line exceeded a specified threshold, the LEC would be required to take some action to reduce its rates. Many LECs could evade a MOU per line condition simply by adding additional lines. Moreover, a MOU per line approach would require self-reporting, because neither an IXC nor the Commission could otherwise readily tell if the condition had been met.

## (ii) Remedies

679. If a LEC meets both conditions of the definition, it must file a revised tariff except under certain limited circumstances. As explained in more detail below, a rate-of-return LEC must file its own cost-based tariff under section 61.38 of the Commission's rules and may not file based on historical costs under section 61.39 of the Commission's rules or participate in the NECA traffic-sensitive tariff. If a competitive LEC meets the definition, it must benchmark its tariffed access rates to the rates of the price cap LEC with the lowest interstate switched access rates in the state, rather than to the rates of the BOC or the largest incumbent LEC in the state (as proposed in the *USF/ICC Transformation NPRM*). We conclude, however, that if a LEC has terminated its revenue sharing agreement(s) before the deadline we establish for filing its revised tariff, or if the competitive LEC's rates are already below the benchmark rate, such a LEC does not have to file a revised interstate switched access tariff. However, once a rate-of-return LEC or a competitive LEC has met both conditions of the definition and has filed revised tariffs, when required, it may not file new tariffs at rates other than those required by the revised pricing rules until it terminates its revenue sharing agreement(s), even if the LEC no longer meets the 3:1 terminating-to-originating traffic ratio condition of the definition or traffic growth threshold. As price cap LECs reduce their switched access rates under the ICC reforms we adopt herein, competitive LECs must benchmark to the reduced rates.

680. *Rate-of-Return Carriers Filing Tariffs Based on Historical Costs and Demand: Section 61.39.* We adopt our proposal in the *USF/ICC Transformation NPRM* that a LEC filing access tariffs pursuant to section 61.39 would lose its ability to base its rates on historical costs and demand if it is engaged in access stimulation.<sup>1135</sup> Incumbent LECs filing access tariffs pursuant to section 61.39 of the Commission's rules currently base their rates on historical costs and demand, which, because of their small size, generally results in high switched access rates based on the high costs and low demand of such carriers.<sup>1136</sup> The limited comment in the record was supportive of our proposal for the reasons set forth in

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<sup>1133</sup> State Joint Board Members propose a condition for access stimulation based on a terminating ratio one standard deviation above the national average terminating ratio annually. See State Members Comments at 156. Under their proposal, a carrier meeting this condition would set new rates so that the terminating revenue for any carrier equals the carrier's initial rate times its originating minutes times the terminating ratio at the one standard deviation point. *Id.* We decline to adopt this proposal because it is unclear that using originating traffic volumes would produce a rate that adequately reflects the increased terminating traffic volumes sufficient to ensure that rates are just and reasonable as required by Section 201(b) of the Act.

<sup>1134</sup> See, e.g., USTelecom Section XV Comments at 9 n.20; Rural Associations Section XV Comments at 33-36; ITTA Section XV Comments at 25; Louisiana Small Company Committee Section XV Comments at 16-17; Toledo Telephone Section XV Comments at 7.

<sup>1135</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4767, para. 664.

<sup>1136</sup> 47 C.F.R. § 61.39.

the *USF/ICC Transformation NPRM*.<sup>1137</sup> We accordingly revise section 61.39 to bar a carrier otherwise eligible to file tariffs pursuant to section 61.39 from doing so if it meets the access stimulation definition. We also require such a carrier to file a revised interstate switched access tariff pursuant to section 61.38 within 45 days after meeting the definition, or within 45 days after the effective date of this rule in cases where the carrier meets the definition on that date.

681. *Participation in NECA Tariffs.* In the *USF/ICC Transformation NPRM*, the Commission proposed that a carrier engaging in revenue sharing would lose its eligibility to participate in the NECA tariffs 45 days after engaging in access stimulation, or 45 days after the effective date of this rule in cases where it currently engages in access stimulation.<sup>1138</sup> A carrier leaving the NECA tariff thus would have to file its own tariff for interstate switched access, pursuant to section 61.38 of the rules.<sup>1139</sup>

682. The record is generally supportive of this approach for the reasons stated in the *USF/ICC Transformation NPRM*,<sup>1140</sup> and we adopt it, subject to one modification. We clarify that, pursuant to section 69.3(e)(3) of the rules,<sup>1141</sup> a LEC required to leave the NECA interstate tariff (which includes both switched and special access services) because it has met the access stimulation definition must file its own tariff for both interstate switched and special access services.<sup>1142</sup>

683. We also adopt a revision to the proposed rule similar to a suggestion by the Louisiana Small Carrier Committee, which recommends that rate-of-return carriers be given an opportunity to show that they are in compliance with the Commission's rules before being required to file a revised tariff.<sup>1143</sup> Accordingly, we conclude that if a carrier sharing access revenues terminates its access revenue sharing agreement before the date on which its revised tariff must be filed, it does not have to file a revised tariff. We believe that when sharing agreements are terminated, in most instances traffic patterns should return to levels that existed prior to the LEC entering into the access revenue sharing agreement. This eliminates a burden on such carriers when there is no ongoing reason for requiring such a filing.

684. *Rate of Return Carriers Filing Tariffs Based On Projected Costs and Demand: Section 61.38.* In the *USF/ICC Transformation NPRM*, we proposed that a carrier filing interstate switched access tariffs based on projected costs and demand pursuant to section 61.38 of the rules be required to file revised access tariffs within 45 days of commencing access revenue sharing, or within 45 days of the

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<sup>1137</sup> See, e.g., AT&T Section XV Comments at 17-18; Level 3 Section XV Comments at 3; USTelecom Section XV Comments at 11.

<sup>1138</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4766, para. 662.

<sup>1139</sup> *Id.*

<sup>1140</sup> See, e.g., Rural Associations Section XV Comments at 35-36; AT&T Section XV Comments at 17-18; Level 3 Section XV Comments at 3; but see USTelecom Section XV Comments at 10-11 (arguing that such a rule is unnecessary).

<sup>1141</sup> 47 C.F.R. § 69.3(e)(3).

<sup>1142</sup> USTelecom suggests that given that shared revenues are not appropriately included in a carrier's revenue requirement, the Commission does not need to address eligibility for participation in NECA tariffs in its access stimulation rules—a carrier would either stop sharing, or file its own tariff without any mandate to do so. USTelecom Section XV Comments at 10-11. We disagree, because current rules only provide for a participating carrier to leave the NECA tariff at the time of the annual tariff filing. A rule prohibiting LECs from further participating in the NECA tariff when the definition is met, and providing for advance notice to NECA, spells out the procedure.

<sup>1143</sup> Louisiana Small Company Committee Section XV Comments at 17 (for example, because unexpectedly high levels of traffic have been terminated).

effective date of the rule if the LEC on that date is engaged in access revenue sharing,<sup>1144</sup> unless the costs and demand arising from the new revenue sharing arrangement had been reflected in its most recent tariff filing.<sup>1145</sup> We further proposed that payments made by a LEC pursuant to an access revenue sharing arrangement should not be included as costs in the rate-of-return LEC's interstate switched access revenue requirement because such payments have nothing to do with the provision of interstate switched access service and are thus not used and useful in the provision of such service.<sup>1146</sup> Thus, we proposed to clarify prospectively that a rate-of-return carrier that shares access revenue, provides other compensation to an access stimulating entity, or directly provides the stimulating activity, and bundles those costs with access, is engaging in an unreasonable practice that violates section 201(b) and the prudent expenditure standard.<sup>1147</sup>

685. We adopt the approach proposed in the *USF/ICC Transformation NPRM*. Commenters that addressed this issue support the approach.<sup>1148</sup> In particular, we adopt a rule requiring carriers filing interstate switched access tariffs based on projected costs and demand pursuant to section 61.38 of the rules to file revised access tariffs within 45 days of commencing access revenue sharing, or within 45 days of the effective date of the rule if the LEC on that date was engaged in access revenue sharing,<sup>1149</sup> unless the costs and demand arising from the new access revenue sharing agreement were reflected in its most recent tariff filing. This tariff filing requirement provides the carrier with the opportunity to show, and the Commission to review, any projected increase in costs, as well as to consider the higher anticipated demand in setting revised rates. If the access revenue sharing agreement(s) that required the new tariff filing has been terminated by the time the revised tariff is required to be filed, we will not require the filing of a revised tariff, as the proposal would have. A refiling in that instance would be unnecessary because the original rates will now more likely reflect the cost/demand relationship of the carrier. If a LEC, however, subsequently reactivates the same telephone numbers in connection with a new access revenue sharing agreement, we will presumptively treat that action to be furtive concealment resulting in the loss of deemed lawful status for the LEC's tariff, as discussed below in conjunction with the discussion of section 204(a)(3) of the Act.<sup>1150</sup> This will prevent a LEC from entering into a series of access revenue sharing agreements to avoid the 45-day filing requirement, while benefiting from the advertising of those telephone numbers used under previous agreements.

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<sup>1144</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4767, para. 663.

<sup>1145</sup> *Id.*

<sup>1146</sup> *Id.* at 4766, para. 661.

<sup>1147</sup> *Id.* The prudent expenditure standard is associated with the "used and useful" doctrine, which together are employed in evaluating whether a carrier's rates are just and reasonable. *See Access Stimulation NPRM*, 22 FCC Rcd at 17997, para. 19, n.47.

<sup>1148</sup> *See, e.g.,* AT&T Section XV Comments at 17-18; USTelecom Section XV Comments at 11. Sprint is concerned that rates filed under section 61.38 will not be just and reasonable, even if LECs' projections are made in good faith because of the lack of a true-up mechanism. Sprint Section XV Comments at 15. Sprint's concern is unfounded. The revised tariffs filed by a section 61.38 carrier meeting the revenue sharing definition will be subject to the Commission's tariff review processes in which the projected cost and demand data can be reviewed and appropriate action taken if necessary.

<sup>1149</sup> *See USF/ICC Transformation NPRM*, 26 FCC Rcd at 4767, para. 663.

<sup>1150</sup> *See infra* para. 695. As described therein, a carrier may be required to make refunds if its tariff does not have deemed lawful status.

686. We also adopt the proposal that payments made by a LEC pursuant to an access revenue sharing agreement are not properly included as costs in the rate-of-return LEC's interstate switched access revenue requirement. This proposal received broad support in the record.<sup>1151</sup>

687. We decline to adopt either of two suggested alternative pricing proposals for section 61.38 LECs. First, several parties suggested allowing a rate-of-return carrier filing a tariff based on projected costs and demand pursuant to section 61.38 to file a rate of \$0.0007, rather than requiring it to make a new cost showing.<sup>1152</sup> Second, other parties proposed that a section 61.38 carrier be allowed to benchmark to the BOC rate in the state since that rate is just and reasonable.<sup>1153</sup> An established ratemaking procedure for section 61.38 LECs already exists. No party has demonstrated why either of the proposed rates would be preferable to the rates developed under existing ratemaking procedures. Thus, the rule we adopt will require section 61.38 carriers to set their rates based on projected costs and demand data.<sup>1154</sup>

688. *Competitive LECs.* In the *USF/ICC Transformation NPRM*, we proposed that when a competitive LEC is engaged in access stimulation, it would be required to benchmark its interstate switched access rates to the rate of the BOC in the state in which the competitive LEC operates, or the independent incumbent LEC with the largest number of access lines in the state if there is no BOC in the state, and if the competitive LEC is not already benchmarking to that carrier's rate.<sup>1155</sup> Under the proposal, a competitive LEC would have to file a revised tariff within 45 days of engaging in access stimulation, or within 45 days of the effective date of the rule if it currently engages in access stimulation.<sup>1156</sup>

689. After reviewing the record, we adopt our proposal with one modification to ensure that the LEC refiles at a rate no higher than the lowest rate of a price cap LEC in the state. In so doing, we conclude that neither the switched access rate of the rate-of-return LEC in whose territory the competitive LEC is operating nor the rate used in the rural exemption<sup>1157</sup> is an appropriate benchmark when the competitive LEC meets the access stimulation definition. In those instances, the access stimulator's traffic vastly exceeds the volume of traffic of the incumbent LEC to whom the access stimulator is currently benchmarking.<sup>1158</sup> Thus, the competitive LEC's traffic volumes no longer operationally

<sup>1151</sup> See, e.g., AT&T Section XV Comments at 12-15; CenturyLink Section XV Comments at 53; Level 3 Section XV Comments at 3; XO Section XV Comments at 44; RNK Section XV Comments at 11.

<sup>1152</sup> See, e.g., AT&T Section XV Comments at 15-17; CTIA Section XV Comments at 7; MetroPCS Section XV Comments at 5; Sprint Section XV Comments at 8-9, 18-20; T-Mobile Section XV Comments at 8-9.

<sup>1153</sup> CenturyLink Section XV Comments at 42; North County Section XV Comments at 2-3 (LECs reduce rates as volumes increase until the BOC rate is reached).

<sup>1154</sup> Beginning July 1, 2012, rate-of-return LECs must comply with the transition procedures described in Section XII.C *infra*.

<sup>1155</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4767, para. 665.

<sup>1156</sup> *Id.*

<sup>1157</sup> See 47 C.F.R. § 61.26(e).

<sup>1158</sup> For example, AT&T submitted data showing that the terminating MOU of 12 competitive LECs in Iowa, Minnesota, and South Dakota averaged 750,000,000 compared to 2,028,398 for NECA Band 8 LECs in those states. See Letter from Brian J. Benison, Director, Federal Regulatory, AT&T Services Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, Attach. at 6 (filed Dec. 3, 2009) (AT&T Dec. 3, 2009 *Ex Parte* Letter). The relationship of those traffic volumes has not changed significantly since 2009. See Letter from Brian J. Benison, Director, Federal Regulatory, AT&T Services Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, Attach. at 4 (filed May 13, 2011).

resemble the carrier's traffic volumes whose rates it had been benchmarking because of the significant increase in interstate switched access traffic associated with access stimulation.<sup>1159</sup> Instead, the access stimulating LEC's traffic volumes are more like those of the price cap LEC in the state,<sup>1160</sup> and it is therefore appropriate and reasonable for the access stimulating LEC to benchmark to the price cap LEC.<sup>1161</sup>

690. Although many parties support using the switched access rates of the BOC in the state, or the rates of the largest independent LEC in the state if there is no BOC,<sup>1162</sup> as we proposed, we conclude 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.<sup>1163</sup> Generally, the BOC will have the lowest interstate switched access rates. However, the record reveals that in California, Pacific Bell's interstate switched access rates are higher than those of other price cap LECs in the state, as well as being higher than the interstate switched access rates of price cap LECs in other states. Benchmarking to the lowest price cap LEC interstate switched access rate in the state will reduce rate variance among states and will significantly reduce the rates charged by competitive LECs engaging in access stimulation, even if it does not entirely eliminate the potential for access stimulation.<sup>1164</sup> However, 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. In addition, we believe the reforms we adopt elsewhere in this Order will, over time, further reduce intercarrier payments and the incentives for this type of arbitrage.

691. We require a competitive LEC to file a revised interstate switched access tariff 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. A competitive LEC whose rates are already at or below the rate to which they would have to benchmark in the refiled tariff will not be required to make a tariff filing.

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<sup>1159</sup> See, e.g., AT&T Section XV Comments at 14-17; CenturyLink Section XV Comments at 37-40; T-Mobile Section XV Comments at 7-8.

<sup>1160</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4767, para. 665. AT&T shows that "rural" access stimulating competitive LECs in Iowa, Minnesota and South Dakota collectively are terminating three to five times as many minutes as the largest incumbent LEC operating in the same state. AT&T Dec. 3, 2009 *Ex Parte* Letter, Attach. at 4.

<sup>1161</sup> We reject NASUCA's suggestion that we use the lowest NECA rate as the benchmark. NASUCA and NJ Rate Counsel Section XV Comments at 11. The traffic patterns of those NECA carriers are likely to be even less comparable to the traffic patterns of a competitive LEC engaged in access stimulation.

<sup>1162</sup> See, e.g., CenturyLink Section XV Comments at 38-39; ITTA Section XV Comments at 24-25; Level 3 Section XV Comments at 3; Omnitel and Tekstar Section XV Reply at 4, 17; IUB Section XV Comments at 17-18; Ohio Commission Section XV Comments at 14-15. Several parties argue that a lower rate would be reasonable and should be adopted. See, e.g., AT&T Section XV Comments at 17; CTIA Section XV Comments at 6-7; Sprint Section XV Comments at 2.

<sup>1163</sup> We decline to adopt the Level 3 proposal that we adopt a requirement that a competitive LEC must file a declaration with the Commission attesting to the fact that it entered into an access revenue sharing agreement within 45 days of the effective date of the agreement. See Level 3 Section XV Comments at 4. Under the revised rules, competitive LECs are required to file revised tariffs if they engage in access stimulation. The proposed declaration would be duplicative.

<sup>1164</sup> See, e.g., AT&T Section XV Comments at 17; Sprint Section XV Comments at 13.



692. We will not adopt a benchmarking rate of \$0.0007 in instances when the definition is met, as is suggested by a few parties.<sup>1165</sup> The \$0.0007 rate originated as a negotiated rate in reciprocal compensation arrangements for ISP-bound traffic, and there is insufficient evidence to justify abandoning competitive LEC benchmarking entirely. Nor will we immediately apply bill-and-keep, as some parties have urged.<sup>1166</sup> We adopt a bill-and-keep methodology for intercarrier compensation below, but decline to mandate a flash cut to bill-and-keep here. Additionally, we reject the suggestion that we detariff competitive LEC access charges if they meet the access stimulation definition.<sup>1167</sup> Our benchmarking approach addresses access stimulation within the parameters of the existing access charge regulatory structure. We expect that the approach we adopt will reduce the effects of access stimulation significantly, and the intercarrier compensation reforms we adopt should resolve remaining concerns.

693. A few parties encourage the Commission to require high volume access tariffs (HVATs) for competitive LECs.<sup>1168</sup> These tariffs reduce rates as volumes increase and, as suggested by some parties, would provide a transition from today's interstate switched access rates to the benchmarked rate over two years.<sup>1169</sup> Under our benchmarking approach, if a competitive LEC meets the definition, its rates must be revised so that such rates are at or below the benchmark rate, unless they are already at those levels. A transitional HVAT that had one or more rates that exceeded the benchmark rate would not be in compliance with the benchmarking requirement adopted herein. Proponents of a transitional HVAT have not established why a transition is required or even appropriate, particularly considering the high traffic volumes associated with access stimulation. A competitive LEC that met the definition could, of course, file an HVAT if all of the rates in the tariff are below the benchmark rate.

694. We also decline to require or allow competitive LECs to use the "settlements specified in the extended average schedules published by NECA"<sup>1170</sup> or the NECA rate band 1 local switching rate,<sup>1171</sup> or to permit a competitive LEC to use section 61.38 procedures to establish its interstate switched access rates if the price cap LEC rates would not adequately compensate the competitive LEC.<sup>1172</sup> We maintain the benchmarking approach to the regulation of the rates of competitive LECs. The average schedules published by NECA are inadequate for this purpose. The schedules are constrained by the characteristics of the carriers included in their samples, which likely do not include any rate-of-return LECs engaging in access stimulation. Thus, NASUCA has not shown that the average schedules would be a reasonable approach for establishing a rate to which competitive LECs could benchmark. There is insufficient evidence in the record that abandoning the benchmarking approach for competitive LEC tariffs and compelling competitive LECs to comply with 61.38 rules is necessary to address concerns regarding

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<sup>1165</sup> See, e.g., AT&T Section XV Comments at 21; Sprint Section XV Comments at 2, 8-9.

<sup>1166</sup> See, e.g., CTIA Section XV Comments at 7; Leap Wireless and Cricket Section XV Comments at 7; MetroPCS Section XV Comments at 4; T-Mobile Section XV Comments at 2, 8-9.

<sup>1167</sup> See, e.g., AT&T Section XV Comments at 13-17 (the BOC rate would continue to encourage traffic pumping); Sprint Section XV Comments at 20-21.

<sup>1168</sup> See, e.g., Free Conferencing Corporation Section XV Comments at 37-38; see also Free Conferencing Corporation July 8, 2011 *Ex Parte* Letter, Attach. at 6 (urging the use of HVAT as a transition to BOC rates in two years).

<sup>1169</sup> See Free Conferencing Corporation July 8, 2011 *Ex Parte* Letter, Attach. at 6-8.

<sup>1170</sup> NASUCA Section XV Comments at 11.

<sup>1171</sup> Bluegrass Section XV Comments at 15-16.

<sup>1172</sup> Bluegrass Section XV Comments at 14-15; but see Free Conferencing Corporation Section XV Comments at 35 (opposing requiring a competitive LEC to use section 61.38).

access stimulation, particularly considering the burden that would be imposed on competitive LECs to start maintaining regulatory accounting records. Instead, we believe it is more appropriate to retain the benchmarking rule but revise it to ensure that the competitive LEC benchmarks to the price cap LEC with the lowest rate in the state, a rate which is likely most consistent with the volume of traffic of an access stimulating LEC.

695. *Section 204(a)(3) (“Deemed Lawful”) Considerations.* In the *USF/ICC Transformation NPRM*, we proposed that LECs that meet the revenue sharing definition be required to file revised tariffs on not less than 16 days’ notice.<sup>1173</sup> We further proposed that if a LEC failed to comply with the tariffing requirements, we would find such a practice to be an effort to conceal its noncompliance with the substantive rules that would disqualify the tariff from deemed lawful treatment.<sup>1174</sup> Finally, we proposed that rate-of-return LECs would be subject to refund liability for earnings over the maximum allowable rate-of-return,<sup>1175</sup> and competitive LECs would be subject to refund liability for the difference between the rates charged and the rate that would have been charged if the carrier had used the prevailing BOC rate, or the rate of the independent LEC with the largest number of access lines in the state if there is no BOC.<sup>1176</sup>

696. After reviewing the record,<sup>1177</sup> we decline to adopt our proposal. We conclude that the policy objectives of this proceeding can be achieved without creating an exception to the statutory tariffing timelines. LECs that meet the access stimulation trigger are required to refile their interstate switched access tariffs as outlined above. Any issues that arise in these refiled tariffs can be addressed through the suspension and rejection authority of the Commission contained in section 204 of the Act, or through appropriate enforcement action.

697. We conclude that a LEC’s failure to comply with the requirement that it file a revised tariff if the trigger is met constitutes a violation of the Commission’s rules, which is sanctionable under section 503 of the Act.<sup>1178</sup> We also conclude that such a failure would constitute “furtive concealment” as described by the D.C. Circuit in *ACS v. FCC*.<sup>1179</sup> We therefore put parties on notice that if we find in a complaint proceeding under sections 206-209 of the Act, that such “furtive concealment” has occurred, that finding will be applicable to the tariff as of the date on which the revised tariff was required to be

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<sup>1173</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4768, para. 666.

<sup>1174</sup> The carrier would also be subject to sanctions for violating the Commission’s tariffing rules.

<sup>1175</sup> 47 C.F.R. § 65.700. An exchange carrier’s interstate earnings are measured in accordance with the requirements set forth in 47 C.F.R. § 65.702.

<sup>1176</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4768, para. 666.

<sup>1177</sup> See, e.g., Level 3 Section XV Comments at 4.

<sup>1178</sup> Section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to \$150,000 for each violation, or each day of a continuing violation, up to a statutory maximum of \$1,500,000 for a single act or failure to act by common carriers; see also 47 C.F.R. § 1.80(b)(2). In 2008, the Commission amended its rules to increase the maximum forfeiture amounts in accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. See *Amendment of Section 1.80(b) of the Commission’s Rules, Adjustment of Forfeiture Maximum to Reflect Inflation*, EB File No. EB-06-SE-132, Order, 23 FCC Rcd 9845, 9847 (2008).

<sup>1179</sup> In 2002, the United States Court of Appeals for the D.C. Circuit, in reversing a Commission decision that had found a tariff filing did not qualify for deemed lawful treatment and was thus subject to possible refund liability, noted that it was not addressing “the case of a carrier that furtively employs improper accounting techniques in a tariff filing, thereby concealing potential rate of return violations.” *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 413 (D.C. Cir. 2002) (*ACS v. FCC*).

filed and any refund liability will be applied as of such date. We conclude that this approach will eliminate any incentives that LECs may have to delay or avoid complying with the requirement that they file revised tariffs. Several parties support this approach.<sup>1180</sup>

698. All American Telephone Co. filed a petition for declaratory ruling requesting that the Commission find that commercial agreements involving the sharing of access revenues between LECs and “free” service providers do not violate the Communications Act.<sup>1181</sup> In this Order, we adopt a definition of access revenue sharing agreement and prescribe that a LEC meeting the conditions of that definition must file revised tariffs. Given our findings and the rules adopted today, we decline to address the All American petition and it is dismissed.

### (iii) Enforcement

699. The revised interstate access rules adopted in this Order will facilitate enforcement through the Commission’s complaint procedures, if necessary.<sup>1182</sup> 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. This will create a rebuttable presumption that revenue sharing is occurring and the LEC has violated the Commission’s rules. The LEC then would have the burden of showing that it does not meet both conditions of the definition. We decline to require a particular showing, but, at a minimum, an officer of the LEC must certify that it has not been, or is no longer engaged in access revenue sharing, and the LEC must also provide a certification from an officer of the company with whom the LEC is alleged to have a revenue sharing agreement(s) associated with access stimulation that that entity has not, or is not currently, engaged in access stimulation and related revenue sharing with the LEC.<sup>1183</sup> If the LEC challenges that it has met either of the traffic measurements, it must provide the necessary traffic data to establish its contention. With the guidance in this Order, we believe parties should in good faith be able to determine whether the definition is met without further Commission intervention.

700. *Non-payment Disputes.* Several parties have requested that the Commission address alleged self-help by long distance carriers who they claim are not paying invoices sent for interstate

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<sup>1180</sup> See, e.g., PAETEC et al. Section XV Comments at 31; XO Section XV Comments at 46 (adopt a rebuttable presumption that increases in access volumes of more than 100 percent in a six month time period would automatically revoke, for the period contemporaneous with and following the increase, the “deemed lawful” status of a LEC whose interstate tariffed rates are above those of the BOC or largest incumbent LEC in the state until reviewed by the Commission).

<sup>1181</sup> See Petition for Declaratory Ruling of All American Telephone Co., Inc., e.Pinnacle Communications, Inc., and ChaseCom to Reconfirm that Local Exchange Carrier Commercial Agreements with Providers of Conferencing, “Chat Line” and Other Services Do Not Violate the Communications Act, WC Docket No. 07-135 (filed May 20, 2009).

<sup>1182</sup> Given the two-year statute of limitations in section 405 of the Act, 47 U.S.C. § 405, a complaining IXC would have two years from the date the cause of action accrued (the date after the tariff should have been filed) to file its complaint. Because the rules we adopt are prospective, they will have no binding effect on pending complaints.

<sup>1183</sup> The Ohio Commission argues that the Commission should not prohibit rebates, credits, discounts, etc. Ohio Commission Section XV Comments at 13-14. Section 203(c)(1) provides that no carrier shall “charge, demand, collect, or receive a greater or less or different compensation for such communication...than the charges specified in the schedule then in effect.” 47 U.S.C. § 203(c)(1). A corollary to subparagraph (1), section 203(c)(2) provides that no carrier shall “refund or remit by any means or device any portion of the charges so specified.” 47 U.S.C. § 203(c)(2). This prohibition on rebates is intended to preclude discrimination in charges, and the practice may be subject to sanctions under section 503. 47 U.S.C. § 503.

switched access services.<sup>1184</sup> As the Commission has previously stated, “[w]e do not endorse such withholding of payment outside the context of any applicable tariffed dispute resolution provisions.”<sup>1185</sup> We otherwise decline to address this issue in this Order, but caution parties of their payment obligations under tariffs and contracts to which they are a party. The new rules we adopt in today’s Order will provide clarity to all affected parties, which should reduce disputes and litigation surrounding access stimulation and revenue sharing agreements.

**(iv) Conclusion**

701. The rules we adopt in this section will require rates associated with access stimulation to be just and reasonable because those rates will more closely reflect the access stimulators’ actual traffic volume. Taking this basic step 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. We have balanced the need for our new rules to address traffic stimulation with the costs that may be imposed on LECs and have concluded that the benefits justify any burdens. Our new rules will work in tandem with the comprehensive intercarrier compensation reforms we adopt below, which will, when fully implemented, eliminate the incentives in the present system that give rise to access stimulation.

**B. Phantom Traffic**

702. In this portion of the Order, we amend the Commission’s rules to address “phantom traffic” by ensuring that terminating service providers receive sufficient information to bill for telecommunications traffic sent to their networks, including interconnected VoIP traffic. The amendments we adopt close loopholes that are being used to manipulate the intercarrier compensation system.

703. “Phantom traffic” refers to traffic that terminating networks receive that lacks certain identifying information. In some cases, service providers in the call path intentionally remove or alter identifying information to avoid paying the terminating rates that would apply if the call were accurately signaled and billed. For example, some parties have sought to avoid payment of relatively high intrastate access charges by making intrastate traffic appear interstate or international in nature.<sup>1186</sup> Parties have also disguised or routed non-local traffic subject to access charges to avoid those charges in favor of lower reciprocal compensation rates.<sup>1187</sup> Collectively, problems involving unidentifiable or misidentified traffic appear to be widespread. Parties have documented that phantom traffic is a sizeable problem, with estimates ranging from 3-20 percent of all traffic on carriers’ networks,<sup>1188</sup> which costs carriers—and

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<sup>1184</sup> See, e.g., Pac-West Section XV Comments at 17-19 (carriers must dispute and pay for there to be a level playing field for all carriers).

<sup>1185</sup> *All American Telephone Co., et al. v. AT&T Corp.*, File EB-10-MD-003, Memorandum Opinion and Order, 26 FCC Rcd 723, 728 (2011).

<sup>1186</sup> See, e.g., CenturyLink Section XV Comments at 19.

<sup>1187</sup> See *id.*; see also Windstream Section XV Comments at 15-16.

<sup>1188</sup> See TCA Section XV Comments at 5 (“TCA concurs in various estimates indicating that phantom traffic comprises up to 20 percent of all terminating traffic for many rural LECs.”); Kansas Commission Section XV Comments at 17; Letter from Michael D. Saperstein, Jr., Director of Federal Regulatory Affairs, Frontier Communications, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, WC Docket Nos. 07-135, 05-337, 04-36, CC Docket Nos. 99-68, 01-92 at 1 (filed Dec. 21, 2010); see also April 6, 2011 ICC Hearing Transcript at 44-45.

ultimately consumers—potentially hundreds of millions of dollars annually.<sup>1189</sup> In turn, carriers are diverting resources to investigate and pursue billing disputes, rather than use such resources for more productive purposes such as capital investment.<sup>1190</sup> This sort of gamesmanship distorts the intercarrier compensation system and chokes off revenue that carriers depend on to deliver broadband and other essential services to consumers, particularly in rural and difficult to serve areas of the country.

704. To address the problem, in the *USF/ICC Transformation NPRM*, we proposed to modify our call signaling rules to require originating service providers to provide signaling information that includes calling party number (“CPN”) for all voice traffic, regardless of jurisdiction, and to prohibit interconnecting carriers from stripping or altering that call signaling information. Based on the record developed in this proceeding, we now adopt our original proposal with the minor modifications described in further detail below. Service providers that originate interstate or intrastate traffic on the PSTN, or that originate inter- or intrastate interconnected VoIP traffic destined for the PSTN, will now be required to transmit the telephone number associated with the calling party to the next provider in the call path. Intermediate providers must pass calling party number or charge number signaling information they receive from other providers unaltered, to subsequent providers in the call path.<sup>1191</sup> These requirements will assist service providers in appropriately billing for calls traversing their networks.

705. By ensuring that the calling party telephone number information is provided and transmitted for all types of traffic originating or terminating on the PSTN, our revised rules will assist service providers in accurately identifying and billing for traffic terminating on their networks, and help to guard against further arbitrage practices. These measures will work in tandem with the Commission’s reforms adopted elsewhere in this Order, which, by minimizing intercarrier compensation rate differences, promise to eliminate the incentive for providers to engage in phantom traffic arbitrage.<sup>1192</sup> Together, these changes will benefit consumers by enabling providers to devote more resources to investment and innovation that would otherwise have been spent resolving billing disputes.

706. Below, we briefly review how service providers exchange necessary billing information and why the current regime of information exchange has proved inadequate to avoid the problems of phantom traffic. We explain how the rules we adopt present an effective, technologically neutral, and forward-looking solution to reduce litigation and disputes over unidentifiable traffic. Finally, we review several proposals received in the record related to our proposed rules.

## 1. Background

707. Service providers need to know certain information for each call to bill for and receive intercarrier payments for traffic that terminates on their networks. Specifically, to know what intercarrier compensation charges apply, a terminating provider must be able to identify the appropriate upstream service provider and the geographic location of the caller (or a proxy for the caller’s location). For calls directly connected between an originating service provider and a terminating service provider, this

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<sup>1189</sup> ITTA Section XV Comments at 4 (citing C. Goldfarb, “Phantom Traffic” – *Problems Billing for the Termination of Telephone Calls: Issues for Congress* 1 (Cong Res. Serv., June 27, 2008)).

<sup>1190</sup> See, e.g., CenturyLink Section XV Comments at 19; Louisiana Small Company Committee Section XV Comments at 11 (“Phantom traffic impacts carriers’ ability to invest in networks and services, and undermines their ability to ensure adequate facilities are in place to meet consumers’ evolving and expanding needs.”).

<sup>1191</sup> See *infra* App. A.

<sup>1192</sup> See Cincinnati Bell *August 3 PN* Comments at 10-11; Charter *August 3 PN* Reply at 6; VON Coalition *August 3 PN* Comments at 7.

information typically is apparent or easily obtained.<sup>1193</sup> However, for calls where the originating and terminating network are not directly connected (i.e., when calls are delivered via tandem transit service or interexchange carrier),<sup>1194</sup> accurate call information may not be available because there may be one or more interconnecting service providers that handle the call before delivering it to the terminating service provider. The terminating carrier may not receive accurate identifying information for a variety of reasons. For instance, signaling for the call may never have been populated with accurate information or the information may have been intentionally stripped.<sup>1195</sup>

708. As described in the *USF/ICC Transformation NPRM*, terminating service providers that are not directly connected to originating providers receive information about calls sent to their networks for termination from a variety of sources. First, terminating service providers may rely on information contained in the Signaling System 7 (SS7) signaling stream. SS7 is a separate or “out of band” network that runs parallel to the PSTN. Commission rules require carriers that use SS7 to convey the calling party number (CPN) to subsequent carriers on interstate calls where it is technically feasible to do so.<sup>1196</sup> Billing records from tandem switch operators are another source of information for terminating service providers about traffic on their networks.<sup>1197</sup> Notably, the CPN or Charge Number (CN) information used in billing records is derived from the SS7 signaling stream.<sup>1198</sup> Finally, service providers may also rely on identifying information contained in Internet protocol sessions or messages (e.g., Session Initiation Protocol (SIP) header fields) for VoIP calls.<sup>1199</sup>

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<sup>1193</sup> See PAETEC et al. Section XV Comments at 3.

<sup>1194</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4752-53, para. 622. Competitive LECs, CMRS carriers, and rural LECs, who would otherwise have no efficient means of connecting their networks, often rely upon transit service from incumbent LECs to facilitate indirect interconnection with each other. See *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 at 4740, para. 125 (2005).

<sup>1195</sup> See *infra* para. 709.

<sup>1196</sup> See 47 C.F.R. § 64.1601. As we described in the *USF/ICC Transformation NPRM*, the SS7 call signaling system is used to set up a pathway across the PSTN and the system performs the function of identifying a path a call can take after the caller dials the called party’s number. See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4751-52, para. 621. Although 47 C.F.R. § 64.1601 requires that the CPN be transmitted where technically feasible, the technical content and format of SS7 signaling is governed by industry standards rather than by Commission rules.

<sup>1197</sup> Billing records are typically created by a tandem switch that receives a call for delivery to a terminating network via tandem transit service. See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4752-53, para. 622 and n.950. Service providers delivering billing records typically use the Exchange Message Interface (EMI) format created and maintained by the Alliance for Telecommunications Industry Solutions Ordering and Billing Forum (ATIS/OBF), an industry standards setting group. See ATIS Exchange Message Interface 22 Revision 2, ATIS Document number 0406000-02200 (July 2005).

<sup>1198</sup> SS7 was designed to facilitate call routing and was not designed for billing purposes. See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4751-52, para. 621 (citing Letter from L. Charles Keller, Counsel for Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 2 (filed Sept. 13, 2005) (Verizon Wireless Sept. 13, 2005 *Ex Parte* Letter)).

<sup>1199</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4751-53, paras. 621-22; RFC 3261, SIP: Session Initiation Protocol (2002) at [www.ietf.org/rfc/rfc3261.txt](http://www.ietf.org/rfc/rfc3261.txt); Megaco Protocol Version 1.0 (2000) at <https://datatracker.ietf.org/doc/rfc3015/>.

709. The record in this proceeding confirms that numerous service providers have encountered difficulties with traffic arriving for termination with insufficient or inaccurate identifying information.<sup>1200</sup> The record suggests that gamesmanship with regard to calling party information is rife.<sup>1201</sup> Commenters describe a number of phantom traffic tactics used to avoid higher intercarrier charges including masking intrastate traffic to make it appear interstate or international in nature.<sup>1202</sup> One carrier alleges that a common phantom traffic scheme it faces involves carriers that disguise traffic by putting a telephone number into the CN field that is local to the terminating exchange to avoid higher intercarrier compensation rates.<sup>1203</sup>

## 2. Revised Call Signaling Rules

710. *Intrastate Traffic.* As described below, we expand the scope of our existing call signaling rules to encompass jurisdictionally intrastate traffic. The record reflects broad support for expanding our rules in this manner and no party opposed or questioned the Commission's legal authority to do so.<sup>1204</sup> The Commission has previously recognized, in exercising authority over intrastate call signaling for caller ID purposes, that "CPN-based services are 'jurisdictionally mixed services'" and that it would be "impractical and uneconomic" to require the development and implementation of systems that would permit separate federal and state call signaling rules to operate.<sup>1205</sup> We conclude that, as with call signaling in the caller ID context, it would be impractical to have separate federal and state rules regarding inclusion of CPN in signaling.<sup>1206</sup> And, we agree with comments in the record asserting that extension of the call signaling rules to intrastate traffic is "justified... because maintaining separate mechanisms for passing CPN is infeasible, and passing CPN is necessary to identify and thus facilitate federal regulation of interstate traffic."<sup>1207</sup>

<sup>1200</sup> See, e.g., USTelecom Section XV Comments at 4 ("Many carriers report that the amount of traffic being received by terminating carriers without calling party identifying information has continued to grow.").

<sup>1201</sup> For example, according to Frontier, an investigation found an "incredible amount of traffic from one telephone number" terminating to its network - an average of 43,378 minutes of interstate traffic a day. Frontier Section XV Comments at 11. According to Frontier, this number was being used to make the traffic appear to be interstate so as to mask the true intrastate nature of the calls to avoid paying intrastate access charges. *Id.*; see also USTelecom Section XV Comments at 4.

<sup>1202</sup> CenturyLink Section XV Comments at 19.

<sup>1203</sup> Windstream Section XV Comments at 16.

<sup>1204</sup> Numerous parties supported the proposal to expand the scope of the rule to encompass intrastate traffic. See, e.g., California Commission Section XV Comments at 6 ("And we agree that these new rules be extended, as the FCC proposes, 'to all traffic originating or terminating on the PSTN, including but not limited to, jurisdictionally intrastate traffic ...'"); Rural Associations Section XV Comments at 17, 25; TCA Section XV Comments at 6.

<sup>1205</sup> *Rules and Policies Regarding Calling Number Identification Service – Caller ID*, CC Docket No. 91-281, Memorandum Opinion and Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking, 10 FCC Rcd 11700, 11723, para. 62 (1995) (*Caller ID Order*).

<sup>1206</sup> In the caller ID context, the Commission found that it would be impractical to require the development and implementation of systems that would permit separate federal and state call signaling rules to operate because such systems would be burdensome, confusing to consumers, and would potentially slow down the call signaling process. See *id.* at 11724-27, paras. 65-74. In the present context of including CPN in signaling, we conclude that separate CPN inclusion requirements for interstate and intrastate traffic are impractical because a call's jurisdiction is typically not determined until after the call signaling process occurs.

<sup>1207</sup> AT&T Section XV Comments at 22 ("Extension of the current rules to intrastate calls is justified under these standards because maintaining separate mechanisms for passing CPN is infeasible, and passing CPN is necessary to (continued...)")

711. *Calling Party Number*. In the *USF/ICC Transformation NPRM*, we sought comment on extending our call signaling rules (which currently require certain common carriers using SS7 to transmit the CPN associated with an interstate call to interstate carriers<sup>1208</sup>) to all traffic originating or terminating on the PSTN, including but not limited to jurisdictionally intrastate traffic<sup>1209</sup> and traffic transmitted using Internet protocols.<sup>1210</sup> The record broadly supports this change to our rules either as proposed, or as a baseline for addressing phantom traffic problems.<sup>1211</sup> We expect that these rule modifications will help reduce regulatory gamesmanship.<sup>1212</sup>

712. *SS7 Charge Number (CN)*. The *USF/ICC Transformation NPRM* also proposed to apply call signaling rules to address CN where carriers use SS7 signaling.<sup>1213</sup> Generally, the CN field is not populated in the SS7 stream when it is the same as CPN.<sup>1214</sup> However, in cases where the CN is different from the CPN (e.g., where a business has a single charge number for multiple end user numbers), the CN parameter is populated and included in billing records in place of CPN.<sup>1215</sup> Consistent with industry practice, the *USF/ICC Transformation NPRM* proposed to clarify that populating the SS7 CN field with information other than the charge number to be billed for a call is prohibited.

713. Windstream maintains that “[i]t is critical that the Commission make clear that scheming carriers cannot disguise jurisdiction on billing records by failing to provide or manipulating the CN,” a practice it states is common.<sup>1216</sup> On the other hand, some parties object to any requirement to not alter the CN field.<sup>1217</sup> According to these parties, the proposed requirement is problematic because intermediate providers may not be able to pass the CN field in some instances,<sup>1218</sup> and the requirement would prevent

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identify and thus facilitate federal regulation of interstate traffic.”). Unlike the caller ID context, in which a California law permitting CPN blocking in certain circumstances was expressly preempted, (*See Caller ID Order*, 10 FCC Rcd at 11730, para. 85) we are not aware of any state laws that conflict with the call signaling rules we adopt. Accordingly, we do not preempt any state laws at this time. If, however, a state law conflicting with our revised call signaling rules were enacted, preemption analysis would be appropriate.

<sup>1208</sup> See 47 C.F.R. § 64.1601.

<sup>1209</sup> See *supra* note 1204.

<sup>1210</sup> See *infra* para. 717.

<sup>1211</sup> See, e.g., Missouri Commission Section XV Comments at 7; NASUCA and NJ Rate Counsel Section XV Reply at 8-9; XO Section XV Comments at 37.

<sup>1212</sup> As we stated in the *USF/ICC Transformation NPRM*, our proposed rules are not intended to affect existing agreements between service providers regarding how to jurisdictionalize traffic in the event that traditional call identifying parameters are missing, as long as such agreements are otherwise consistent with Commission rules and other legal requirements. See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4756, para. 632. Accordingly, we decline to adopt proposals to use calling party number or originating and terminating numbers as the basis for jurisdictionalizing calls. See, e.g., Rural Associations Section XV Comments at 27-29; Rural Associations Section XV Reply at 12; but see CTIA Section XV Comments at 9-10; NASUCA and NJ Rate Counsel Section XV Reply at 11.

<sup>1213</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4756, para. 631.

<sup>1214</sup> See *id.*

<sup>1215</sup> See Windstream Section XV Comments at 13.

<sup>1216</sup> *Id.* at 14.

<sup>1217</sup> See, e.g., PAETEC et al. Section XV Comments at 8-9; PAETEC et al. Section XV Reply at 6-7.

<sup>1218</sup> See Verizon Section XV Comments at 49 n. 69; HyperCube Section XV Reply at 12-13.



intermediate providers from modifying the CN for their own purposes.<sup>1219</sup>

714. We adopt the proposal contained in the *USF/ICC Transformation NPRM* to require that the CN be passed unaltered where it is different from the CPN. We believe that this requirement will be an adequate remedy to the problem of CN number substitution that disguises the characteristics of traffic to terminating service providers. Additionally, we note that the CN field may only be used to contain a calling party's charge number, and that it may not contain or be populated with a number associated with an intermediate switch, platform, or gateway, or other number that designates anything other than a calling party's charge number. We are not persuaded by objections to this requirement. First, unsupported objections that there may be "circumstances where a CN may be different from the CPN but cannot be easily transmitted" are unpersuasive without more specific evidence.<sup>1220</sup> Second, we note that the Commission addressed similar circumstances in the 2006 *Prepaid Calling Card Order*, and prohibited carriers that serve prepaid calling card providers from passing the telephone number associated with the platform in the charge number parameter.<sup>1221</sup> In this case, we agree with the analysis of the *Prepaid Calling Card Order* that "[b]ecause industry standards allow for the use of CN to populate carrier billing records ... passing the number of the [] platform in the parameters of the SS7 stream to carriers involved in terminating a call may lead to incorrect treatment of the call for billing purposes."<sup>1222</sup> In sum, the record demonstrates that CN substitution is a technique that leads to phantom traffic, and our proposed rules are a necessary and reasonable response.<sup>1223</sup>

715. *Multi-Frequency (MF) Automatic Number Identification (ANI)*. As noted in the *USF/ICC Transformation NPRM*, some service providers do not use SS7 signaling, but instead rely on Multi-Frequency (MF) signaling.<sup>1224</sup> The *USF/ICC Transformation NPRM* proposed that service providers using MF Signaling pass the CPN, or the CN if different, in the MF Automatic Number Identification (MF ANI) field.<sup>1225</sup>

716. We amend our rules to require service providers using MF signaling to pass the number of the calling party (or CN, if different) in the MF ANI field. This requirement will provide consistent treatment across signaling systems and will ensure that information identifying the calling party is included in call signaling information for all calls.<sup>1226</sup> Moreover, this requirement responds to the concerns expressed in the record that MF signaling can be used by "unscrupulous providers" to engage in phantom traffic practices.<sup>1227</sup> The previous record concerning the technical limitations of MF ANI

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<sup>1219</sup> PAETEC et al. Section XV Reply at 6-7.

<sup>1220</sup> Verizon Section XV Comments at 49 n.69.

<sup>1221</sup> *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, 7302-03, para. 34 (2006) (*Prepaid Calling Card Order*).

<sup>1222</sup> *See id.*

<sup>1223</sup> *See, e.g.,* Windstream Section XV Comments at 15-17.

<sup>1224</sup> Some providers also use IP signaling. *See infra* para. 717.

<sup>1225</sup> *See* Core Section XV Comments at 11 ("Identifying the calling party's number in the SS7 context, and the ANI and/or Caller ID in the MF signaling context, will certainly help carriers reduce and narrow call rating disputes."); *but see* AT&T Section XV Comments at 25.

<sup>1226</sup> As a result, we decline to adopt AT&T's suggestion that we broadly exempt MF signaling. *See* AT&T Section XV Comments at 25.

<sup>1227</sup> *See* XO Section XV Comments at 36-37.

appears to be mixed.<sup>1228</sup> In balancing the need for a rule that covers all traffic with the technical limitations asserted in the record, we conclude that the approach most consistent with our policy objective is not to exclude the entire category of MF traffic. Such a categorical exclusion could create a disincentive to invest in IP technologies and invite additional opportunities for arbitrage. Although our rules will apply to carriers that use or pass MF signaling, we do not mandate any specific method of compliance. Carriers will have flexibility to devise their own means to pass this information in their MF signaling. Nevertheless, to the extent that a party is unable to comply with our rule as a result of technical limitations related to MF signaling in its network, it can seek a waiver for good cause shown, pursuant to section 1.3 of the Commission's rules.<sup>1229</sup>

717. *IP Signaling.* Consistent with the proposal in the *USF/ICC Transformation NPRM*, the rules we adopt today also apply to interconnected VoIP traffic. Failure to include interconnected VoIP traffic in our signaling rules would create a large and growing loophole as the number of interconnected VoIP lines in service continues to grow.<sup>1230</sup> Many commenters supported application of the proposed requirements to VoIP traffic.<sup>1231</sup> Therefore, VoIP service providers will be required to transmit the telephone number of the calling party for all traffic destined for the PSTN that they originate. If they are intermediate providers in a call path, they must pass, unaltered, signaling information they receive indicating the telephone number, or billing number if different, of the calling party. Because IP transmission standards and practices are rapidly changing, we refrain from mandating a specific compliance method and instead leave to service providers using different IP technologies the flexibility to determine how best to comply with this requirement.

718. In extending our call signaling rules to interconnected VoIP service providers, we acknowledge that the Commission has not classified interconnected VoIP services as “telecommunications services” or “information services.” We need not resolve this issue here, for we would have authority to impose call signaling on interconnected VoIP providers even under an information service classification.<sup>1232</sup> This Order adopts intercarrier compensation requirements for the

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<sup>1228</sup> Compare AT&T Section XV Comments at 25 (“Multi Frequency signaling was not designed in many instances to forward originating CN or CPN data to a terminating carrier in the MF Automatic Number Identification (ANI) field. Rather, the MF ANI standards and technology were developed to provide IXCs with the data they need to bill end user customers that originate calls.”); Verizon 2008 ICC/USF NPRM Comments at 65 n.97 (“MF trunks are configured to signal ANI only on the originating end of a Feature Group D access call. . . . MF trunks do not signal ANI on non-access calls or on the terminating leg of an access call.”); with Participating Wyoming Rural Independents Missoula Plan Comments at 17 (an exception for MF signaling relating to non-Feature Group D traffic is unnecessary, because “[c]urrent technology and methods do exist to enable carriers to identify MF signaling protocol. Thus, to allow for an unnecessary exception would exacerbate phantom traffic problems”).

<sup>1229</sup> See *infra* para. 723; 47 C.F.R. § 1.3.

<sup>1230</sup> Total business and residential interconnected VoIP service connections have increased from 21.7 million in December 2008 to 31.7 million in December 2010. See Industry Analysis and Technology Division, Wireline Competition Bureau, *Local Telephone Competition Report: Status as of December 2010*, at 2 (Oct. 2011). See also e.g., Blooston Section XV Comments at 5; ITTA Section XV Comments at 3; CenturyLink Section XV Comments at 7.

<sup>1231</sup> Frontier Section XV Comments at 12 (“Failure to apply these rules equally to VoIP traffic would leave a gaping hole in the Commission’s rules for the fastest-growing segment of traffic”); see also Consolidated Section XV Comments at 34-36.

<sup>1232</sup> See 47 U.S.C. §§ 151, 152, 154(i); *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010) (quoting *Am. Library Ass’n v. FCC*, 406 F.3d 689, 691-692 (D.C. Cir. 2005)) (“The Commission ... may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission’s general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject; and (2) the regulations are reasonably ancillary to the (continued...)”).

exchange of VoIP-PSTN traffic between a LEC and another carrier.<sup>1233</sup> Applying our call signaling rules to interconnected VoIP service providers will enable service providers terminating interconnected VoIP traffic to receive signaling information that will help prevent this traffic from terminating without compensation,<sup>1234</sup> contrary to the prospective intercarrier compensation regime we adopt for that traffic under section 251(b)(5). In addition, under the intercarrier compensation reform framework we adopt today, traffic terminating without compensation could create a need for recovery that shifts costs created by phantom traffic to end-user rates or the Connect America Fund, undermining the transitional role for intercarrier compensation charges established as part of that framework. Our new call signaling rules are necessary to address these concerns.

### 3. Prohibition of Altering or Stripping Call Information

719. In the *USF/ICC Transformation NPRM*, we also sought comment on a proposed rule that would prohibit service providers from altering or stripping relevant call information. More specifically, we proposed to require all telecommunications providers and entities providing interconnected VoIP service to pass the calling party's telephone number (or, if different, the financially responsible party's number), unaltered, to subsequent carriers in the call path.<sup>1235</sup> Commenters overwhelmingly supported this proposal.<sup>1236</sup> We believe that a prohibition on stripping or altering information in the call signaling stream serves the public interest. The prohibition should help ensure that the signaling information required by our rules reaches terminating carriers. Therefore, we adopt our proposal to prohibit stripping or altering call signaling information with the modifications discussed below.

720. In response to comments in the record, we make several clarifying changes to the text of the proposed rules in this section. First, commenters objected to the use of the undefined term "financially responsible party" in the proposed rules.<sup>1237</sup> We agree with the concerns and clarify that providers are required to pass the billing number (e.g., CN in SS7) if different from the calling party's number. For similar reasons, for purposes of this rule, we add the following definition of the term "intermediate provider" to the rules: "any entity that carries or processes traffic that traverses or will traverse the PSTN at any point insofar as that entity neither originates nor terminates that traffic." We find that adding this definition will eliminate potential ambiguity in the revised rule.<sup>1238</sup> As provided in Appendix A, we also make modest adjustments to the rules proposed in the *USF/ICC Transformation*

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Commission's effective performance of its statutorily mandated responsibilities."). Additionally, as the Commission has previously found, section 706 provides authority applicable in this context. *See generally Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17968-72, paras. 117-23 (2010).

<sup>1233</sup> See *infra* Section XIV.

<sup>1234</sup> Carriers are generally prohibited from blocking calls. *See Establishing Just and Reasonable Rates for Local Exchange Carriers; Call Blocking by Carriers*, WC Docket No. 07-135, 22 FCC Rcd 11629 (2007) (*Call Blocking Declaratory Ruling*). Therefore, there may be situations where a carrier is forced to complete a call even though it is unable to bill for that call due to lack of identifying information in its signaling. *See* Core Section XV Reply at 2; *see also infra* para 973.

<sup>1235</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4793, App. B.

<sup>1236</sup> *See, e.g.*, ATA Section XV Comments at 4; Comcast Section XV Comments at 9; Leap Wireless and Cricket Section XV Comments at 8.

<sup>1237</sup> *See* AT&T Section XV Comments 25; Verizon Section XV Comments at 51.

<sup>1238</sup> *See, e.g.*, Verizon Section XV Comments at 50 (noting that the term "intermediate provider" was undefined).

*NPRM*. Specifically, we clarify that the obligation to pass signaling information applies to the telephone number or billing number,<sup>1239</sup> and we clarify that the revised rules apply to telecommunications carriers and providers of interconnected VoIP services. Finally, because, as discussed below, our waiver process is available to parties seeking exceptions to the revised rule, we remove the proposed rule language limiting applicability in relation to industry standards.<sup>1240</sup> With these minor changes, we adopt the proposed prohibition on stripping or altering information regarding the calling party number.

#### 4. Exceptions

721. The *USF/ICC Transformation NPRM* sought comment on whether phantom traffic rules should contain limited exceptions, including where it would not be technically feasible to comply with the obligation to transmit the calling party number with the network technology deployed or where industry standards would permit deviation from the duty to pass signaling information unaltered.<sup>1241</sup> Some parties suggested that the Commission should exercise caution before including any exceptions to its rules. For example, the Missouri Small Telephone Company Group stated that it “does not believe it is appropriate for an industry standard to trump a federal rule,” and as such “the entire exception [should] be deleted.”<sup>1242</sup> Similarly, parties recommended that the Commission eliminate or carefully enumerate the circumstances in which it would be acceptable to deviate from the requirement to pass signaling information unaltered. The Nebraska Rural Independent Companies expressed concern that the technical feasibility exception “leaves room for many providers to use the excuse of ‘transmission was not technically feasible’” and therefore posited that there should be “few to no circumstances that the proposed rules will not be followed.”<sup>1243</sup>

722. Meanwhile, other parties proposed that technical feasibility and industry standards exceptions be applied to both sections of the proposed signaling rules, §§ 64.1601(a) and (b).<sup>1244</sup> Commenters also suggested that the rules include an exception for all industry standards, whether published or not,<sup>1245</sup> and asked that the Commission clarify that the rules do not require the deployment of new equipment or otherwise add costs for compliance.<sup>1246</sup> Finally, parties asked the Commission to explicitly recognize certain exceptions to the proposed rules.<sup>1247</sup>

723. We agree with the concern expressed by some commenters that any exceptions would have the potential to undermine the rules.<sup>1248</sup> Moreover, we are concerned that disputes concerning the

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<sup>1239</sup> See, e.g., *id.* at 50 n. 71 (urging the Commission to delete references to “all” SS7 notation from the final rules).

<sup>1240</sup> See *infra* para. 723.

<sup>1241</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4793, App. B.

<sup>1242</sup> MoSTCG Section XV Comments at 10; see also NECA et al. Section XV Comments at 24.

<sup>1243</sup> Nebraska Rural Companies Section XV Comments at 25.

<sup>1244</sup> See Verizon Section XV Comments at 49; Level 3 Section XV Reply at 9-10; see also AT&T Section XV Comments at 24; Verizon Section XV Reply at 32.

<sup>1245</sup> See PAETEC et al. Section XV Comments at 4, 13; Earthlink Section XV Comments at 24.

<sup>1246</sup> See AT&T Section XV Comments at 24-25, Reply at 15; CTIA Section XV Comments at 9; Level 3 Section XV Reply at 9. However, some parties have indicated that the revised rules will not incrementally increase the costs to any carrier. See ITTA Section XV Comments at 21.

<sup>1247</sup> See, e.g., AT&T Section XV Comments at 24-25.

<sup>1248</sup> See MoSTCG Section XV Comments at 10; Nebraska Rural Companies Section XV Comments at 25; Rural Associations Section XV Comments at 22-24.

applicability of exceptions could arise and lead to costly disagreements or litigation. Accordingly, we decline to adopt any general exceptions to our new call signaling rules at this time. Parties seeking limited exceptions or relief in connection with the call signaling rules we adopt can avail themselves of established waiver procedures at the Commission. To that end, we delegate authority to the Wireline Competition Bureau to act upon requests for a waiver of the rules adopted herein in accordance with existing Commission rules.<sup>1249</sup>

## 5. Signaling / Billing Record Requirements

### a. Proposals

724. A number of parties commenting on the *USF/ICC Transformation NPRM*<sup>1250</sup> suggest that our signaling rules should address, in addition to CPN and CN information, other call signaling fields including Operating Company Number (OCN),<sup>1251</sup> Carrier Identification Code (CIC),<sup>1252</sup> Jurisdiction Information Parameter (JIP),<sup>1253</sup> and Local Routing Number (LRN).<sup>1254</sup> These parties propose additional

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<sup>1249</sup> 47 C.F.R. § 1.3.

<sup>1250</sup> See, e.g., Frontier Section XV Comments at 13; Rural Associations Section XV Comments at 22, 27, n. 64, Rural Associations Section XV Reply at 9-14; PAETEC et al. Section XV Comments at 4, 6-8, PAETEC et al. Section XV Reply at 3-5.

<sup>1251</sup> Operating Company Numbers (OCNs), also called company codes, are a four digit numerical code used to uniquely identify telecommunications service providers per industry standard ATIS-0300251, *Codes for Identification of Service Providers for Information Exchange*. NECA assigns all company codes. According to NECA, applications of OCNs include, but are not limited to NECA F.C.C. Tariff No. 4, Assignment of OCNs in the Local Exchange Routing Guide (LERG), Access Service Requests (ASRs), Multiple Exchange Carrier Access Billing (MECAB), Small Exchange Carrier Access Billing (SECAB), Exchange Message Interface (EMI), and Exchange Message Records (EMR). See [https://www.neca.org/cms400min/NECA\\_Templates/Code\\_Administration.aspx](https://www.neca.org/cms400min/NECA_Templates/Code_Administration.aspx) (last visited May 31, 2011). The Operating Company Number (OCN) is used in billing records to identify a local telecommunications provider. Billing records for calls completed without an IXC identify the originating carrier by an OCN. See Verizon, Verizon's Proposed Regulatory Action to Address Phantom Traffic at 4 (Verizon Phantom Traffic White Paper), attached to Letter from Donna Epps, Vice President, Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Dec. 20, 2005).

<sup>1252</sup> CICs (Carrier Identification Code) are a numeric code assigned by the North American Numbering Plan Administrator for the provisioning of selected switched services. The numeric code is unique to each entity and is used by the telephone company to route calls to the trunk group designated by the entity to which the code was assigned. See ATIS Telecom Glossary <http://www.atis.org/glossary/definition.aspx?id=6095> (last visited June 6, 2011). CIC is also defined in the Commission's rules as a code used in tandem switching that can be used to identify an interexchange provider. See 47 C.F.R. § 69.2(vv).

<sup>1253</sup> The Jurisdiction Information Parameter (JIP) is defined as an optional parameter in the SS7 Initial Address Message. In the number portability context, the JIP parameter is used to retain, in call signaling, the first six dialed digits of a telephone number that has been ported. See TRAVIS RUSSELL, SIGNALING SYSTEM #7 366, 643 (Table 8.35) McGraw-Hill Communications (Fifth Edition 2006); see also Frontier Section XV Comments at 13 (JIP "is the NPA-NXX that identifies the originating caller's geographic location and the originating caller's service provider."). The record in this proceeding also indicates that parties are making alternate use of the optional JIP parameter pursuant to agreements. See XO Section XV Comments at 33 ("pursuant to agreements already in place, some carriers are currently exchanging VoIP traffic via local interconnection trunks and populating the Jurisdictional Indicator Parameter ("JIP") field on the call record to designate the traffic as VoIP traffic").

signaling requirements that they assert will allow terminating carriers to identify the service provider financially responsible for each call, to jurisdictionalize traffic, and to bill the appropriate parties.<sup>1255</sup> Other parties oppose these proposals.<sup>1256</sup>

**b. Discussion**

725. After considering the substantial record received in response to the *USF/ICC Transformation NPRM*, we determine that limiting the scope of the rules we adopt to address phantom traffic to CPN and CN signaling is consistent with our goal of helping to ensure complete and accurate passing of call signaling information, while minimizing disruption to industry practices or existing carrier agreements.<sup>1257</sup> Our revised and expanded requirements with regard to CPN and CN will ensure that terminating carriers will receive, via SS7, MF, or IP signaling, information helpful in identifying carriers sending terminating traffic to their networks. This information, in combination with billing records provided to terminating carriers in accordance with industry standards, should significantly reduce the amount of unbillable traffic that terminating carriers receive.

726. As detailed above, several commenters advocate requirements for CIC or OCN to be included in billing records. However, neither our existing nor our proposed rules specify any billing record requirements. Accordingly, we decline, at this time, to disturb the industry billing record processes that have developed independently of Commission regulation.

727. Other commenters want to require CIC or OCN information to be passed in call signaling.<sup>1258</sup> These commenters do not, however, address certain complexities related to such a requirement, such as whether and how the signaling should be required in the SS7 stream, whether equivalent signaling should be required for IP traffic, and if so, what formats and protocols should be required.<sup>1259</sup> These complexities are, in our view, best resolved by industry standard setting bodies so that they can be informed by, and adapt to, changing technology.<sup>1260</sup> Accordingly, unlike calling party  
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<sup>1254</sup> The Local Routing Number (LRN) is a telephone number assigned in the local number portability database for the purposes of routing a call to a telephone number that has been ported. When a call is made to a number that has been ported, the routing path for the call is established based on the LRN rather than on the dialed number. See TRAVIS RUSSELL, *SIGNALING SYSTEM #7 640* McGraw-Hill Communications (Fifth Edition 2006).

<sup>1255</sup> Specifically, parties proposing CIC and OCN signaling requirements would like the Commission to mandate inclusion of CIC or OCN in providers' SS7 call signaling or in billing records, as appropriate. See GVNW Section XV Comments at 5-6; PAETEC et al. Section XV Comments at 6-7. Parties proposing JIP and LRN signaling requirements assert that such requirements would help solve phantom traffic problems. See, e.g., Frontier Section XV Comments at 13; Rural Associations Section XV Comments at 21-23.

<sup>1256</sup> See AT&T Section XV Reply at 18; Verizon Section XV Reply Comments at 33.

<sup>1257</sup> *USF/ICC Transformation NPRM*, 26 FCC Red at 4756, para. 632.

<sup>1258</sup> Blooston Section XV Comments at 10; Consolidated Section XV Comments at 37-38.

<sup>1259</sup> For example, as discussed above, commenters request that the Commission require providers to include CIC or OCN codes in signaling information and/or billing records. But, no commenter explains exactly how these proposals would be implemented, given that the CIC field is optional under the current SS7 industry standard. And, the proposals do not provide specific procedures by which IXCs involved in a call path would access the SS7 signaling stream to insert their OCN in the CIC field. Additionally, Sprint commented that if a terminating carrier subtenants a tandem, the tandem owner has the responsibility to pass the OCN and CIC to the terminating carrier. Sprint does not offer a legal basis to impose such an obligation on a tandem owner if it is providing transit service. See Sprint Section XV Comments at 26.

<sup>1260</sup> See ATIS Section XV Comments at 7.

number-based requirements, which have long been at the core of our signaling rules, we decline to include requirements for signaling CIC or OCN in our revised call signaling rules. If the reforms adopted herein prove inadequate to curb problems associated with phantom and unidentifiable traffic, we will revisit measures such as additional signaling mandates at a later date.

728. There is debate in the record about the technical feasibility of proposals relating to JIP. For example, the Nebraska Rural Independent Companies propose that wireless carriers be required to populate the JIP with a two digit state identifier and a two digit MTA code associated with the cell site along with the six-digit NPA-NXX of the originating switch.<sup>1261</sup> But, in reply comments, HyperCube noted that “the JIP can be populated only with the LRN 6-digit NPA-NXX code. There are only six spaces in the field, and therefore wireless carriers cannot be required to populate the field not only with the LRN of the originating switch but also with a two-digit state code and a two-digit MTA code associated with the originating cell site.”<sup>1262</sup> Additionally, wireless providers note that JIP does not, in some circumstances, provide accurate information about a call’s jurisdiction.<sup>1263</sup> The record pertaining to JIP lacks the specific factual information necessary to resolve conflicting information at this level of detail about the operation, and carrier usage of JIP. Furthermore, as with CIC and OCN signaling, complexities related to JIP signaling are, in our view, best resolved by industry standard setting bodies so that they can be informed by and adapt to changing technology.<sup>1264</sup> Finally, we are reluctant to mandate any particular use of the JIP field as doing so would preclude innovative use of the field for other purposes, such as identification of VoIP traffic, specified in agreements between carriers.<sup>1265</sup>

729. We also note that the OCN and JIP fields provide alternatives to CPN and CN as a means of identifying the originating carrier for a call. We are thus not convinced that signaling requirements related to OCN and JIP will lead to any additional incremental reductions in the phantom traffic problem over our revised rules related to CPN and CN.

### c. Enforcement

730. Commenters to the *USF/ICC Transformation NPRM* urged the Commission to consider a number of measures to ensure compliance with our new rules.<sup>1266</sup> As explained below, however, there is

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<sup>1261</sup> See Nebraska Rural Companies Section XV Comments at 23-24.

<sup>1262</sup> HyperCube Section XV Reply Comments at 13 n.39.

<sup>1263</sup> See, e.g., AT&T Reply at 19; T-Mobile Section XV Comments at 13.

<sup>1264</sup> Similar conflicting information is present in the record regarding the LRN and its applicability in the call signaling context as well. Several commenters propose requiring the LRN to be included in signaling or in billing records. See TDS Section XV Comments at 9; Texas Telephone Section XV Comments at 11-12. Other commenters note that the LRN is not an SS7 parameter and is used primarily for the limited purpose of routing calls to numbers that have been ported to providers other than the carrier to which the number was assigned. See AT&T Section XV Reply Comments at 19 n.51. The record before us does not contain sufficiently detailed information to resolve this discrepancy, and, as with other signaling proposals discussed above, we believe these issues are best resolved by industry standards setting bodies.

<sup>1265</sup> See XO Section XV Comments at 33.

<sup>1266</sup> See *infra* paras. 731-735. We note that some parties suggested that the Commission expand the scope of the Commission’s *T-Mobile Order* to allow all LECs to demand interconnection with all carriers. See *Developing a Unified Intercarrier Compensation Regime*; *T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855 (2005) (*T-Mobile Order*), *petitions for review pending*, *Ronan Tel. Co. et al. v. FCC*, No. 05-71995 (9th Cir. filed Apr. 8, 2005); see also ITTA Section XV Comments at 22-23; Rural Associations Section XV Comments at (continued...)

no persuasive evidence that existing enforcement mechanisms and complaint processes are inadequate.<sup>1267</sup> We therefore decline to adopt these enforcement proposals. Parties aggrieved by violations of our phantom traffic rules have a number of options, such as filing an informal or formal complaint.<sup>1268</sup> In addition, the Commission has broad authority to initiate proceedings on its own motion to investigate and enforce its phantom traffic rules.<sup>1269</sup>

731. Some commenters suggest that the Commission impose financial responsibility on the last carrier sending traffic with incomplete billing data.<sup>1270</sup> Under this proposal, the terminating carrier would be allowed to charge its highest rate to the service provider delivering the phantom traffic to it. 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 penalized.<sup>1271</sup>

732. We decline to adopt additional measures related to enforcement of our phantom traffic rules. Proposals to impose upstream liability or financial responsibility on carriers threaten to unfairly burden tandem transit and other intermediate providers with investigative obligations. Instead, we agree that the “responsibility – and liability – should lie with the party that failed to provide the necessary information, or that stripped the call-identifying information from the traffic before handing it off.”<sup>1272</sup> Moreover, the phantom traffic rules we adopt herein are not intended to ensnare providers that happen to receive incomplete signaling information.<sup>1273</sup> Imposing upstream liability on all carriers in a call path would be likely to generate confusion and result in the unintended consequence of yielding additional phantom traffic disputes.

733. Commenters also advocated for imposition of a “penalty rate” for unidentifiable traffic or treble damages for willful and repeated action, suggesting that this approach will provide “strong  
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30; USTelecom Section XV Comments at 5-6; Windstream Section XV Comments at 17-19. We address these issues in Sections XII.C.5 and XVII.N.

<sup>1267</sup> In response to suggestions that the Commission encourage use of the complaint process to combat phantom traffic, we reiterate that allegations of violations of our rules will be subject to the Commission’s existing enforcement and complaint mechanisms. See CenturyLink Section XV Comments at 22; ITTA Section XV Comments at 21-22; Time Warner Cable Section XV Comments at 13-14.

<sup>1268</sup> See 47 C.F.R. § 1.711. Parties can file an informal complaint by contacting the Enforcement Bureau, which will seek to facilitate a resolution to the issue. See 47 C.F.R. §§ 1.716-18. Additionally, parties can avail themselves of the Commission’s formal complaint process, if they were not satisfied with the outcome of their informal complaint. 47 U.S.C. § 208; 47 C.F.R. §§ 1.718, 1.720-36. Formal complaint proceedings are similar to court proceedings and are generally resolved on a written record. See 47 C.F.R. § 1.720. We note, under the Act, that section 208 complaints can only be brought against common carriers. See 47 U.S.C. § 208(a). Parties seeking relief against an interconnected VoIP provider for alleged violations of our signaling rules could seek relief against that interconnected VoIP provider’s partnering or affiliated LEC. If this proves to be insufficient, the Commission could reevaluate whether a different approach is appropriate.

<sup>1269</sup> See 47 U.S.C. §§ 403, 503.

<sup>1270</sup> See Rural Associations Section XV Comments at 26-27; XO Section XV Comments at 38; NASUCA and NJ Rate Counsel Section XV Reply at 11.

<sup>1271</sup> 2008 Order and ICC/USF FNPRM, 24 FCC Rcd at 6647-49 App. A, paras 336-42; *id.* at 6846-48 App. C, paras. 332-38.

<sup>1272</sup> Comcast Section XV Comments at 10.

<sup>1273</sup> AT&T Section XV Reply at 16; *see also* Level 3 Section XV Reply at 10; CenturyLink Section XV Reply at 20.



financial incentives to ensure compliance.”<sup>1274</sup> We note that commenters advocating for additional enforcement measures such as financial penalties provide no sufficient reason that the Commission’s existing enforcement mechanisms are inadequate to address any rule violations.<sup>1275</sup> We also note that a phantom traffic-specific penalty rate or other financial penalty provision would likely divert additional industry and Commission resources to disputes over the applicability and enforcement of the penalty rate. Based on the availability of the Commission’s existing enforcement mechanisms, we think it is unlikely that any benefits of an additional phantom-traffic specific enforcement mechanism will outweigh its costs. Therefore, we decline to adopt a “penalty rate” or other financial punishment in connection with phantom traffic.

734. Parties also proposed that the Commission allow selective call blocking, which would permit carriers in the call path to block traffic that is unidentified or for which parties refuse to accept financial responsibility.<sup>1276</sup> We decline to adopt any remedy that would condone, let alone expressly permit, call blocking.<sup>1277</sup> The Commission has a longstanding prohibition on call blocking.<sup>1278</sup> In the *2007 Call Blocking Order*, the Wireline Competition Bureau emphasized that “the ubiquity and reliability of the nation’s telecommunications network is of paramount importance to the explicit goals of the Communications Act of 1934, as amended” and that “Commission precedent provides that no carriers, including interexchange carriers, may block, choke, reduce or restrict traffic in any way.”<sup>1279</sup> We find no reason to depart from this conclusion. We continue to believe that call blocking has the potential to degrade the reliability of the nation’s telecommunications network.<sup>1280</sup> Further, as NASUCA highlights in its reply comments, call blocking ultimately harms the consumer, “whose only error may be relying on an originating carrier that does not fulfill its signaling duties.”<sup>1281</sup>

735. *Other Proposals.* Finally, parties proposed that the Commission should impose rules surrounding the proper look-up<sup>1282</sup> and routing for traffic.<sup>1283</sup> Because these proposals are unrelated to the Commission’s limited phantom traffic objectives related to signaling, and because we find little evidence

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<sup>1274</sup> GVNW Section XV Comments at 6; *see also* Frontier Section XV Comments at 12; WGA Section XV Comments at 5.

<sup>1275</sup> *See supra* note 1267. Although we decline to adopt any specific enforcement mechanism related to phantom traffic and continue to believe our existing enforcement mechanisms are adequate, we will monitor this issue and, if necessary, may determine that additional measures are appropriate.

<sup>1276</sup> *See, e.g.*, Frontier Section XV Reply at 9; Missouri Commission Section XV Comments at 9; RNK Communications Section XV Comments at 9.

<sup>1277</sup> We note that at least two states currently allow for blocking of intrastate traffic in certain circumstances. *See* Missouri Commission Section XV Comments at 9; Ohio Commission Section XV Comments at 11-12.

<sup>1278</sup> *See Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11629, 11631 paras. 1, 6; *see also Blocking Interstate Traffic in Iowa*, Memorandum Opinion and Order, 2 FCC Rcd 2692 (1987) (denying application for review of Bureau order, which required petitioners to interconnect their facilities with those of an interexchange carrier in order to permit the completion of interstate calls over certain facilities).

<sup>1279</sup> *Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11631, para. 6.

<sup>1280</sup> *Id.* at 11631, para. 5 (internal citation omitted).

<sup>1281</sup> NASUCA and NJ Rate Counsel Section XV Reply at 11.

<sup>1282</sup> *See, e.g.*, CenturyLink Section XV Comments at 24.

<sup>1283</sup> *See, e.g.*, Aventure Section XV Comments at 7-9; Rural Associations Section XV Comments at 29-30.

at this time of a need for additional Commission action, we decline to adopt these proposals.<sup>1284</sup> We believe the changes to the call signaling rules adopted in this Order provide a narrowly tailored and straightforward remedy to the problems of unidentifiable traffic.

## XII. COMPREHENSIVE INTERCARRIER COMPENSATION REFORM

736. Consistent with the National Broadband Plan's recommendation to phase out regulated per-minute intercarrier compensation charges,<sup>1285</sup> in this section we adopt bill-and-keep as the default methodology for all intercarrier compensation traffic. We believe setting an end state for all traffic will promote the transition to IP networks, provide a more predictable path for the industry and investors, and anchor the reform process that will ultimately free consumers from shouldering the hidden multi-billion dollar subsidies embedded in the current system.

737. Under bill-and-keep arrangements, a carrier generally looks to its end-users—which are the entities and individuals making the choice to subscribe to that network—rather than looking to other carriers and their customers to pay for the costs of its network. To the extent additional subsidies are necessary, such subsidies will come from the Connect America Fund, and/or state universal service funds. Wireless providers have long been operating pursuant to what are essentially bill-and-keep arrangements, and this framework has proven to be successful for that industry.<sup>1286</sup> Bill-and-keep arrangements are also akin to the model generally used to determine who bears the cost for the exchange of IP traffic, where providers bear the cost of getting their traffic to a mutually agreeable exchange point with other providers.

738. Bill-and-keep has significant policy advantages over other proposals in the record.<sup>1287</sup> A bill-and-keep methodology will ensure that consumers pay only for services that they choose and receive, eliminating the existing opaque implicit subsidy system under which consumers pay to support other carriers' network costs. This subsidy system shields subsidy recipients and their customers from price signals associated with network deployment choices. A bill-and-keep methodology also imposes fewer regulatory burdens and reduces arbitrage and competitive distortions inherent in the current system, eliminating carriers' ability to shift network costs to competitors and their customers.<sup>1288</sup> We have legal

<sup>1284</sup> See AT&T Section XV Reply at 15 n.39; XO Section XV Comments at 38-39.

<sup>1285</sup> See National Broadband Plan at 150 (Recommendation 8.14).

<sup>1286</sup> CMRS providers are prohibited from filing interstate access tariffs, *see* 47 C.F.R. § 20.15(c), but may collect access charges from an IXC if both parties agree pursuant to contract. *See Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, Declaratory Ruling, 17 FCC Rcd 13192, 13198, para. 12 (2002) (*Sprint/AT&T Declaratory Ruling*), *petitions for review dismissed*, *AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. Cir. 2003). Practically speaking, this means that CMRS providers generally do not collect access charges for calls that originate or terminate on their networks. CMRS providers are, however, able to receive reciprocal compensation for eligible traffic that terminates on their networks, although the record indicates that many of those arrangements are also bill-and-keep. *See, e.g.*, Letter from Tamara Preiss, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 07-135, at 6, 10 (filed June 28, 2010); CTIA *USF/ICC Transformation NPRM* Comments at 36 (explaining that bill-and-keep “is the model that has been successful in the wireless industry”); T-Mobile *USF/ICC Transformation NPRM* Comments at 24 (internal citations omitted) (detailing that “[w]ireless carriers essentially operate now under a bill-and-keep regime, and bill-and-keep, is in large part, the end point of this proposal”); *cf.* ABC Plan, Attach. 5 at 36-37 (commenting that the majority of intraMTA wireless traffic has been, and currently is, exchanged at rates at or below \$0.0007 per minute).

<sup>1287</sup> *See infra* Section XII.A.1.

<sup>1288</sup> *See generally*, Letter from Kathleen O'Brien Ham, VP, Federal Regulatory Affairs, T-Mobile, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 03-109; CC Docket Nos. 01-92, 96-46; GN Docket No. 09-51 (filed Oct. 20, 2011) (T-Mobile Oct. 20, 2011 *Ex Parte* Letter).

authority to adopt a bill-and-keep methodology as the end point for reform pursuant to our rulemaking authority to implement sections 251(b)(5) and 252(d)(2), in addition to authority under other provisions of the Act, including sections 201 and 332.<sup>1289</sup>

739. We also adopt in this section a gradual transition for terminating access, providing price cap carriers, and competitive LECs that benchmark to price cap carrier rates, six years and rate-of-return carriers, and competitive LECs that benchmark to rate-of-return carrier rates, nine years to reach the end state. We believe that initially focusing the bill-and-keep transition on terminating access rates will allow a more manageable process and will focus reform where some of the most pressing problems, such as access charge arbitrage, currently arise. Additionally, we believe that limiting reform to terminating access charges at this time minimizes the burden intercarrier compensation reform will place on consumers and will help manage the size of the access replacement mechanism adopted herein. We recognize, however, that we need to further evaluate the timing, transition, and possible need for a recovery mechanism for those rate elements—including originating access, common transport elements not reduced, and dedicated transport—that are not immediately transitioned; we address those elements in the FNPRM. The transition we adopt sets a default framework, leaving carriers free to enter into negotiated agreements that allow for different terms.<sup>1290</sup>

#### A. Bill-and-Keep as the End Point for Reform

740. In this section, we first explain the policy reasons for adopting a bill-and-keep methodology. We then explain our legal authority to comprehensively reform intercarrier compensation and adopt a bill-and-keep methodology as the end state for all traffic. Finally, we explain why, on balance, a national, uniform framework best advances our goals and how states will have a critical role in implementing this national framework.

#### 1. Bill-and-Keep Best Advances the Goals of Reform

741. We adopt a bill-and-keep methodology as a default framework and end state for all intercarrier compensation traffic. We find that a bill-and-keep framework for intercarrier compensation best advances the Commission’s policy goals and the public interest, driving greater efficiency in the operation of telecommunications networks<sup>1291</sup> and promoting the deployment of IP-based networks.<sup>1292</sup>

742. *Bill-and-Keep Is Market-Based and Less Burdensome than the Proposed Alternatives.* Bill-and-keep brings market discipline to intercarrier compensation because it ensures that the customer

<sup>1289</sup> See *infra* Section XII.A.2.

<sup>1290</sup> We agree with commenters that “[c]arriers should be free to negotiate commercial agreements that may depart from the default regime.” Verizon *USF/ICC Transformation NPRM* Comments at 7.

<sup>1291</sup> See National Broadband Plan at 142. See also T-Mobile *USF/ICC Transformation NPRM* Comments at 17 (explaining that “LEC requirements that packet-based traffic be converted into TDM further deprive consumers of the full benefits that packet-based technologies can offer. This arrangement also stifles investment. . . .”); Global Crossing *USF/ICC Transformation NPRM* Comments at 7 (stating that “Global Crossing has previously noted that it spends approximately 2,290 man-hours per month managing the intercarrier compensation regime, which accounts for time required to address disputes, bill reconciliation, contract negotiation, routing, and other tasks.”).

<sup>1292</sup> See AT&T *USF/ICC Transformation NPRM* Reply at 3; see also CTIA *USF/ICC Transformation NPRM* Comments at 36; Google *USF/ICC Transformation NPRM* Comments at 9; Sprint *USF/ICC Transformation NPRM* Comments, App. B at 4. See also Letter from Stuart Polikoff, VP – Regulatory Policy and Business Development, OPASTCO to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, WC Docket Nos. 05-337 and 06-122, CC Docket Nos. 96-45 and 01-92, at 2 (filed Oct. 28, 2009) (urging that “[a]ll intercarrier compensation (ICC) rates transition down to zero over seven years”).

who chooses a network pays the network for the services the subscriber receives.<sup>1293</sup> Specifically, a bill-and-keep methodology requires carriers to recover the cost of their network through end-user charges,<sup>1294</sup> which are potentially subject to competition. Under the existing approach, carriers recover the cost of their network from competing carriers through intercarrier charges, which may not be subject to competitive discipline. Thus, bill-and-keep gives carriers appropriate incentives to serve their customers efficiently.<sup>1295</sup>

743. Bill-and-keep is also less burdensome than approaches that would require the Commission and/or state regulators to set a uniform positive intercarrier compensation rate, such as \$0.0007. In particular, bill-and-keep reduces the significant regulatory costs and uncertainty associated with choosing such a rate, which would require complicated, time consuming regulatory proceedings, based on factors such as demand elasticities for subscription and usage as well as the nature and extent of competition.<sup>1296</sup> As the Commission has recognized with respect to the existing reciprocal compensation rate methodology, “[s]tate pricing proceedings under the TELRIC [Total Element Long Run Incremental Cost] regime have been extremely complicated and often last for two or three years at a time. . . . The drain on resources for the state commissions and interested parties can be tremendous.”<sup>1297</sup> Indeed, the cost of implementing such a framework potentially could outweigh the resulting intercarrier compensation revenues for many carriers.<sup>1298</sup> Moreover, in setting any new intercarrier rate, it would be necessary to rely on information from carriers who would have incentives to maximize their own revenues, rather than ensure socially optimal intercarrier compensation charges.<sup>1299</sup> Thus, the costs of

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<sup>1293</sup> See *infra* paras. 744-45, 749, 775.

<sup>1294</sup> In certain areas, we recognize that, in addition to end user charges, explicit universal service support may also be appropriate. See generally Section XIII.

<sup>1295</sup> See, e.g., Patrick DeGraba, *Central Office Bill and Keep as a Unified Inter-carrier Compensation Regime*, 19 Yale Journal of Regulation 37 (2002) (DeGraba); AT&T *USF/ICC Transformation NPRM* Reply at 23.

<sup>1296</sup> See, e.g., Body of European Regulators for Electronic Communications, *BEREC Common Statement on Next Generation Networks Future Charging Mechanisms/Long Term Termination Issues*, June 2010, [http://erg.eu.int/doc/berec/bor\\_10\\_24\\_ngn.pdf](http://erg.eu.int/doc/berec/bor_10_24_ngn.pdf), at 24-26, 51 (BEREC Common Statement); see also DeGraba at 26-27; *Inter-carrier Compensation FNPRM*, 20 FCC Rcd at 4790-92, App. C (“In practice, however, regulators rarely have sufficient information or sufficient resources to establish rates that accurately reflect the cost of providing service. . . . Furthermore, as new technologies and network architectures develop, the challenges associated with setting cost-based rates will only increase.”).

<sup>1297</sup> *Review of the Commission’s Rules Regarding the Pricing of Unbundled Network Elements and Resale of Service by Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, 18 FCC Rcd 18945 at 18948-49, para. 6 (2003). See also, e.g., Pennsylvania Commission 2008 *Order and ICC/USF FNPRM* Comments at 24 (describing the possible adoption of a new incremental cost pricing methodology as imposing an “obligation upon the states to carry out a new series of very complex and expensive proceedings in order to derive cost-based rates”); Verizon 2008 *Order and ICC/USF FNPRM* Comments at 47-48 (discussing the burdens associated with the regulatory process of setting reciprocal compensation rates under a new methodology).

<sup>1298</sup> See, e.g., Virginia Commission August 3 *PN* Comments at 6; Vermont Commission *USF/ICC Transformation NPRM* Reply at 6; TCA 2008 *Order and ICC/USF FNPRM* Comments at 10; Nebraska PSC 2008 *Order and ICC/USF FNPRM* Comments at 7; Leap Wireless 2008 *Order and ICC/USF FNPRM* Comments at 10-11.

<sup>1299</sup> See, e.g., BEREC Common Statement at 24; DeGraba at 26-27.

choosing a new positive intercarrier compensation rate would be significant, and a reasonable outcome would be highly uncertain.<sup>1300</sup>

744. *Bill-and-Keep Is Consistent with Cost Causation Principles.* As the *USF/ICC Transformation NPRM* observed, “[u]nderlying historical pricing policies for termination of traffic was the assumption that the calling party was the sole beneficiary and sole cost-causer of a call.”<sup>1301</sup> However, as one regulatory group has observed, if the called party did not benefit from incoming calls, “users would either turn off their phone or not pick up calls.”<sup>1302</sup> This is particularly true given the prevalence of caller ID, the availability of the national do-not-call registry, and the option of having unlisted telephone numbers.<sup>1303</sup> More recent analyses have recognized that both parties generally benefit from participating in a call, and therefore, that both parties should split the cost of the call. That line of economic research finds that the most efficient termination charge is less than incremental cost, and could be negative.<sup>1304</sup>

<sup>1300</sup> See, e.g., *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Global Networks Inc., for Authorization to Provide In-Region, Interlata Services in Massachusetts*, CC Docket No. 01-9, 16 FCC Rcd 8988 (2001).

<sup>1301</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4716, para. 525.

<sup>1302</sup> BEREK Common Statement at 28.

<sup>1303</sup> See, e.g., *AT&T USF/ICC Transformation NPRM Comments* at 15 & n.22.

<sup>1304</sup> See Benjamin E. Hermalin and Michael L. Katz, *Network Interconnection with Two-Sided User Benefits*, Walter A. Haas School of Business, University of California, Berkeley (2001); see also DeGraba at 37-84; Doh-Shin Jeon, Jean-Jacques Laffont and Jean Tirole, *On the “Receiver Pays” Principle*, 35 RAND J. OF ECON., 85 (2004). See generally, Wilko Bolt and Alexander F. Tieman, *Social Welfare and Cost Recovery in Two-Sided Markets*, IMF Working Paper, at 103–117, [www.imf.org/external/pubs/ft/wp/2005/wp05194.pdf](http://www.imf.org/external/pubs/ft/wp/2005/wp05194.pdf) (2005); E. Glen Weyl, *A Price Theory of Multi-Sided Platforms*, 100 AM. ECON. REV., 1642 (2010); Alexander White, and E. Glen Weyl, *Imperfect Platform Competition: A General Framework*, [http://alex-white.net/Home/Research\\_files/WWIPC.pdf](http://alex-white.net/Home/Research_files/WWIPC.pdf) (2011). See also, e.g., *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4716, para. 525 (citing relevant sources); *Inter-carrier Compensation FNPRM*, 20 FCC Rcd at 4782-86, App. C. See also *ISP Remand Order*, 16 FCC Rcd at 9183-85, paras. 71-74; CTIA *USF/ICC Transformation NPRM Comments* at 36 (Bill-and-keep “is also perfectly consistent with the realities of the modern telecommunications network and cost-causation principles. Both the calling and called parties benefit from participating in the call, and a bill-and-keep regime fairly apportions costs premised on that reality – a point the Commission has recognized for a decade.”) (internal citations omitted).

Earlier models of interconnection pricing assumed that the calling party was both the cost causer and the sole beneficiary of the call. See, e.g., Jean-Jacques Laffont, Patrick Rey, and Jean Tirole, *Network Competition I: Overview and Non-Discriminatory Pricing*, 29 RAND J. OF ECON., 1 (1998); Jean-Jacques Laffont, Patrick Rey, and Jean Tirole, *Network Competition II: Price Discrimination*, 29 RAND J. OF ECON., 38 (1998); Mark Armstrong, *Network Interconnection in Telecommunications*, 108 THE ECON. J., 545 (1998). Even in this stylized setting a number of results were found that implied that above cost termination charges were inefficient. For example, network providers can tacitly collude through access charges to set monopolistic retail prices, and worse, network providers acting competitively may raise termination charges beyond the monopoly level, harming consumers and themselves. See, e.g., Michael Carter and Julian Wright, *Interconnection in Network Industries*, 14 REV. OF INDUS. ORG., 1 (1999); see also Julian Wright, *Access Pricing Under Competition: An Application to Cellular Networks*, 50 J. OF INDUS. ECON., 289 (2002); see also Mark Armstrong, *The Theory of Access Pricing and Interconnection*, 1 HANDBOOK OF TELECOMM. ECON., 295 (Cave M. et al., eds. 2002).

In some cases, unregulated networks also wish to mark usage prices up over their incremental costs. See, e.g., Wouter Dessein, *Network Competition in Nonlinear Pricing*, 34 RAND J. OF ECON., 593 (2003); Wouter Dessein, *Network Competition with Heterogeneous Customers and Calling Patterns*, 16 INFO. ECON. AND POLICY, 323 (2004); David Harbord & Marco Pagnozzi, *Network-Based Price Discrimination and “Bill-and-Keep” vs. “Cost-* (continued...)

745. Moreover, the subscription decisions of the called party play a significant role in determining the cost of terminating calls to that party.<sup>1305</sup> A consequent effect of the existing intercarrier compensation regime is that it allows carriers to shift recovery of the costs of their local networks to other providers because subscribers do not have accurate pricing signals to allow them to identify lower-cost or more efficient providers.<sup>1306</sup> By contrast, a bill-and-keep framework helps reveal the true cost of the network to potential subscribers by limiting carriers' ability to recover their own costs from other carriers and their customers,<sup>1307</sup> even as we retain beneficial policies regarding interconnection, call blocking, and geographic rate averaging.<sup>1308</sup>

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*Based*” *Regulation of Mobile Termination Rates*, 10 REV. OF NETWORK ECON. (2010). This means that so long as overall costs can be recovered through other charges, such as a fixed fee, the efficient termination charge is less than the carrier's incremental cost (so that retail prices, after markups, reflect underlying resource costs). *See, e.g.*, Jean-Jacques Laffont & Jean Tirole, *COMPETITION IN TELECOMM.*, Section 2.5 (2000). Similarly, in an analysis of dynamic investment incentives, it was shown that access charges (both origination and termination) should be set below incremental cost. *See* Carlo Cambini and Tommaso Valletti, *Investments and Network Competition*, 36 RAND J. OF ECON., 446 (2005); *see also* Carlo Cambini and Tommaso Valletti, *Network Competition with Price Discrimination: ‘Bill and Keep’ Is Not So Bad After All*, 81 ECON. LETTERS 205 (2003).

<sup>1305</sup> It is the called party that chooses the carrier that will be used for originating calls from, and terminating calls to, that user.

<sup>1306</sup> This was made possible by virtue of the interrelationship of the tariffed access charge regime, mandatory interconnection and policies against blocking or refusing to deliver traffic and statutory requirements for nationwide averaging of long distance rates. *See, e.g.*, *CLEC Access Reform Order*, 16 FCC Rcd at 9935–36, para. 31; *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262 and 94-1, Sixth Report and Order, *Low-Volume Long-Distance Users*, CC Docket No. 99-249, Report and Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Eleventh Report and Order, 15 FCC Rcd 12962 (*CALLS Order*), *aff’d in part, rev’d in part, and remanded in part*, *Texas Office of Public Util. Counsel et al. v. FCC*, 265 F.3d 313 (5th Cir. 2001) (subsequent history omitted).

<sup>1307</sup> *Inter-carrier Compensation FNPRM*, 20 FCC Rcd at 4787-88, App. C. Bill-and-keep “rewards efficient carriers and punishes inefficient ones by forcing carriers to incorporate their costs into their own retail rates – which, unlike regulated intercarrier compensation, are subject to competition.” *AT&T USF/ICC Transformation NPRM Reply* at 23.

<sup>1308</sup> Under geographic rate averaging, long-distance providers are precluded from charging customers of an interstate service in one state a rate different from that in another state. *See* 47 U.S.C. § 254(g).

We therefore reject the contentions of some parties that the cost of completing calls to their customers from other providers' networks are being imposed on them by the customers of those other networks. *See, e.g.*, NASUCA *USF/ICC Transformation NPRM Reply* at 125; PAETEC et al. *USF/ICC Transformation NPRM Reply* at 27. To the extent that these commenters in reality are contending that both calling and called parties benefit from a call, but not to an equal degree in all cases, they have not provided evidence demonstrating the relative benefit to each party, how that should be factored in to any intercarrier compensation payment owed, nor how the benefits arising from such an approach outweigh the regulatory costs associated with its implementation. *See, e.g.*, Core *USF/ICC Transformation NPRM Comments* at 13-14; State Members *USF/ICC Transformation NPRM Comments* at 152. Some carriers contending that the calling party is the cost causer have acknowledged that, even in the face of non-payment of intercarrier compensation, “it may be self-defeating to ‘turn off’ a large IXC and leave one’s own customers unable to place or receive calls carried via that long distance provider.” Rural Associations Section XV Comments at 37 (emphasis added).

746. We reject claims that bill-and-keep does not allow for sufficient cost recovery.<sup>1309</sup> In the past, parties have argued that a bill-and-keep approach somehow results in “free” termination.<sup>1310</sup> But bill-and-keep merely shifts the responsibility for recovery from other carrier’s customers to the customers that chose to purchase service from that network plus explicit universal service support where necessary.<sup>1311</sup> Such an approach provides better incentives for carriers to operate efficiently by better reflecting those efficiencies (or inefficiencies) in pricing signals to end-user customers.<sup>1312</sup>

747. To the extent carriers in costly-to-serve areas are unable to recover their costs from their end users while maintaining service and rates that are reasonably comparable to those in urban areas, universal service support, rather than intercarrier compensation should make up the difference. In this respect, bill-and-keep helps fulfill the direction from Congress in the 1996 Act that the Commission should make support explicit rather than implicit.<sup>1313</sup>

748. *Consumer Benefits of Bill-and-Keep.* Economic theory suggests that carriers will reduce consumers’ effective price of calling, through reduced charges and/or improved service quality. We predict that reduced quality-adjusted prices will lead to substantial savings on calls made, and to increased calling. Economic theory suggests that quality-adjusted prices will be reduced regardless of the extent of competition in any given market,<sup>1314</sup> but will be reduced most where competition is strongest.<sup>1315</sup> These price reductions will be most significant among carriers who, by and large, incur but do not collect termination charges, notably CMRS and long-distance carriers. The potential for benefits to wireless customers is particularly important, as today there are approximately 300 million wireless devices, compared to approximately 117 million fixed lines, in the United States.<sup>1316</sup> Lower termination charges for wireless carriers could allow lower prepaid calling charges and larger bundles of free calls for the

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<sup>1309</sup> The Commission has cited evidence suggesting that the forward-looking incremental cost of terminating traffic was extremely low, and very near \$0—certainly much lower than current switched access charges, and even many reciprocal compensation rates. *See, e.g., 2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6610-12, 6613-14 App. A, paras. 254-57, 260-61; *id.* at 6808-10, 6811-12, App. C at paras. 249-52, 255-56. *See also* BERC Common Statement at 48, 51; Letter from Gary M. Epstein and Richard R. Cameron, Counsel for ICF, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, at Attach. 3, p. 3 (filed Aug. 17, 2004). *But see* CenturyLink *USF/ICC Transformation NPRM* Comments at 62 (noting possible proliferation of arbitrage if there is inadequate cost recovery).

<sup>1310</sup> *See, e.g.,* Core Section XV Reply at 15; Louisiana Small Company Committee Section XV Comments at 9; KMC Telecom and Xspedia *Inter-carrier Compensation FNPRM* Reply at 2.

<sup>1311</sup> *See, e.g.,* AT&T *USF/ICC Transformation NPRM* Reply at 23 (explaining that bill-and-keep would not limit the amount of recovery but merely the source of that recovery) (emphasis in original).

<sup>1312</sup> *Id.* at 23-24. *See also supra* paras. 742-743.

<sup>1313</sup> *See, e.g.,* VON Coalition *August 3 PN* Comments at 6-7; Vonage Section XV Reply at iii, 12.

<sup>1314</sup> *See, e.g.,* J. Bulow and P. Pfleiderer, *A Note on the Effect of Cost Changes on Prices*, J. OF POLITICAL ECON., 91 (1983).

<sup>1315</sup> *See id.*; *see also*, J. Hausman and G. Leonard, *Efficiencies from the Consumer Viewpoint*, 7 GEO. MASON LAW REVIEW, 707 (1999).

<sup>1316</sup> *See* CTIA, “U.S. Wireless Quick Facts,” <http://www.ctia.org/advocacy/research/index.cfm/aid/10323>; *see also* FCC, Wireline Competition Bureau, *Local Telephone Competition Status as of Dec. 31, 2010*, [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2011/db1007/DOC-310264A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1007/DOC-310264A1.pdf).

same monthly price.<sup>1317</sup> For example, carriers presently offer free “in-network” wireless calls at least in part because they do not have to pay to terminate calls on their own network. Lower termination charges could also enable more investment in wireless networks, resulting in higher quality service—e.g., fewer dropped calls and higher quality calls—as well as accelerated deployment of 4G service.<sup>1318</sup> Similarly, IXC, calling card providers, and VoIP providers will be able to offer cheaper long-distance rates and unlimited minutes at a lower price.

749. Moreover, as carriers face intercarrier compensation charges that more accurately reflect the incremental cost of making a call, consumers will see at least three mutually reinforcing types of benefits. First, carriers operations will become more efficient as they are able to better allocate resources for delivering and marketing existing communications services. Specifically, as described below, bill-and-keep will over time eliminate wasteful arbitrage schemes and other behaviors designed to take advantage of or avoid above-cost interconnection rates, as well as reduce ongoing call monitoring, intercarrier billing disputes, and contract enforcement efforts. Second, carrier decisions to invest in, develop, and market communications services will increasingly be based on efficient price signals.<sup>1319</sup>

750. Third, and perhaps most importantly, we expect carriers will engage in substantial innovation to attract and retain consumers. New services that are presently offered on a limited basis will be expanded, and innovative services and complementary products will be developed. For example, with the substantial elimination of termination charges under a bill-and-keep methodology, a wide range of IP-calling services are likely to be developed and extended,<sup>1320</sup> a process that may ultimately result in the sale of broadband services that incorporate voice at a zero or nominal charge. All these changes will bring substantial benefits to consumers.

751. The impact of the Commission’s last substantial intercarrier compensation reform supports our view that consumers will benefit significantly from today’s reforms. In 2000, the *CALLS Order* reduced interstate access charges.<sup>1321</sup> At the same time, in ways similar to the present reforms, we imposed modest increases in the fixed charges faced by end users.<sup>1322</sup> In the *CALLS Order*, the Commission forecasted that reduced interstate access rates would bring a range of efficiency benefits.<sup>1323</sup> Although some of these forecasts were met with initial skepticism,<sup>1324</sup> end-users in fact realized benefits

<sup>1317</sup> Previous ICC reforms have translated into wireless consumer rate reductions and an increase in service offerings; we anticipate a similar outcome as a result of the reform adopted herein. See, e.g., Letter from Scott K. Bergmann, Assistant Vice President, Regulatory Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 09-51, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45 at 5 (filed Sept. 29, 2011).

<sup>1318</sup> See Letter from Charles McKee, VP, Federal and State Regulatory, Sprint, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket No. 01-92, 96-45, Attach. at 1 (filed Oct. 3, 2011) (“Sprint will be able to invest such expense savings in enhancing its network and expanding its provision of wireless broadband services, while continuing to provide consumers with industry-leading pricing.”).

<sup>1319</sup> See, e.g. Steven Landsburg (2011), *Price Theory and Applications*, South-Western Publishers, p. 36.

<sup>1320</sup> For example, bill-and-keep could allow substantial extension and development of services such as GoogleVoice and Skype.

<sup>1321</sup> See *CALLS Order*, 15 FCC Rcd 12962, 12975-76 para. 30.

<sup>1322</sup> See *id.*

<sup>1323</sup> See generally, *CALLS Order*, 15 FCC Rcd 12962-74, paras. 1-28.

<sup>1324</sup> NJ Division of the Ratepayer Advocate *CALLS NPRM* Comments at 8-9 (“Under this proposal, residential customers would see a cost increase of \$50 million per month if this proposal is adopted. This cost would increase (continued...)”).



that exceeded most expectations. In particular, the *CALLS Order* resulted in substantial decreases in calling prices, but in largely unexpected ways. As a result of the *CALLS Order*, retail toll charges fell sharply, bringing average customer expenditures per minute of interstate toll calling down 18 percent during the year 2000.<sup>1325</sup> However, rather than merely reducing per-minute rates, wireless carriers started offering a new form of pricing, a fixed fee for a “bucket” of minutes, and ended distance-based pricing. As a result of these price declines, the gains in consumer surplus for wireless users in the United States from the *CALLS Order* were estimated to be about \$115 billion per year.<sup>1326</sup> Competitive pressure from wireless providers brought similar changes to fixed line carriers, who began offering unlimited domestic calls. These price declines and innovations also had important indirect effects, allowing end-users to fundamentally change the way they used telephony services. For example, lower calling charges enabled a substantial and ongoing shift from landlines to wireless. In short, the Commission’s prior intercarrier compensation reform led to more convenient access to telecommunication services and substantially lower costs for long-distance calls.

752. *Bill-and-Keep Eliminates Arbitrage and Marketplace Distortions.* Bill-and-keep will address arbitrage and marketplace distortions arising from the current intercarrier compensation regimes, and therefore will promote competition in the telecommunications marketplace. Intercarrier compensation rates above incremental cost have enabled much of the arbitrage that occurs today,<sup>1327</sup> and to the extent that such rates apply differently across providers, have led to significant marketplace distortions. Rates today are determined by looking at the average cost of the entire network, whereas a bill-and-keep approach better reflects the incremental cost of termination,<sup>1328</sup> reducing arbitrage incentives. For example, based on a hypothetical calculation of the cost of voice service on a next generation network providing a full range of voice, video, and data services, one study estimated that the incremental cost of delivering an average customer’s total volume of voice service could be as low as \$0.000256 per month; on a per minute basis, this incremental cost would translate to a cost of \$0.0000001 per minute.<sup>1329</sup> Moreover, non-voice traffic on next generation networks (NGNs) is growing much more

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to \$200 million per month if the SLC charge reaches the cap of \$7.00 per month. In the short term, there is a huge monthly cost increase to consumers and over the long term, there could be a \$2.4 billion dollar increase on an annualized basis to consumers.”). See NASUCA *CALLS NPRM* Comments at 7-15 (predicting that the *CALLS* proposal will negatively affect consumers by increasing the rates paid, reducing consumer confidence and negatively impacting low income and low volume end users).

<sup>1325</sup> See Federal Communications Commission/WCB (2008), *Reference Book on Rates, Price Indices, and Household Expenditures for Telephone Service*, Table 1.15, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-284934A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284934A1.pdf). For three years, 1997-1999, average customer expenditures per minute of interstate toll calls held constant at \$0.11 per minute. In 2000, average customer expenditures per minute of interstate toll calls fell 18 percent to \$0.09 cents per minute. However, this likely understates the full decline in reduction as a result of the Commission’s reforms because the access charge reduction occurred in July of 2000. In 2001, the average rate fell to \$0.08, or 27 percent from the \$0.11 starting point. Rates fell again in 2002, to \$0.07 cents per minute, and again in 2003 to \$0.06 cents. See *id.*

<sup>1326</sup> See ABC Plan, at Attach. 4, para. 11.

<sup>1327</sup> See *supra* paras. 662-666. We therefore reject claims that arbitrage arises solely because of *differences* in rates among jurisdictions of traffic or otherwise regardless of the absolute rate level. See, e.g., CRUSIR *USF/ICC Transformation NPRM* Comments at 11-12; Rural Carriers - State *USF/ICC Transformation NPRM* Comments at 2-3; ITTA *USF/ICC Transformation NPRM* Comments at 39-40.

<sup>1328</sup> See *supra* note 1304. See, e.g., 2008 *Order and USF/ICC FNPRM*, 24 FCC Rcd at 6610-14 paras. 253-61

<sup>1329</sup> See Letter from Henry Hultquist, Vice President – Federal Regulatory, AT&T Services, Inc. to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 01-92; WC Docket Nos. 99-68, 05-337, 07-135, at 4 (filed Oct. 13, 2008) (incremental cost of a softswitch is between 0.0010 and 0.00024).

rapidly than voice traffic, and under any reasonable methods of cost allocation, the share of voice cost to total cost will continue to be small in an NGN.<sup>1330</sup> Record evidence indicates that the incremental cost of termination for circuit-switched networks is likewise extremely small.<sup>1331</sup>

753. Our conclusion that the incremental cost of call termination is very nearly zero, coupled with the difficulty of appropriately setting an efficient, positive intercarrier compensation charge, further supports our adoption of bill-and-keep.<sup>1332</sup> Exact identification of efficient termination charges would be extremely complex, and considering the costs of metering, billing, and contract enforcement that come with a non-zero termination charge, we find that the benefits obtained from imposing even a very careful estimate of the efficient interconnection charge would be more than offset by the considerable costs of doing so.<sup>1333</sup>

754. Some parties have expressed concerns that bill-and-keep arrangements will encourage carriers to “dump” traffic on other providers’ terminating network, because the cost of termination to the carrier delivering the traffic will be zero.<sup>1334</sup> Such concerns, however, appear to be largely speculative; no commenter has identified a concrete reason why any carrier would engage in such “dumping” or how it would do so. Indeed, there has been no evidence that any such “dumping” has occurred in the wireless industry, which has operated under a similar framework. Even so, if a long distance carrier decided to deliver all of its traffic to a terminating LECs’ tandem switch, that practice could result in tandem exhaust, requiring the terminating LEC to invest in additional switching capacity. To help address this concern, we confirm that a LEC may include traffic grooming requirements in its tariffs. These traffic grooming requirements specify when a long distance carrier must purchase dedicated DS1 or DS3 trunks to deliver traffic rather than pay per-minute transport charges, a determination based on the amount of traffic going to a particular end office. We believe this accountability and additional information will deter concerns regarding traffic dumping.<sup>1335</sup>

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<sup>1330</sup> See, e.g., *Ref. 2009-70-MR-EC-Future of Interconnection Charging Methods* at 74, Nov. 23, 2010, [http://ec.europa.eu/information\\_society/policy/ecomm/doc/library/ext\\_studies/2009\\_70\\_mr\\_final\\_study\\_report\\_F\\_101123.pdf](http://ec.europa.eu/information_society/policy/ecomm/doc/library/ext_studies/2009_70_mr_final_study_report_F_101123.pdf) (“In the future, the voice total costs will be much smaller in an ‘NGN only’ network than in a ‘PSTN only’ legacy network. The share of the voice total costs in the total costs of the network will be small in an NGN network.”); see also Letter from Donna N. Lampert, Counsel for Google, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45; WC Docket Nos. 10-90, 05-337; GN Docket No. 09-51, Attach. at 2-7 (filed June 16, 2011) (Google June 16, 2011 *Ex Parte* Letter) (arguing that “standalone voice will represent a vanishingly small segment of overall network traffic” and illustrating “the changing nature of the relationship between traditional voice traffic and modern IP-based communications”). “The move to bill-and-keep would rid the intercarrier compensation system of the inefficiencies and arbitrage opportunities that have plagued it and speed the transition to more efficient feature-rich IP networks. . . .” T-Mobile Oct. 20, 2011 *Ex Parte* Letter at 1.

<sup>1331</sup> See, e.g., *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6610-14, paras. 253-61; 6808-12, paras. 248-56.

<sup>1332</sup> We note that the statutory text of section 252(d)(2) provides that the methodology for reciprocal compensation should allow for the recovery of the “additional costs” of a call which equals incremental cost, not the average or total cost of transporting or terminating a call. See 47 U.S.C. § 252(d)(2)(A)(ii) (noting that costs should be approximate “the additional costs of terminating such calls”).

<sup>1333</sup> We acknowledge that it is also possible that in some instances, the efficient termination rates of preceding models would not allow overall cost recovery. In that case, while the efficient *cost-covering* termination rate could lie above incremental cost, we also conclude that it is more efficient to ensure cost recovery via direct subsidies, such as the CAF, than by distorting usage prices.

<sup>1334</sup> See, e.g., Verizon *USF/ICC Transformation NPRM* Comments at 13-16.

<sup>1335</sup> We would expect that these handoffs would recognize the same engineering principles that govern current network configurations. To the extent that one party to the interconnection agreement desired to deviate from those (continued...)

755. *Bill-and-Keep Is Appropriate Even If Traffic Is Imbalanced.* The Commission initially permitted states to impose bill-and-keep arrangements on providers, but did so with the caveat that traffic should be roughly in balance.<sup>1336</sup> At the time, the Commission reasoned that carriers incur costs for terminating traffic, and bill-and-keep may not enable the recovery of such costs from other carriers.<sup>1337</sup> The Commission also expressed concern that, in a reciprocal compensation arrangement, bill-and-keep may “distort carriers’ incentives, encouraging them to overuse competing carriers’ termination facilities by seeking customers that primarily originate traffic.”<sup>1338</sup>

756. In light of technological advancements and our rejection of the calling party network pays model in favor of a model that better tracks cost causation principles, we revisit the Commission’s prior concerns and conclusions supporting the “balanced traffic limitation.”<sup>1339</sup> First, we reject claims that, as a policy matter, bill-and-keep is only appropriate in the case of roughly balanced traffic.<sup>1340</sup> Concerns about the balance of traffic exchanged reflect the view that the calling party’s network should bear all the costs of a call. Given the understanding that both the calling and called party benefit from a call, the “direction” of the traffic—i.e., which network is originating or terminating the call—is no longer as relevant.<sup>1341</sup> Under bill-and-keep, “success in the marketplace will reflect a carrier’s ability to serve customers efficiently, rather than its ability to extract payments from other carriers.”<sup>1342</sup> Additionally, bill-and-keep is most consistent with the models used for wireless and IP networks, models that have flourished and promoted innovation and investment without any symmetry or balanced traffic requirement.<sup>1343</sup>

757. Second, as already explained, we reject the assertion that bill-and-keep does not enable cost recovery. Although a bill-and-keep approach will not provide for the recovery of certain costs via

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standards, the interconnection agreement could establish the amount, if any, the deviating entity should compensate the other carrier. We seek comment on these and other possible issues related to traffic dumping in the attached FNPRM. See *supra* Section XVII.N.

<sup>1336</sup> 47 C.F.R. § 51.713(b) (“A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to § 51.711(b) [permitting asymmetrical rates based on a cost study]”).

<sup>1337</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 16055, para. 1112.

<sup>1338</sup> *Id.*; but see *ISP Remand Order*, 16 FCC Rcd at 9183-85, paras. 71-74.

<sup>1339</sup> As such, we revise the relevant rules as described in Appendix A below.

<sup>1340</sup> See COMPTTEL *USF/ICC Transformation NPRM* Comments at 33-34; Cincinnati Bell *USF/ICC Transformation NPRM* Reply at 11-12; Cbeyond et al. *USF/ICC Transformation NPRM* Comments at 14-15; EarthLink *USF/ICC Transformation NPRM* Reply at 9; PAETEC et al. *USF/ICC Transformation NPRM* Reply at 17; Letter from Jeffrey S. Lanning, Ass’t Vice President – Federal Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 06-122, 05-337, 04-36, 03-109, CC Docket Nos. 01-92, 99-200, 99-68, 96-98, 96-45, GN Docket No. 09-45 at 3 (filed Oct. 21, 2011) (CenturyLink Oct. 21, 2011 *Ex Parte* Letter). We also discuss below certain arguments that, in the context of reciprocal compensation under the section 251 and 252 framework, bill-and-keep only may be lawfully imposed in the context of roughly balanced traffic. See *infra* XII.A.2.

<sup>1341</sup> See *supra* paras. 744-747.

<sup>1342</sup> *Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4787, App. C.

<sup>1343</sup> For instance, commenters suggest that “eventually most traffic will flow over VoIP” and “the only barriers to such migration are the antiquated ICC regimes.” MetroPCS *August 3 PN* Comments at 8.

*intercarrier* compensation, it will still allow for cost recovery via end-user compensation and, where necessary, explicit universal service support.<sup>1344</sup> We find that although the statute provides that each carrier will have the opportunity to recover its costs, it does not entitle each carrier to recover those costs from another carrier, so long as it can recover those costs from its own end users and explicit universal service support where necessary.

758. As a result, we depart from the Commission's earlier articulated concern that bill-and-keep distorts carriers incentives. To the contrary, we conclude, based on policy and economic theory, that bill-and-keep best addresses the significant arbitrage incentives inherent in today's system.<sup>1345</sup>

759. These conclusions are consistent with the Commission's more recent consideration of bill-and-keep arrangements in the context of ISP-bound traffic. Specifically, in the *ISP Remand Order*, the Commission stated that its initial "concerns about economic inefficiencies associated with bill and keep missed the mark" because they incorrectly assumed that the "calling party was the sole cost causer of the call."<sup>1346</sup> The Commission tentatively concluded that bill-and-keep would provide a viable solution to the market distortions caused by ISP-bound traffic.<sup>1347</sup> Indeed, the Commission's experience with ISP-bound traffic suggests that a bill-and-keep approach may be most efficient where the traffic is not balanced because the obligation to pay reciprocal compensation in such situations may give rise to uneconomic incentives.<sup>1348</sup> We therefore conclude it is appropriate to amend section 51.713 of our rules.<sup>1349</sup>

## 2. Legal Authority

760. Our statutory authority to implement bill-and-keep as the default framework for the exchange of traffic with LECs flows directly from sections 251(b)(5) and 201(b) of the Act.<sup>1350</sup> Section 251(b)(5) states that LECs have a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."<sup>1351</sup> Section 201(b) grants the Commission authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."<sup>1352</sup> In *AT&T Corp. v. Iowa Utilities Board*, the Supreme Court held that "the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,'

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<sup>1344</sup> See *infra* Section XIII.

<sup>1345</sup> We find that the adoption of a bill-and-keep methodology will help address long-term arbitrage problems while access stimulation and phantom traffic rules adopted today will address arbitrage in the near term. See *supra* Section XI.

<sup>1346</sup> See *Inter-carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 at 9183-83, paras. 71-74 (2001) (*ISP Remand Order*), remanded but not vacated by *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

<sup>1347</sup> See *id.* at 9155, para. 6.

<sup>1348</sup> As discussed above, bill-and-keep avoids the incentives for arbitrage that can arise from excessive intercarrier compensation rates without imposing the regulatory costs of other regimes. See *supra* paras. 752-754.

<sup>1349</sup> See 47 C.F.R. § 51.713. See *supra* Appendix A.

<sup>1350</sup> We have additional statutory authority under section 332 to regulate interconnection arrangements involving CMRS providers. See *infra* paras. 834-836.

<sup>1351</sup> 47 U.S.C. § 251(b)(5).

<sup>1352</sup> 47 U.S.C. § 201(b).

which include §§ 251 and 252.”<sup>1353</sup> As discussed below, we may exercise this rulemaking authority to define the types of traffic that will be subject to section 251(b)(5)’s reciprocal compensation framework and to adopt a default compensation mechanism that will apply to such traffic in the absence of an agreement between the carriers involved.

761. *The Scope of Section 251(b)(5).* Section 251(b)(5) imposes on all LECs the “duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” The Commission initially interpreted this provision to “apply only to traffic that originates and terminates within a local area.”<sup>1354</sup> In the 2001 *ISP Remand Order*, however, the Commission noted that its initial reading is inconsistent with the statutory terms.<sup>1355</sup> The Commission explained that section 251(b)(5) does not use the term “local,”<sup>1356</sup> but instead speaks more broadly of the transport and termination of “telecommunications.”<sup>1357</sup> As defined in the Act, the term “telecommunications” means the “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received”<sup>1358</sup> and thus encompasses communications traffic of any geographic scope (e.g., “local,” “intrastate,” or “interstate”) or regulatory classification (e.g., “telephone exchange service,”<sup>1359</sup> “telephone toll service,”<sup>1360</sup> or “exchange access”<sup>1361</sup>). The Commission reiterated this interpretation of section 251(b)(5) in its *2008 Order and ICC/USF FNPRM*,<sup>1362</sup> and we proposed in the *ICC/USF Transformation NPRM* to make clear that section 251(b)(5) applies to “all telecommunications, including access traffic.”<sup>1363</sup>

762. After reviewing the record, we adopt our proposal and conclude that section 251(b)(5) applies to traffic that traditionally has been classified as access traffic. Nothing in the record seriously calls into question our conclusion that access traffic is one form of “telecommunications.” By the express terms of section 251(b)(5), therefore, when a LEC is a party to the transport and termination of access traffic, the exchange of traffic is subject to regulation under the reciprocal compensation framework.

763. We recognize that the Commission has not previously regulated access traffic under section 251(b)(5). The reason, as the Commission has previously explained,<sup>1364</sup> is section 251(g).<sup>1365</sup>

<sup>1353</sup> *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999).

<sup>1354</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 16013, para. 1034.

<sup>1355</sup> See generally *ISP Remand Order*, 16 FCC Rcd 9151 (2001).

<sup>1356</sup> *ISP Remand Order*, 16 FCC Rcd at 9166-67, para. 34.

<sup>1357</sup> *Id.* at 9165-66 para. 31-32.

<sup>1358</sup> 47 U.S.C. § 153(43).

<sup>1359</sup> See *id.* at § 153(47).

<sup>1360</sup> See *id.* at § 153(48).

<sup>1361</sup> See *id.* at § 153(16).

<sup>1362</sup> *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6479, paras. 7-8.

<sup>1363</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4712-13, para. 514.

<sup>1364</sup> *ISP Remand Order*, 16 FCC Rcd at 9165-66, para. 31; *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6483, para. 16.

<sup>1365</sup> 47 U.S.C. § 251(g).

Section 251(g) is a “transitional device”<sup>1366</sup> that requires LECs to continue “provid[ing] exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation)” previously in effect “until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission.”<sup>1367</sup> Section 251(g) thus preserved the pre-1996 Act regulatory regime that applies to access traffic, including rules governing “receipt of compensation,” and thereby precluded the application of section 251(b)(5) to such traffic “unless and until the Commission by regulation should determine otherwise.”<sup>1368</sup>

764. In this Order, we explicitly supersede the traditional access charge regime and, subject to the transition mechanism we outline below, regulate terminating access traffic in accordance with the section 251(b)(5) framework. Consistent with our approach to comprehensive reform generally and the desire for a more unified approach, we find it appropriate to bring all traffic within the section 251(b)(5) regime at this time, and commenters generally agree.<sup>1369</sup> Doing so is key to advancing our goals of encouraging migration to modern, all IP networks; eliminating arbitrage and competitive distortions; and eliminating the thicket of disparate intercarrier compensation rates and payments that are ultimately borne by consumers. Even though the transition process detailed below is limited to terminating switched access traffic and certain transport traffic, we make clear that the legal authority to adopt the bill-and-keep methodology described herein applies to all intercarrier compensation traffic. As noted below, we seek comment on the transition and recovery for originating access and transport in the accompanying FNPRM.

765. We reject arguments that section 251(b)(5) does not apply to intrastate access traffic. Like other forms of carrier traffic, intrastate access traffic falls within the scope of the broad term “telecommunications” used in section 251(b)(5). “Had Congress intended to exclude certain types of telecommunications traffic,” such as “local” or “intrastate” traffic, “from the reciprocal compensation framework, it could have easily done so by using more restrictive terms to define the traffic subject to section 251(b)(5).”<sup>1370</sup> Nor do we believe that section 2(b) of the Act, which generally preserves state authority over intrastate communications, bears on our interpretation of section 251(b)(5).<sup>1371</sup> As the Supreme Court noted, “[s]uch an interpretation [of section 2(b)] would utterly nullify the 1996 amendments, which clearly ‘apply’ to intrastate services, and clearly confer ‘Commission jurisdiction’

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<sup>1366</sup> *WorldCom v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003); *see also Competitive Tel. Ass’n v. FCC*, 309 F.3d 8, 15 (D.C. Cir. 2002).

<sup>1367</sup> 47 U.S.C. § 251(g).

<sup>1368</sup> *ISP Remand Order*, 16 FCC Rcd at 9169, para. 39.

<sup>1369</sup> *See USF/ICC Transformation NPRM*, 26 FCC Rcd at 4711, para. 512. *See generally id.* at 4710-15, paras. 509-22 (seeking comment on the Commission’s legal authority to accomplish comprehensive intercarrier compensation reform). *See AT&T USF/ICC Transformation NPRM Comments* at 38-43; *CBeyond et al. USF/ICC Transformation NPRM Comments* at 7-11; *Comcast USF/ICC Transformation NPRM Comments* at 6-8; *MetroPCS USF/ICC Transformation NPRM Comments* at 9-12; *Time Warner Cable USF/ICC Transformation NPRM Comments* at 3-5; *but see NARUC USF/ICC Transformation NPRM Comments* at 10-12.

<sup>1370</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4712, para. 513; *but see NARUC USF/ICC Transformation NPRM Comments* at 10.

<sup>1371</sup> *See Massachusetts DTC USF/ICC Transformation NPRM Comments* at 20; *New York Commission USF/ICC Transformation NPRM Comments* at 12; *State Members USF/ICC Transformation NPRM Comments* at 143; *NASUCA August 3 PN Comments* at 30.

over some matters.”<sup>1372</sup> Indeed, if section 2(b) limited the scope of section 251(b)(5), we could not apply the reciprocal compensation framework even to local traffic between a CLEC and an ILEC—the type of traffic that has been subject to our reciprocal compensation rules since the Commission implemented the 1996 Act. We see no reason to adopt such an absurd reading of the statute.

766. We also reject arguments that sections 251(g) and 251(d)(3) somehow limit the scope of the “telecommunications” covered by section 251(b)(5).<sup>1373</sup> Whatever protections these provisions provide to state access regulations, it is clear that those protections are not absolute. As noted above, section 251(g) preserves access charge rules only during a transitional period, which ends when we adopt superseding regulations. Accordingly, to the extent section 251(g) has preserved state intrastate access rules against the operation of section 251(b)(5) until now, this rulemaking Order supersedes that provision.<sup>1374</sup>

767. Section 251(d)(3) states that “[i]n prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that— (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.”<sup>1375</sup> As the Commission has previously observed, “section 251(d)(3) of the Act independently establishes a standard

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<sup>1372</sup> *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 380.

<sup>1373</sup> See Massachusetts DTC *USF/ICC Transformation NPRM* Comments at 20-21; NARUC *USF/ICC Transformation NPRM* Comments at 12; State Members *USF/ICC Transformation NPRM* Comments at 143-144; see also Ohio Commission *USF/ICC Transformation NPRM* Comments at 58.

<sup>1374</sup> Commenters have different views on whether section 251(g) preserves the intrastate as well as interstate access regime. Compare Massachusetts DTC *USF/ICC Transformation NPRM* Comments at 20-21; Arizona Commission *USF/ICC Transformation NPRM* Reply at 4-5 with Nebraska Rural Companies *August 3 PN* Comments at 19. If section 251(g) does not apply to state access regulations, it is unclear what other provision of the Act would prevent section 251(b)(5) from directly applying to intrastate access traffic, given that section 251(d)(3) does not speak to the preemptive effect of the statute. As we noted in the *Local Competition First Report and Order*, “although section 251(g) does not directly refer to intrastate access charge mechanisms, it would be incongruous to conclude that Congress was concerned about the effects of the potential disruption to the interstate access charge system, but had no such concerns about the effects on analogous intrastate mechanisms.” *Local Competition First Report and Order*, 11 FCC Rcd at 15869, para. 732. See also, e.g., *Competitive Telecomms. Ass’n v. FCC*, 117 F.3d 1068, 1072 (8th Cir. 1997) (*Competitive Telecomms. Ass’n*) (finding it “clear from the Act that Congress did not intend all access charges to move to cost-based pricing, at least not immediately. The Act plainly preserves certain rate regimes already in place.”). Moreover, as we explained in the *USF/ICC Transformation NPRM*, “[t]he court order accompanying the AT&T consent decree made clear that the decree required access charges to be used in both the interstate and intrastate jurisdictions: ‘Under the proposed decree, state regulators will set access charges for intrastate interexchange service and the FCC will set access charges for interstate interexchange service.’ *AT&T*, 552 F. Supp. at 169 n.161. Because both the interstate and intrastate access charge systems were created by the same consent decree, it is reasonable to conclude that both systems were preserved by section 251(g).” *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4712 n.750. We need not resolve this issue, however, because all traffic terminated on a LEC will, going forward, be governed by section 251(b)(5) regardless of whether section 251(g) previously covered the state intrastate access regime.

<sup>1375</sup> 47 U.S.C. § 251(d)(3). We note that section 261(c) likewise preserves state authority to “impos[e] requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State’s requirements are not inconsistent with this part or the Commission’s regulations to implement this part.” 47 U.S.C. § 261(c) (emphasis added).

very similar to the judicial conflict preemption doctrine,”<sup>1376</sup> and “[i]ts protections do *not* apply when the state regulation is inconsistent with the requirements of section 251, *or* when the state regulation substantially prevents implementation of the requirements of section 251 or the purposes of sections 251 through 261 of the Act.”<sup>1377</sup> Moreover, “in order to be consistent with the requirements of section 251 and not ‘substantially prevent’ implementation of section 251 or Part II of Title II, state requirements must be consistent with the FCC’s implementing regulations.”<sup>1378</sup> In other words, section 251(d)(3) instructs the Commission not to preempt state regulations that are consistent with and promote federal rules and policies, but it does not protect state regulations that frustrate the Act’s policies or our implementation of the statute’s requirements.<sup>1379</sup> As discussed in this Order, we are bringing all telecommunications traffic terminated on LECs, including intrastate switched access traffic, into the section 251(b)(5) framework to fulfill the objectives of section 251(b)(5) and other provisions of the Act.<sup>1380</sup> Consequently, we find that, to the extent section 251(d)(3) applies in this context, it does not prevent us from adopting rules to implement the provisions of section 251(b)(5) and applying those rules to traffic traditionally classified as intrastate access.<sup>1381</sup>

768. Finally, we reject the view of some commenters that the pricing standard set forth in

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<sup>1376</sup> *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, WC Docket No. 03-251, Memorandum Opinion and Order and Notice of Inquiry, 20 FCC Rcd 6830 at 6839, para. 19 (2005) (footnote references omitted).

<sup>1377</sup> *Id.* at 6842, para. 23 (emphasis in original).

<sup>1378</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 15550, para. 103.

<sup>1379</sup> In light of our interpretation of section 251(d)(3), we need not resolve whether “[t]he word ‘access’ in section 251(d)(3) . . . refers not to access charge obligations, but to unbundled network element requirements.” *See ABC Plan Proponents August 3 PN Reply* at 22-23.

<sup>1380</sup> *See supra* Section XII.A.

<sup>1381</sup> We also disagree with commenters’ claims that the timing requirements of section 251(d)(1) mean that, if the Commission had authority to supersede existing intrastate access regulations, such authority expired “fifteen years ago.” *See State Members USF/ICC Transformation NPRM Comments* at 144. Section 251(d)(1) provides that “[w]ithin 6 months after [February 8, 1996,] the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.” 47 U.S.C. § 251(d)(1). However, the actions that were “necessary” to implement section 251 at the time of the 1996 Act do not constitute the entire universe of regulations that may be necessary or appropriate to implement those provisions in the future. Thus, although the Commission adopted initial regulations implementing section 251(b)(5) in the *Local Competition First Report and Order*, it has modified them since. *See, e.g., ISP Remand Order*, 16 FCC Rcd 9151 (2001). Our interpretation also is reinforced by the historical relationship between access charges as implicit subsidy mechanisms and the goal of universal service. Although Congress provided a six month deadline for the initial implementation of section 251, it did not provide a similar deadline for implementing the universal service requirements of section 254. As the Eighth Circuit recognized, if access charges moved immediately to the section 251(b)(5) framework, it potentially could threaten universal service given the lack of a six month deadline for the establishment of explicit universal service support mechanisms. *See Competitive Telecomms. Ass’n*, 117 F.3d at 1073-76. We note that the Commission did, in fact, assert authority to address intrastate access charges in the *Local Competition First Report and Order*, 11 FCC Rcd at 15869, paras. 732-33, although that action was reversed by this same *Competitive Telecomms. Ass’n* decision. *See Competitive Telecomms. Ass’n*, 117 F.3d at 1075 n.5. That decision preceded the Supreme Court’s holding that the Commission has rulemaking authority under section 201(b) to implement the requirements of section 251 of the Act. *See Iowa Utils. Bd. v. FCC*, 525 U.S. 366, 377-86 (1999).



section 252(d)(2)(A) limits the scope of section 251(b)(5).<sup>1382</sup> As the Commission explained in the *2008 Order and ICC/USF FNPRM*, section 252(d)(2)(A)(i) “deals with the mechanics of who owes what to whom, it does not define the scope of traffic to which section 251(b)(5) applies.”<sup>1383</sup> The Commission noted that construing “the pricing standards in section 252(d)(2) to limit the otherwise broad scope of section 251(b)(5)”<sup>1384</sup> would nonsensically suggest that “Congress intended the tail to wag the dog.”<sup>1385</sup> We reaffirm that conclusion here.

769. *Authority To Adopt Bill-and-Keep as a Default Compensation Standard.* We conclude that we have the statutory authority to establish bill-and-keep as the default compensation arrangement for all traffic subject to section 251(b)(5). That includes traffic that, prior to this Order, was subject to the interstate and intrastate access regimes, as well as traffic exchanged between two LECs or a LEC and a CMRS carrier.

770. Section 201(b) states that “[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”<sup>1386</sup> As the Supreme Court held in *Iowa Utilities Board*, section 201(b) of the Act “means what it says: The FCC has rulemaking authority to carry out the ‘provisions of this Act,’ which include §§ 251 and 252.”<sup>1387</sup> Moreover, section 251(i) of the Act states that “[n]othing in this section [section 251] shall be construed to limit or otherwise affect the Commission’s authority under section 201.”<sup>1388</sup> Section 251(i) “fortifies [our] position” that we have authority to regulate the default compensation arrangement applicable to traffic subject to section 251(b)(5).<sup>1389</sup>

771. We conclude that we have statutory authority to establish bill-and-keep as a default compensation mechanism with respect to interstate traffic subject to section 251(b)(5).<sup>1390</sup> Section 201 has long conferred authority on the Commission to regulate interstate communications to ensure that “charges, practices, classifications, and regulations” are “just and reasonable” and not unreasonably discriminatory.<sup>1391</sup> Indeed, the D.C. Circuit recently upheld the Commission’s authority under section

<sup>1382</sup> See NARUC *USF/ICC Transformation NPRM* Comments at 10-11; New York Commission *USF/ICC Transformation NPRM* Comments at 10-11.

<sup>1383</sup> *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6481, para. 12.

<sup>1384</sup> *Id.* at 6480, para. 11.

<sup>1385</sup> *Id.*

<sup>1386</sup> 47 U.S.C. § 201(b).

<sup>1387</sup> *AT&T v. Iowa Utilities Bd.*, 525 U.S. at 378.

<sup>1388</sup> 47 U.S.C. § 251(i).

<sup>1389</sup> *Core Commc’ns. Inc. v. FCC*, 592 F.3d 139, 143 (D.C. Cir. 2010) (*Core*).

<sup>1390</sup> Some commenters argue that the Commission may prescribe a rate for interstate services only if it undertakes the rate prescription process set forth in Section 205 of the Act. See 47 U.S.C. § 205. See EarthLink *August 3 PN* Comments at 28 (citing *AT&T Co. v. FCC*, 487 F.2d 865 (2d Cir. 1973) (*AT&T*)); see also Core *USF/ICC Transformation NPRM* Comments at 8-9; SureWest *USF/ICC Transformation NPRM* Comments at 14-22. We disagree. In *AT&T*, the Second Circuit held that the Commission may not require a carrier to seek permission to file a tariff effecting a rate increase, but instead must process such a tariff in accordance with the procedures set forth in sections 203 to 205 of the Act. Nothing in that decision calls into question our authority to adopt rules to define what constitutes a just and reasonable rate for purposes of section 201. See, e.g., *Cable & Wireless, PLC v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

<sup>1391</sup> 47 U.S.C. § 201; see also, e.g., *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984).

201 to establish interim rates for ISP-bound traffic, which the Commission had found to also be subject to section 251(b)(5).<sup>1392</sup>

772. In any event, we conclude that we have authority, independent of our traditional interstate rate-setting authority in section 201, to establish bill-and-keep as the default compensation arrangement for all traffic subject to section 251(b)(5), including intrastate traffic. Although section 2(b) has traditionally preserved the states' authority to regulate intrastate communications, after the 1996 Act section 2(b) has "less practical effect" because "Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control."<sup>1393</sup> Thus, "[w]ith regard to the matters addressed by the 1996 Act," Congress "unquestionably" "has taken the regulation of local telecommunications competition away from the States,"<sup>1394</sup> and, as the Supreme Court has held, "the administration of the new *federal* regime is to be guided by federal-agency regulations."<sup>1395</sup> Our rulemaking authority in section 201(b) "*explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies"<sup>1396</sup> and thereby authorizes our adoption of rules to implement section 251(b)(5)'s directive that LECs have a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."<sup>1397</sup>

773. We reject the argument of some commenters that sections 252(c) and 252(d)(2) limit our authority to adopt bill-and-keep.<sup>1398</sup> Section 252(c) provides that states conducting arbitration proceedings under section 252 shall "establish any rates for interconnection, services, or network elements according to" section 252(d).<sup>1399</sup> Section 252(d)(2), in turn, states in relevant part that "[f]or the purposes of compliance by an *incumbent local exchange carrier* with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable" unless they: (i) "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls *that originate on the network facilities of the other carrier*;" and (ii) determine such costs through a "reasonable approximation of the additional costs of terminating such calls."<sup>1400</sup> Section 252(d)(2) also states that the pricing standard it sets forth "shall not be construed . . . to preclude arrangements . . . that waive mutual

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<sup>1392</sup> See *Core*, 592 F.3d 139; see also *2008 Order and USF/ICC FNPRM*, 24 FCC Rcd at 6481, paras. 11-12 (finding that the "Commission has authority under section 201(b) to adopt rules to fill [] gap[s]" in section 252). In the *2008 Order and ICC/USF FNPRM* the Commission observed that sections 201 and 251(i), when read together, "preserve the Commission's authority to address new issues that fall within its section 201 authority over interstate traffic, including compensation for the exchange of ISP-bound traffic." *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6484-85, para. 21

<sup>1393</sup> *AT&T v. Iowa Utilities Board*, 525 U.S. at 381-82 n.8.

<sup>1394</sup> *Id.* at 378-79 n.6.

<sup>1395</sup> *Id.* (emphasis in original).

<sup>1396</sup> *Id.* at 380.

<sup>1397</sup> 47 U.S.C. § 251(b)(5).

<sup>1398</sup> See COMPTTEL *USF/ICC Transformation NPRM* Comments at 33-34; NASUCA *USF/ICC Transformation NPRM* Comments at 94, 103-05; Rural Associations *USF/ICC Transformation NPRM* Comments at 22, 26; Pac-West *USF/ICC Transformation NPRM* Comments at 11; CenturyLink Oct. 21, 2011 *Ex Parte* Letter at 2.

<sup>1399</sup> 47 U.S.C. § 252(c)(2).

<sup>1400</sup> 47 U.S.C. § 252(d)(2)(A) (emphasis added).

recovery (such as bill-and-keep arrangements).”<sup>1401</sup> Although the Supreme Court made clear that the Commission may, through rulemaking, establish a “pricing methodology” under section 252(d) for states to apply in arbitration proceedings,<sup>1402</sup> the Eighth Circuit has held that “[s]etting specific [reciprocal compensation] prices goes beyond the FCC’s authority to design a pricing methodology and intrudes on the states’ right to set the actual rates pursuant to § 252(c)(2).”<sup>1403</sup> Commenters who cite section 252(d) as a limitation on the Commission’s authority to adopt bill-and-keep argue that bill-and-keep intrudes on states’ rate-setting authority by effectively setting a compensation rate of zero.<sup>1404</sup>

774. We disagree for two reasons. First, the pricing standard in section 252(d) simply does not apply to most of the traffic that is the focus of this Order – traffic exchanged between LECs and IXC. Section 252(d) applies only to traffic exchanged with an ILEC, so CLEC-IXC traffic is categorically beyond its scope. Even with respect to traffic exchanged with an ILEC, section 252(d) applies only to arrangements between carriers where the traffic “originate[s] on the network facilities of the other carrier,” i.e., the carrier sending the traffic for transport and termination. IXCs, however, typically do not originate (or terminate) calls on their own network facilities but instead transmit calls that originate and terminate on distant LECs. Accordingly, to the extent our bill-and-keep rules apply to LEC-IXC traffic, the rules do not implicate any question of the states’ authority under section 252(c) or (d) or the Eighth Circuit’s interpretation of those provisions.<sup>1405</sup>

775. Second, and in any event, bill-and-keep is consistent with section 252(d)’s pricing standard. Section 252(d)(2)(B) makes clear that “arrangements that waive mutual recovery (such as bill-and-keep arrangements)” are consistent with section 252(d)’s pricing standard.<sup>1406</sup> As explained in the *Local Competition First Report and Order*, this provision precludes any argument that “the Commission and states do not have the authority to mandate bill-and-keep arrangements” or that bill-and-keep is permissible only if it is voluntarily agreed to by the carriers involved.<sup>1407</sup> Bill-and-keep also ensures “recovery of each carrier of costs” associated with transport and termination.<sup>1408</sup> The Act does not specify from whom each carrier may (or must) recover those costs and, under the approach we adopt today, each carrier will “recover” its costs from its own end users or from explicit support mechanisms such as the

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<sup>1401</sup> 47 U.S.C. § 252(d)(2)(B).

<sup>1402</sup> *AT&T v. Iowa Utilities Board*, 525 U.S. at 384.

<sup>1403</sup> *Iowa Utilities Board v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000).

<sup>1404</sup> See NASUCA *USF/ICC Transformation NPRM* Reply at 120-23.

<sup>1405</sup> Opponents of bill-and-keep argue that the language in the bill-and-keep “savings clause” in section 252(d)(2)(B)(i) implies the requirement that traffic be roughly in balance for a bill-and-keep arrangement to be appropriate. See *XO USF/ICC Transformation NPRM* Comments at 24; *EarthLink USF/ICC Transformation NPRM* Reply at 9. We disagree. Although our rules currently require a rough balance of traffic flows before a state may impose bill-and-keep in an arbitration proceeding, 47 C.F.R. § 51.713, as explained below, we reject that restriction as a matter of policy. See *supra* paras. 755-759. For present purposes, it is sufficient to note that nothing in section 252(d)(2) requires that traffic be balanced before bill-and-keep may be imposed on carriers.

<sup>1406</sup> 47 U.S.C. § 252(d)(2)(B)(i).

<sup>1407</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 16054, para. 1111 (explaining that section 252(d)(2) “would be superfluous if bill-and-keep arrangements were limited to negotiated agreements, because none of the standards in section 252(d) apply to voluntarily-negotiated agreements.”); see also 47 U.S.C. § 252(a)(1).

<sup>1408</sup> Although bill-and-keep by definition “waive[s] mutual recovery” (47 U.S.C. § 252(d)(2)(B)(i)) in that carriers do not pay each other for transporting and terminating calls, a bill-and-keep framework provides for “reciprocal” recovery because each carrier exchanging traffic is entitled to recover their costs through the same mechanism, i.e., through the rates they charge their own customers.

federal universal service fund.<sup>1409</sup> Thus, bill-and-keep will not limit the amount of a carrier's cost recovery, but instead will alter the source of the cost recovery – network costs would be recovered from carriers' customers supplemented as necessary by explicit universal service support, rather than from other carriers.<sup>1410</sup>

776. Finally, even assuming section 252(d) applies, our adoption of bill-and-keep as a default compensation mechanism would not intrude on the states' role to set rates as interpreted by the Eighth Circuit. To the extent the traffic at issue is intrastate in nature and subject to section 252(d)'s pricing standard, states retain the authority to regulate the rates that the carriers will charge *their end users* to recover the costs of transport and termination to ensure that such rates are “just and reasonable.”<sup>1411</sup> Moreover, states will retain important responsibilities in the implementation of a bill-and-keep framework. An inherent part of any rate setting process is not only the establishment of the rate level and rate structure, but the definition of the service or functionality to which the rate will apply.<sup>1412</sup> Under a bill-and-keep framework, the determination of points on a network at which a carrier must deliver terminating traffic to avail itself of bill-and-keep (sometimes known as the “edge”) serves this function, and will be addressed by states through the arbitration process where parties cannot agree on a negotiated outcome.<sup>1413</sup> Depending upon how the “edge” is defined in particular circumstances, in conjunction with how the carriers physically interconnect their networks, payments still could change hands as reciprocal compensation even under a bill-and-keep regime where, for instance, an IXC pays a terminating LEC to transport traffic from the IXC to the edge of the LEC's network.<sup>1414</sup> Consistent with their existing role

<sup>1409</sup> The economic premise of a bill-and-keep regime differs from the calling party network pays (CPNP) philosophy of cost causation. Under CPNP thinking the party that initiated the call is receiving the most benefit from that call. Under the bill-and-keep methodology the economic premise is that both the calling and the called party benefit from the ability to exchange traffic, i.e., being interconnected. This is consistent with policy justifications for bill-and-keep described in the *Inter-carrier Compensation NPRM* in which the Commission said “there may be no reason why *both* LECs should not recover the costs of providing these benefits directly from their end users. Bill-and-keep provides a mechanism whereby end users pay for the benefit of making *and* receiving calls.” *Inter-carrier Compensation NPRM*, 16 FCC Rcd at 9625, para. 37 (emphasis in original).

<sup>1410</sup> “Carriers would need to turn to their own customers (supplemented, in appropriate cases, by explicit universal service support) to recoup their network costs, rather than to other carriers and, ultimately, those carriers' customers.” AT&T *USF/ICC Transformation NPRM* Reply at 23.

<sup>1411</sup> 47 U.S.C. § 252(d)(2)(A).

<sup>1412</sup> See, e.g., *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87–313, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 3051–56, paras. 359–68 (1989) (discussing the need for, and definition of, baskets and bands of services for purposes of price cap regulation of AT&T); *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*; and *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85–229, Report and Order, 104 FCC 2d 958, paras. 214–17, 220–22 (1986) (requiring the identification and tariffing of certain Basic Service Elements underlying enhanced services). See also, e.g., 47 C.F.R. § 61.2(a) (“In order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations.”); 47 C.F.R. § 61.54(j) (“The general rules (including definitions), regulations, exceptions, and conditions which govern the tariff must be stated clearly and definitely.”).

<sup>1413</sup> In the FNPRM we seek comment on relying on that approach to defining the “edge” for purposes of bill-and-keep more generally, or whether additional Commission guidance or rules would be appropriate. See *infra* Section XVII.N.

<sup>1414</sup> This statement does not suggest any particular outcome with respect to the definition of the “edge,” which is an issue we seek comment on below. See *infra* Section XVII.N.

under sections 251 and 252, which we do not expand or contract, states will continue to have the responsibility to address these issues in state arbitration proceedings, which we believe is sufficient to satisfy any statutory role that the states have under section 252(d) to “determin[e] the concrete result in particular circumstances” of the bill-and-keep framework we adopt today.<sup>1415</sup>

777. *Originating Access.* Some parties contend that the Commission lacks authority over originating access charges under section 251(b)(5) because that section refers only to transport and termination.<sup>1416</sup> Other commenters urge the Commission to act swiftly to eliminate originating access charges.<sup>1417</sup> Although we conclude that the originating access regime should be reformed, at this time we establish a transition to bill-and-keep only with respect to terminating access charge rates. The concerns we have with respect to network inefficiencies, arbitrage, and costly litigation are less pressing with respect to originating access, primarily because many carriers now have wholesale partners or have integrated local and long distance operations.

778. As discussed above, section 251(g) provides for the continued enforcement of certain pre-1996 Act obligations pertaining to “exchange access” until “such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission.”<sup>1418</sup> Exchange access is defined to mean “the offering of access to telephone exchange services or facilities for the purpose of the *origination* or termination of telephone toll services.”<sup>1419</sup> Thus, section 251(g) continues to preserve originating access until the Commission adopts rules to transition away from that system. At this time, we adopt transition rules only with respect to terminating access and seek comment in the FNPRM on the ultimate transition away from such charges as part of the transition of all access charge rates to bill-and-keep.<sup>1420</sup> In the meantime, we will cap interstate originating access rates at their current level, pending resolution of the issues raised in our FNPRM.<sup>1421</sup>

779. *Section 332 and Wireless Traffic.* With respect to wireless traffic exchanged with a LEC, we have independent authority under section 332 of the Act to establish a default bill-and-keep methodology that will apply in the absence of an interconnection agreement. Although we have not previously exercised our authority under section 332 to reform intercarrier compensation charges paid by or to wireless providers, we have clear authority to do so, and this authority extends to both interstate and intrastate traffic.<sup>1422</sup> The Eighth Circuit has construed the Act to authorize the Commission to set reciprocal compensation rates for CMRS providers.<sup>1423</sup> In reaching that decision, the court relied on:

<sup>1415</sup> *AT&T v. Iowa Utilities Board*, 525 U.S. at 384.

<sup>1416</sup> Compare CBeyond et al. *USF/ICC Transformation NPRM* Comments at 10-11 with Global Crossing *USF/ICC Transformation NPRM* Comments at 12-13.

<sup>1417</sup> See iBasis *August 3 PN* Comments at 1-2.

<sup>1418</sup> 47 U.S.C. § 251(g).

<sup>1419</sup> 47 U.S.C. § 153(16) (emphasis added).

<sup>1420</sup> See *supra* Section XVII.M.

<sup>1421</sup> See *infra* Section XII.C.

<sup>1422</sup> We note that the Commission relied on its section 332 authority to adopt rules prohibiting LECs from imposing compensation obligations on CMRS carriers for non-access traffic pursuant to tariff. See *Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855, 4863-64, para. 14 (2005) (*T-Mobile Order*); see also *infra* Sections XII.C.5 and XV.

<sup>1423</sup> *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997), *vacated and remanded in part in other grounds sub nom. AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

(a) section 332(c)(1)(B), which obligates LECs to interconnect with wireless providers “pursuant to the provisions of section 201;”<sup>1424</sup> (b) section 2(b), which provides that the Act should not be construed to apply or to give the Commission jurisdiction with respect to charges in connection with intrastate communication service by radio “[e]xcept as provided in . . . section 332;”<sup>1425</sup> and (c) the preemptive language in section 332(c)(3)(A), which prohibits states from regulating the entry of or the rates charged by CMRS providers.<sup>1426</sup> The D.C. Circuit likewise recently acknowledged the Commission’s authority in this regard, observing that the Commission historically had elected to leave intrastate access rates imposed on CMRS providers to state regulation, and recognizing: “That the FCC *can* issue guidance does not mean it must do so.”<sup>1427</sup> Accordingly, we conclude that we have separate authority under sections 201 and 332(c) to establish rules governing the exchange of both intrastate and interstate traffic between LECs and CMRS carriers.

780. *Section 254(k)*. We also reject the claims of some commenters that a bill-and-keep approach would violate section 254(k) of the Act.<sup>1428</sup> Section 254(k) of the Act states that a telecommunications carrier “may not use services that are not competitive to subsidize services that are subject to competition,” and that the Commission “shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.”<sup>1429</sup> Some parties express concern that, under a bill-and-keep regime, retail voice telephone services subject to universal service support would bear more than “a reasonable share of the joint and common costs.”<sup>1430</sup>

781. The United States Court of Appeals for the Eighth Circuit previously considered and rejected similar arguments concerning the reallocation of loop costs between end users and IXC.<sup>1431</sup> Specifically, the court considered whether the recovery of joint and common costs must be borne mutually by end-users and by IXCs, and whether a shift in cost recovery from IXCs to end-users violated section 254(k) of the Act.<sup>1432</sup> As to the first provision of section 254(k), the court found that “[s]ection 254(k) was not designed to regulate the apportionment of loop costs between end-users and IXCs because this allocation does not involve improperly shifting costs from a competitive to a non-competitive

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<sup>1424</sup> 47 U.S.C. § 332(c)(1)(B).

<sup>1425</sup> *Id.* § 152(b).

<sup>1426</sup> *Id.* § 332(c)(3)(A).

<sup>1427</sup> *MetroPCS California, LLC v. FCC*, 644 F.3d 410, 414 (D.C. Cir. 2011) (*MetroPCS California v. FCC*) (emphasis in original). See also *id.* (noting the Commission’s position in the *North County v. MetroPCS* decision “that ‘[w]hether to depart so substantially from such long-standing and significant Commission precedent [and to proceed to regulate intrastate rates on this basis] is a complex question better suited to a more general rulemaking proceeding’”). We find this rulemaking proceeding the appropriate context to address this issue.

<sup>1428</sup> See, e.g., Nebraska Rural Companies *USF/ICC Transformation NPRM* Comments at 31; State Members *USF/ICC Transformation NPRM* Comments at 150; SureWest *USF/ICC Transformation NPRM* Reply at 8.

<sup>1429</sup> 47 U.S.C. § 254(k).

<sup>1430</sup> For example, commenters contend that “long distance toll carriers and other service providers, along with their end users, benefit from the utilization of expensive RLEC networks to originate, transport and terminate calls” and that bill-and-keep “would prohibit a reasonable allocation of costs to these other carriers that reflects a rational measure of their use of RLEC networks.” Rural Associations *USF/ICC Transformation NPRM* Comments at 23-24. See also Nebraska Rural Companies *USF/ICC Transformation NPRM* Comments at 31.

<sup>1431</sup> See *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 559 (8<sup>th</sup> Cir. 1998).

<sup>1432</sup> See *id.*

service,” even if “a LEC allocates all of its local loop costs to the end-user.”<sup>1433</sup> Further, the court disagreed that an increase in the SLC price cap violates the second part of 254(k) by causing services included in the definition of universal service to bear more than a reasonable share of the joint and common costs of facilities used to provide those services. The court explained that the “SLC is a method of recovering loop costs, not an allocation of costs between supported and unsupported services”<sup>1434</sup> in violation of section 254(k). We concur with the Eighth Circuit’s analysis and conclude that it applies equally in this context. A bill-and-keep framework resolves whether a carrier will recover its costs from its end users or from other carriers; the underlying service whose costs are being recovered is the same, however, so no costs are being improperly shifted between competitive and non-competitive services for purposes of section 254(k).<sup>1435</sup>

### 3. Other Proposals Considered

#### a. Low Uniform Per-Minute Rate

782. Several parties have suggested that the Commission adopt a low uniform per-minute access charge rather than a bill-and-keep approach.<sup>1436</sup> For example, some stakeholders propose an end state of \$0.0007 for terminating switched and certain terminating transport elements.<sup>1437</sup> Although we recognize that a low uniform rate would result in substantially reduced intercarrier compensation rates, we find several difficulties with this approach.

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<sup>1433</sup> *Id.*

<sup>1434</sup> *Id.*

<sup>1435</sup> We find the bill-and-keep methodology consistent with section 254(k). As to the first provision of section 254(k), we find this approach more consistent with the statute than the previous regime. Access charges were designed to include a subsidy of the local network. *See, e.g., 2008 Order and USF/ICC FNPRM*, 24 FCC Rcd at 6569-70, 6574-75, App. A at paras. 165-66, 173-75; *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4706, 4722, paras. 501, 540. Given the historical under-allocation of costs to non-regulated services that use the local network, the use of access charges—which are not subject to competition—to subsidize the local network would, in effect, subsidize such services, which can be subject to competition. *See USF/ICC Transformation NPRM*, 26 FCC Rcd at 4573, 4732, paras. 52, 569. *See also, e.g., CALLS Order*, 15 FCC Rcd at 13001, para. 98 (“To date, we are not aware of any incumbent LECs that have allocated any loop costs to ADSL services.”). *See Petition of Qwest Corporation For Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8664, para. 79 & n.238 (2010). *See, e.g., Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements; 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules; Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, WC Docket Nos. 02-112, 06-120, CC Docket No. 00-175, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, 16460-61, para. 39 (2007) (finding that AT&T and Verizon lack classical market power with respect to certain mass market services, including bundled local and long distance voice telephone service); *id.* at 16466, para. 49 (concluding the same with respect to certain retail enterprise services). Further, as to the second provision of section 254(k), we explain above why we conclude that bill-and-keep best advances the relevant policy considerations. To the extent that our adoption of bill-and-keep results in an additional allocation of joint and common costs to services supported by universal service, we find that to be reasonable based on those policy considerations. *See 47 U.S.C. § 254(k)* (directing the Commission “to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.”).

<sup>1436</sup> *See, e.g., Verizon USF/ICC Transformation NPRM Comments* at 7-13; *Level 3 USF/ICC Transformation NPRM Comments* at 8-9.

<sup>1437</sup> *See ABC Plan, Attach 1* at 9.

783. *Relationship to All-IP Networks.* We believe that an end point of a low uniform per-minute rate perpetuates the use of TDM networks, whereas our goal is to facilitate the transition to an all-IP network and to promote IP-to-IP interconnection.<sup>1438</sup> Some commenters claim that the existing intercarrier compensation regime is consistent with investment in IP networks, citing LECs' investments in softswitches for example,<sup>1439</sup> but they do not rebut the conclusion that *per minute* charges are inconsistent with the exchange of traffic on an IP-to-IP basis.<sup>1440</sup> Nor do they cite evidence that carriers that historically have relied heavily on per-minute intercarrier compensation charges—typically incumbent LECs—have nonetheless interconnected on an IP-to-IP basis.<sup>1441</sup> The record affirms the *USF/ICC Transformation NPRM*'s suggestion that per-minute intercarrier compensation charges are an impediment to IP-to-IP interconnection.<sup>1442</sup>

784. *Use in Agreements.* Some commenters observe that members of the industry have entered into negotiated agreements for the exchange of traffic at a \$0.0007 rate.<sup>1443</sup> But selected parties' use of a rate in interconnection agreements<sup>1444</sup> does not necessarily support enacting that rate for an entire industry.<sup>1445</sup> The Commission has recognized that the reasonableness of a negotiated rate cannot be

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<sup>1438</sup> See *infra* Section XVII.P.

<sup>1439</sup> See, e.g., COMPTTEL *USF/ICC Transformation NPRM* Comments at 4-5; PAETEC et al. *USF/ICC Transformation NPRM* Comments at 6-7, n. 16.

<sup>1440</sup> See, e.g., Letter from Ad Hoc Telecommunications Users Committee et al., to Julius Genachowski, Chairman, FCC, et al., WC Docket Nos. 10-90, 07-135, 05-337, 03-109, 06-122; GN Docket No. 09-51; CC Docket Nos. 01-92, at 9 (filed Aug. 18, 2011) (Ad Hoc et al. Aug. 18, 2011 *Ex Parte* Letter) ("IP-to-IP traffic today is often exchanged based upon capacity or ports, not per-minute as is the case with circuit-switched TDM traffic. IP network charges are generally driven by peak hour network utilization levels, which are poorly reflected by per-minute charges.").

<sup>1441</sup> Rather, the record reveals that incumbent LECs generally have been reluctant to interconnect on an IP-to-IP basis. See Global Crossing *USF/ICC Transformation NPRM* Comments at 7; XO *USF/ICC Transformation NPRM* Reply at 12-13.

<sup>1442</sup> See, e.g., XO *USF/ICC Transformation NPRM* Comments at 22.

<sup>1443</sup> "The \$0.0007 per minute rate is also consistent with the rates contained in certain recently negotiated agreements between ILECs and CLECs. For example, Verizon recently entered into a commercial agreement with Bandwidth.com for the exchange of VoIP traffic at \$0.0007 per minute." See ABC Plan, Attach. 5 at pp. 34-35; Verizon *USF/ICC Transformation NPRM* Comments at 12-13.

<sup>1444</sup> Some commenters also question the extent to which the \$0.0007 rate actually is employed in voluntarily negotiated agreements. See, e.g., Cablevision and Charter Section XV Reply at 8 ("The fact that the market has been almost universally *unwilling* to provide Verizon with agreements at its preferred rate (with the exception of one small provider that serves PBX customers) is the reason it is asking the Commission to impose such a rate, and should readily dispel any contention that \$0.0007 represents a rate for the exchange of IP-originated or IP terminated traffic set by the 'market.'") (emphasis in original).

<sup>1445</sup> A number of commenters argue that \$0.0007 cannot be enacted for the entire industry because no cost basis has been offered in the record to justify the rate. Rather, some commenters have provided data taking various approaches to estimating cost that yield different rates higher than \$0.0007 per minute. See Letter from James Bradford Ramsay, Counsel to the State Members of the Federal State Joint Board on Universal Service, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, at 2 (filed July 14, 2011) ("there is NO record evidence – no empirical data – no actual cost studies – to support imposing a single industry-wide \$0.0007 rate as compensatory") (emphasis in original). Other commenters believe that the \$0.0007 rate is higher than the cost of termination under other measures, especially as more and more providers move to IP technology. See Sprint Section XV Comments at 18, n.32 ("The \$.0007 rate (continued...)



evaluated in isolation, but must be considered in the context of the agreement as a whole.<sup>1446</sup> The suggestion to take a rate that appears in some interconnection agreements<sup>1447</sup> in isolation from the other rates, terms, and conditions in that agreement and apply it more broadly therefore conflicts with the Commission's policies regarding interconnection agreements.<sup>1448</sup>

785. For these reasons, we decline to adopt a positive per-minute rate as the end point to reform though we implement \$0.0007 per-minute as part of the transition to bill-and-keep, as described below.<sup>1449</sup>

**b. Flat-Rated Charges**

786. The *USF/ICC Transformation NPRM* also sought comment on the use of flat-rated charges as an alternative pricing methodology.<sup>1450</sup> The possible use of flat-rated charges is a hold over suggestion made prior to the explosion of bundled offerings and the decline of per-minute long-distance calling rates. This approach received limited support in the record, and we decline to adopt it.<sup>1451</sup> Flat-rated charges would continue the present opaque system where customers of one network subsidize customers of another,<sup>1452</sup> and would in all likelihood, result in arbitrary prices being assigned to different interconnecting carriers. Considerable questions remain as to how flat-rated charges would be calculated and structured. Given the potential variability of these rates, we believe such charges would fail to

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was computed some 12 years ago, and Sprint believes that the economic cost of terminating a minute today, particularly using current IP technology, is even lower.”).

<sup>1446</sup> See *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245; GN Docket No. 09-51, 26 FCC Rcd at 5336-37 paras. 217-19. The fact that an agreement was negotiated among companies with roughly comparable bargaining power may be a good reason to judge that agreement as establishing just and reasonable rates, terms and conditions between those two parties. See *id.* at 5334-36, paras. 215-16.

<sup>1447</sup> In the *ISP Remand Order*, the \$0.0007 rate was selected as a transitional rate on the glide path to the recovery of costs from end-users based on evidence that some carriers had agreed to this rate in interconnection agreement negotiations. See *ISP Remand Order*, 16 FCC Rcd at 9190-91, para. 85. In the *2008 Order and ICC/USF FNPRM*, the Commission decided to “maintain the \$.0007 cap and the mirroring rule pursuant to its section 201 authority. These rules shall remain in place until we adopt more comprehensive intercarrier compensation reform.” *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6489 para. 29.

<sup>1448</sup> In particular, the Commission replaced its previous “pick and choose” rule that permitted carriers to opt-in to isolated provisions of existing interconnection agreements with the “all or nothing” rule that required carriers to opt-in to interconnection agreements as a whole. See generally, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Second Report and Order, 19 FCC Rcd 13494 (2004); see also Letter from James M. Tobin, Counsel for Pac-West, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 01-92; WC Docket No. 99-68, Attach. at 5 (filed Oct. 6, 2008) (“The \$0.0007 rate was just one element in negotiated interconnection agreements that, like any negotiation, necessarily involved various tradeoffs in other areas, and has no precedential effect when taken in isolation.”); Letter from Thomas Jones, Counsel for twtelecom inc. and One Communications Corp., to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45; WC Docket Nos. 05-337, 99-68, 04-36, Attach., at 3 (filed Oct. 6, 2008).

<sup>1449</sup> See *infra* Section XII.C.

<sup>1450</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4719 para. 531.

<sup>1451</sup> See, e.g., COMPTTEL *USF/ICC Transformation NPRM* Comments at 34-35; GVNW *USF/ICC Transformation NPRM* Comments at 24.

<sup>1452</sup> See *supra* para. 657.

address the arbitrage and marketplace distortions described above that arise from the fact that intercarrier rates are currently above incremental cost.<sup>1453</sup> Nor would a transition to such flat-rated charges address the marketplace distortions that arise from the differential application of intercarrier compensation rules to different providers and different types of traffic.<sup>1454</sup> To the extent that flat-rated charges were based on something other than per-minute rates, the regulatory and implementation costs of setting the rates could be significant.<sup>1455</sup> Flat-rated charges applied to TDM traffic could also continue to hinder the transition to all-IP networks. We agree that if some carriers require other carriers to convert their IP traffic to TDM to complete a call, “merely substituting a flat-rated intercarrier compensation regime for a per minute system is not going to accelerate the deployment of IP networks or speed the transition away from the circuit-switched PSTN.”<sup>1456</sup> We find such approaches less consistent with cost causation principles and the goal of ensuring more appropriate pricing signals to end users than the bill-and-keep methodology we adopt.

**c. More Limited Rate Reductions**

787. Other parties advocate that the Commission initiate reforms to only the highest intercarrier charges and then reassess whether further reform is necessary. The Rural Associations, for instance, propose that RLEC intrastate switched access rates be reduced to interstate levels by individual carriers at the direction of state commissions in tandem with the creation of a federal restructure mechanism.<sup>1457</sup> Carriers would have access to the restructure mechanism if they make certain service and rate reduction commitments.<sup>1458</sup> We have several concerns with the RLEC Plan: There is no mandate for action, action to reduce non-intrastate rates would be delayed for three to five years, and the Plan would not result in uniformity of rates. We find that such a conservative approach to reform would do little to address the multitude of issues described in the *USF/ICC Transformation NPRM* that plague the current intercarrier compensation systems. Again, we find bill-and-keep to be the best option to accomplish comprehensive intercarrier compensation reform.

**B. Federal/State Roles in Implementing Bill-and-Keep**

788. We turn now to the transition and implementation issues surrounding our move to a bill-and-keep framework, beginning in this section with the threshold question of respective federal and state roles. In the *USF/ICC Transformation NPRM*, we outlined two possible approaches for working with the states to advance sustainable intercarrier compensation reform, given a uniform, national methodology as the end point for reform.<sup>1459</sup> Under the first approach, the states would set the transition and recovery mechanism for intrastate access charges, while the Commission would do so for interstate charges, including providing universal service support to offset carriers’ reduced interstate revenues, as required.<sup>1460</sup> The Commission also sought comment on providing incentives for states to implement their transitions expeditiously, for example by making limited federal universal service funds available to assist with intrastate recovery, while setting a firm backstop for states that failed to act. Under the second approach, the Commission would set the transition path and recovery mechanism for all traffic, including

<sup>1453</sup> See *supra* paras. 662-666.

<sup>1454</sup> See *supra id.*

<sup>1455</sup> See *supra* 742-743.

<sup>1456</sup> COMPTTEL *USF/ICC Transformation NPRM* Comments at 35.

<sup>1457</sup> See *Rural Association USF/ICC Transformation NPRM Comments* at 12-22.

<sup>1458</sup> See *id.*

<sup>1459</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4721-28, paras. 537-55.

<sup>1460</sup> See *id.*

intrastate calls, while assuming the burden of USF recovery, as necessary, for both interstate and intrastate revenues reduced as a result of reform.<sup>1461</sup>

789. In response, we received proposals supporting both approaches. Some states supported the bifurcated approach in which they would manage the transition and recovery for intrastate rates while the majority of industry stakeholders supported a more predictable, nationally uniform approach.<sup>1462</sup> The State Members of the Federal State Joint Board, meanwhile, submitted an alternative plan under which states would be responsible for reforming intrastate access charges, even as the federal jurisdiction assumed the primary burden for intrastate revenue recovery through SLC increases up to the current SLC caps and explicit support from the federal universal service fund.<sup>1463</sup> In contrast, other stakeholders proposed that the Commission adopt a uniform, national framework for reductions in interstate and intrastate access charges, as well as recovery from the federal jurisdiction.<sup>1464</sup> The *August 3 Public Notice* sought additional comment on these approaches as well as possible modifications.<sup>1465</sup>

790. We now conclude that a uniform, national framework for the transition of intercarrier compensation to bill-and-keep, with an accompanying federal recovery mechanism, best advances our policy goals of accelerating the migration to all IP networks, facilitating IP-to-IP interconnection, and promoting deployment of new broadband networks by providing certainty and predictability to carriers and investors. Although states will not set the transition for intrastate rates under this approach, we do follow the State Member's proposal regarding recovery coming from the federal jurisdiction. Doing so takes a potentially large financial burden away from states. States will also help implement the bill-and-keep methodology: They will continue to oversee the tariffing of intrastate rate reductions during the transition period as well as interconnection negotiations and arbitrations pursuant to sections 251 and 252, and will have responsibility for determining the network "edge" for purposes of bill-and-keep.<sup>1466</sup>

791. Today, intrastate access rates vary widely. In many states, intrastate rates are significantly higher than interstate rates; in others, intrastate and interstate rates are at parity; and in still other states, intrastate access rates are below interstate levels.<sup>1467</sup> The varying rates have created

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<sup>1461</sup> See *id.*

<sup>1462</sup> See, e.g., AT&T *USF/ICC Transformation NPRM* Comments at 31, 38-43 (urging federal framework); CTIA *USF/ICC Transformation NPRM* Comments at 40-42 (same); California Commission *USF/ICC Transformation NPRM* Comments at 19-20 (urging current jurisdictional roles); New York Commission *USF/ICC Transformation NPRM* at 7-12 (same).

<sup>1463</sup> See State Members *USF/ICC Transformation NPRM* Comments at 153-55.

<sup>1464</sup> See ABC Plan at 11-13; Joint Letter at 2-3.

<sup>1465</sup> *Further Inquiry Into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51, Public Notice, DA 11-1348 at 10-13 (WCB rel. Aug. 3, 2011) (*August 3 PN*). The *August 3 PN* sought comment on the ABC Plan, which proposed for the Commission to unify all rates consistent with the second option from the *USF/ICC Transformation NPRM*. Comment was also sought on an alternative whereby states would act to reform intrastate access during an initial three year period, following which the Commission would bring intrastate traffic under section 251(b)(5), consistent with the first option. *Id.* at 12.

<sup>1466</sup> See *supra* para. 776; *infra* paras. 1321, 1370.

<sup>1467</sup> Letter from Joe A. Douglas, Vice President, Government Relations, NECA, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 80-286, Attach. (filed Dec. 29, 2010) (NECA Dec. 29, 2010 *Ex Parte* Letter) (providing a report showing average intrastate access rates per state for NECA common line 2010 pool members from as low as 1.98 cents per minute to as high as 13.5 cents per minute).

incentives for arbitrage and pervasive competitive distortions within the industry.<sup>1468</sup> Equally important, consumers may not receive adequate price signals to make economically efficient choices because local and long-distance rates do not necessarily reflect the underlying costs of their calls. Depending on their regulatory classification, some carriers charge and collect intercarrier compensation charges, while other carriers do not. A bill-and-keep system will ultimately eliminate the competitive distortions and consumer inequities that arise today when different carriers that use differing technologies (wireline, wireless, VoIP) to perform the same function – complete a call – are subject to different regulatory classifications and requirements.

792. Providing a uniform national transition and recovery framework, to be implemented in partnership with the states, will achieve the benefits of a uniform system and realize the goals of reducing arbitrage and promoting investment in IP networks as quickly as possible. By transitioning all traffic in a coordinated manner, we will minimize opportunities for arbitrage that could be presented by disparate intrastate rates.<sup>1469</sup> For example, our approach will reduce the potential for arbitrage that could result from a widening gap between intrastate and interstate rates if the Commission were to initially reduce interstate rates only.<sup>1470</sup> In addition, a coordinated transition involving both intrastate and interstate traffic will help to align principles of cost causation and provide appropriate pricing signals to end users. Whether completing an interstate or intrastate call, consumers will benefit from a unified system in which arbitrage opportunities that inequitably shift costs among consumers are reduced.

793. By moving in a coordinated manner to address the intercarrier compensation system for all traffic, we will also help to ensure that there is no disruption in the transition to more efficient forms of all IP networks. The record suggests that a “federally managed, geographically neutral” intercarrier compensation regime that eliminates incentives for arbitrage will allow service providers to deploy resources in more productive ways.<sup>1471</sup> In addition, a unified approach for all ICC traffic will help remove obstacles to progress toward all-IP networks where jurisdictional boundaries become less relevant.<sup>1472</sup> In sum, our approach helps to ensure that the intercarrier compensation modernization effort will continue apace without unnecessary delays needed to harmonize disparate state actions.

794. Although several states have sought to reform intrastate access rates, significant challenges remain that could impede our comprehensive reform efforts absent a uniform, national transition.<sup>1473</sup> Under the direction of both state commissions and legislatures, states have taken a variety

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<sup>1468</sup> See, e.g., AT&T *USF/ICC Transformation NPRM* Comments at 13; see also NASUCA *USF/ICC Transformation NPRM* Comments at 73 (describing a patchwork of rates).

<sup>1469</sup> See AT&T *USF/ICC Transformation NPRM* Comments at 13; CBeyond et al. *USF/ICC Transformation NPRM* Comments at 8-9; ABC Plan Proponents *August 3 PN Reply* at 4.

<sup>1470</sup> CBeyond et al. *USF/ICC Transformation NPRM* Comments at 8-9.

<sup>1471</sup> See TIA *August 3 PN* Comments at 10; see also AT&T *USF/ICC Transformation NPRM* Comments at 14; Google *USF/ICC Transformation NPRM* Comments at 5.

<sup>1472</sup> See Google *USF/ICC Transformation NPRM* Comments at 5; Global Crossing *USF/ICC Transformation NPRM* Comments at 6-7; Ad Hoc et al. Aug. 18, 2011 *Ex Parte* Letter, at 2.

<sup>1473</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4723-24, para. 543 (highlighting efforts of states including Nebraska, Iowa, and Maine); see also Alaska Commission *USF/ICC Transformation NPRM* Comments at 26-27; IUB *USF/ICC Transformation NPRM* Comments at 4-5; Kansas Commission April 18 *USF/ICC Transformation NPRM* Comments at 15; Massachusetts DTC *USF/ICC Transformation NPRM* Comments at 19, Attachs. 1 & 2; Michigan Commission *USF/ICC Transformation NPRM* Comments at 10-13; Missouri Commission *USF/ICC Transformation NPRM* Comments at 17; New Jersey Board *USF/ICC Transformation NPRM* Comments at 5; Ohio Commission *USF/ICC Transformation NPRM* Comments at 55-57; Washington Commission *USF/ICC Transformation NPRM* Comments at 8-11; Letter from James Bradford Ramsay, General Counsel, NARUC, to (continued...)

of approaches to reform.<sup>1474</sup> In some states, these efforts have resulted in intrastate access rate levels coming to parity with interstate levels.<sup>1475</sup> In other states, reform has led to reductions in intrastate rate levels, but rates remain above interstate levels.<sup>1476</sup> Although many states may genuinely desire to advance additional reforms, the challenges posed by a state-by-state process would likely result in significant variability and unpredictability of outcomes.<sup>1477</sup> Moreover, some state commissions lack authority to address intrastate access reform,<sup>1478</sup> and we are concerned that many states will be unable to complete reforms in a timely manner or will otherwise decline to act. Indeed, the Missouri Commission endorsed a section 251(b)(5) approach because “states should not be allowed to delay access reform.”<sup>1479</sup> The lack of certainty and predictability for the industry without a uniform framework is a significant concern. Carriers and investors need predictability to make investment and deployment decisions and lack of certainty regarding intrastate access rates or recovery hampers these efforts. In addition some parties warned that it would be “extremely costly” to participate in “the multitude” of state commission proceedings that would follow from an approach relying on dozens of different state transitions and recovery frameworks.<sup>1480</sup>

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Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, Attach. A (filed Sept. 21, 2011); Letter from Brian J. Benison, Director – Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 05-337, GN Docket No. 09-51, Attach. 1, 2 (filed Oct. 25, 2010) (AT&T Oct. 25, 2010 *Ex Parte* Letter); Petition of Sprint to Reduce Intrastate Access Rates of Incumbent Local Exchange Carriers in North Carolina, Interim Report of the Access Charges Working Group, Docket P-100, Sub 167 (filed Oct. 14, 2010), *cited in* NASUCA *USF/ICC Transformation NPRM* Comments at 73 n.214. Since the release of the *USF/ICC Transformation NPRM*, we note that there have been additional intrastate access reform efforts. *See, e.g.*, 2011 Tenn. Pub. Acts 068 (codified at TENN. CODE. ANN. § 65-5-301 et seq.); *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers and the Pennsylvania Universal Service Fund*, Docket No. I-00040105, Opinion and Order, (Pa. PUC rel. July 18, 2011).

<sup>1474</sup> *See, e.g.*, Michigan Commission *USF/ICC Transformation NPRM* Comments at 10; New Jersey Board *USF/ICC Transformation NPRM* Comments at 5; *Board’s Investigation and Review of Local Exchange Carrier Intrastate Access Rates*, Docket No. TX08090830, Telecommunications Order, 27 (NJ Bd. of Pub. Utils. Feb. 1, 2010); 2011 Tenn. Pub. Acts 068 (codified at TENN. CODE. ANN. § 65-5-301 et seq.).

<sup>1475</sup> *See, e.g.*, Kansas Commission *USF/ICC Transformation NPRM* Comments at 15; Massachusetts DTC *USF/ICC Transformation NPRM* Comments at 19.

<sup>1476</sup> *See, e.g.*, Missouri Commission *USF/ICC Transformation NPRM* Comments at 17.

<sup>1477</sup> The record indicates that, in some cases, state reform efforts have taken well over a decade, sometimes with little result. *See* Verizon *USF/ICC Transformation NPRM* Reply at 57-66 (describing the length of reform efforts in states including Minnesota and Arizona and noting that South Dakota recently completed a six year proceeding that resulted in a rule capping CLEC rates “at a remarkably high six cents per minute”).

<sup>1478</sup> *See* Florida Commission *USF/ICC Transformation NPRM* Comments at 5; Montana Commission *USF/ICC Transformation NPRM* Reply at 5.

<sup>1479</sup> Missouri Commission *USF/ICC Transformation NPRM* Comments at 19 (“One option is for states to remain responsible for reforming intrastate access charges while the second option relies on the FCC to establish a methodology which states would then work with the FCC to implement. The MoPSC prefers the second option. Assuming the FCC’s initial goal of intercarrier compensation reform is for parity between intrastate and interstate rates then the FCC should set a schedule for achieving that objective. States should be allowed to accelerate intrastate reform; however, a state should not be allowed to delay access reform.”); *see also* Wisconsin Commission *August 3 PN* Comments at 5.

<sup>1480</sup> CBeyond et al. *USF/ICC Transformation NPRM* Comments at 8.

795. In addition, as noted above, adopting a uniform federal transition and recovery mechanism will free states from potentially significant financial burdens. Our recovery mechanism will provide carriers with recovery for reductions to eligible interstate *and* intrastate revenue. As a result, states will not be required to bear the burden of establishing and funding state recovery mechanisms for intrastate access reductions, while states will continue to play a role in implementation. Furthermore, the Residential Rate Ceiling adopted as part of our recovery mechanism will help ensure that consumer telephone rates remain affordable, and will also recognize so-called “early adopter” states that have already undertaken reform of intrastate access charges and rebalanced rates.<sup>1481</sup>

796. Some commenters argued that the uniform approach we take today is inappropriate because states should be allowed to pursue tailored intrastate access reforms.<sup>1482</sup> We appreciate and respect the expertise and on-the-ground knowledge of our state partners concerning intrastate telecommunications. Indeed, as we have said, states will have responsibility for implementing the bill-and-keep methodology adopted herein and will continue to oversee the tariffing of intrastate rates during the transition period and interconnection negotiations and arbitrations pursuant to section 252, as well as determine the network “edge” for purposes of bill-and-keep.<sup>1483</sup> With respect to the ultimate ICC framework and the intervening transition, however, we find that a uniform national approach will best create predictability for carriers and promote efficient pricing and new investment to the benefit of consumers.

797. We also conclude that a uniform transition to bill-and-keep is preferable to the plan of State Members of the Universal Service Joint Board that would set a positive per-minute ICC rate per carrier that could be higher than existing reciprocal compensation rates.<sup>1484</sup> In particular, the State Members suggest that the Commission set a single rate per provider for all purchasers in a single location, and then provide states the option of adopting this proposal or not.<sup>1485</sup> If a state adopts the single rate per provider option it would require “that each telecommunications carrier in the State would establish a maximum intercarrier per-minute termination rate that is no higher than the lower of its own current per-minute interstate termination rate and its average intercarrier compensation terminating rate.”<sup>1486</sup> Under this plan, however, states could choose not to adopt the single rate per provider option and therefore could maintain existing intrastate rates in perpetuity, preserving all the associated problems with the current system.

### C. Transition

798. In light of our decision to adopt a uniform federal transition to bill-and-keep, in this section we set out a default transition path for terminating end office switching and certain transport rate elements to begin that process. We also begin the process of reforming other rate elements by capping all interstate rate elements as of the effective date of the rules adopted pursuant to this Order,<sup>1487</sup> and capping terminating intrastate rates for all carriers. Doing so ensures that no rates increase during reform, and that

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<sup>1481</sup> See *infra* paras. 913 - 916.

<sup>1482</sup> See, e.g., Kansas Commission *USF/ICC Transformation NPRM* Comments at 36-39; Michigan Commission *USF/ICC Transformation NPRM* Comments at 9.

<sup>1483</sup> See *supra* para. 776; *infra* paras. 1321, 1370.

<sup>1484</sup> See State Members *USF/ICC Transformation NPRM* Comments at 153-55.

<sup>1485</sup> See *id.* See also Cincinnati Bell *USF/ICC Transformation NPRM* Comments at 15-16 (supporting the State Members’ Plan as a possible alternative).

<sup>1486</sup> State Members *USF/ICC Transformation NPRM* Comments at 154.

<sup>1487</sup> The effective date of the rules will be 30 days after the rules are published in the Federal Register.

carriers do not shift costs between or among other rate elements, which would be counter to the principles we adopt today. And, this transition will help minimize disruption to consumers and service providers by giving parties time, certainty, and stability as they adjust to an IP world and a new compensation regime.

799. In the *USF/ICC Transformation NPRM*, we sought comment on the transition away from existing intercarrier compensation rates to facilitate carriers' movement to IP networks, including the sequencing and timing of rate reductions that would allow carriers to plan appropriately.<sup>1488</sup> The record contains a variety of recommendations for the length of the transition period and the rates that would be affected during different phases of the transition.<sup>1489</sup> Some of these proposals would begin the reform process by reducing intrastate switched access rates, and in some cases, reciprocal compensation rates, down to interstate rate levels over three to five years.<sup>1490</sup> Other proposals would reduce both interstate and intrastate rates to bill-and-keep or another end-point in the same amount of time.<sup>1491</sup> Parties also supported different transition periods by carrier type. For example, some parties submit that rate-of-return carriers should be given longer to reduce their rates than price cap carriers because the costs and rates of rate-of-return carriers generally are significantly higher than those of price cap carriers.<sup>1492</sup> Some parties suggest that competitive LECs should be given more time than other carriers to transition their rates.<sup>1493</sup>

800. Balancing these considerations, we set forth our transition path for terminating end office switching and certain transport rate elements and reciprocal compensation charges in Figure 9. In brief, our transition plan first focuses on the transition for terminating traffic, which is where the most acute intercarrier compensation problems, such as arbitrage, currently arise. We believe that limiting reductions at this time to terminating access rates will help address the majority of arbitrage and manage the size of the access replacement mechanism. We also take measures today to start reforming other elements as well by capping all interstate switched access rates in effect as of the effective date of the rules, including originating access and all transport rates. Absent such action, rate-of-return carriers could shift costs between or among other rate elements and rates to interconnecting carriers could continue to increase as they have been in the past years, which is counter to the reform we adopt today. Even so, we do not

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<sup>1488</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4720-28, paras. 533-55. This is consistent with the National Broadband Plan, which observed that “[s]udden changes in USF and ICC could have unintended consequences that slow progress” and that “[s]uccess will come from a clear road map for reform, including guidance about the timing and pace of changes to existing regulations, so that the private sector can react and plan appropriately.” National Broadband Plan at 141.

<sup>1489</sup> See, e.g., AT&T *USF/ICC Transformation NPRM* Comments at 30-32; California Commission *USF/ICC Transformation NPRM* Comments at 18-20; CBeyond et al. *USF/ICC Transformation NPRM* Comments at 4-7; Comcast *USF/ICC Transformation NPRM* Comments at 3-6; CTIA *USF/ICC Transformation NPRM* Comments at 37-39; Earthlink *USF/ICC Transformation NPRM* Comments at 11; Frontier *USF/ICC Transformation NPRM* Comments at 5, 7-8; Global Crossing *USF/ICC Transformation NPRM* Comments at 14; Kansas Commission *USF/ICC Transformation NPRM* Comments at 39-41; Level 3 *USF/ICC Transformation NPRM* Comments at 6-8; MetroPCS *USF/ICC Transformation NPRM* Comments at 6-7; MoSTCG *USF/ICC Transformation NPRM* Comments at 10; T-Mobile *USF/ICC Transformation NPRM* Comments at 27-28.

<sup>1490</sup> See, e.g., CBeyond et al. *USF/ICC Transformation NPRM* Comments at 4, Earthlink *USF/ICC Transformation NPRM* Comments at 11, Frontier *USF/ICC Transformation NPRM* Comments at 5, 7-8, Global Crossing *USF/ICC Transformation NPRM* Comments at 14, and Level 3 *USF/ICC Transformation NPRM* Comments at 6-8.

<sup>1491</sup> AT&T *USF/ICC Transformation NPRM* Comments at 30.

<sup>1492</sup> Rural Associations *August 3 PN* Comments at 35-39.

<sup>1493</sup> See, e.g., COMPTel *August 3 PN* Comments at 20-22.

specify the transition to reduce these rates further at this time. Instead, we seek comment regarding the transition and recovery for such other rate elements in the FNPRM.<sup>1494</sup>

801. Thus, at the outset of the transition, all interstate switched access and reciprocal compensation rates will be capped at rates in effect as of the effective date of the rules.<sup>1495</sup> We cap these rates as of the effective date of the rules<sup>1496</sup> to ensure that carriers cannot make changes to rates or rate structures to their benefit in light of the reforms adopted in this Order. For price cap carriers, all intrastate rates will also be capped, and, for rate-of-return carriers, all terminating intrastate access rates will also be capped. Consistent with many proposals in the record, our transition plan provides rate-of-return carriers, whose rates typically are higher, additional time to transition as appropriate. Specifically, we conclude that a six-year transition for price cap carriers and competitive LECs that benchmark to price cap carrier rates and a nine-year transition for rate-of-return carriers and competitive LECs that benchmark to rate-of-return carrier rates to transition rates to bill-and-keep strikes an appropriate balance that will moderate potential adverse effects on consumers and carriers of moving too quickly from the existing intercarrier compensation regimes.<sup>1497</sup>

Figure 9

Intercarrier Compensation Reform Timeline		
Effective Date	For Price Cap Carriers and CLECs that benchmark access rates to price cap carriers <sup>1498</sup>	For Rate-of-Return Carriers and CLECs that benchmark access rates to rate-of-return carriers <sup>1499</sup>
Effective Date of the rules	All intercarrier switched access rate elements, including interstate and intrastate originating and terminating rates and reciprocal compensation rates are capped.	All interstate switched access rate elements, including all originating and terminating rates and reciprocal compensation rates are capped. Intrastate terminating rates are also capped.

<sup>1494</sup> We do, however, cap price cap interstate and intrastate originating access rates to combat potential arbitrage and other efforts designed to increase or otherwise maximize sources of intercarrier revenues during the transition.

<sup>1495</sup> Although the ABC Plan and Joint Letter proposed that rates should be capped on January 1, 2012, ABC Plan at 11, Joint Letter at 3, we cap such rates as of the effective date of the rules. This will ensure that carriers do not seek to inflate their access charges in advance of our reforms. Specifically, we cap all rate elements in the “traffic sensitive basket” and the “trunking basket” as described in 47 C.F.R. §§ 61.42(d)(2)-(3) unless a price cap carrier made a tariff filing increasing any such rate element prior to the effective date of the rules and such change was not yet in effect.

<sup>1496</sup> See *supra* n. 1495.

<sup>1497</sup> As a baseline, we adopt the transition proposed in the ABC Plan and Joint Letter with the addition of an extra year to allow each set of carriers to complete a transition to bill-and-keep. See *id.*

<sup>1498</sup> ABC Plan, Attach. 1 at 11. We note that CMRS providers are subject to mandatory detariffing. Nonetheless, CMRS providers are included in the transition to the extent their reciprocal compensation rates are inconsistent with the reforms we adopt here.

<sup>1499</sup> Joint Letter at 3 & n.1. We note that carriers remain free to make elections regarding participation in the NECA pool and tariffing processes during the transition. See 47 C.F.R. § 69.601 et seq. At the same time, we decline to adopt the Rural Associations’ proposal to require carriers that withdraw from NECA association tariffs for switched access elements to continue to contribute to the pool as if they had remained part of the NECA pool. See Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos.10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, Attach. at 25 (filed Oct. 17, 2011). Such a requirement would frustrate efficiencies generated by our reforms and could unnecessarily burden carriers with costs that are no longer necessary.



July 1, 2012	Intrastate terminating switched end office <sup>1500</sup> and transport rates, <sup>1501</sup> originating and terminating dedicated transport, <sup>1502</sup> and reciprocal compensation rates, if above the carrier's interstate access rate, are reduced by 50 percent of the differential between the rate and the carrier's interstate access rate.	Intrastate terminating switched end office <sup>1503</sup> and transport rates, <sup>1504</sup> originating and terminating dedicated transport, <sup>1505</sup> and reciprocal compensation rates, if above the carrier's interstate access rate, are reduced by 50 percent of the differential between the rate and the carrier's interstate access rate.
July 1, 2013	Intrastate terminating switched end office and transport rates, originating and terminating dedicated transport rates, and reciprocal compensation, if above the carrier's interstate access rate, are reduced to parity with interstate access rate.	Intrastate terminating switched end office and transport rates, originating and terminating dedicated transport rates, and reciprocal compensation, if above the carrier's interstate access rate, are reduced to parity with interstate access rate.
July 1, 2014	Terminating switched end office and reciprocal compensation rates are reduced by one-third of the differential between end office rates and \$0.0007.*	Terminating switched end office and reciprocal compensation rates are reduced by one-third of the differential between end office rates and \$0.005.*
July 1, 2015	Terminating switched end office and reciprocal compensation rates are reduced by an additional one-third of the original differential to \$0.0007.*	Terminating switched end office and reciprocal compensation rates are reduced by an additional one-third of the original differential to \$0.005.*
July 1, 2016	Terminating switched end office and reciprocal compensation rates are reduced to \$0.0007.*	Terminating switched end office and reciprocal compensation rates are reduced to \$0.005.*
July 1, 2017	Terminating switched end office and reciprocal compensation rates are reduced to bill-and-keep. Terminating switched end office and transport are reduced to \$0.0007 for all terminating traffic within the tandem serving area when the terminating carrier owns the serving tandem switch.	Terminating end office and reciprocal compensation rates are reduced by one-third of the differential between its end office rates (\$0.005) and \$0.0007.*
July 1, 2018	Terminating switched end office and transport are reduced to bill-and-keep for all terminating traffic within the tandem serving area when the terminating carrier owns the serving tandem switch.	Terminating switched end office and reciprocal compensation rates are reduced by an additional one-third of the differential between its end office rates as of July 1, 2016 and \$0.0007.*
July 1, 2019		Terminating switched end office and reciprocal compensation rates are reduced to \$0.0007.*
July 1, 2020		Terminating switched end office and reciprocal compensation rates are reduced

<sup>1500</sup> See App. A, 47 C.F.R. § 51.903(d).

<sup>1501</sup> See App. A, 47 C.F.R. § 51.903(i).

<sup>1502</sup> See App. A, 47 C.F.R. § 51.903(c).

<sup>1503</sup> See App. A, 47 C.F.R. § 51.903(d).

<sup>1504</sup> See App. A, 47 C.F.R. § 51.903(i).

<sup>1505</sup> See App. A, 47 C.F.R. § 51.903(c).

\* Transport rates remain unchanged from the previous step.

		to bill-and-keep.*
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802. We believe that these transition periods strike the right balance between our commitment to avoid flash cuts and enabling carriers sufficient time to adjust to marketplace changes and technological advancements, while furthering our overall goal of promoting a migration to modern IP networks.<sup>1506</sup> We find that consumers will benefit from this regulatory transition, which enables their providers to adapt to the changing regulatory and technical landscape and will enable a faster and more efficient introduction of next-generation services.

803. The transition we adopt is partially based on a stakeholder proposal,<sup>1507</sup> with certain modifications, including the adoption of a bill-and-keep methodology as the end state for all traffic. As explained further below, states will play a key role in implementing the framework we adopt today. In particular, states will oversee changes to intrastate access tariffs to ensure that modifications to intrastate tariffs are consistent with the framework and rules we adopt today. For example, states will help guard against carriers improperly moving costs between or among different rate elements to reap a windfall from reform.

804. Since intercarrier compensation charges are constrained by the transition glide path that we adopt, we will be monitoring to ensure that carriers do not shift costs to other rate elements that are not specifically covered, such as special access or common line. We also clarify that, in cases where a provider's interstate terminating access rates are higher than its intrastate terminating access rates, intrastate rate reductions shall begin to occur at the stage of the transition in which interstate rates come to parity with intrastate rate levels.<sup>1508</sup>

805. The transition imposes a cap on originating intrastate access charges for price cap carriers at current rates as of the effective date of the rules. The transition does not cap originating intrastate access charges for rate-of-return carriers. Rate-of-return carriers suggested that it would not be viable for them to reduce terminating switched rates, while at the same time reducing originating rates without overburdening the Universal Service Fund.<sup>1509</sup> In the meantime, rate-of-return carriers indicate that the wholesale long distance market will constrain originating rates.<sup>1510</sup> Given our commitment to control the size of the CAF and minimize burdens on consumers, we do not cap intrastate originating access charges

<sup>1506</sup> We decline to adopt a "tribal carve-out" for ICC reform as proposed by Gila River. *See* Letter from Tom W. Davidson, Counsel to Gila River Telecommunications, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, WC Docket Nos. 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45 at 2 n.2 (filed Oct. 21, 2011). There is insufficient evidence in the record demonstrating that any such carve-out is necessary; nor is there any evidence that the recovery mechanism we adopt below, coupled with the Total Earnings Review process for additional recovery described below, is somehow insufficient for Tribal carriers. Moreover, we are concerned that such a carve-out could invite arbitrage opportunities that we are seeking to curtail in this Order.

<sup>1507</sup> *See* ABC Plan, Attach. 1 at 11; Joint Letter at 3 & n.1.

<sup>1508</sup> *See* App. A, 47 C.F.R. §§ 51.907, 909. As we describe above, in most cases intrastate terminating access rates are higher than intrastate rates (*see supra* para. 791), and we believe that initially focusing our reforms to address this disparity is appropriate. *But see* Letter from Tina Pidgeon et al., General Communication, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 2 (filed Oct. 6, 2011) (proposing that the higher of interstate or intrastate access rates be reduced during the first two years).

<sup>1509</sup> Rural Associations *August 3 PN* Comments at 40.

<sup>1510</sup> *Id.* at 41 ("[I]f originating access rates are not reduced . . . then the interexchange carriers upon which RLECs rely to provide retail toll service will likely increase their wholesale rates . . . . Another likely outcome is that some IXC's may simply exit rural markets and no longer provide wholesale services to RLECs.").

for rate-of-return carriers at this time. As noted above, we have placed priority on reform of terminating access charges and we are mindful of the compromises that must be made to accomplish meaningful reform in a measured and timely manner. In the FNPRM, we seek comment on the transition of *all* originating access charges to bill-and-keep, including originating intrastate access charges for rate-of-return carriers.

806. *CMRS Providers.* As noted above, CMRS providers will be subject to the transition applicable to price cap carriers. Although CMRS providers are subject to mandatory detariffing, these providers are included to the extent their reciprocal compensation rates are inconsistent with the reforms we adopt here.<sup>1511</sup> In section XV, we also address compensation for non-access traffic exchanged between LECs and CMRS providers. As we detail in that section, we immediately adopt bill-and-keep as the default compensation methodology for non-access traffic exchanged between LECs and CMRS providers under section 20.11 of our rules and Part 51.

807. *Competitive LECs.* To ensure smooth operation of our transition, we provide competitive LECs that benchmark their rates a limited allowance of additional time to make tariff filings during the transition period. Application of our access reforms will generally apply to competitive LECs via the CLEC benchmarking rule.<sup>1512</sup> For interstate switched access rates,<sup>1513</sup> competitive LECs are permitted to tariff interstate access charges at a level no higher than the tariffed rate for such services offered by the incumbent LEC serving the same geographic area (the benchmarking rule).<sup>1514</sup> There are two exceptions to the general benchmarking rule. First, rural competitive LECs offering service in the same areas as non-rural incumbent LECs are permitted to “benchmark” to the access rates prescribed in the NECA access tariff, assuming the highest rate band for local switching (the rural exemption). Second, as explained in Section XI.A above, competitive LECs meeting the access revenue sharing definition are required to benchmark to the lowest interstate switched access rate of a price cap LEC in the state.<sup>1515</sup> Because we retain the CLEC benchmark rule during the transition, we allow competitive LECs an extra 15 days from the effective date of the tariff to which a competitive LEC is benchmarking to make its filing(s). We emphasize that the rates that are filed by the competitive LEC must comply with the applicable benchmarking rate. As is the case now, we decline to adopt rules governing the rates that competitive LECs may assess on their end users.

808. We decline to adopt a separate and longer transition period for competitive LECs, as suggested by some commenters.<sup>1516</sup> For one, competitive LEC rates are already at or near parity for

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<sup>1511</sup> See *supra* note 1498.

<sup>1512</sup> In cases where more than one incumbent LEC operates within a competitive LEC’s service area and those incumbent LECs are both price cap and rate-of-return regulated, a question may arise as to the appropriate transition track for the competitive LEC. See *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9131-32, paras 46-48 (2004). If the competitive LEC tariffs a benchmarked or average rate in such circumstances, that competitive LEC shall adopt the transition path applicable to the majority of lines capable of being served in its territory. For example, if price cap carriers serve 70 percent of a competitive LEC’s service territory and rate-of-return carriers serve 30 percent of the service territory, then the competitive LEC using a blended rate should follow the price cap transition.

<sup>1513</sup> References to access services and access rate elements in our rules or otherwise does not presuppose the application of access charge regulation.

<sup>1514</sup> See 47 C.F.R. § 61.26; see also *CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3.

<sup>1515</sup> See *infra* para. 679.

<sup>1516</sup> See, e.g., COMPTTEL *August 3 PN Comments* at 20-22; TDS Metrocom *August 3 PN Reply* at 4-5. But see Northern Telephone & Data Corp. *Ex Parte Comments* at 2-3 (filed Oct. 20, 2011) (“Any plan adopted by the (continued...)”).

many if not all access rates. Due to the operation of the Commission's CLEC benchmark rules, competitive LEC tariffed access rates are largely already at parity with incumbent LEC rates. And, in a large number of states, competitive LEC intrastate access rates are at or near parity to those of the incumbent LEC, as well.<sup>1517</sup> Thus, we do not find a sufficient basis for creating a separate transition for competitive LECs. Moreover, the transition periods of six and nine years are sufficiently long to permit advance planning and represent a careful balance of the interests of all stakeholders. As a result, we conclude that a uniform approach for all LECs is preferable and do not find compelling evidence to depart from the important policy objectives underlying the CLEC benchmarking rule. Further, new arbitrage opportunities could arise and increased regulatory oversight would be necessary were we to abandon the CLEC benchmarking rule.

### 1. Authority To Specify the Transition

809. Specifying the timing and steps for the transition to bill-and-keep requires us to make a number of line-drawing decisions. Although we could avoid those decisions by moving to bill-and-keep immediately, such a flash cut would entail significant market disruption to the detriment of consumers and carriers alike. As the D.C. Circuit has recognized, “[w]hen necessary to avoid excessively burdening carriers, the gradual implementation of new rates and policies is a standard tool of the Commission,” and the transition “may certainly be accomplished gradually to permit the affected carriers, subscribers and state regulators to adjust to the new pricing system, thus preserving the efficient operation of the interstate telephone network during the interim.”<sup>1518</sup> Thus, “[i]t is reasonable for the FCC to take into account the ability of the industry to adjust financially to changing policies,” and “[i]nterim solutions may need to consider the past expectations of parties and the unfairness of abruptly shifting policies.”<sup>1519</sup> In such circumstances, “the FCC should be given ‘substantial deference’ when acting to impose interim regulations.”<sup>1520</sup>

810. In our judgment, the framework we adopt carefully balances the potential industry disruption for both payers and recipients of intercarrier compensation as we transition to a new intercarrier compensation regime more broadly. It is particularly appropriate for the Commission to exercise its authority to craft a transition plan in this context, where the Commission is acting, as it has in prior orders, to reconcile the “implicit tension between” the Act’s goals of “moving toward cost-based rates and protecting universal service.”<sup>1521</sup>

(Continued from previous page) —————

Commission cannot treat ILECs and CLECs differently; and similarly, must recognize that [sic] many rural CLECs, such as NTD, should receive the same treatment as rural ILECs under the transition.”).

<sup>1517</sup> See, e.g., *Verizon New England, Inc., et al., for Investigation under Chapter 159, Section 14, of the Intrastate Access Rates of Competitive Local Exchange Carriers*, D.T.C. 07-9, Order, (Mass. D.T.C. June 22, 2009), *aff’d*, Order on Motion for Reconsideration and Clarification (Dec. 7, 2009); DEL. CODE ANN. tit. 26 § 707(e) (2008); MO. ANN. STAT. § 392.370 (2008); 66 PA. CONS. STAT. ANN. § 3017(c) (2004); 20 VA. ADMIN. CODE § 5-417-50(E) (2007); WASH. ADMIN. CODE § 480-120-540(2) (2007).

<sup>1518</sup> *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095, 1135-36 (D.C. Cir. 1984).

<sup>1519</sup> *MCI Telecomm’ns Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984).

<sup>1520</sup> *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1106 (D.C. Cir. 2009); see also *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002); *Competitive Telecomm’ns Ass’n v. FCC*, 117 F.3d 1068, 1073-75 (8th Cir. 1997); *MCI*, 750 F.2d at 141.

<sup>1521</sup> *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 538 (8th Cir. 1998).

## 2. Implementation Issues

811. We now address a number of ancillary issues surrounding implementation of the transition. First, we describe the continuing role of tariffs during the transition. Next, we discuss price cap conversions and the impact of our reforms on existing agreements. Finally, we address pending petitions that are mooted by the changes adopted as part of the transition.

812. *Role of Tariffs.* Under today's intercarrier compensation system, carriers typically tariff their access charges. To avoid disruption of these well-established relationships,<sup>1522</sup> we preserve a role for tariffing charges for toll traffic during the transition.<sup>1523</sup> Pursuant to the transition set forth above, we permit LECs to tariff the default charges for intrastate toll traffic at the state level, and for interstate toll traffic with the Commission, in accordance with the timetable and rate reductions set forth above.<sup>1524</sup> At the same time, carriers remain free to enter into negotiated agreements that differ from the default rates established above, consistent with the negotiated agreement framework that Congress envisioned for the 251(b)(5) regime to which access traffic is transitioned. As an interim matter, this new regime will facilitate the benefits that can arise from negotiated arrangements, while also allowing for revenue predictability that has been associated with tariffing.<sup>1525</sup> In some respects our allowance of some tariffing may be similar to the wireless termination tariffs for non-access traffic addressed in the Commission's 2005 *T-Mobile Order*.<sup>1526</sup> In that decision, the Commission prohibited the filing of state tariffs governing the compensation for terminating non-access CMRS traffic because they were inconsistent with the negotiated agreement framework contemplated by Commission precedent and by Congress when it enacted section 251.<sup>1527</sup> We do not, however, believe that the policies underlying the prohibition of wireless termination tariffs for non-access traffic in the *T-Mobile Order* precludes our allowance of certain tariffing of intercarrier compensation for toll traffic.<sup>1528</sup> Finally, during the transition, traffic that historically has been addressed through interconnection agreements will continue to be so addressed.

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<sup>1522</sup> See Letter from Mary McManus, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, at 2 (filed Oct. 5, 2011) (Comcast Oct. 5, 2011 *Ex Parte* Letter).

<sup>1523</sup> In the FNPRM, we seek comment on whether the Commission needs to forbear from tariffing requirements in section 203 of the Act and part 61 of our rules to enable carriers to negotiate alternative arrangements pursuant to this Order. See *infra* para. 1322.

<sup>1524</sup> Although we do not require a "fresh look" to open existing contracts, we recognize that the framework we adopt today encourages carriers to enter into contracts in lieu of the tariffing framework. If two carriers do not have a reciprocal compensation rate today or are otherwise unable to agree to a rate through negotiations, we make clear that state commissions will continue to have a role in establishing rates for non-access traffic where those rates had not been previously established. States may initially establish such rates on the basis of the Commission's existing cost methodology (TELRIC) consistent with section 51.715 or on the basis of the Commission's new cost methodology, i.e., bill-and-keep. After such rates are initially established, they shall be subject to the transition set forth above.

<sup>1525</sup> See *infra* para. 961.

<sup>1526</sup> *T-Mobile Order*, 20 FCC Rcd at 4860, para. 9.

<sup>1527</sup> See *id.* As provided in Section XIV, we do not disrupt the regulatory approach applicable to CMRS providers, which are subject to detariffing.

<sup>1528</sup> See *infra* paras. 964-965.

813. Because carriers will be revising intrastate access tariffs to reduce rates for certain terminating switched access rate elements, and capping other intrastate rates,<sup>1529</sup> states will play a critical role implementing and enforcing intercarrier compensation reforms. In particular, state oversight of the transition process is necessary to ensure that carriers comply with the transition timing and intrastate access charge reductions outlined above. Under our framework, rates for intrastate access traffic will remain in intrastate tariffs.<sup>1530</sup> As a result, to ensure compliance with the framework and to ensure carriers are not taking actions that could enable a windfall and/or double recovery, state commissions should monitor compliance with our rate transition; review how carriers reduce rates to ensure consistency with the uniform framework; and guard against attempts to raise capped intercarrier compensation rates, as well as unanticipated types of gamesmanship. Consistent with states' existing authority, therefore, states could require carriers to provide additional information and/or refile intrastate access tariffs that do not follow the framework or rules adopted in this Order. Moreover, state commissions will continue to review and approve interconnection agreements and associated reciprocal compensation rates to ensure that they are consistent with the new federal framework and transition. Thus, we will be working in partnership with states to monitor carriers' compliance with our rules, thereby ensuring that consumers throughout the country will realize the tremendous benefits of ICC reform.

814. *Price Cap Conversions.* The Commission has regulated the provision of interstate access services by incumbent LECs, pursuant to either rate-of-return regulation or price cap regulation. The Commission has previously described the benefits that flow from the adoption of price cap regulation,<sup>1531</sup> and has allowed carriers to convert from rate-of-return to price cap regulation.<sup>1532</sup> The Commission continues to encourage carriers to undergo such conversions. The application of our reforms to proposed conversions will be addressed in the context of those proceedings based on the individualized situation of the carrier seeking to convert to price cap regulation.<sup>1533</sup>

815. *Existing Agreements.* With respect to the impact of our reforms on existing agreements, we emphasize that our reforms do not abrogate existing commercial contracts or interconnection agreements or otherwise require an automatic "fresh look" at these agreements.<sup>1534</sup> As the Commission

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<sup>1529</sup> We do not cap intrastate originating access for rate-of-return carriers in this Order. We note that states remain free to do so, provided states support any recovery that may be necessary, and such a result would promote the goals of comprehensive reform adopted today.

<sup>1530</sup> As we describe in Section XIII, we require carriers to file with their interstate tariffs all data, including as relevant intrastate rates and MOU, necessary to verify eligibility for ARC replacement funding.

<sup>1531</sup> *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6790-91, para. 33 (1990).

<sup>1532</sup> See, e.g., *CenturyTel, Inc. Petition for Conversion to Price Cap Regulation and Limited Waiver Relief*, WC Docket No. 08-191, Order, 24 FCC Rcd 4677 (WCB 2009); *Windstream Petition for Conversion to Price cap Regulation and for Limited Waiver Relief*, WC Docket No. 07-171, Order, 23 FCC Rcd 5294 (2008).

<sup>1533</sup> Similarly, transition issues related to rate-of-return affiliates of price cap holding companies, see *supra* para. 271, will be addressed in the context of such proceedings as well.

<sup>1534</sup> In the past, several commenters have requested that the Commission give them a fresh look at existing contracts in the context of comprehensive reform. See, e.g., Letter from Richard R. Cameron and Teresa D. Baer, Counsel for Global Crossing, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 08-152, 99-68; CC Docket Nos. 01-92, 96-45 at 2 (filed Sept. 18, 2008) (asking that the Commission "provide an 18-month window within which carriers can reconfigure their interconnection facilities without incurring reconfiguration charges or early termination liabilities under existing transport contracts"); Sage Telecom 2008 ICC/USF FNPRM Comments at 13 ("The Commission should be aware that wholesale agreements for local service (unbundled network element platform replacement agreements) often contain rates for transport and termination of traffic . . . . While these agreements (continued...)")

has recognized, both telecommunications carriers and their customers often benefit from long-term contracts—providers gain assurance of cost recovery, and customers (whether wholesale or end-users) may receive discounted and stable prices—and we try to avoid disrupting such contracts.<sup>1535</sup> Indeed, giving carriers or customers an automatic fresh look at existing commercial contracts or interconnection agreements could result in a windfall for entities that entered long-term arrangements in exchange for lower prices, as compared to other entities that avoided the risk of early termination fees by electing shorter contract periods at higher prices.<sup>1536</sup> Accordingly, we decline to require that these existing arrangements be reopened in connection with the reforms in this Order, and leave such issues to any change-of-law provisions in these arrangements and commercial negotiations among the parties.<sup>1537</sup> We do, however, make clear that our actions today constitute a change in law, and we recognize that existing agreements may contain change-of-law provisions that allow for renegotiation and/or may contain some mechanism to resolve disputes about new agreement language implementing new rules.

816. *Dismissal as Moot of Pending Petitions.* The reforms adopted today render moot a petition filed by Embarq in 2008 and a petition filed by Michigan CLECs in 2010.<sup>1538</sup> The Embarq petition sought waivers that would allow it to unify its switched access rates by making reductions to its intrastate rates and offsetting increases to its interstate rates.<sup>1539</sup> The actions taken in this Order, which set forth a comprehensive intercarrier compensation plan, render the Embarq petition moot and, we further note that CenturyLink has subsequently filed a letter seeking to withdraw the petition.<sup>1540</sup> The Michigan CLECs filed a petition asking the Commission to preempt Michigan’s 2009 access restructuring law,

(Continued from previous page)

were of course ‘negotiated,’ they were negotiated under particular assumptions regarding the applicable regulatory defaults, and under circumstances of asymmetrical bargaining power. The Commission should consider whether such provisions will adversely affect competition and thus should be subject to a fresh look.”).

<sup>1535</sup> See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17400, 17402–03, paras. 692, 697–99 (2003) (*Triennial Review Order*); see also, e.g., AT&T 2005 ICC FNPRM Reply at 17–20 (arguing against giving end users a fresh look at existing contracts). To the extent that there is evidence that particular termination penalties are inappropriate, the Commission can resolve such a matter through an enforcement proceeding. See *Triennial Review Order*, 18 FCC Rcd at 17403, para. 698.

<sup>1536</sup> See *Triennial Review Order*, 18 FCC Rcd at 17403, para. 699.

<sup>1537</sup> This situation is thus different from cases where the Commission found that certain contract provisions might adversely affect competition or where end-user customers would be denied the benefits of new Commission policy absent a fresh look opportunity. See, e.g., *Local Competition First Report and Order*, 11 FCC Rcd at 16044, para. 1094; *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Second Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 7341, 7350, para. 21 (1993) (allowing a fresh look at agreements in “situations where excessive termination liabilities would affect competition for a significant period of time”); *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, 5906, para. 151 (1991) (giving customers of AT&T 90 days to terminate their contracts without penalty to let them “tak[e] advantage of 800 number portability when it arrives”).

<sup>1538</sup> See *Petition for Waiver of Embarq Pleading Cycle Established*, WC Docket No. 08-160, Public Notice, 23 FCC Rcd 11914 (2008); *Pleading Cycle Established for Comments on Joint Michigan CLEC Petition for Declaratory Ruling and Motion for Temporary Relief*, WC Docket No. 10-45, Public Notice, 25 FCC Rcd 1807 (2010).

<sup>1539</sup> See *Petition for Waiver of Embarq Local Operating Companies of Sections 61.3 and 61.44-61.48 of the Commission’s Rules, and any Associated Rules Necessary to Permit it to Unify Switched Access Charges Between Interstate and Intrastate Jurisdictions*, WC Docket No. 08-160 (filed Aug. 1, 2008).

<sup>1540</sup> See Letter from Jeffrey Lanning, Assistant Vice President – Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 08-160 (filed June 23, 2011).

which mandated intrastate access rate reductions and created an access restructuring mechanism that was unavailable to CLECs.<sup>1541</sup> Here, again, the actions we take in this Order, which include bringing intrastate access traffic within section 251(b)(5) and subjecting that traffic to the above transition, address many of the access rates elements at issue in the Michigan CLECs' petition.<sup>1542</sup> We therefore dismiss the petition as the reforms in this Order and the accompanying FNPRM will render it moot.

### 3. Other Rate Elements

817. *Originating Access.* We find that originating charges also should ultimately be subject to the bill-and-keep framework. Some commenters urge that originating charges be retained, at least on an interim basis.<sup>1543</sup> Other parties express concerns with the retention of originating access charges.<sup>1544</sup> The legal framework underpinning our decision today is inconsistent with the permanent retention of originating access charges. In the *Local Competition First Report and Order*, the Commission observed that section 251(b)(5) does not address charges payable to a carrier that originates traffic and concluded, therefore, that such charges were prohibited under that provision of the Act.<sup>1545</sup> Accordingly, we find that originating charges for all telecommunications traffic subject to our comprehensive intercarrier compensation framework should ultimately move to bill-and-keep.

818. Notwithstanding this conclusion, we take immediate action to cap all interstate originating access charges and intrastate originating access charges for price cap carriers. Although we do not establish the transition for rate reductions to bill-and-keep in this Order, we seek comment in the FNPRM on the appropriate transition and recovery mechanism for ultimately phasing down originating access charges.<sup>1546</sup> Meanwhile, we prohibit carriers from increasing their originating interstate access rates above those in effect as the effective date of the rules.<sup>1547</sup> A cap on interstate originating access represents a first step as part of our measured transition toward comprehensive reform and helps to ensure that our initial reforms to terminating access are not undermined. Thus, interstate originating switched access rates will remain capped and may not exceed current levels until further action by the Commission addressing the appropriate transition path for this traffic.

<sup>1541</sup> See Joint Petition for Expedited Declaratory Ruling that the State of Michigan's Statute 2009 PA 182 is Preempted Under Sections 253 and 254 of the Communications Act, WC Docket No. 10-45 (filed Feb. 12, 2010).

<sup>1542</sup> To the extent that states have established rate reduction transitions for rate elements not reduced in this Order, nothing in this Order impacts such transitions. See, e.g., Letter from John R. Liskey, Executive Director, MITA, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51 at 2 (filed Oct. 17, 2011). Nor does this Order prevent states from reducing rates on a faster transition provided that states provide any additional recovery support that may be needed as a result of a faster transition.

<sup>1543</sup> See, e.g., ABC Plan, Attach. 1 at 11; Cincinnati Bell *August 3 PN Comments* at 3.

<sup>1544</sup> iBasis Retail, Inc. *August 3 PN Comments* at 2; CRUSIR *August 3 PN Comments* at 11-13; Texas Telephone *August 3 PN Comments* at 7-8.

<sup>1545</sup> See *Local Competition First Report and Order*, 11 FCC Rcd at 16016, para. 1042.

<sup>1546</sup> See *supra* Section XVII.M.

<sup>1547</sup> This prohibition on increasing access rates also applies to any remaining Primary Interexchange Carrier Charge in section 69.153 of the Commission's rules, the per-minute Carrier Common Line charge in section 69.154 of the Commission's rules, and the per-minute Residual Interconnection Charge in section 69.155 of the Commission's rules. 47 C.F.R. §§ 69.153, 69.154, 69.155. Price cap carriers and CLECs that benchmark to price cap rates are also prohibited from increasing their originating intrastate access rates.



819. *Transport.* Similarly, the transition path set forth above begins the transition for transport elements, including capping such rates, but does not provide the transition for all transport charges for price cap or rate-of-return carriers to bill-and-keep. For price cap carriers, in the final year of the transition, transport and terminating switched access shall go to bill-and-keep levels where the terminating carrier owns the tandem. However, transport charges in other instances, i.e., where the terminating carrier does not own the tandem, are not addressed at this time. Meanwhile, under the transition for rate-of-return carriers, which is consistent with the transition path put forward by the Joint Letter, interstate and intrastate transport charges will be capped at interstate levels in effect as of the effective date of the rules through the transition.<sup>1548</sup>

820. Ultimately, we agree with concerns raised by commenters that the continuation of transport charges in perpetuity would be problematic.<sup>1549</sup> For example, the record contains allegations of “mileage pumping,” where service providers designate distant points of interconnection to inflate the mileage used to compute the transport charges.<sup>1550</sup> Further, Sprint alleges that current incumbent LEC tariffed charges for transport are “very high and constitute a sizeable proportion of the total terminating access charges ILECs impose on carriers today.”<sup>1551</sup> More fundamentally, if transport rates are allowed to persist, it gives incumbent LECs incentives to retain a TDM network architecture and therefore likely serves as a disincentive for incumbent LECs to establish more efficient interconnection arrangements such as IP.<sup>1552</sup> As a result, commenters suggest that perpetuating high transport rates could undermine the Commission’s reform effort and lead to anticompetitive behavior or regulatory arbitrage such as access stimulation.<sup>1553</sup> We therefore seek comment on the appropriate treatment of, and transition for, all tandem switching and transport rates in the FNPRM.<sup>1554</sup>

821. *Other Rate Elements.* Finally, we note that the transition set forth above caps rates but does not provide the transition path for all rate elements or other charges, such as dedicated transport charges.<sup>1555</sup> In our FNPRM, we seek comment on what transition should be set for these other rate elements and charges as part of comprehensive reform, and how we should address those elements.

#### 4. Suspension or Modification Under Section 251(f)(2)

822. Section 251(f)(2) provides that a LEC with fewer than two percent of the country’s subscriber lines may petition its state commission for a suspension or modification of the application to it of a requirement or requirements of section 251(b) or (c), and that the state commission shall grant such

<sup>1548</sup> See ABC Plan, Attach. 1 at 11; Joint Letter at 3.

<sup>1549</sup> See, e.g., COMPTel August 3 PN Comments at 14-20; NCTA August 3 PN Comments at 19-20; Sprint August 3 PN Comments at 11-16; T-Mobile August 3 PN Comments at 8.

<sup>1550</sup> See AT&T Section XV Comments at 5, 30-37; Letter from John T. Nakahata, Counsel to Level 3, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45, WC Docket Nos. 10-90, 07-135, 03-109, GN Docket No. 09-51, Attach at 2 (filed Sept. 16, 2011).

<sup>1551</sup> Sprint August 3 PN Comments at 13.

<sup>1552</sup> Sprint August 3 PN Comments at 15; NCTA August 3 PN Comments at 20.

<sup>1553</sup> See CBeyond et al. August 3 PN Comments at 15-18; NCTA August 3 PN Comments at 20; T-Mobile August 3 PN Comments at 7; Time Warner Cable August 3 PN Comments at 7; see also Section XVII.M.

<sup>1554</sup> See *supra* Section XVII.M.

<sup>1555</sup> See Level 3 August 3 PN Comments at 11-12; COMPTel August 3 PN Comments at 18-20; Letter from Charles W. McKee, VP, Federal and State Regulatory, Sprint, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, at 2 (filed Oct. 3, 2011).

petition where it makes certain determinations.<sup>1556</sup> That provision further states that the state commission must act on the petition within 180 days and “may suspend enforcement of the requirement or requirements to which the petition applies” pending action on the petition.<sup>1557</sup> Parties aggrieved by a state commission decision under section 251(f) may seek review of that decision in federal district court – under section 252(e)(6) of the Act, if the decision is rendered in the course of arbitrating an interconnection agreement,<sup>1558</sup> or under general “federal question” jurisdiction if the decision arises outside of the arbitration context.<sup>1559</sup>

823. In *Iowa Utilities Board v. FCC*, the Eighth Circuit held that state commissions had “exclusive authority” to make decisions under section 251(f) and that the FCC lacked authority to prescribe “governing standards for such determinations.”<sup>1560</sup> On review, however, the Supreme Court reversed the Eighth Circuit’s decision with regard to the Commission’s general authority to implement Title II of the Act. The Court stated that “the grant in § 201(b) [of the Act] means what it says: The FCC has rulemaking authority to carry out the ‘provisions of this Act,’ which include §§ 251 and 252.”<sup>1561</sup> Accordingly, we find that this general grant of rulemaking authority recognized by the Court includes the authority to adopt reasonable rules construing and implementing section 251(f).<sup>1562</sup>

824. In light of the Supreme Court’s holding, we may adopt specific, binding prophylactic rules that give content to, among other things, the “public interest, convenience, and necessity” standard that governs states’ exercise of section 251(f)(2) authority to act on suspension/modification petitions. We sought comment on specific rules in the *ICC/USF Transformation NPRM* and in the *2008 ICC NPRM*.<sup>1563</sup> However, given the limited record we received in response, we decline to adopt specific rules regarding section 251(f)(2) at this time. Nevertheless, we caution states that suspensions or modifications of the bill-and-keep methodology we adopt today would, among other things, re-introduce regulatory uncertainty, shift the costs of providing service to a LEC’s competitors and the competitor’s customers, increase transaction costs for terminating calls, and undermine the efficiencies gained from adopting a uniform national framework.<sup>1564</sup> Accordingly, we believe it highly unlikely that any attempt by a state to modify or suspend the federal bill-and-keep regime would be “consistent with the public interest, convenience and necessity” as required under section 251(f)(2)(B), and we urge states not to grant any

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<sup>1556</sup> 47 U.S.C. § 251(f)(2) (“The State commission shall grant such petition to the extent that, and for such duration as, [it] determines that such suspension or modification -- (A) is necessary -- (i) to avoid a significant adverse economic impact on users of telecommunications services generally; (ii) to avoid imposing a requirement that is unduly economically burdensome; or (iii) to avoid imposing a requirement that is technically infeasible; and (B) is consistent with the public interest, convenience, and necessity.”).

<sup>1557</sup> *Id.*

<sup>1558</sup> See, e.g., *New Cingular Wireless PCS, LLC v. Finley*, 2010 WL 3860384 at \*1, \*11-14 (E.D. N.C. 2010); *Wireless World, L.L.C. v. Virgin Islands PSC*, 2008 WL 5635107 at \*2, \*3-12 (D. VI 2008).

<sup>1559</sup> See 47 U.S.C. § 252(e)(6); 28 U.S.C. § 1331. See also, e.g., *Midcontinent Commc’ns v. North Dakota PSC*, 2009 WL 3722898 at \*5-9 (D. ND 2009).

<sup>1560</sup> 120 F.2d 753, 802 (8th Cir. 1997) (subsequent history omitted).

<sup>1561</sup> *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1998).

<sup>1562</sup> *Id.* at 385.

<sup>1563</sup> See *ICC/USF Transformation NPRM*, 26 FCC Rcd at 4714, paras. 519-20; see also *2008 ICC/USF NPRM*, 24 FCC Rcd at 6623-26, App. A, paras. 282-90.

<sup>1564</sup> See *supra* Section XII.A (discussing the justification for adopting a bill-and-keep methodology).

petitions seeking to modify or suspend the bill-and-keep provisions we adopt herein. We will monitor state action regarding the reforms we adopt today, and may provide specific guidance for states' review of section 251(f)(2) petitions in the future.

## 5. The Duty To Negotiate Interconnection Agreements

825. Because we move traffic from the access charge regime to the section 251(b)(5) framework, where payment terms are agreed to pursuant to an interconnection agreement, incumbent LECs have asked the Commission to make clear that they have the ability to compel other LECs and CMRS providers to negotiate to reach an interconnection agreement. This is a concern for incumbent LECs because under sections 251 and 252 of the Act, although LECs and CMRS providers can compel incumbent LECs to negotiate in good faith and invoke arbitration if negotiations fail, incumbent LECs generally lack the ability to compel other LECs and CMRS providers to negotiate for payment for traffic that is not exchanged pursuant to a tariff. In particular, parties have asked the Commission to expand upon the Commission's findings in the 2005 *T-Mobile Order*, which found that incumbent LECs can compel CMRS providers to negotiate to reach an interconnection agreement.

826. After reviewing the record, we conclude it is appropriate to clarify certain aspects of the obligations the Commission adopted in the 2005 *T-Mobile Order*. As a result, in this section, we reaffirm the findings in the *T-Mobile Order* that incumbent LECs can compel CMRS providers to negotiate in good faith to reach an interconnection agreement, and make clear we have authority to do so pursuant to Sections 332, 201, 251 as well as our ancillary authority under 4(i). We also clarify that this requirement does not impose any section 251(c) obligations on CMRS providers, nor does it extend section 252 of the Act to CMRS providers.

827. We decline, at this time, to extend the obligation to negotiate in good faith and the ability to compel arbitration to other contexts. For example, the *T-Mobile Order* did not address relationships involving competitive LECs or among other interconnecting service providers. Subsequently, competitive LECs have requested that the Commission expand the scope of the *T-Mobile Order* and require CMRS providers to negotiate agreements with competitive LECs under the section 251/252 framework, just as they do with incumbent LECs.<sup>1565</sup> In addition, rural incumbent LECs urged the Commission to "extend the T-Mobile Order to give ILECs the right to demand interconnection negotiations with all carriers."<sup>1566</sup> We do not believe the record is currently sufficient to justify doing so, but ask further questions about the policy implications as well as our legal authority to do so in the FNPRM.<sup>1567</sup>

### a. Background

828. Regulated intercarrier compensation payments among carriers have been imposed in two basic ways: through tariffs and through carrier-to-carrier agreements. The comprehensive intercarrier compensation reforms we adopt supersede the preexisting access charge regime, bringing that traffic into the section 251(b)(5) reciprocal compensation framework subject to a transition to bill-and-keep. Under that transitional framework, however, we permit carriers to negotiate alternative intercarrier compensation

<sup>1565</sup> See, e.g., Pac-West Comments at 3; PAETEC et al. Section XV Reply at 23-24; Letter from Michael B. Hazzard, counsel for Xspedius, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, Attach. at 7 (filed Aug. 10, 2005); Supra Telecommunications and Information Systems *Ex Parte* Comments and Cross-Petition for Limited Clarification, CC Docket No. 01-92 at 10 (filed July 14, 2005).

<sup>1566</sup> Rural Associations Section XV Comments at 29 n.67, 30.

<sup>1567</sup> See *infra* para. 1324.

arrangements to the default rates specified in the tariffs.<sup>1568</sup> In addition, the FNPRM seeks comment on the appropriate long-term implementation framework, including whether even the transitional role for tariffing should be replaced, with carriers relying solely on interconnection agreements.<sup>1569</sup>

829. Notably, interconnection, and the associated intercarrier compensation, has evolved since the passage of the 1996 Act in a manner different than originally anticipated. The Act contemplated that competitive carriers would obtain reciprocal compensation arrangements with incumbent LECs by request, leading to negotiation and, if necessary, arbitration.<sup>1570</sup> The 1996 Act included an implementation framework in section 252, which “introduced a mechanism by which CMRS providers may compel LECs to enter into bilateral interconnection arrangements.”<sup>1571</sup> The Act also provides specific legal standards for reciprocal compensation that states are required to apply in resolving disputes, and these statutory standards help to define the scope of the obligations in question.<sup>1572</sup> Section 252 also provides that parties may enter into arrangements without regard to these standards, but specifically contemplates that such arrangements would be the product of a negotiation process.<sup>1573</sup> Section 252 did not expressly impose the same obligations on CMRS providers, or other non-incumbent LECs, to ensure payment of the associated intercarrier compensation, however. With respect to intercarrier compensation in particular, experience has not borne out prior views presuming a limited need for regulatory protections for incumbent LECs. In particular, given mandatory interconnection and restrictions on blocking traffic, LECs have been unable to avoid terminating traffic delivered to them even absent a compensation agreement, and experience has shown that even incumbent LECs thus can be at a negotiating disadvantage in particular circumstances.

830. Consequently, the Commission found in the *T-Mobile Order*, terminating LECs had difficulty getting other carriers, such as CMRS providers, to enter into agreements for compensation for non-access traffic absent a legal compulsion for those carriers to do so.<sup>1574</sup> Although certain states, in response, allowed the filing of wireless termination tariffs, the Commission prohibited those on a prospective basis as inconsistent with the framework established in sections 251 and 252 of the Act.<sup>1575</sup> That prohibition of tariffs, standing alone, would have left incumbent LECs with no meaningful way to obtain an arrangement for the receipt of compensation from CMRS providers that complied with the relevant default requirements under the Act and Commission rules. Thus, the *T-Mobile Order* adopted section 20.11(e) of the Commission’s rules, which authorizes incumbent LECs to request interconnection and requires CMRS providers to comply with “the negotiation and arbitration procedures set forth in section 252 of the Act.”<sup>1576</sup> The *T-Mobile Order* also required CMRS providers to “negotiate in good faith” and follow the Commission’s interim transport and termination pricing rules once a request for

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<sup>1568</sup> See *supra* Section XII.C (discussion of the transition period).

<sup>1569</sup> See *infra* Section XVII.N (seeking comment on interconnection).

<sup>1570</sup> See 47 U.S.C. §§ 251(b)(5), 252(a).

<sup>1571</sup> *T-Mobile Order*, 20 FCC Rcd at 4861, para. 11.

<sup>1572</sup> See 47 U.S.C. § 251(b)(5), 252(d)(2).

<sup>1573</sup> 47 U.S.C. § 252(a)(1).

<sup>1574</sup> *T-Mobile Order*, 20 FCC Rcd at 4864, para. 15.

<sup>1575</sup> *Id.* at 4863-64, para. 14.

<sup>1576</sup> *Id.* at 4863-65, paras. 14-16. See also 47 C.F.R. § 20.11(e).

interconnection is made.<sup>1577</sup>

831. Subsequently, the Rural Cellular Association (RCA) and the American Association for Paging Carriers (AAPC) filed petitions asking the Commission to reconsider certain aspects of the *T-Mobile Order*. RCA argues that the Commission exceeded its authority by directly applying sections 251(c) and 252 of the Act to CMRS carriers.<sup>1578</sup> Specifically, it argues that the Commission cannot require CMRS providers to interconnect directly with ILECs pursuant to section 251(c), or submit to compulsory arbitration pursuant to section 252.<sup>1579</sup> Likewise the American Association of Paging Carriers argues that section 20.11(e) of the Commission's rules is contrary to the Administrative Procedure Act because the Commission failed to give notice of the proposed rule, and that section 20.11(e) contravenes Congressional intent by directly applying section 251(c) to CMRS providers.<sup>1580</sup> In addition, the Commission received several petitions seeking clarification regarding the operation of the *T-Mobile Order* and the state of the law that existed prior to that decision.<sup>1581</sup>

**b. Petitions for Reconsideration of the *T-Mobile Order***

832. As described below, we resolve the challenges several parties have made to the Commission's authority to adopt sections 20.11(d) and (e). We conclude that the Commission has both direct and ancillary authority to permit incumbent LECs to request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures of section 252 of the Act. Given this clarification of the Commission's exercise of its authority, we find that these requirements, codified in section 20.11(e) of the Commission's rules, are consistent with the Act. We also conclude that the adoption of those requirements in the *T-Mobile Order* was procedurally proper, and we consequently deny requests to reconsider that rule.

**(i) Authority To Adopt Section 20.11(e) of the Commission's Rules**

833. In its petition for reconsideration, RCA claims that the Commission lacked authority to adopt section 20.11(e) of the Commission's rules arguing that the Commission cannot directly apply section 251(c) of the Act to CMRS providers by requiring them to interconnect directly with ILECs, or submit to compulsory arbitration pursuant to section 252 of the Act.<sup>1582</sup> RCA misinterprets the nature of the Commission's action in the *T-Mobile Order*, however, viewing it as the direct application of sections 251(c) and 252 to CMRS providers.<sup>1583</sup> Properly understood, the Commission did not apply sections

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<sup>1577</sup> 47 C.F.R. § 20.11(e). The applicable rules for interim transport and termination pricing are found in section 51.715 of the Commission's rules.

<sup>1578</sup> RCA Petition for Clarification or, in the Alternative, Reconsideration, CC Docket No. 01-92 at 2-3 (filed Apr. 29, 2005) (RCA Petition).

<sup>1579</sup> *Id.* at 6-10.

<sup>1580</sup> AAPC Petition for Reconsideration, CC Docket No. 01-92 at 4-6 (filed Apr. 29, 2005) (AAPC Petition).

<sup>1581</sup> See, e.g., MetroPCS Petition; Missouri Small Telephone Company Group Petition for Reconsideration, CC Docket No. 01-92 (filed Mar. 25, 2005) (MoSTCG Petition) (seeking clarification that small ILECs may opt in to existing traffic termination arrangements that wireless carriers have with other rural ILECs); T-Mobile USA Petition for Clarification or, in the Alternative, Reconsideration, CC Docket No. 01-92 (filed Apr. 29, 2005) (seeking clarification on the pricing rules that apply during negotiations between wireless carriers and ILECs).

<sup>1582</sup> RCA Petition at 6-10.

<sup>1583</sup> *Id.*

251(c) and 252 in that manner.<sup>1584</sup> Rather, the *T-Mobile Order* obligations imposed on CMRS providers, codified in section 20.11(e) of the Commission's rules, implement the Commission's authority under sections 201 and 332, and are reasonably ancillary to the implementation of our statutorily mandated responsibilities under sections 201, 251(a)(1), 251(b)(5) and 332.

834. *Direct Authority Under Sections 201 and 332.* Sections 201 and 332 of the Act provide a basis for rules allowing an incumbent LEC to request interconnection, including associated compensation, from a CMRS provider and invoke the negotiation and arbitration procedures set forth in section 252 of the Act. Section 332(c)(1)(B) states that “[u]pon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service” pursuant to the provisions of section 201 of the Act.<sup>1585</sup> Section 201(a) provides that “every common carrier engaged in interstate or foreign communication by wire or radio” shall: (i) “furnish such communication service upon reasonable request therefore;” and (ii) “in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.”<sup>1586</sup> We have long relied on these provisions to regulate the terms of LEC-CMRS interconnection, including associated compensation.

835. Historically, interconnection requirements imposed under these provisions were understood to encompass not only the technical linking of networks, but also the associated compensation. For example, intercarrier compensation under the access charge regime had, as its origin, the need to “ensur[e] *interconnection* at reasonable rates, as required under Section 201 of the Act, 47 U.S.C. § 201.”<sup>1587</sup> Likewise, the Commission previously has specified not only the intercarrier

<sup>1584</sup> See *infra* Section XII.C.5.b(ii).

<sup>1585</sup> 47 U.S.C. § 332(c)(1)(B).

<sup>1586</sup> 47 U.S.C. § 201(a). Although section 201(a) requires an opportunity for hearing, our previous use of notice and comment procedures to satisfy the section 201 hearing requirement was expressly confirmed by the U.S. Court of Appeals for the Third Circuit. See *Bell Telephone Co. v. FCC*, 503 F.2d 1250, 1265 (3rd Cir. 1974) (holding that section 201(a) permits procedures less formal and adversarial than an evidentiary hearing because, among other things, courts have come to favor rulemaking over adjudication for the formulation of new policy), *cert. denied*, 422 U.S. 1026 (1974). As discussed below, the Commission provided notice and received comment here. See *infra* para. 843. Consequently, we reject arguments that the Commission cannot rely on its section 201(a) authority to require interconnection through a rulemaking proceeding. See, e.g., RCA Reply, CC Docket No. 01-92 at 4-5 (filed July 11, 2005). For further discussion of the Commission's authority under sections 332 and 201 to regulate LEC-CMRS intercarrier compensation, see Section XV.

<sup>1587</sup> *American Telephone and Telegraph Company and the Bell System Operating Companies Tariff F.C.C. No. 8 (BSOC 8); Exchange Network Facilities for Interstate Access (ENFIA)*, CC Docket No. 78-371, Order on Reconsideration, 93 FCC 2d 739, para. 33 (1983) (emphasis added) (adopting certain tariffed charges as “inherently a temporary measure, intended to provide a means of approximating costs that cannot be known with precision until a more permanent access charge system can be put in place”). See also *MTS and WATS Market Structure Inquiry (Phase I)*, 93 FCC 2d 241, paras. 37-39 (1983) (concluding that “[s]ection 201(a) authorizes this Commission to replace the industry-devised contractual arrangement with a Commission-devised formula” and adopting access charge rules); *Investigation of Access and Divestiture Related Tariffs; MTS and WATS Market Structure*, CC Docket No. 83-1145 Phase I, CC Docket No. 78-72 Phase I, Memorandum Opinion and Order, 98 FCC 2d 730 (1984) (holding that “[p]ursuant to 47 U.S.C. §§ 154(i), 201(a), and 205(a), the Commission is authorized to establish charges for carrier interconnections.”); *Hawaiian Telephone Company Tariff F.C.C. No. 18, Exchange Network Facilities for Interstate Access Hawaiian Telephone Company Tariff F.C.C. No. 19, Customer Indirect Network Exchange Access Hawaiian Telephone Company Revisions to Tariff F.C.C. No. 11, Foreign Exchange Service*, Memorandum Opinion and Order, 85 FCC 2d 767, para. 6 (Com. Car. Bur. 1981) (observing that “a great deal of (continued...)”).

compensation required in conjunction with interconnection by, and with, CMRS providers, but also the mechanism for implementing those compensation obligations. Even prior to the adoption of section 332 of the Act, the Commission relied on its section 201 authority to require LECs and CMRS providers to negotiate interconnection agreements in good faith governing the physical interconnections among these carriers, as well as the associated charges.<sup>1588</sup> Following the adoption of section 332, the Commission affirmed that “LECs [must] provide reasonable and fair interconnection for all commercial mobile radio services,”<sup>1589</sup> including “mutual compensation” by each interconnected carrier for “the reasonable costs incurred by such providers in terminating traffic” that originated on the other carrier’s facilities.<sup>1590</sup> At that time the Commission retained its then-existing implementation framework, which primarily relied on negotiated agreements with only a limited role expressly identified for tariffing, while observing that this framework would be subject to “review and possible revision.”<sup>1591</sup>

836. In the *T-Mobile Order* the Commission built upon the existing rules governing interconnection and compensation for non-access traffic exchanged between LECs and CMRS providers, incorporating the right of incumbent LECs to request interconnection with a CMRS provider, including associated compensation, and adopting an implementation mechanism.<sup>1592</sup> It established obligations surrounding the pre-existing duty both CMRS providers and ILECs have to establish connections between their respective networks, as well as exercising the Commission’s authority over the pre-existing tariffing regime. We find, in light of the analysis and precedent above, that these actions are supported by the Commission’s authority under sections 201 and 332 of the Act.<sup>1593</sup>

837. *Ancillary Authority.* Ancillary authority also supports the *T-Mobile Order* requirement that CMRS providers comply with the negotiation and arbitration procedures set forth in section 252 of

(Continued from previous page) —————

attention has been paid to compensation arrangements because of the legal obligation imposed upon local telephone companies under Section 201 of the Communications Act, 47 U.S.C. § 201, to interconnect their local exchange facilities with interstate services . . . . This right to interconnection is limited only by the duty to pay a fair and reasonable sum to the local telephone companies for the service.” ).

<sup>1588</sup> *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Declaratory Ruling, 2 FCC Rcd 2910, 2912-13, paras. 17-21 (1987) (*CMRS Interconnection Declaratory Ruling*).

<sup>1589</sup> *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1497-98, para. 230 (1994) (*CMRS Second Report and Order*).

<sup>1590</sup> *CMRS Second Report and Order*, 9 FCC Rcd at 1498, para. 232 (“LECs shall compensate CMRS providers for the reasonable costs incurred by such providers in terminating traffic that originates on LEC facilities. Commercial mobile radio service providers, as well, shall be required to provide such competition to LECs in connection with mobile-originated traffic terminating on LEC facilities.”).

<sup>1591</sup> *Id.* at 1497, 1498, paras. 229, 235.

<sup>1592</sup> *T-Mobile Order*, 20 FCC Rcd at 4864-65 para. 16; 47 C.F.R. § 20.11(e). *See also T-Mobile Order*, 20 FCC Rcd at 4864, para. 15 n.61 (observing that, “given uncertainty as to the relationship between the arrangements contemplated in section 20.11 and the section 251/252 agreements contained in the Act . . . the rights of LECs to compel negotiations with CMRS providers are not entirely clear” and that “although CMRS providers may indeed have an existing legal obligation to compensate LECs for the termination of wireless traffic under section 20.11(b)(2) . . . the rules fail to specify the mechanism by which LECs may obtain this compensation”).

<sup>1593</sup> *See, e.g., CenturyTel Opposition*, CC Docket No. 01-92 at 7 (filed June 30, 2005) (supporting the Commission’s authority to adopt the relevant rules pursuant to sections 201 and 332 of the Act); *CTIA Opposition*, CC Docket No. 01-92 at 2 (filed June 30, 2005) (same); *SBC Opposition*, CC Docket No. 01-92 at 5 (filed June 30, 2005) (same).

the Act.<sup>1594</sup> Ancillary jurisdiction may be employed, at the Commission's discretion, when two conditions are satisfied: "(1) the Commission's general jurisdictional grant under Title I of the Act covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."<sup>1595</sup> Both incumbent LECs and CMRS providers are telecommunications carriers, over which we have clear jurisdiction. Further, to meaningfully implement intercarrier compensation requirements established pursuant to sections 201, 332, and 251(b)(5) against the backdrop of mandatory interconnection and prohibitions on blocking traffic under sections 201 and 251(a)(1), it was appropriate for the *T-Mobile Order* to impose requirements on CMRS providers beyond those expressly covered by the language of section 252.

838. As discussed above, pursuant to the authority of sections 201 and 332, the Commission required interconnected LECs and CMRS providers to pay mutual compensation for the non-access traffic that they exchange.<sup>1596</sup> Even if sections 201 and 332 were not viewed as providing direct authority to require that CMRS providers negotiate interconnection agreements with incumbents LECs for the exchange of non-access traffic under the section 252 framework, such action clearly is reasonably ancillary to the Commission's authority under those provisions, including the associated requirement to pay mutual compensation. Likewise, although section 251(b)(5) does not itself require CMRS providers to enter reciprocal compensation arrangements, the Commission brought intraMTA LEC-CMRS traffic within that framework.<sup>1597</sup> CMRS providers received certain benefits from this regime,<sup>1598</sup> and the Commission likewise anticipated that they would enter agreements under which they would both "receive reciprocal compensation for terminating certain traffic that originates on the networks of other carriers, and . . . pay such compensation for certain traffic that they transmit and terminate to other carriers."<sup>1599</sup> Further, when carriers are indirectly interconnected pursuant to section 251(a)(1), as is often the case for LECs and CMRS providers, the carriers' interconnection arrangements can be relevant to addressing the appropriate reciprocal compensation, as the Commission recently recognized.<sup>1600</sup>

839. Given that the Commission prohibited tariffing of wireless termination charges for non-access traffic on a prospective basis, LECs needed to enter into agreements with CMRS providers providing for compensation under those regimes. Because LEC-CMRS interconnection is compelled by section 251(a)(1) of the Act, and section 201 of the Act also generally restricts carriers from blocking

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<sup>1594</sup> See, e.g., SBC Opposition, CC Docket No. 01-92 (filed June 30, 2005) (citing the Commission's "authority under 47 U.S.C. § 154(i) to 'make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions'").

<sup>1595</sup> *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010) (quoting *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691-692 (D.C. Cir. 2005)).

<sup>1596</sup> See *supra* para. 834.

<sup>1597</sup> See *infra* Section XV.

<sup>1598</sup> See, e.g., *Local Competition First Report and Order*, 11 FCC Rcd at 16016, para. 1042 ("We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic. As of the effective date of this Order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge.").

<sup>1599</sup> See, e.g., *Local Competition First Report and Order*, 11 FCC Rcd at 16018, para. 1045.

<sup>1600</sup> *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended, et al.*, WC Docket No. 10-143, CC Docket No. 01-92, GN Docket No. 09-51, Declaratory Ruling, 26 FCC Rcd 8259, 8270, para. 21 (2011) (*Interconnection Clarification Order*).



traffic,<sup>1601</sup> experience revealed that incumbent LECs would have limited practical ability to ensure that CMRS providers negotiated and entered such agreements because they could not avoid terminating the traffic even in the absence of an agreement to pay compensation. To ensure that the balance of regulatory benefits intended for each party under the LEC-CMRS interconnection and compensation regimes was not frustrated, it was necessary for the Commission to establish a mechanism by which incumbent LECs could request interconnection, and associated compensation, from CMRS providers, and ensure that those providers would negotiate those agreements, subject to an appropriate regulatory backstop. Thus, the Commission's section 4(i) authority also supports the *T-Mobile Order* requirement that CMRS providers negotiate interconnection agreements with incumbent LECs in good faith under the section 252 framework.

**(ii) Consistency with the Communications Act and the Administrative Procedure Act**

840. In response to the concerns of some Petitioners, we clarify that the negotiation and arbitration requirements adopted for CMRS providers in the *T-Mobile Order* did not impose section 251(c) on CMRS providers.<sup>1602</sup> As commenters observe, with one exception, the requirements of section 251(c) expressly apply to incumbent LECs, and nothing in the *T-Mobile Order* attempts to extend those statutory requirements to CMRS providers.<sup>1603</sup> Nor does the reference to "interconnection" in section 20.11(e) of the Commission's rules apply to CMRS providers the statutory interconnection obligations governing incumbent LECs under section 251(c)(2).<sup>1604</sup> As the *T-Mobile Order* makes clear, the primary focus of that rule is to provide a mechanism to implement mutual compensation for non-access traffic between incumbent LECs and CMRS providers.<sup>1605</sup> However, the Commission's mutual compensation rules were adopted in the context of addressing LEC-CMRS interconnection, against a backdrop where "interconnection" regulations were understood to encompass not only the physical connection of networks, but also the associated intercarrier compensation.<sup>1606</sup> In addition, as the Commission recently

<sup>1601</sup> Although the Commission's prohibitions on blocking under section 201 generally apply to interstate traffic, *see, e.g., Call Blocking Declaratory Ruling*, 22 FCC Rcd 11629, given LECs' indirect interconnection with CMRS providers, and the fact that CMRS providers' telephone numbers are not tied to particular geographic locations, it is unclear that a LEC that undertook to block intrastate CMRS traffic could avoid blocking interstate traffic.

<sup>1602</sup> *See generally* AAPC Petition at 4; RCA Petition at 2, 5-6, 8-11. *But see, e.g.,* MetroPCS Communications Petition for Limited Clarification or Partial Reconsideration, CC Docket No. 01-92 at 2 n.8 (filed Apr. 29, 2005) (MetroPCS Petition) ("The *Order* was not intended to impose upon other CMRS carriers the panoply of duties under Section 251(c) of the Act -- e.g., the duty to provide direct interconnection under § 251(c)(2), the duty to provide unbundled access under § 251(c)(3), the duty to offer resale under § 251(c)(4), the duty to provide notice of changes under § 251(c)(4) or the duty to allow collocation under § 251(c)(5)."); T-Mobile Opposition and Comments, CC Docket No. 01-92 at 5 (filed June 30, 2005) ("T-Mobile does not read the *WTT Order* as having imposed interconnection obligations on CMRS providers pursuant to the Commission's authority to implement Section 251(c) of the Communications Act.").

<sup>1603</sup> *See, e.g.,* AllTel Opposition, CC Docket No. 01-92, at 2-3 (filed June 30, 2005); Leap Comments, CC Docket No. 01-92 at 4 (filed June 30, 2005). Section 251(c)(1) also requires "requesting telecommunications carriers . . . to negotiate in good faith the terms and conditions of" interconnection agreements. 47 U.S.C. § 251(c)(1).

<sup>1604</sup> *See, e.g.,* RCA Petition at 3, 5-6, 9.

<sup>1605</sup> *See, e.g., T-Mobile Order*, 20 FCC Rcd at 4864-65, 15-16.

<sup>1606</sup> *See supra* para 835. We thus conclude that the definition of "interconnection" in section 51.5 of the Commission's rules is not dispositive of the interpretation of that term here. *See, e.g.,* RCA Petition at 4 (citing the definition of "interconnection" in 47 C.F.R. § 51.5, which is focused on "the linking of two networks" and excluding "transport and termination of traffic"). This rule was codified in Part 20, not Part 51.

recognized, interconnection arrangements can bear on the resolution of disputes regarding reciprocal compensation under the section 252 framework.<sup>1607</sup> For example, while interconnection for the exchange of access traffic does not currently implicate section 251(b), an interconnection agreement for the exchange of reciprocal compensation traffic may contain terms relevant to determining appropriate rates under the statute and Commission rules.<sup>1608</sup> Moreover, section 20.11(e) of the Commission's rules does not supplant or expand the otherwise-applicable interconnection obligations for CMRS providers, as some contend.<sup>1609</sup> Thus, in response to a request by an incumbent LEC for interconnection under section 20.11(e), CMRS providers are not required to enter into direct interconnection, and may instead satisfy their obligation to interconnect through indirect arrangements.

841. Similarly, the Commission did not interpret section 252 as binding on CMRS providers in the same manner as incumbent LECs.<sup>1610</sup> Rather, the Commission exercised its authority under sections 201, 332, 251 and 4(i) to apply to CMRS providers' duties analogous to the negotiation and arbitration requirements expressly imposed on incumbent LECs under section 252.<sup>1611</sup> Although Congress did not expressly extend these requirements this broadly in section 252 of the Act, our subsequent experience with interconnection and intercarrier compensation, as described above,

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<sup>1607</sup> *Interconnection Clarification Order*, 26 FCC Rcd at 8270, para. 21; *Local Competition First Report and Order*, 11 FCC Rcd at 15991, para. 997 ("we find that indirect connection (e.g., two non-incumbent LECs interconnecting with an incumbent LEC's network) satisfies a telecommunications carrier's duty to interconnect pursuant to 251(a)").

<sup>1608</sup> See, e.g., 47 U.S.C. §§ 251(b)(5), 252(d)(2)(A); 47 C.F.R. § 51.701(b)(1) (specifically excluding "interstate or intrastate exchange access, information access, or exchange services for such access" from the scope of the reciprocal compensation pricing rules); *Local Competition First Report and Order*, 11 FCC Rcd at 16012-25, paras. 1033-59; see also *id.*

<sup>1609</sup> See, e.g., RCA Petition at 3, 5-6, 9. See also, e.g., Nextel Partners Comments and Opposition, CC Docket No. 01-92 at (filed June 30, 2005) (arguing that section 20.11(e) of the Commission's rules should not be interpreted to "impose new physical interconnection negotiations on CMRS providers"); Qwest Opposition, CC Docket No. 01-92 at 2 n.4 (filed June 30, 2005) (acknowledging that "ILECs do not have a statutory right to demand Section 251(b) or (c) interconnection with CMRS carriers," but that "they certainly have the right to demand interconnection with CMRS providers pursuant to Sections 201(a) and 251(a) of the Act and to insist that the CMRS provider conduct itself in good faith during the negotiation (and performance) phases of the agreement."); Cingular Wireless Reply, CC Docket No. 01-92 at 2-4 (filed July 11, 2005) (arguing that the *T-Mobile Order* should not be interpreted to impose a new direct interconnection requirement on CMRS providers). For these same reasons, we reject the claim that section 20.11(e) is in conflict with section 20.11(a) of the Commission's rules, which grants CMRS providers certain interconnection rights with respect to incumbent LECs. See RCA Petition at 5-6 (citing 47 C.F.R. § 20.11(a)). Nothing in section 20.11(e) of the Commission's rules should be read to eliminate CMRS providers' rights under section 20.11(a).

<sup>1610</sup> See, e.g., *T-Mobile Order*, 20 FCC Rcd at 4864, para. 15 (observing that "LECs may not require CMRS providers to negotiate interconnection agreements or submit to arbitration under section 252 of the Act"). As AAPC observes, for example, "the *ILEC's* receipt of a request for interconnection from another telecommunications carrier is an explicit condition precedent" to a petition for arbitration under section 252. AAPC Petition at 4 (citing 47 U.S.C. § 252(b)(1)) (emphasis in original).

<sup>1611</sup> See, e.g., CTIA Opposition, CC Docket No. 01-92 at 6 (filed June 30, 2005) ("Thus, the references to Section 252 in the *Order* and in the amended Section 20.11 were simply a shorthand way of generally describing the procedures that the Commission intended to make available to the requesting ILECs in negotiating reciprocal compensation agreements."); T-Mobile Opposition and Comments, CC Docket No. 01-92 at 6 (filed June 30, 2005) ("The Commission also should clarify that, as discussed above, any reference to negotiation and arbitration procedures under Section 252 is solely a shorthand for procedures similar to those that the Commission has applied under Section 252, rather than reliance upon Section 252 as its jurisdictional authority.").

demonstrate the need for the duties imposed on CMRS providers in the *T-Mobile Order*.<sup>1612</sup> Thus, the Commission sensibly required CMRS providers to negotiate interconnection agreements with incumbent LECs in good faith, subject to arbitration by the state or, where the state lacks authority<sup>1613</sup> or otherwise fails to act,<sup>1614</sup> by the Commission.<sup>1615</sup> This approach also is supported by the concept of cooperative federalism, which is reasonably contemplated by sections 251 and 252 of the Act.<sup>1616</sup> Because of the cooperative federalism embodied by sections 251 and 252, and the role of the Commission in arbitrating interconnection disputes under the section 252 framework when states lack authority or otherwise fail to act, we also reject claims that the *T-Mobile Order* constituted an unlawful delegation to the states.<sup>1617</sup>

842. We also do not interpret silence in certain provisions of the Act regarding the duties of CMRS providers as precluding the Commission's action in the *T-Mobile Order*. For one, we reject requests that we ignore the Commission's experience with interconnection and intercarrier compensation and treat Congress' silence regarding the rights of incumbent LECs to invoke negotiation and arbitration in section 252 of the Act as equivalent to a statutory prohibition on extending such rights.<sup>1618</sup> Nor are we persuaded that the language of section 332(c)(1)(B) precludes the Commission's extension of section 252-type procedures in this manner. RCA observes that section 332(c)(1)(B) only expressly discusses

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<sup>1612</sup> See *supra* paras. 828-836.

<sup>1613</sup> See, e.g., *Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes With Verizon-Virginia, Inc.*, CC Docket No. 00-218, Memorandum Opinion and Order, 16 FCC Rcd 6224 (2001).

<sup>1614</sup> See, e.g., *Petition of Northland Networks, Ltd. For Preemption of the Jurisdiction of the New York Public Service Commission Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended*, WC Docket No. 03-242, Memorandum Opinion and Order, 19 FCC Rcd 2396 (Wir. Comp. Bur. 2004).

<sup>1615</sup> See generally 47 C.F.R. Part 51, Subpart I.

<sup>1616</sup> See, e.g., *Core v. Verizon PA*, 493 F.3d 333 (3d Cir. 2007); *Centennial Puerto Rico License Corp. v. Telecom. Reg. Bd. of Puerto Rico*, 634 F.3d 17, 22 (1st Cir. 2011).

<sup>1617</sup> See, e.g., AACP Petition at 6; RCA Reply, CC Docket No. 01-92 at 7-9 (filed July 11, 2005). We also disagree with RCA that a role for the states is at odds with the "uniform, national deregulatory environment for CMRS" that "Congress sought to achieve." RCA Reply, CC Docket No. 01-92 at 7-8 (filed July 11, 2005). As the D.C. Circuit recently recognized, a state role in the context of LEC-CMRS interconnection issues can be "consistent with the dual regulatory scheme assumed in the Communications Act" notwithstanding concerns about a resulting "patchwork of regulatory schemes throughout the states [that could] undermine Congress's understanding that 'mobile services ... by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.'" *MetroPCS v. FCC*, 644 F.3d 410, 413-14 (D.C. Cir. 2011). See also *id.* at 414 ("the FCC's reasonable reading of the Communications Act and Rule 20.11(b) is not disturbed by MetroPCS's wish that the FCC do it all, which finds no expression in the statute").

<sup>1618</sup> Compare, e.g., RCA Reply, CC Docket No. 01-92 at 6 (filed July 11, 2005) (arguing that, because section 252 expressly imposes certain obligations on incumbent LECs, it is inconsistent with the Act to impose those requirements on other carriers) with, e.g., SBC Opposition, CC Docket No. 01-92 at 5 (filed June 30, 2005) (arguing that the focus on incumbent LECs in section 252 "by no means prohibits the Commission from adopting a rule allowing ILECs to request negotiations"). RCA further observes that section 251(c)(1) expressly requires incumbent LECs to negotiate interconnection agreements in good faith "in accordance with section 252," while the good faith negotiation requirement for requesting carriers does not specifically reference section 252. RCA Reply, CC Docket No. 01-92 at 6 (filed July 11, 2005). This simply reflects the explicit focus on incumbent LECs in the text of section 252, however. Because we do not interpret the Act's silence in section 252 regarding implementation procedures governing non-incumbent LECs as precluding section 20.11(e) of the Commission's rules, we likewise do not interpret section 251(c)(1) in that manner.

requests by CMRS providers for interconnection, and contends that precludes rules that would enable incumbent LECs to request interconnection from CMRS providers.<sup>1619</sup> As a threshold matter, we observe that CMRS providers are required to interconnect with other carriers under section 251(a) of the Act, and that section 201 also provides the Commission authority to require CMRS providers to interconnect. We thus disagree with RCA's suggestion that section 332 should be read to preclude CMRS providers from being subject to such requests.<sup>1620</sup> With respect to the procedures for implementing such requests, however, we note that the Commission previously has suggested "that the procedures of section 252 are not applicable in matters involving section 251(a) alone."<sup>1621</sup> We find it appropriate to interpret the obligations imposed on CMRS providers under section 20.11(e) in a manner consistent with the Commission's interpretation of the scope of the comparable requirements of section 252 from which it was derived. We thus make clear that section 20.11(e) does not apply to requests for direct or indirect physical interconnection alone, but only requests that also implicate the rates and terms for exchange of non-access traffic.

843. We further find that the rules adopted in the *T-Mobile Order* were procedurally proper, contrary to the contentions of some petitioners.<sup>1622</sup> The Commission's 2001 *Intercarrier Compensation NPRM* expressly sought "comment on the rules [the Commission] should adopt to govern LEC interconnection arrangements with CMRS providers, whether pursuant to section 332, or other statutory authority,"<sup>1623</sup> and "on the relationship between the CMRS interconnection authority assigned to the Commission under sections 201 and 332, and that granted to the states under sections 251 and 252."<sup>1624</sup> The T-Mobile petition was incorporated into the docket in that proceeding, and in response to the Commission's request for comment on that petition,<sup>1625</sup> the issue of LECs being able to request interconnection negotiations with CMRS carriers was raised in the record.<sup>1626</sup> We thus are not persuaded

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<sup>1619</sup> RCA Reply, CC Docket No. 01-92 at 5 (filed July 11, 2005).

<sup>1620</sup> See, e.g., *Policy and Rules Concerning the Interstate Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended; Petitions for Forbearance*, CC Docket No. 96-61, Memorandum Opinion and Order, 14 FCC Rcd 391, 398, para. 15 (1998) ("the interconnection requirements of section 251(a) clearly apply to CMRS providers").

<sup>1621</sup> *Interconnection Clarification Order*, 26 FCC Rcd at 8270, para. 21 & n.76.

<sup>1622</sup> See, e.g., AAPC Petition at 4 (arguing that section 20.11(e) of the Commission's rules "was adopted without providing general notice of 'either the terms or substance of the proposed rule' in apparent disregard of the Administrative Procedures Act") (quoting 4 U.S.C. § 553(b)(3)).

<sup>1623</sup> *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9642, para. 90.

<sup>1624</sup> *Id.* at 9641, para. 86.

<sup>1625</sup> *Comment Sought on Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic*, CC Docket No. 01-92, Public Notice, 17 FCC Rcd 19046 (2002); *Intercarrier Compensation for Wireless Traffic*, 67 Fed. Reg. 64,120 (Oct. 17, 2002) (publishing the Public Notice in the Federal Register). See also T-Mobile Opposition and Comments, CC Docket No. 01-92 at 7 (filed June 30, 2005) ("The Commission fully complied with [notice and comment] requirements by issuing a public notice seeking comment on the reciprocal compensation issues involving CMRS providers and incumbent LECs, as raised in the petition for declaratory ruling filed by T-Mobile and other parties. This public notice was subsequently published in the Federal Register and therefore satisfies the notice-and-comment requirements of the APA.") (footnotes omitted).

<sup>1626</sup> SBC Opposition, CC Docket No. 01-92, at 3 n.7 (filed June 30, 2005). See also, e.g., Alabama Rural Local Exchange Carriers Reply, CC Docket No. 01-92 at 6 (filed Nov. 1, 2002) (The Commission should "revise its existing rules to make it clear that 'that CMRS providers have an affirmative obligation to negotiate and enter into interconnection compensation agreements with independent LECs' prior to terminating traffic to such LECs (continued...)").

that parties lacked adequate notice and an opportunity to comment on the requirements ultimately imposed in section 20.11(e) of the Commission's rules.

**c. Requests for Clarification**

844. A number of petitions seek clarification regarding the operation of the *T-Mobile Order* and/or the state of the law that existed prior to such decision.<sup>1627</sup> Except insofar as discussed above,<sup>1628</sup> or in our actions regarding wireless intercarrier compensation generally,<sup>1629</sup> we decline to provide such clarification here. The Commission has discretion whether to issue a declaratory ruling, and rather than addressing these requests here, we can address issues as they arise.<sup>1630</sup>

**d. Extending *T-Mobile* to Other Contexts**

845. We decline, at this time, to extend the obligations enumerated in the *T-Mobile Order* to other contexts. As discussed above, the *T-Mobile Order* imposed on CMRS providers the duty to negotiate interconnection agreements with incumbent LECs under the section 252 framework.<sup>1631</sup> However, the *T-Mobile Order* did not address relationships involving competitive LECs or among other interconnecting service providers. Subsequently, competitive LECs have requested that the Commission expand the scope of the *T-Mobile Order* and require CMRS providers to negotiate agreements with competitive LECs under the section 251/252 framework, just as they do with incumbent LECs.<sup>1632</sup> In addition, rural incumbent LECs urged the Commission to "give small carriers some legal authority to demand a negotiated interconnection agreement," and argued that "the Commission should extend the *T-Mobile Order* to give ILECs the right to demand interconnection negotiations with all carriers."<sup>1633</sup> Policy and legal issues surrounding the possible extension of the *T-Mobile Order* are insufficiently addressed in our current record, and as such we seek comment in the accompanying FNPRM on whether to extend *T-Mobile Order* obligations to other contexts.<sup>1634</sup>

846. However, this issue remains highly relevant notwithstanding our adoption of bill-and-keep as the default for reciprocal compensation between LECs and CMRS providers under section

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pursuant to arrangements with an RBOC.") (quoting Frontier and Citizens Comments, CC Docket 01-92, at 8 (filed Oct. 18, 2002)).

<sup>1627</sup> See, e.g., MetroPCS Petition; Missouri Small Telephone Company Group Petition for Reconsideration, CC Docket No. 01-92 (filed Mar. 25, 2005) (MoSTCG Petition); T-Mobile USA Petition for Clarification or, in the Alternative, Reconsideration, CC Docket No. 01-92 (filed Apr. 29, 2005).

<sup>1628</sup> See *supra* Section XII.C.5.b.

<sup>1629</sup> See *infra* Section XV.

<sup>1630</sup> See 47 C.F.R. § 1.2; *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973) (Commission did not abuse its discretion by declining to grant a declaratory ruling).

<sup>1631</sup> See *supra* XII.C.5.

<sup>1632</sup> See, e.g., Pac-West Comments at 3; PAETEC et al. Section XV Reply at 23-24; Letter from Michael B. Hazzard, counsel for Xspedius, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, Attach. at 7 (filed Aug. 10, 2005); *Supra* Telecommunications and Information Systems *Ex Parte* Comments and Cross-Petition for Limited Clarification, CC Docket No. 01-92 at 10 (filed July 14, 2005).

<sup>1633</sup> Rural Associations Section XV Comments at 29 n.67, 30.

<sup>1634</sup> See *infra* para. 1324

251(b)(5).<sup>1635</sup> Under a bill-and-keep methodology, carriers still will need to address issues such as the “edge” for defining the scope of bill-and-keep, subject to arbitration where they cannot reach agreement.<sup>1636</sup> These issues do not lend themselves well to one-size-fits-all approaches as would be required under a tariffing regime. Imposing a duty to negotiate, subject to arbitration, will negate the need for Commission intervention in this context and will facilitate more market-based solutions.<sup>1637</sup> Because we also maintain our existing requirements regarding interconnection and prohibitions on blocking traffic, our experience suggests that carriers under no legal compulsion to come to the table may have no incentive to do so, thus frustrating the efforts of interconnected carriers to resolve open questions. The section 252 framework—already in place in other contexts under the terms of the Act—may be a reasonable mechanism to use to address these situations.

### **XIII. RECOVERY MECHANISM**

#### **A. Introduction**

847. In this section, we adopt a transitional recovery mechanism to facilitate incumbent LECs’ gradual transition away from ICC revenues reduced as part of this Order. This mechanism allows LECs to recover ICC revenues reduced as part of our intercarrier compensation reforms, up to a defined baseline, from alternate revenue sources: incremental, and limited increases in end user rates and, where appropriate, universal service support through the Connect America Fund. The recovery mechanism is limited in time and carefully balances the benefits of certainty and a gradual transition with our goal of keeping the federal universal service fund on a budget and minimizing the overall burden on end users.

848. The recovery mechanism is not 100 percent revenue-neutral relative to today’s revenues, but it eliminates much of the uncertainty carriers face under the existing ICC system, allowing them to make investment decisions based on a full understanding of their revenues from ICC for the next several years. Absent reform, price cap and rate-of-return carriers alike face an increasingly unpredictable revenue stream from ICC, which will only get worse as demand for traditional telephone service continues to decline. For price cap carriers, under the current system, access rates remain constant as demand declines, so declining MOUs have led to rapid and significant revenue declines. Rate-of-return carriers are experiencing similar declines in intrastate access revenues, because most states do not perform regular true ups of intrastate access rates to reflect declining demand. And while rate-of-return carriers’ interstate access rates do increase today as demand declines, in theory holding their interstate access revenues constant, in practice the rapid decline in demand has caused large rate increases that incent other communications providers to develop and use access avoidance schemes.<sup>1638</sup> Such schemes, along with phantom traffic, uncertainty about payment for VoIP, and resulting litigation, have placed significant additional strain on the reliability of intercarrier compensation as a revenue stream for all types

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<sup>1635</sup> See *infra* XV. We hold above that the mutual compensation owed for purposes of section 20.11 of the Commission’s rules is coextensive with the reciprocal compensation requirements between LECs and CMRS providers, and we also adopt bill-and-keep as the default reciprocal compensation arrangement in this context. See *supra* XV.C. For convenience, this discussion uses the phrases “mutual compensation” and “reciprocal compensation” interchangeably, without prejudging the appropriate compensation level prior to this Order.

<sup>1636</sup> See *supra* Sections XII.A and XV.

<sup>1637</sup> See, e.g., RNK Communications Section XV Comments at 8 (citing benefits that can arise from a framework that allows parties to negotiate mutually agreeable outcomes, rather than all parties being categorically bound to a single regime); Verizon Section XV Comments at 13-14 (same); Bandwidth.com Reply at 11, 15-17 (same).

<sup>1638</sup> See, e.g., Letter from Jerry Weikle, ERTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, at 1, 3 (filed July 8, 2011) (ERTA July 8, 2011 *Ex Parte* Letter)(describing arbitrage concerns with respect to Halo Wireless).

of carriers. These trends are only likely to accelerate as communication options for consumers continue to proliferate beyond landline telephone calling.

849. In establishing the framework for recovery, we conclude that carriers should first look to limited recovery from their own end users, consistent with the principle of bill and keep and the model in the wireless industry, and we take measures to ensure that phone rates remain affordable and reasonably comparable among all Americans. Therefore, we adopt several safeguards to protect end users from unreasonable or excessive increases, for example by adopting a Residential Rate Ceiling above which consumer recovery through a federal Access Recovery Charge (ARC) is prohibited, and significantly mitigating ICC recovery from residential consumers by balancing it with recovery from multi-line businesses. We also adopt protections to ensure that multiline businesses do not see any unreasonable increases by adopting a per-line total cap that includes both the federal SLC and the new federal ARC. Additional recovery, when permitted, will be provided from the CAF. We also adopt safeguards to ensure USF stays within our budget and to ensure that CAF ICC support serves to advance our goal of universal voice and broadband, creating significant consumer benefits. We note that, during the transition adopted in this Order, all LECs will continue to collect intercarrier compensation for originating access and dedicated transport, providing continued revenue flows from those sources.

## **B. Summary**

850. Our recovery mechanism has two basic components. First, we define the revenue incumbent LECs are eligible to recover, which we refer to as “Eligible Recovery.” Second, we specify how incumbent LECs may recover Eligible Recovery through limited end-user charges and, where eligible and a carrier elects to receive it, CAF support. Competitive LECs are free to recover reduced revenues through end-user charges.

### *851. Eligible Recovery.*

- Price cap incumbent LECs’ Baseline for recovery will be 90 percent of their Fiscal Year 2011 (FY2011)<sup>1639</sup> interstate and intrastate access revenues for the rates subject to reform and net reciprocal compensation revenues. For price cap carriers’ study areas that participated in the Commission’s 2000 *CALLS* reforms, and thus have had interstate access rates essentially frozen for almost a decade, Price Cap Eligible Recovery (i.e., revenues subject to our recovery mechanism) will be the difference between: (a) the Price Cap Baseline, subject to 10 percent annual reductions; and (b) the revenues from the reformed intercarrier compensation rates in that year, based on estimated MOUs multiplied by the associated default rate for that year. For carriers that have more recently converted to price cap regulation and did not participate in the *CALLS* plan, we phase in the reductions after five years, so that the initial 10 percent reduction occurs in year six. Estimated MOUs will be calculated as FY2011 minutes for all price cap carriers, and will be reduced 10 percent annually for each year of reform to reflect MOU trends over the past several years. Because such demand reductions have applied equally to all price cap carriers, we do not make any distinction among price cap carriers for purposes of this calculation. We adopt this straight line approach to determining MOUs, rather than requiring carriers to report actual minutes each year, because it will be more predictable for carriers and less burdensome to administer.
- Rate-of-return incumbent LECs’ Baseline for recovery, which is somewhat more complex, will be based on their 2011 interstate switched access revenue requirement (which is recovered today through interstate access revenues and local switching support (LSS), if

<sup>1639</sup> We define “fiscal year” 2011 for these purposes as October 1, 2010 through September 30, 2011.

applicable), plus FY2011 intrastate terminating switched access revenues and FY2011 net reciprocal compensation revenue. Rate-of-Return Eligible Recovery will be the difference between: (a) the Rate-of-Return Baseline, subject to five percent annual reductions; and (b) the revenues from the reformed intercarrier compensation rates in that year, based on actual MOUs multiplied by the associated default rate for that year. The annual Rate-of-Return Baseline reduction used in the calculation of Rate-of-Return Eligible Recovery revenue reflects two considerations. First, in recent years rate-of-return carriers' interstate switched access revenue requirements have been declining on average at approximately three percent annually due to declining regulated costs, with corresponding declines in interstate access revenues; such declines are projected to continue each year for the next several years.<sup>1640</sup> In addition, rate-of-return carriers' intrastate revenues have been declining on average at 10 percent per year as MOU decline,<sup>1641</sup> with state regulatory systems that typically do not have annual, automatic mechanisms to increase rates to account for declining demand. Weighing these considerations, we find it appropriate to reduce rate-of-return carriers' Eligible Recovery by five percent annually.<sup>1642</sup> This approach to revenue recovery will put most rate-of-return carriers in a better financial position—and will provide substantially more certainty—than the *status quo* path absent reform, where MOU declines would continue to be large and unpredictable and would significantly reduce intrastate revenues. This approach also provides carriers with the benefit of any costs savings and efficiencies they can achieve by enabling carriers to retain revenues even if their switched access costs decline. And it avoids creating misaligned incentives for carriers to inefficiently increase costs to grow their intercarrier compensation revenue requirement and thereby draw more access replacement from the CAF.

852. *Recovery from End Users.* Consistent with past ICC reforms, we permit carriers to recover a limited portion of their Eligible Recovery from their end users through a monthly fixed charge called an ARC. We take measures to ensure that any ARC increase on consumers does not impact affordability of rates, including by limiting the annual increase in consumer ARCs to \$0.50. We also make clear that carriers may not charge an ARC on any Lifeline customers.<sup>1643</sup> This charge is calculated independently from, and has no bearing on, existing SLCs, although for administrative and billing efficiencies we do permit carriers to combine the charges as a single line item on a bill.

<sup>1640</sup> See Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at Attach. 3 at 1 (filed Sept. 9, 2011) (NTCA Sept. 9, 2011 *Ex Parte* Letter).

<sup>1641</sup> See generally Letter from Regina McNeil, VP of Legal, General Counsel & Corporate Secretary, NECA to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket No. 01-92 (filed April 6, 2011); Letter from Regina McNeil, VP of Legal, General Counsel & Corporate Secretary, NECA to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket No. 01-92 (filed May 11, 2011); Letter from Regina McNeil, VP of Legal, General Counsel & Corporate Secretary, NECA to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket No. 01-92 (filed May 25, 2011) (collectively *NECA Data Filings*) (based upon aggregation of confidential data).

<sup>1642</sup> We seek comment in the FNPRM asking whether we should change this reduction after five years by either moving to a decline based on MOUs and/or increasing the decline by one percent per year up to a maximum of 10 percent annual baseline decline. See *supra* para. 1329.

<sup>1643</sup> See, e.g., Letter from Chris Riley, Policy Counsel, Free Press, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 11-65, WC Docket Nos. 10-90, 05-337, 03-109, 11-42, GN Docket No. 09-51, CC Docket No. 01-92 at 1 (filed Oct. 14, 2011) (urging the Commission to exclude any Lifeline customers from any recovery charge adopted as part of ICC reform).



- *Recovery Fairly Balanced Across All End Users.* We do not, as some commenters urge, put the entire burden of access recovery on consumers. Rather, consistent with the Commission's approach in past reforms, under which business customers also contributed to offset declines in access charges, we balance consumer and single-line business recovery with recovery from multi-line businesses. We also adopt additional measures to protect consumers of incumbent LECs that elect not to receive CAF funding, by limiting the proportion of Eligible Recovery that can come from consumers and single-line businesses based on a weighted share of a carrier's residential versus business lines.<sup>1644</sup>
- *Protections for Consumers Already Paying Rebalanced Rates.* To protect consumers, including in states that have already rebalanced rates through prior state intercarrier compensation reforms, we adopt a Residential Rate Ceiling that prohibits imposing an ARC on any consumer paying an inclusive local monthly phone rate of \$30 or more.<sup>1645</sup>
- *Protections for Multi-Line Businesses.* Although we do not adopt a business rate ceiling, nor were there proposals in the record to do so, we do take measures to ensure that multi-line businesses' total SLC plus ARC line items are just and reasonable. The current multi-line business SLC is capped at \$9.20. Some carriers, particularly smaller rate of return and mid-size carriers, are at or near the cap, while larger price cap carriers may have business SLCs as low as \$5.00. To minimize the burden on multi-line businesses, we do not permit LECs to charge a multi-line business ARC where the SLC plus ARC would exceed \$12.20 per line. This limits the ARC for multi-line businesses for entities at the current \$9.20 cap to \$3.00. We find this limitation for multi-line businesses consistent with the reasons we place an overall limit on the residential ARCs discussed below.
- To recover Eligible Recovery, price cap incumbent LECs are permitted to implement monthly end user ARCs with five annual increases of no more than \$0.50 for residential/single-line business consumers, for a total monthly ARC of no more than \$2.50 in the fifth year; and \$1.00 (per month) per line for multi-line business customers, for a total of \$5.00 per line in the fifth year, provided that: (1) any such residential increases would not result in regulated residential end-user rates that exceed the \$30 Residential Rate Ceiling; and (2) any multi-line business customer's total SLC plus ARC does not exceed \$12.20. The monthly ARC that could be charged to any particular consumer cannot increase by more than \$0.50 annually, and in fact we estimate that the average increase in the monthly ARC that would be permitted across all consumer lines over the period of reform, based on the amount of eligible recovery, is approximately \$0.20 annually.<sup>1646</sup> However, we expect that not all

<sup>1644</sup> This limitation is only necessary for carriers that are not eligible or elect not to receive CAF funding because carriers recovering from CAF will have the full ARC imputed to them.

<sup>1645</sup> The Residential Rate Ceiling is based on the federal SLC and the ARC; the flat rate for residential local service, mandatory extended area service charges, and state subscriber line charges; per-line state high cost and/or access replacement universal service contributions; state E911 charges; and state TRS charges. See *infra* paras. 913-916.

<sup>1646</sup> FCC Staff Analysis. Using incumbent LECs' filings in this docket, staff totaled each LECs' access revenues that are being reduced as a result of this Order, and then converted these aggregate dollar figures into a per line amount by dividing by the carrier's average lines in service for the most recent filing period. See Letter from Karen Brinkmann, Counsel to Alaska Communications Systems, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51 at Attach. (filed Sept. 7, 2011); Letter from Karen Brinkmann, Counsel to Hawaiian Telecom, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51 at Attach. (filed June 24, 2011); Letter from Karen Brinkmann, Counsel to Fairpoint, CC Docket No. 01-92, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51 at Attach. (filed Apr. 19, 2011); Letter from Maggie McCready, Vice President, Federal Regulatory, Verizon, (continued...)

carriers will elect or be able to charge the ARC due in part to competitive pressures, and we therefore predict the average actual increase across all consumers to be approximately \$0.10-\$0.15 each year, peaking at approximately \$0.50 to \$0.90 after five or six years, and declining thereafter.<sup>1647</sup>

- To recover Eligible Recovery, rate-of-return incumbent LECs are permitted to implement monthly end user ARCs with six annual increases of no more than \$0.50 (per month) for residential/single-line business consumers, for a total ARC of no more than \$3.00 in the sixth

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to Marlene H. Dortch, Secretary, FCC, and Lynne Hewitt Engledow, Pricing Policy Division, Wireline Competition Bureau, FCC, CC Docket No. 01-92, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51 at 2 (filed Apr. 14, 2011); Letter from Christopher Heimann, General Attorney, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51 at Attach. (filed Apr. 8, 2011); Letter from Maggie McCready, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, and Lynne Hewitt Engledow, Pricing Policy Division, Wireline Competition Bureau, FCC, CC Docket No. 01-92, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51 at Ex. 1 (filed Mar. 24, 2011); Letter from Maggie McCready, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, and Lynne Hewitt Engledow, Pricing Policy Division, Wireline Competition Bureau, FCC, CC Docket No. 01-92, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51 at Ex. 1 (filed Mar. 14, 2011); Letter from Melissa Newman, Vice President-Federal Relations, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at Attach. (filed Jan. 18, 2011); CenturyLink, Response to FCC Data Request, CC Docket No. 01-92, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51 (filed Jan. 13, 2011); Letter from Michael D. Saperstein, Jr., Director of Federal Regulatory Affairs, Frontier, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51 at Attach. (filed Dec. 16, 2010); Letter from Malena Barzilai, Regulatory Counsel & Director – Federal Regulatory Affairs, Windstream, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51 at Attach. (filed Oct. 15, 2010) (collectively *ILEC Data Filings*); *see also*, Letter from Regina McNeil, Vice President of Legal, General Counsel and Corporate Secretary, NECA, to Marlene H. Dortch, Secretary, FCC, and Lynne Hewitt Engledow, Pricing Policy Division, Wireline Competition Bureau, FCC, CC Docket No. 01-92, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51 at Attach. (filed May 25, 2011); Letter from Regina McNeil, Vice President of Legal, General Counsel and Corporate Secretary, NECA, to Marlene H. Dortch, Secretary, FCC, and Lynne Hewitt Engledow, Pricing Policy Division, Wireline Competition Bureau, FCC, CC Docket No. 01-92, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51 at Attach. (filed May 11, 2011); Letter from Joe A. Douglas, Vice President, Government Relations, NECA, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 80-286 at Attach. (filed Dec. 29, 2010). Staff then trended this value over the period of reform to reflect the excess MOU loss over expected line loss (annual declines of 10 percent and 7.5 percent respectively), and applied the appropriate reduction to eligible recovery. This produced the approximate total recovery need per line for the carrier over the course of reform. Staff then divided this value by the number of ARC increases (5 for price cap, 6 for rate of return) to get an average ARC increase across all lines. Staff then adjusted this average based on each carrier's mix of residential and single line businesses to multiline businesses and the carrier's potential annual ARC increases, factoring in the annual caps of \$0.50 and \$1.00 on consumers and multiline businesses respectively, the residential ceiling of \$30 and the business ARC + SLC limit of \$12.20 and the exclusion of Lifeline lines, to estimate the average imputed consumer ARC increase.

<sup>1647</sup> To estimate likely actual consumer ARC increase, staff applied a 25-50 percent reduction factor to the theoretically permitted ARCs to reflect our expectation that competitive pressures will prevent carriers from imposing the full charges on all consumers. Filings in the record support our prediction that carriers will not charge the maximum permitted ARCs on all customers. *See, e.g.*, Reply Comments of AT&T Inc. on the Missoula Plan for Intercarrier Compensation Reform, CC Docket No. 01-92, filed Feb. 1, 2007, Exhibit 1 at n. 11. *See also* <http://www.phoenix-center.org/perspectives/Perspective11-06Final.pdf> (suggesting carriers would realize as little as 40 percent ARC recovery). We recognize that these estimates are necessarily predictive and imprecise, however, and we believe any burden on consumers will be significantly outweighed by the benefits of reform even if carriers are able to charge the full permitted ARCs.

year; and \$1.00 (per month) per line for multi-line business customers for a total of \$6.00 per line in the sixth year, provided that: (1) such increases would not result in regulated residential end-user rates that exceed the \$30 Residential Rate Ceiling; and (2) any multi-line business customer's total SLC plus ARC does not exceed \$12.20.

- Competitive LECs, which are not subject to the Commission's end-user rate regulations today, may recover reduced intercarrier revenues through end-user charges.

853. *Explicit Support from the Connect America Fund.* The Commission has recognized that some areas are uneconomic to serve absent implicit or explicit support. ICC revenues have traditionally been a means of having other carriers (who are now often competitors) implicitly support the costs of the local network. As we continue the transition from implicit to explicit support that the Commission began in 1997, recovery from the CAF for incumbent LECs will be provided to the extent their Eligible Recovery exceeds their permitted ARCs. For price cap carriers that elect to receive CAF support, such support is transitional, phasing out over three years beginning in 2017. This phase-out reflects, in part, the fact that such carriers will be receiving additional universal service support from the CAF that will phase in over time and is designed to reflect the efficient costs of providing service over a voice and broadband network. For rate-of-return carriers, ICC-replacement CAF support will phase down as Eligible Recovery decreases over time, but will not be subject to other reductions.

- All incumbent LECs that elect to receive CAF support as part of this recovery mechanism will be subject to the same accountability and oversight requirements adopted in Section VIII above. For rate-of-return carriers, the obligations for deploying broadband upon reasonable request specified in the CAF section above apply as a condition of receiving ICC-replacement CAF.<sup>1648</sup> For price cap carriers that elect to receive ICC-replacement CAF support, we require such support be used for building and operating broadband-capable networks used to offer their own retail service in areas substantially unserved by an unsubsidized competitor<sup>1649</sup> of fixed voice and broadband services. Thus, all CAF support will directly advance broadband deployment. This approach is consistent with carriers' representations that they currently use ICC revenues for broadband deployment.<sup>1650</sup>
- Competitive LECs, which have greater freedom in setting rates and determining which customers they wish to serve, will not be eligible for CAF support to replace reductions in ICC revenues.<sup>1651</sup>

### C. Policy Approach to Recovery

854. As discussed above, our reforms seek to enable more widespread deployment of broadband networks, to foster the transition to IP networks, and to reduce marketplace distortions. We recognize that this transition affects different—but overlapping—segments of consumers in different ways. We therefore seek to adopt a balanced approach to reform that benefits consumers as a whole.

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<sup>1648</sup> These are the same obligations, including latency, speed and usage levels, adopted for rate-of-return legacy high-cost funding adopted above. *See supra* Section VI.

<sup>1649</sup> *Supra* para. 103.

<sup>1650</sup> *See, e.g.,* CenturyLink *USF/ICC Transformation NPRM* Comments at 50; Nebraska Rural Independent Companies *USF/ICC Transformation NPRM* Comments at 25; USTelecom *USF/ICC Transformation NPRM* Comments at 3.

<sup>1651</sup> We are not abrogating agreements in this Order, but observe that agreements may have relevant change of law provisions. *See supra* para. 815.

855. The overall reforms adopted in this Order will enable expanded build-out of broadband and advanced mobile services to millions of consumers in rural America who do not currently have broadband service. Our ICC reforms will fuel new investment by making incumbent LECs' revenue more predictable and certain. Indeed, incumbent LECs receiving CAF support as part of this recovery mechanism will have broadband deployment obligations.

856. In addition, as discussed above, we anticipate that reductions in intercarrier compensation charges will result in reduced prices for network usage, thereby enabling more customers to use unlimited all-distance service plans or plans with a larger volume of long distance minutes, and also leading to increased investment and innovation in communications networks and services.<sup>1652</sup> Moreover, consistent with previous ICC reforms, which gave rise to substantial benefits from lower long distance prices, we expect consumers to realize substantial benefits from this reform. This is especially true for customers of carriers for which intercarrier compensation charges historically have been a significant cost, such as wireless providers and long distance carriers.<sup>1653</sup>

857. Today, carriers receive payments from other carriers for carrying traffic on their networks at rates that are based on recovering the average cost of the network, plus expenses, common costs, overhead, and profits, which together far exceed the incremental costs of carrying such traffic. The excess of the payments over the associated costs constitutes an implicit annual subsidy of local phone networks—a subsidy paid by consumers and businesses everywhere in the country. This distorts competition, placing actual and potential competitors that do not receive these same subsidies at a market disadvantage, and denying customers the benefits of competitive entry.

858. As we pursue the benefits of reforming this system, we also seek to ensure that our transition to a reformed intercarrier compensation and universal service system does not undermine continued network investment—and thus harm consumers. Consequently, our recovery mechanism is designed to provide predictability to incumbent carriers that had been receiving implicit ICC subsidies, to mitigate marketplace disruption during the reform transition, and to ensure our intercarrier compensation reforms do not unintentionally undermine our objectives for universal service reform. As the State Members observe, for example, “[b]ankers and equity investors need to be able to see that both past and future investments will be backed by long-term support programs that are predictable.”<sup>1654</sup> Similarly, they

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<sup>1652</sup> An example of lower usage prices is lower per-minute prices within a bundle of cell-phone minutes (e.g., through larger numbers of minutes being added to the bundle). See, e.g., *supra* Section XII.A.1.

<sup>1653</sup> See *supra* Section XII.A.1. In addition, economists have estimated that above-cost access charges reduced U.S. economic welfare by an estimated \$10–17 billion annually during the late 1980s, but that the annual welfare loss declined substantially to between \$2.5 billion and \$7 billion following the Commission's access charge reforms in the 1980s and early 1990s. See Letter from Jerry Ellig, Senior Research Fellow, Mercatus Center, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45, WC Docket Nos. 08-183, 07-135, 05-337, 99-68 at 2 (filed Sept. 22, 2008) (citing Robert W. Crandall, *AFTER THE BREAKUP: U.S. TELECOMMUNICATIONS IN A MORE COMPETITIVE ERA* 141 (1991) and Robert W. Crandall & Leonard Waverman, *WHO PAYS FOR UNIVERSAL SERVICE?* 120 (2000)).

<sup>1654</sup> State Members *USF/ICC Transformation NPRM* Comments at 5; see also, e.g., Kansas Commission *USF/ICC Transformation NPRM* Comments at 3; Louisiana PSC *August 3 PN* Comments at 4; Verizon Section XV Reply at 19-20 (quoting Rebecca Arbogast et al., Stifel Nicolaus, *FCC Looks To Shift USF-ICC Reform Drive into Overdrive; August Order Eyed*, at 1 (Mar. 15, 2011)); FCC Universal Service Fund and Intercarrier Compensation Workshop, April 6, 2011, CC Docket No. 01-92 at 96-97, transcript available at <http://www.fcc.gov/events/universal-service-fundintercarrier-compensation-reform-workshop>.

note that “abrupt changes in support levels can harm consumers.”<sup>1655</sup> Predictable recovery during the intercarrier compensation reform transition is particularly important to ensure that carriers “can maintain/enhance their networks while still offering service to end-users at reasonable rates.”<sup>1656</sup> Providing this stability does not require revenue neutrality, however.

859. Ultimately, consumers bear the burden of the inefficiencies and misaligned incentives of the current ICC system, and they are the ultimate beneficiaries of ICC reform. In structuring a reasonable transition path for ICC reform, we seek to balance fairly the burdens borne by various categories of end users, including consumers already paying high residential phone rates, consumers paying artificially low residential phone rates, and consumers that contribute to the universal service fund. Given nationwide disparities in local rates, it would be unfair to place the entire burden of the ICC transition on USF contributors. Just as the Commission has undertaken some intercarrier compensation reforms since the 1996 Act, shifting away from implicit intercarrier subsidies to end-user charges and universal service for recovery, some states have done so, as well. For example, Alaska has recently reformed its intrastate access system, establishing a Network Access Fee of \$5.75, and increasing the role of the Alaska USF in subsidizing carriers’ intrastate revenues with a state USF surcharge of 9.4 percent.<sup>1657</sup> Similarly, in Wyoming, which has also rebalanced rates, many rural customers face total charges for basic residential phone service in excess of \$40 per month.<sup>1658</sup> The Nebraska Companies note total out-of-pocket local residential rates in that state already exceed \$30 per month and should not be increased under any federal reforms contemplated by the Commission.<sup>1659</sup> Were we to place the entire burden of ICC recovery on USF contributors, not only would consumers in each of these states be forced to contribute more, but USF, which is also supported through consumer contributions, could not stay within the budget discussed in Section VII.B above. Meanwhile, as discussed above, other states have retained high intrastate intercarrier compensation rates to subsidize artificially low local rates—including some as low as \$5 per month—effectively shifting the costs of those local networks to long distance and wireless customers across the country.<sup>1660</sup> In this context, we find it reasonable to allow carriers to seek some recovery from their own customers, subject to protection for consumers already paying rates for local phone service at or near \$30 per month. We also prevent carriers from charging an ARC on any Lifeline customers. We also protect consumers by limiting any increases in consumer ARCs based upon actual or imputed increases in ARCs for business customers.

860. Some commenters argue that a variety of other regulatory considerations should alter the Commission’s approach to recovery. For example, some express concerns about the level of existing federal subscriber line charges (SLCs) and special access rates and the extent to which carriers use the ratepayer- and universal service-funded local network to provide unregulated services.<sup>1661</sup> Although we

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<sup>1655</sup> State Members *USF/ICC Transformation NPRM* Comments at 5-6; *see also, e.g.,* Michigan PSC *USF/ICC Transformation NPRM* Comments at 18.

<sup>1656</sup> Michigan PSC *USF/ICC Transformation NPRM* Reply at 10. *See also, e.g.,* Louisiana PSC *August 3 PN* Comments at 3-4.

<sup>1657</sup> Alaska Regulatory Commission *USF/ICC Transformation NPRM* Comments at 26-27.

<sup>1658</sup> Wyoming PSC *USF/ICC Transformation NPRM* Reply at 5.

<sup>1659</sup> Nebraska Rural Independent Companies *USF/ICC Transformation NPRM* Comments at 30 n.45 (“...with the local rate benchmarks required under the Nebraska USF program along with subscriber line charge and other surcharges, total out-of-pocket local residential rates in the state already exceed \$30 per month”).

<sup>1660</sup> *See supra* Section VII.D.5.

<sup>1661</sup> *See, e.g.,* Free Press *August 3 PN* Comments at 10; NASUCA *August 3 PN* Comments at 62-63.

address certain of those issues below, we are not persuaded that we should delay comprehensive intercarrier compensation and universal reform pending resolution of those outstanding questions, given the urgency of advancing the country's broadband goals. Nor do we treat those issues as a static, unchanging backdrop to the reforms we adopt here. In the FNPRM below we reevaluate existing SLCs, including by seeking comment on whether SLCs today are set at an excessive level and should be reduced.<sup>1662</sup> To attempt to account for these concerns through reduced recovery here, particularly given potential changes that the Commission might consider, would unduly complicate—and significantly delay—badly needed reform that we believe will result in significant consumer benefits. Consequently, we believe that the consumer protections incorporated in our recovery mechanism and the transitional nature of the recovery strike the right balance for consumers as a whole.

861. Although the preceding has been focused on the substantial benefits of our reform to consumers, in crafting these reforms we also took account of costs and benefits to industry. Our reforms are minimally burdensome to carriers, imposing only minor incremental costs (i.e., costs that would not be otherwise incurred without our reforms). The incremental costs of reform arise primarily from implementation, meaning that they are one-time costs of the transition that are not incurred on an ongoing basis. Further, these costs are heavily outweighed by efficiency benefits that carriers, as well as other industry participants and consumers, will experience. For carriers as well as end users, these benefits include significantly more efficient interconnection arrangements. Carriers will provide existing services more efficiently, make better pricing decisions for those services, and innovate more efficiently. Carriers' incentives to engage in inefficient arbitrage will also be reduced, and carriers will face lower costs of metering, billing, recovery, and disputes related to intercarrier compensation. Further, carriers, firms more generally, and consumers, facing more efficient prices for voice services, will make more use of voice services to greater effect, and more efficient innovation will result. In contrast to the transitional, one-time costs of reform, these efficiency benefits are ongoing and will compound over time.

#### **D. Carriers Eligible To Participate in the Recovery Mechanism**

862. The Commission sought comment in the *USF/ICC Transformation NPRM* on whether recovery should be limited to certain carriers, or whether it should extend more broadly to all LECs.<sup>1663</sup> We extend the recovery mechanisms adopted in this Order to all incumbent LECs because regulatory constraints on their pricing and service requirements otherwise limit their ability to recover their costs.<sup>1664</sup>

<sup>1662</sup> One commenter states that “the Commission concluded that approximately 82 percent of residential and single-line business price-cap lines had forward-looking costs below \$6.50.” Free Press *USF/ICC Transformation NPRM* Comments at 7. In fact, rather than endorsing that cost estimate, the Commission concluded that “even the most conservative estimate of forward-looking costs” for price cap carriers “shows that [the cost of] a substantial number of lines exceeds both the current \$5.00 SLC cap, and the ultimate \$6.50 SLC cap.” *Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps; Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262, 94-1, Order, 17 FCC Rcd 10868, 10871-72 para. 5 (2002). Notwithstanding that distinction, however, we find it appropriate to take a fresh look not only at whether SLCs are set at appropriate levels under existing regulations, but, longer term, whether such charges should be retained at all. See *infra* Section XVII.O.

<sup>1663</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4732-33, para. 571. See also, e.g., 2008 *USF/ICC FNPRM*, 24 FCC Rcd at 6632, 6637-39 App. A, paras. 302, 318-19; 2005 *Inter-carrier Compensation FNPRM*, 20 FCC Rcd at 4706, 4709-10, 4732, paras. 43, 50, 51, 104.

<sup>1664</sup> If an incumbent LEC receives recovery of any costs or revenues that are already being recovered as Eligible Recovery through ARCs or the CAF, that LEC's ability to recover reduced switched access revenue from ARCs or the CAF shall be reduced to the extent it receives duplicative recovery. Incumbent LECs seeking revenue recovery will be required to certify as part of their tariff filings to both the FCC and to any state commission exercising jurisdiction over the incumbent LEC's intrastate costs that the incumbent LEC is not seeking duplicative recovery in (continued...)

All incumbent LECs have built out their networks subject to COLR obligations, supported in part by ongoing intercarrier compensation revenues.<sup>1665</sup> Thus, incumbent LECs have limited control over the areas or customers that they serve, having been required to deploy their network in areas where there was no business case to do so absent subsidies, including the implicit subsidies from intercarrier compensation. At the same time, incumbent LECs generally are subject to more statutory and regulatory constraints than other providers in the retail pricing of their local telephone service.<sup>1666</sup> Thus, incumbent LECs are limited in their ability to increase rates to their local telephone service customers as a whole to offset reduced implicit subsidies.

863. Proposals to limit the recovery mechanism to only some classes of incumbent LECs, such as rate-of-return carriers,<sup>1667</sup> neglect these considerations, and in particular ignore that price cap incumbent LECs typically are also subject to regulatory constraints on end-user charges. We do, however, recognize the differences faced by price cap and rate-of-return carriers under the *status quo* absent reform, and therefore adopt different recovery mechanisms for price cap and rate-of-return carriers, as explained below.

864. *Competitive LECs.* We decline to provide an explicit recovery mechanism for competitive LECs.<sup>1668</sup> Unlike incumbent LECs, because competitive carriers have generally been found to lack market power in the provision of telecommunications services,<sup>1669</sup> their end-user charges are not subject to comparable rate regulation,<sup>1670</sup> and therefore those carriers are free to recover reduced access (Continued from previous page) \_\_\_\_\_

the state jurisdiction for any Eligible Recovery subject to the recovery mechanism. To monitor and ensure that this does not occur, we require carriers participating in the recovery mechanism, whether ARC and/or CAF, to file data annually. See *infra* paras. 921-923.

<sup>1665</sup> See, e.g., CenturyLink *USF/ICC Transformation NPRM* Comments at 3, 9; SureWest *USF/ICC Transformation NPRM* Comments at 10; Pend Orielle *USF/ICC Transformation NPRM* Comments at 7; Windstream Aug. 21, 2008 Comments, CC Docket Nos. 94-68, 01-92, 96-45; WC Docket Nos. 08-152, 07-135, 04-36, 06-122, 05-337, 99-68 at 7.

<sup>1666</sup> This includes both Commission regulation of the federal SLC and, frequently, state regulation of retail local telephone service rates as well.

<sup>1667</sup> See, e.g., NCTA *USF/ICC Transformation NPRM* Reply at 8 (“Any access replacement support should be limited to a very small number of truly rural providers that are subject to rate-of-return regulation, and should not be available to make all incumbent LECs whole for every dollar of access charge revenue that is eliminated”).

<sup>1668</sup> CMRS providers generally do not collect access charges for originating or terminating calls on their networks. As they will generally not be losing access revenue and will see the elimination of most terminating access charges, they are not entitled to recovery from the recovery mechanism. See generally *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4718 n.787.

<sup>1669</sup> *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, at 9926, para. 8 (2001) (*CLEC Access Charge Order*) (“Competitive entrants into the exchange access market have historically been subject to our tariff rules, but have been largely free of the other regulations applicable to incumbent LECs.”) (citations omitted).

<sup>1670</sup> For instance, the Commission has declined to regulate the SLCs of competitive LECs. See *Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps; Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262, 94-1, Order, 17 FCC Rcd 10868, 10870 n.8 (2002) (subsequent history omitted); see also *CLEC Access Charge Order*, 16 FCC Rcd at 9955, para. 81 (stating that competitive LECs competing with CALLS incumbent LECs are free to build into their end-user rates a component equivalent to the incumbent LEC’s SLC).

revenue through regular end-user charges.<sup>1671</sup> Some competitive LECs have argued that their rates are constrained by incumbent LEC rates (as supplemented by regulated end-user charges and CAF support);<sup>1672</sup> to the extent this is true, we would expect this competition to constrain incumbent LECs' ability to rely on end-user recovery as well. Moreover, competitive LECs typically have not built out their networks subject to COLR obligations requiring the provision of service when no other provider will do so,<sup>1673</sup> and thus typically can elect whether to enter a service area and/or to serve particular classes of customers (such as residential customers) depending upon whether it is profitable to do so without subsidy.

865. In light of those considerations, we disagree with parties that advocate making the recovery mechanism we adopt today available to all carriers, both incumbent and competitive, or to all carriers that currently receive access charge revenues.<sup>1674</sup> Competitive LECs are free to choose where and how they provide service, and their ability to recover costs from their customers is generally not as limited by statute or regulation as it is for incumbent LECs.<sup>1675</sup>

866. We likewise decline to permit competitive LECs to reduce their access rates over a longer period of time than incumbent LECs. Instead, we believe that the approach adopted in the *CLEC Access Charge Order*, under which competitive LECs benchmark access rates to incumbent LECs' rates, is the better approach.<sup>1676</sup> That benchmarking rule was designed as a tool to constrain competitive LECs' access rates to just and reasonable levels without the need for extensive, ongoing accounting oversight and detailed evaluation of competitive LECs' costs.<sup>1677</sup> Deviating from that framework for purposes of the access reform transition would create new opportunities for arbitrage and require increased regulatory oversight, notwithstanding the fact that competitive LECs' access rates under the *CLEC Access Charge*

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<sup>1671</sup> Although some competitive LECs assert that their contracts with business customers would not readily allow them to change intercarrier compensation rates under those contracts in the event of intercarrier compensation reform, *see, e.g.*, TDS Metrocom *August 3 PN* Reply at 6, those contracts reflect decisions made against the backdrop of possible intercarrier compensation reforms being contemplated by the Commission.

<sup>1672</sup> *See e.g.*, EarthLink *USF/ICC Transformation NPRM* Comments at 11 ("Even where EarthLink has the ability to modify rates, it may be prevented from increasing such rates because of competitive constraints (e.g., the incumbent against whom EarthLink competes may not raise rates either because it is vertically integrated and its access charge savings offset its losses or it recovers a portion of its lost access revenue from a USF revenue recovery mechanism).").

<sup>1673</sup> *See supra* paras. 82-83.

<sup>1674</sup> *See, e.g.*, XO *USF/ICC Transformation NPRM* Comments at 50; Verizon and Verizon Wireless *USF/ICC Transformation NPRM* Comments at 50 ("All of these . . . proposed mechanisms, are designed to do the same thing—to give carriers a soft landing following reductions in ICC rates. All should be treated alike."); COMPTel *USF/ICC Transformation NPRM* Comments at 37; PacWest *USF/ICC Transformation NPRM* Comments at 9; SouthEast Telephone *USF/ICC Transformation NPRM* Comments at 5; Letter from Bill Wade, General Manager, Mid-Rivers Communications, to Julius Genachowski, Chairman, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 1-4 (filed Oct. 17, 2011).

<sup>1675</sup> *See, e.g.*, ITTA *USF/ICC Transformation NPRM* Comments at vi ("[C]ompetitors without COLR obligations have defined their own service areas in a manner that allows them to serve only the lowest-cost customers in an area.").

<sup>1676</sup> *See generally CLEC Access Charge Order*; *see also* Letter from Karen Reidy, COMPTel, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, at 3 (filed July 27, 2011).

<sup>1677</sup> *CLEC Access Charge Order*, 16 FCC Rcd at 9924, para. 2.



*Order* were not based on any demonstrated level of need associated with those carriers' networks or operations. Nor has any commenter provided sufficient evidence to warrant departure from the benchmarking approach in this context. We therefore decline to adopt a separate transition path for competitive LECs. Rather, consistent with the general benchmarking rule that had been used for interstate access service, competitive LECs will benchmark to the default rates of the incumbent LEC in the area they serve as specified under this Order.

#### **E. Determining Eligible Recovery**

867. The first step in our recovery mechanism is defining the amount, called "Eligible Recovery," that incumbent LECs will be given the opportunity to recover.

##### **1. Establishing the Price Cap Baseline**

868. *Costs vs. Revenues.* The *USF/ICC Transformation NPRM* sought comment on whether, in adopting a recovery mechanism, the Commission should base recovery on carrier costs, carrier revenues, or some combination thereof.<sup>1678</sup> For the reasons set forth below, for price cap carriers, we will provide recovery based upon Fiscal Year 2011 ("FY2011" or "Baseline")<sup>1679</sup> access revenues that are reduced as part of the reforms we adopt today, plus FY2011 net reciprocal compensation revenues. Selecting FY2011 ensures that gaming or any disputes or nonpayment that may occur after the release of the Order does not impact carriers' Baseline revenues. For rate-of-return carriers, we adopt a bifurcated approach based on: (1) their 2011 interstate switched access revenue requirement;<sup>1680</sup> and (2) their FY2011 intrastate switched access revenues for services with rates to be reduced as part of the reforms we adopt today, plus FY2011 net reciprocal compensation revenues. Carriers have not demonstrated here that the existing intercarrier compensation revenues that we use as part of our Baseline calculations are

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<sup>1678</sup> AT&T *USF/ICC Transformation NPRM* Comments at 4730, para. 564, citing National Broadband Plan at 148.

<sup>1679</sup> We will use Fiscal Year 2011 (i.e., October 1, 2010 through September 30, 2011) data to allow carriers a reasonable amount of time to collect the data necessary for implementation of these reforms. We chose to use a full 12-month period, rather than, for example, annualizing a portion of 2011 data, to ensure that carriers with seasonal calling patterns are not disproportionately affected. *See, e.g.*, Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, CC Docket Nos. 00-218, 00-251, Memorandum Opinion and Order, 18 FCC Rcd 17722, 17866, para. 366 & n.958 (Wir. Comp. Bur. 2003) (discussing seasonal variation in traffic and noting, for example, that "[r]esort communities typically experience upwards of 60-75 percent of their total annual traffic during a 2 or 3 month vacation period"). We note that, because annual USF funding is not as subject to the same seasonal variance as are calling patterns, we use annualized figures for certain CAF purposes in this Order.

<sup>1680</sup> For a rate-of-return carrier that participated in the NECA 2011 annual switched access tariff filing, its 2011 interstate switched access revenue requirement will be its projected interstate switched access revenue requirement associated with the NECA 2011 annual interstate switched access tariff filing. For a rate-of-return carrier subject to section 61.38 of the Commission's rules that filed its own annual access tariff in 2010 and did not participate in the NECA 2011 annual switched access tariff filing, its 2011 interstate switched access revenue requirement will be its projected interstate switched access revenue requirement in its 2010 annual interstate switched access tariff filing. For a rate-of-return carrier subject to section 61.39 of the Commission's rules that filed its own annual switched access tariff in 2011, its revenue requirement will be its historically-determined annual interstate switched access revenue requirement filed with its 2011 annual interstate switched access tariff filing.

confiscatory or otherwise unjustly or unreasonably low,<sup>1681</sup> and we thus find them to be an appropriate starting point for our calculations under the recovery mechanism.<sup>1682</sup>

869. We conclude that, where the Commission lacks data, it is preferable to rely on revenues for determining recovery, as most commenters suggest.<sup>1683</sup> Defining carriers' costs today would be a burdensome undertaking that could significantly delay implementation of ICC reform. "Cost" would first have to be defined for these purposes, which is a difficult and time-consuming exercise. Indeed, price cap carriers' access charges are not based on current costs,<sup>1684</sup> and reliable cost information is not readily available.<sup>1685</sup> It is not clear that a reliable cost study based on current network configuration could be completed without undue delay,<sup>1686</sup> and doing so could be a complicated, time consuming, and expensive process, nor is it clear that a regulatory proceeding could come up with a definition of "cost" appropriate for recovery that is any better than the revenues approach we adopt today.

870. Moreover, the Commission has long recognized that intercarrier compensation rates include an implicit subsidy because they are set to recover the cost of the entire local network, rather than the actual incremental cost of terminating or originating another call. Given our commitment to a gradual transition with no flash cuts, our focus on revenues is appropriate to ensure carriers have a measured transition away from this implicit support on which they have been permitted to rely for many years.

871. For rate-of-return carriers, however, interstate switched access rates today are determined based on their interstate switched access revenue requirement, which is calculated in a manner that includes their "regulated interstate switched access costs" as the Commission has historically defined them, plus a prescribed rate of return on the net book value of their interstate switched access investment. Although rate-of-return carriers' revenue requirement might not be based on the precise measure of cost

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<sup>1681</sup> Indeed, within the range of just and reasonable rates it is possible that rates could be set at levels lower than those that generated the FY2011 revenues in certain cases, as discussed in greater detail below. *See infra* Section XIII.G.

<sup>1682</sup> To the extent that it subsequently is determined that an incumbent LEC's rates during the Baseline time period were not just and reasonable because they were too low, that carrier may seek additional recovery as needed through the Total Cost and Earnings Review Mechanism. *See infra* Section XIII.G.

<sup>1683</sup> *See, e.g.,* ABC Plan at 9.

<sup>1684</sup> *See, e.g.,* *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain of the Commission's Cost Assignment Rules*, WC Docket No. 07-21, pp. 2-3 (filed Jan. 25, 2007) ("Under pure price cap regulation, rates are subject to price ceilings that are determined without reference to costs. Indeed, a key premise of price cap regulation is that consumers will benefit from increased efficiencies that will result from severing the relationship between rates and costs.").

<sup>1685</sup> *See, e.g.,* *Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160 from Enforcement of Certain of the Commission's Cost Assignment Rules*, WC Docket Nos. 07-21, 05-342, Memorandum Opinion and Order, 23 FCC Rcd 7302 (2008), *pet. for recon. pending, pet. for review pending, NASUCA v. FCC*, Case No. 08-1226 (D.C. Cir. filed June 23, 2008). In addition, the jurisdictional separations process has been frozen since 2001, and is currently subject to a referral to the Separations Joint Board. *See Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 26 FCC Rcd 7133 (2011); 47 C.F.R. Part 36.

<sup>1686</sup> As the Commission noted in 2009, "Many carriers no longer have the necessary employees and systems in place to comply with the old jurisdictional separations process and likely would have to hire or reassign and train employees and redevelop systems for collecting and analyzing the data necessary to perform separations." *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 24 FCC Rcd 6162, 6166 at para. 12 (2009); *see, e.g.,* Alexicon *USF/ICC Transformation NPRM* Comments at 2-4; TCA *USF/ICC Transformation NPRM* Comments at 4; ITTA *USF/ICC Transformation NPRM* Comments at 5-6.

we might otherwise adopt if we were starting anew, we believe that using those carriers' interstate revenue requirement is sensible for purposes of determining their Eligible Recovery. For one, this information is readily available today.<sup>1687</sup> In addition, use of the revenue requirement avoids implementation issues surrounding disputed or uncollectable interstate access revenues, providing greater predictability and substantially insulating small carriers from the harms of arbitrage schemes such as phantom traffic.<sup>1688</sup> This approach likewise prevents carriers that may have been earning in excess of their permitted rate of return from locking in those revenues and continuing such overearnings in perpetuity.

872. Our approach is also consistent with the reforms to local switching support (LSS) we adopt above. Historically, smaller carriers have received LSS as a subsidy for certain switching costs, effectively satisfying a portion of their interstate switched access revenue requirement.<sup>1689</sup> As discussed above, defining Eligible Recovery based on carrier's interstate switched access requirement allows us to eliminate LSS as a separate universal service support mechanism for rate-of-return carriers. Eligible Recovery will be calculated from carriers' entire interstate switched access revenue requirement—whether it historically was recovered through access charges or LSS. Thus, in essence, carriers receiving LSS today will be eligible to receive support as part of their Eligible Recovery.

873. At the same time, although rate-of-return carriers do track certain costs to establish their interstate revenue requirement for switched access services, the same information is not readily available—or necessarily relevant—for intrastate switched access services or net reciprocal compensation. As a result, their Eligible Recovery will be based on their FY2011 intrastate switched access revenues addressed as part of the reform adopted today plus FY2011 net reciprocal compensation as of April 1, 2012.<sup>1690</sup>

874. The *USF/ICC Transformation NPRM* also sought comment on whether, under a revenues-based approach, to base carriers' recovery on gross intercarrier revenue or alternatively to use net intercarrier compensation, defined as “a company's total intercarrier compensation revenue . . . less its intercarrier compensation expense” including expenses paid by affiliates.<sup>1691</sup> We received a mixed record

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<sup>1687</sup> We will carefully monitor material changes in cost allocation to categories where recovery remains based on actual cost to ensure that carriers do not shift costs properly associated with switched access. We rely on the revenue requirement information available at the time of the initial tariff filings required to implement this recovery framework. This not only enables implementation of our recovery mechanism in the specified timeframes, but also addresses possible incentives to engage in gaming if carriers were able to increase the Rate-of-Return Baseline subsequently. If a carrier subsequently can demonstrate that it is materially harmed by the use of the projected, rather than final, 2011 interstate revenue requirement, it may seek a waiver of the rule specifying the Rate-of-Return Baseline to allow it to rely on an increased Rate-of-Return Baseline amount. Any such waiver would be subject to the Commission's traditional “good cause” waiver standard, rather than the Total Cost and Earnings Review specified below. See 47 C.F.R. § 1.3.

<sup>1688</sup> See, e.g., ERTA July 8, 2011 *Ex Parte* Letter. For price cap carriers, there is no revenue requirement to use for this purpose. Consequently, we discuss below the extent to which price cap carriers will be able to include currently disputed ICC revenues in their FY2011 baseline. See *infra* para. 880.

<sup>1689</sup> 47 C.F.R. § 69.106(b).

<sup>1690</sup> Rate-of-return carriers may elect to have NECA or another entity perform the annual analysis. The underlying data must be submitted to the relevant state commissions, to the Commission, and, for carriers that are eligible for and elect to receive CAF, to USAC.

<sup>1691</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4731, para. 567.

in response.<sup>1692</sup> For the reasons described below, the approach we adopt is neither a pure net revenue approach nor a pure gross revenue approach.

875. Although we are sympathetic to requests to determine recovery based on net revenues, we decline to do so for several reasons. Most importantly, we are committed to a gradual transition with sufficient predictability to enable continued investment, and a net revenue approach could reduce that predictability,<sup>1693</sup> especially for non-facilities-based providers of long distance service who pay intercarrier compensation expenses indirectly through their purchase of wholesale long distance service from third parties.

876. There also are other difficulties, substantive and administrative, involved in calculating net revenues, which cannot be adequately addressed based on the information in the record. For example, although reductions in an individual incumbent LEC's ICC revenue are tied to a particular study area, its affiliated IXC or wireless carrier may operate across multiple study areas, and the record does not suggest an administrable method for accurately identifying the cost savings associated with a particular incumbent LEC. Moreover, determinations of which affiliates should be counted, whether they are wholly owned by the incumbent LEC or not, and to what extent, would be highly company-specific and could lead to inequitable treatment of similarly-situated carriers.

877. Such an approach also could create inefficient incentives during the transition regarding the acquisition of exchanges with ICC revenue reductions. For example, if an incumbent LEC has a large reduction in ICC revenue that is offset by affiliates' ICC cost savings, other carriers that lack affiliates with comparable ICC cost savings will be deterred from acquiring such exchanges if they would not be able to obtain additional recovery once it acquired that exchange. Conversely, if a carrier that lacked affiliates with comparable ICC cost savings *would* be entitled to new recovery if it acquired that exchange, a net revenue recovery approach could create inefficient incentives to acquire such exchanges given the potential for expanded CAF support (and thus also risk unconstrained growth in universal service).

878. Finally, although the record does not enable us to determine the precise extent to which savings will be passed through from IXC to incumbent LEC, competition in the long distance market is likely to lead IXCs to pass on significant savings to incumbent LECs, rendering 100 percent gross revenues likely more generous than necessary for incumbent LECs.<sup>1694</sup> This is further complicated by incumbent LECs with affiliated IXCs that provide wholesale long distance service; counting the cost savings associated with wholesale long distance service against the recovery need for the affiliated

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<sup>1692</sup> Compare, e.g., Nebraska Rural Independent Companies' *USF/ICC Transformation NPRM* Comments at 30 (advocating a net approach); NASUCA *USF/ICC Transformation NPRM* Comments at 112-14 (same); COMPTTEL *USF/ICC Transformation NPRM* Comments at 36 (same) with, e.g., AT&T *USF/ICC Transformation NPRM* Comments at 35-37 (arguing against a net approach); ITTA *USF/ICC Transformation NPRM* Comments at 29 (same); Kansas Corporation Commission *USF/ICC Transformation NPRM* Comments at 42 (arguing that a net approach would have a minimal impact for many Kansas incumbent LECs).

<sup>1693</sup> See *supra* Section VII.D.11.

<sup>1694</sup> See, e.g., Testimony of Robert W. Quinn, Senior Vice President—Federal Regulatory, AT&T, at FCC Universal Service Fund and Intercarrier Compensation Workshop, April 6, 2011, CC Docket No. 01-92 at 66, transcript available at <http://www.fcc.gov/events/universal-service-fundintercarrier-compensation-reform-workshop>.; AT&T *USF/ICC Transformation NPRM* Comments at 36; see also *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4732-33, para. 571, (citing DEBRA J. ARON, *ET AL.*, AN EMPIRICAL ANALYSIS OF REGULATOR MANDATES ON THE PASS THROUGH OF SWITCHED ACCESS FEES FOR IN-STATE LONG-DISTANCE TELECOMMUNICATIONS IN THE U.S. at 6-11, 30-31 (Oct. 14, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1674082](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1674082)).

incumbent LEC could create disincentives for the IXC to simultaneously pass through those cost savings in lower wholesale long distance rates, thereby reducing the potential for lower retail long distance rates.

## 2. Calculating Eligible Recovery for Price Cap Incumbent LECs

879. For price cap carriers, the recovery mechanism allows them to determine at the outset exactly how much their Eligible Recovery will be each year. The certainty regarding this recovery will enable price cap carriers to better manage the transition away from intercarrier compensation for recovery. Our recovery approach will use historical trends regarding changes in demand to project future changes in demand (typically MOU), in conjunction with the default rates specified by our reforms, to determine Eligible Recovery.<sup>1695</sup> Specifically, under our mechanism, Price Cap Eligible Recovery will be calculated from a Baseline of 90 percent of relevant FY2011 revenues, reduced on a straight-line basis at a rate of ten percent annually starting in year one (2012). This is consistent with the historical trajectory of decreasing MOU,<sup>1696</sup> with which price cap carriers' intercarrier compensation revenues decline today. We conclude this approach provides the necessary predictability for carriers<sup>1697</sup> without reducing their incentives to seek efficiencies or to maximize use of their network. We will not annually true-up actual MOU for price cap carriers, instead likewise using a straight line decline of 10 percent relative to FY2011 MOU, which is a more predictable and administratively less burdensome approach. If MOU decline is less than 10 percent, carriers will receive the benefit of additional revenues. Conversely, if MOU decline accelerates, the risk of decreased revenues falls on the carriers. This allocation of risk incents carriers to be more efficient and retain customers.

880. Specifically, the Price Cap Baseline for price cap incumbent LECs' recovery will be the total switched access revenues that: (1) are being reduced as part of reform adopted today; (2) are billed for service provided in FY2011; and (3) for which payment has been received by March 31, 2012. In addition, the Baseline will include net reciprocal compensation revenues for FY2011, based on net payments as of March 31, 2012. Carriers will be required to submit to the states data regarding all FY2011 switched access MOU and rates, broken down into categories and subcategories corresponding to the relevant categories of rates being reduced. With this information, states with authority over intrastate access charges will be able to monitor implementation of the recovery mechanism and compliance with our rules, and help guard against cost-shifting or double dipping by carriers.<sup>1698</sup> A price cap incumbent LEC that is eligible to receive CAF shall also file this information with USAC for purposes of implementing CAF ICC support, and we delegate to the Wireline Competition Bureau authority to work with USAC to develop and implement processes for administration of CAF ICC support.<sup>1699</sup> These

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<sup>1695</sup> We recognize that our transitional intercarrier compensation framework sets default rates but leaves carriers free to negotiate alternatives. Our approach to recovery relies on the default rates specified by our transition and will impute those rates for purposes of determining recovery, even if carriers negotiate a lower ICC rate with particular providers.

<sup>1696</sup> See *infra* paras. 885-886.

<sup>1697</sup> See, e.g., FCC Universal Service Fund and Intercarrier Compensation Workshop, April 6, 2011, CC Docket No. 01-92 at 97, transcript available at <http://www.fcc.gov/events/universal-service-fundintercarrier-compensation-reform-workshop>. (comments of Paul Gallant, Senior Vice President and Telecom Analyst, MF Global, discussing the importance of certainty of access revenue to continued investor support for broadband build-out).

<sup>1698</sup> See *supra* paras. 812-813. Upon request, carriers will also be required to file these data with the Commission.

<sup>1699</sup> USAC plays a critical role in the day-to-day administration of universal service support mechanisms, see, e.g., *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4595, para. 116 n.192, including the ICC-replacement CAF support that is part of our recovery mechanism.

figures will establish the Base Minutes for each relevant category, and shall not include disputed revenues or revenues otherwise not recovered, for whatever reason, or the MOU associated with such revenues. Every carrier, in support of its annual access tariff filing, must also provide data necessary to justify its ability to impose an ARC, including the potential impact of the ARC for residential and multi-line business customers.

881. In determining the recovery mechanism, we decline to provide 100 percent revenue neutrality relative to today's revenues. Rather, we adopt an approach that is informed in part based on the *status quo* path facing price cap carriers today, where intercarrier compensation revenues decline as MOU decline,<sup>1700</sup> but also adopt some additional reductions for carriers that have had the benefit of interstate rates essentially being frozen for almost a decade, rather than being reduced annually as would typically occur under price cap regulation. Thus, for study areas of carriers that participated in the *CALLS* plan, which is approximately 95 percent of all price cap lines, and 90 percent of all lines across the country, we adopt a 10 percent initial reduction in price cap incumbent LECs' Eligible Recovery to reflect the fact that these carriers' productivity gains have generally not been accounted for in their regulated rates for many years. Incentive regulation typically provides a mechanism for sharing the benefits of productivity gains with ratepayers.<sup>1701</sup> Prior to the *CALLS Order* in 2000, the Commission included a productivity adjustment to the price cap indices to ensure that savings would be shared.<sup>1702</sup> The *CALLS Order* did not include a productivity-related adjustment, however, providing instead a transitional "X-factor" designed simply to target the lower rates specified in that reform plan.<sup>1703</sup> After the targeted rates were achieved, which occurred by 2002 for 96 percent of study areas for carriers participating in the *CALLS* plan, the X-factor was set equal to inflation for the carriers originally subject to the *CALLS* plan and provided no additional consumer benefit from any productivity gains.<sup>1704</sup> As a result, study areas of price cap LECs that participated in the *CALLS* plan have had no X-Factor reductions to their price cap indices (PCIs), productivity-related or otherwise, for any PCI at least since 2004, and some price cap carriers' X-Factor reductions to their switched access-related PCIs stopped even earlier than that.<sup>1705</sup>

882. The record supports the use of a productivity factor such as the X-factor previously applied to price-cap carriers to reduce the amount carriers are eligible to recover through a recovery

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<sup>1700</sup> See *infra* paras. 885-886. Although we adopt rules to help address concerns about traffic identification and establish a prospective intercarrier compensation framework for VoIP-PSTN traffic, absent our actions in this Order, issues regarding compensation for that traffic would not have been resolved. Because we are considering the *status quo* path absent reform, our recovery framework is based on historical declining demand notwithstanding reforms that potentially could mitigate some of that decline.

<sup>1701</sup> David E.M. Sappington, *Price Regulation*, in *Handbook of Telecommunications Economics*, Vol. I, 225, 231, 248-53 (Martin E. Cave et al. eds., 2002).

<sup>1702</sup> See *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, 18 FCC Rcd 14976 at 14997-98, para. 35 (2003) (*CALLS Remand Order*).

<sup>1703</sup> *CALLS Order*, 15 FCC Rcd at 13028-29, paras. 160-63.

<sup>1704</sup> See *id.*

<sup>1705</sup> Because price cap carriers reached their target rates at different times, the inflation-only X-factor took effect at different times for different price cap carriers. In the *CALLS Remand Order*, the Commission concluded that price cap carriers serving 36 percent of total nationwide price cap access lines had achieved their target rates by their 2000 annual access filing. *CALLS Remand Order*, 18 FCC Rcd at 15002, para. 43, 15010-13, App. B. By the 2001 annual accessing filings the number grew to carriers serving 75 percent of total access lines, and by the 2002 annual access filings, carriers serving 96 percent of total access lines had achieved their target rates. *Id.*

mechanism.<sup>1706</sup> A productivity factor would require recovery to decrease annually by a predetermined amount designed to capture for consumers the efficiencies found to apply generally to the industry. For example, if we had maintained a five percent annual X-factor, rates for carriers that had reached their target rates would have been subject to caps reduced by five percent each year, so by today those rate caps would have been reduced by approximately 30 percent. Although the record does not contain the detailed analysis required to support a particular productivity factor that would apply on an ongoing basis,<sup>1707</sup> we find this initial 10 percent reduction for study areas of price cap LECs that participated in the *CALLS* Plan to be a conservative approach given the absence of any sharing of productivity or other X-factor reductions for a number of years, particularly when supplemented by other justifications for revenue reductions that we do not otherwise account for in our standard recovery mechanism.<sup>1708</sup>

883. We recognize, however, that the industry has changed significantly since the 2000 *CALLS* Order, with some price cap *CALLS* carriers merging with or acquiring carriers that did not participate in the *CALLS* plan and/or newly converted price cap carriers acquiring study areas that did participate in the *CALLS* plan. For this reason, we conclude it is necessary to apply the 10 percent reduction on a study area basis for *CALLS* participants, which we collectively define as “*CALLS* study areas.” Thus, we will apply the 10 percent reduction to all price cap study areas that participated in the *CALLS* plan.<sup>1709</sup>

884. We also recognize, however, some price cap LECs converted to price cap regulation from rate-of-return regulation within the last five years and therefore such carriers did not participate in the *CALLS* plan. Thus, not all price cap carriers have had the benefit of productivity gains associated with reaching their target rates by 2002.<sup>1710</sup> Indeed, there are a few study areas that have converted to price cap regulation in the last two years and are still in the process of reducing their interstate rates to meet their *CALLS* target rate. As a result, for non-price cap study areas that were not part of the *CALLS* plan, we believe a more incremental approach is warranted.<sup>1711</sup> In particular, for non-*CALLS* study areas, we

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<sup>1706</sup> See generally CRUSIR *USF/ICC Transformation NPRM* Comments at 8 (“An X-factor should be applied to [price cap] carriers on an ongoing basis. Although productivity is one factor to note, so is the decreasing cost of the optical transmission gear and switching equipment used by these carriers.”); Ad Hoc *USF/ICC Transformation NPRM* Comments at 33-38; Free Press *USF/ICC Transformation NPRM* Comments at 8. But see AT&T *USF/ICC Transformation NPRM* Reply at 38-39. (“In the 20th century, it was appropriate to impose such a productivity factor on price-cap carriers to reflect the declining per-line costs of providing service, which resulted from both efficiency improvements and steady increases in line counts . . . . Over the past decade, however, ILECs have hemorrhaged access lines, and their per-line costs have—if anything—increased.”).

<sup>1707</sup> See, e.g., *USTA v. FCC*, 188 F.3d 521, 525-530 (D.C. Cir. 1999) (reversing and remanding for further explanation the Commission’s prescription of a 6.5 percent productivity factor).

<sup>1708</sup> As discussed below, we consider these additional factors more specifically in the context of any Total Cost and Earnings Review requested by an incumbent LEC to justify a greater recovery need. See *infra* Section XIII.G.

<sup>1709</sup> All incumbent LECs subject to price cap regulation at the time of the *CALLS* Order elected to participate in the *CALLS* plan. See, e.g., *Iowa Telecom Forbearance Order*, 17 FCC Rcd 24319 (2002). See also *CALLS Remand Order*, 18 FCC Rcd at 15010-13, App. B (listing carriers subject to the *CALLS* Order).

<sup>1710</sup> See *supra* note 1705.

<sup>1711</sup> The Commission sought comment in the *USF/ICC Transformation NPRM* on whether any intercarrier compensation reform recovery mechanism should differ depending upon the type of carrier. *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4732-33, para. 571. Likewise, carriers have advocated in this proceeding that the Commission’s intercarrier compensation reforms accommodate the particular needs of carriers that converted to price cap regulation subsequent to *CALLS*. See, e.g., *ACS August 3 PN* Reply at 4 (advocating different treatment under any intercarrier compensation reform given its recent conversion to price cap regulation); (continued...)

will delay the implementation of the 10 percent reduction to Eligible Recovery for five years, which is approximately the difference in time between when 96 percent of study areas of *CALLS* price cap carriers reached their target rates in 2002 and when the non-*CALLS* price cap carriers began converting from rate-of-return in 2007. We believe doing so enables carriers that more recently converted to price cap regulation, carriers which are typically smaller, to have additional time to adjust to the intercarrier compensation rate reductions. In year six, the 10 percent reduction to Eligible Recovery will apply equally to all price cap carriers.

885. In addition, as discussed in the *USF/ICC Transformation NPRM*, Commission data and the record confirm that carriers are losing lines and experiencing a significant and ongoing decrease in minutes-of-use.<sup>1712</sup> Incumbent LEC interstate switched access minutes have decreased each year since 2000,<sup>1713</sup> as shown in the chart below.<sup>1714</sup>

(Continued from previous page) \_\_\_\_\_

Letter from Russell M. Blau, counsel for Consolidated, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51 at 1 (filed Aug. 22, 2011) (expressing concern with the impact of certain universal service and intercarrier compensation reform proposals, “especially those that recently and voluntarily converted to price cap regulation”); Windstream 2008 Order and ICC/USF FNPRM Comments at 22 & n.49 (advocating intercarrier compensation reform and an accompanying recovery mechanism that accommodates the needs of carriers that recently converted to price cap regulation); Letter from Eric N. Einhorn, V.P. Federal Government Affairs, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-337, 06-122, 08-152, 07-135; CC Docket Nos. 01-92, 96-45, 99-68 at 5 (filed Oct. 27, 2008) (same).

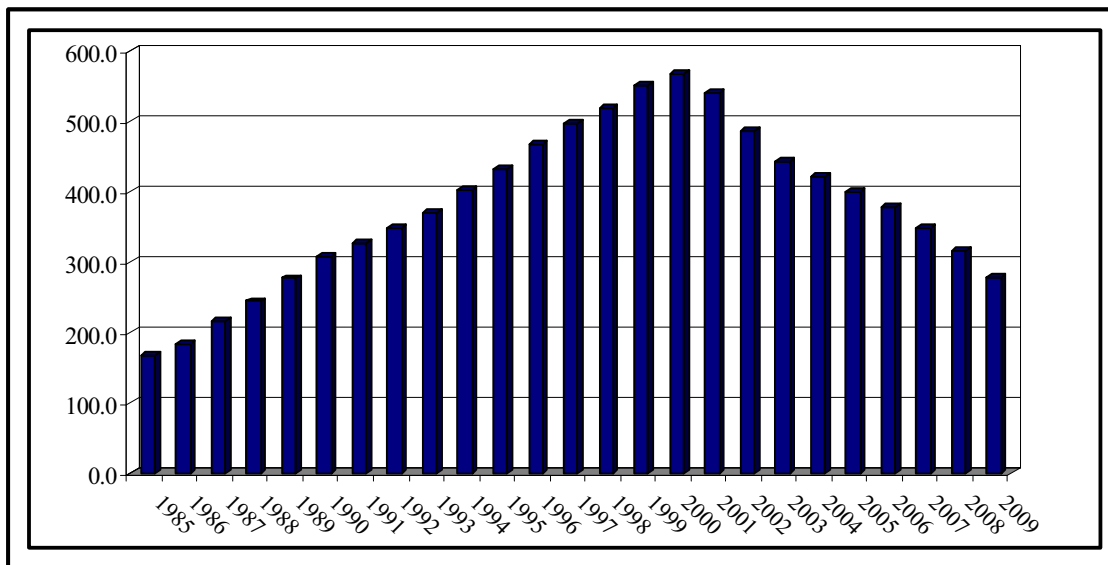
<sup>1712</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4732, para. 570; *Sept. 2010 Trends in Telephone Service*, at Table 7.1, Chart 10.1; 2010 Universal Service Monitoring Report at Table 8.1; Letter from Donna Epps, Vice President – Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 07-135 at 1 (filed Oct. 28, 2010); see also PAETEC *USF/ICC Transformation NPRM* Comments at 33-34.

<sup>1713</sup> 2010 *Trends in Telephone Service*, Table 10.1.

<sup>1714</sup> Network Usage by Carrier, Annual Submission by NECA of Access Minutes of Use, available at <http://transition.fcc.gov/wcb/iatd/neca.html> (Tier-1 NECA and Non-NECA Companies).



Figure 10

**Interstate Switched Access Minutes for Incumbent LECs (In Billions)**<sup>1715</sup>

886. This represents an average annual decrease of over 10 percent and a total decrease of over 36 percent since 2006.<sup>1716</sup> Further, the percentage loss of MOU is accelerating—it increased each year between 2006 and 2010, and exceeded 13 percent in 2010.<sup>1717</sup> Based on the record, it is our predictive judgment that significant declines in MOU will continue.<sup>1718</sup> Accordingly, we will reduce Price Cap Eligible Recovery by 10 percent annually for price cap carriers to reflect a conservative prediction regarding the loss of MOU, and associated loss of revenue, that would have occurred absent reform.

887. As a result, for price cap carriers, Base Minutes will be reduced by 10 percent annually beginning in 2012 to reflect decline in MOU. For example, Year One or “Y1” (2012) Intrastate Minutes will be .9 x Intrastate Base Minutes; Y2 (2013) Intrastate Minutes will be .81 x Intrastate Base Minutes (i.e., .9 x .9 x Intrastate Base Minutes); etc.

<sup>1715</sup> See IATD, Wir. Comp. Bur., Universal Service Monitoring Report, Chart 8.1 (Dec. 2010).

<sup>1716</sup> Network Usage by Carrier, Annual Submission by NECA of Access Minutes of Use, available at <http://transition.fcc.gov/wcb/iatd/neca.html> (Tier-1 NECA and Non-NECA Companies); see also Letter from Stuart Polikoff, Director of Government Relations, OPASTCO, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-337, CC Docket Nos. 01-92, 96-45, Attach. at 12-13 (filed May 27, 2008) (providing a 2008 projection that, over the subsequent three years, “intrastate access revenues will decline by between 5% and 12% per year (with 8% as the most likely annual decline)”).

<sup>1717</sup> *Id.*

<sup>1718</sup> See, e.g., AT&T USF/ICC Transformation NPRM Comments at 54 (“The legacy POTS business model is declining at an astonishing rate. Incumbent carriers are hemorrhaging customers to competitors....”); Verizon and Verizon Wireless USF/ICC Transformation NPRM Comments at 20 (“[D]isbursements from the fund should take into account the overall declining nature of switched access revenues.”).

888. *Price Cap Eligible Recovery.* Price Cap Eligible Recovery in a given year is the cumulative reduction in a particular intercarrier compensation rate since the base year multiplied by the pre-determined minutes for that rate for that year, as defined above.

**Price Cap Example.**<sup>1719</sup> A price cap carrier has a 2011 intrastate terminating access rate for transport and switching of \$.0028, an interstate terminating access rate for transport and switching of \$.0020, and 10,000,000 Intrastate Base Minutes. Its Eligible Recovery for intrastate switched access revenue would be determined as follows:

*Year 1.* Reduce intrastate terminating access rate for transport and switching, if above the carrier's interstate access rate, by 50 percent of the differential between the rate and the carrier's interstate access rate.

The carrier's Year 1 (Y1) Minutes equal 9,000,000 (10,000,000 x .9). Its intrastate terminating access rate for transport and switching, \$.0028 in 2011, is reduced by \$.0004 ((\$.0028-\$.0020) x 50 percent)) to \$.0024. Its Y1 Eligible Recovery is \$3,600 (\$.0004 x 9,000,000). For a *CALLS* study areas, Eligible Recovery would be reduced by an additional 10 percent to \$3,240 (\$3,600 x .9). For a non-*CALLS* study area, such reductions will begin in year six.

*Year 2.* Reduce intrastate terminating access rate for transport and switching, if above the carrier's interstate access rate, to the carrier's interstate access rate.

The carrier's Year 2 (Y2) Minutes equal 8,100,000 (9,000,000 x .9). Its intrastate terminating access rate for transport and switching is reduced by an additional \$.0004 from \$.0024 to \$.0020, for a cumulative reduction of \$.0008. Its Y2 Eligible Recovery is \$6,480 (\$.0008 x 8,100,000). For a *CALLS* study area, Eligible Recovery would be reduced by an additional 10 percent to \$5,832 (\$6,480 x .9). For a non-*CALLS* study area, such reductions will begin in year six.

889. *This Approach to Recovery for Price Cap Carriers Provides Certainty and Encourages Efficiency.* Under the Act, the Commission has "broad discretion in selecting regulatory tools, [which] specifically includes 'selecting methods . . . to make and oversee rates,'"<sup>1720</sup> and is not compelled to follow any "particular regulatory model."<sup>1721</sup> Our approach to defining Price Cap Eligible Recovery continues to give those incumbent LECs incentives for efficiency while also providing greater predictability for carriers and consumers. Under price cap regulation, incumbent LECs already have significant incentives to control their costs associated with services provided to end-users, but have not had the same incentives to limit the costs imposed on IXCs for terminating calls on the price cap incumbent LECs' networks. These costs are ultimately borne by the IXCs' customers generally, rather than by the price cap LECs' customers specifically. By phasing out those termination charges and

<sup>1719</sup> This is a simplified example of the calculation of Price Cap Eligible Recovery for a price cap carrier's reduction in intrastate terminating access resulting from the reforms we adopt for illustrative purposes only. It is not intended to encompass all necessary calculations applicable in determining Price Cap Eligible Recovery in the periods discussed in the example for all possible rates addressed by our Order.

<sup>1720</sup> *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Further Notice of Proposed Rulemaking, 3 FCC Rcd 3195, 3297-98, para. 194 (citations omitted) (1988). See also *LEC Price Cap Order* at 6836, paras. 401-03.

<sup>1721</sup> *Id.* Consequently, we disagree with commenters that suggest we lack authority to adopt such an approach. See, e.g., Blooston Rural Carriers *USF/ICC Transformation NPRM* Comments at 23-36. Some of these commenters object to particular ways of implementing recovery that they view as problematic. See, e.g., Alexicon *USF/ICC Transformation NPRM* Comments at 33 & Exh. D. Because the recovery mechanism adopted here differs from those envisioned by those commenters, those filings do not dissuade us from taking this approach.

providing recovery in part through limited end-user charges, our reform will provide price cap LECs incentives to minimize such costs as they transition to broadband networks.

890. We have considered a number of alternative proposals regarding the elimination of intercarrier terminating switched access charges and find that the approach we adopt today constitutes a hybrid of a variety of proposals that best protects consumers while facilitating the reasonable transition to an all-broadband network. Some commenters have argued that no additional recovery should be allowed absent a specific showing that denying recovery would constitute a taking.<sup>1722</sup> Based upon the record in this proceeding, we conclude that such a denial would represent a flash-cut for price cap LECs, which is inconsistent with our commitment to a gradual transition and could threaten their ability to invest in extending broadband networks. We also find that denying any recovery pending the adjudication of a request for an exogenous low-end adjustment under our price cap rules<sup>1723</sup> would be unduly burdensome for carriers and for the Commission because of the number of claims the carriers would be required to file and the Commission would be required to adjudicate.<sup>1724</sup> Our definition of Price Cap Eligible Recovery for both *CALLS* and non-*CALLS* study areas gives predictability not only to price cap carriers, but also to consumers and universal service contributors, given the fluctuations that could result from a true-up approach for these large carriers.<sup>1725</sup>

### 3. Calculating Eligible Recovery for Rate-of-Return Incumbent LECs

891. For rate-of-return incumbent LECs, we adopt a recovery mechanism that provides more certainty and predictability than exists today, while also rewarding carriers for efficiencies achieved in switching costs. Specifically, the recovery mechanism will allow interstate rate-of-return carriers to determine at the outset of the transition their total ICC and recovery revenues for all transitioned rate elements, for each year of the transition: Eligible Recovery will be adjusted as necessary with annual true ups to ensure that rate-of-return carriers have the opportunity to receive their Baseline Revenue, notwithstanding changes in demand for their intercarrier compensation rates being capped or reduced under our Order. We find that providing this greater degree of certainty for rate-of-return carriers, which are generally smaller and less able to respond to changes in market conditions than are price cap carriers, is necessary to provide a reasonable transition from the existing intercarrier compensation system.<sup>1726</sup>

892. As the starting point for calculating the Rate-of-Return-Baseline, we will use a rate of return carrier's 2011 interstate switched access revenue requirement, plus FY2011 intrastate switched access revenues and FY2011 net reciprocal compensation revenues.<sup>1727</sup> We will then adjust this Baseline

<sup>1722</sup> See, e.g., Free Press *USF/ICC Transformation NPRM* Comments at 3, NASUCA *USF/ICC Transformation NPRM* Comments at 20.

<sup>1723</sup> See 47 C.F.R. § 69.3(b)

<sup>1724</sup> Unlike some proposals in the record, see, e.g., ABC Plan, Attach. 1 at 11-12, we require carriers to seek recovery first from all their customers—residential and single-line business customers as well as multi-line business customers—rather than from residential customers only. This will reduce the burden on residential customers and the CAF.

<sup>1725</sup> See, e.g., T-Mobile *August 3 PN* Comments at 19-20; Comcast *August 3 PN* Comments at 15.

<sup>1726</sup> See e.g., Letter from Lawrence Zawalick, Senior Vice President, Rural Telephone Finance Cooperative, to Julius Genachowski, Chairman, FCC, WC Docket Nos. 10-90, 07-135, 05-337 and 03-109, GN Docket No. 09-51 and CC Docket Nos. 01-92 and 96-45, Attach. at 10 (noting that, for rate-of-return carriers, the “[c]apital markets and private lenders would react positively to regulatory certainty and cash flow stability”).

<sup>1727</sup> Average schedule carriers will use projected settlements associated with 2011 annual interstate switched access tariff filing.

over time to reflect trends in the *status quo* absent reform. Under the interstate regulation that has historically applied to them, rate-of-return carriers were able to increase *interstate* access rates to offset declining MOU, which has averaged 10 percent per year, and consequently had insufficient incentive to reduce costs despite rapidly decreasing demand.<sup>1728</sup> However, the record indicates that, in the aggregate, rate-of-return carriers' interstate switched access revenue requirement has been declining approximately three percent each year, reflecting declines in switching costs.<sup>1729</sup> As a result, interstate switched access revenues have been declining at approximately three percent annually. NECA and a number of rate-of-return carriers project that the revenue requirement will continue to decline at approximately three percent a year over the next five years, because switching costs are declining dramatically given the availability of IP-based softswitches, which are significantly less costly and more efficient than the TDM-based switches they replace.<sup>1730</sup> Similarly, the record reveals that legacy LSS, which is being incorporated in our recovery mechanism for rate-of-return carriers, is projected to decline approximately two percent per year, likewise resulting in reduced interstate revenues for carriers receiving LSS.<sup>1731</sup>

893. In the intrastate jurisdiction, moreover, the majority of states do not have an annual true-up mechanism; intrastate rates generally do not automatically increase as demand declines and as a result, most rate-of-return carriers have been experiencing significant annual declines in intercarrier

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<sup>1728</sup> See *supra* paras. 885-886.

<sup>1729</sup> Letter from Jeffrey E. Dupree, Vice President—Government Relations, NECA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51, Attach. 2, at 1 (filed Aug. 29, 2011) (“Preliminary RLEC CAF Computations”) (NECA et al. Aug. 29, 2011 *Ex Parte* Letter).

<sup>1730</sup> See *supra* para. 752. Softswitches are modular general-purpose hardware programmed to control voice calls across TDM- and IP-based networks. See William Stallings, *Data and Computer Communications*, 8th ed., at 307, Pearson Prentice Hall, Upper Saddle River NJ, 2007. The use of softswitches permits carriers to reduce capital and operating costs for a range of reasons. As a straight replacement for a legacy specialized Class 5 central office switch, a softswitch is said to save 70 percent in space, 60 percent in power, and up to 50 percent operating expenses in certain situations. See, e.g., *id.*; Google *August 3 PN* Comments at 8 n.28; Franklin D. Ohrtman, Jr., *Softswitch: Architecture for VoIP*, McGraw-Hill, New York, NY, 2003 (Chapter 11 *passim*, compare with page 57: “A Class 5 switch can cost tens of thousands of dollars and require at least half a city block in real estate.”); <http://www.genband.com/Home/Solutions/Fixed/Network-Transformation-Large-Office.aspx>; and <http://www.metaswitch.com/wireline/Local-Exchange-Evolution.aspx> and [http://www.ericsson.com/res/docs/whitepapers/efficient\\_softswitching.pdf](http://www.ericsson.com/res/docs/whitepapers/efficient_softswitching.pdf). Costs are also reduced when softswitches are used to gain the efficiencies of IP technologies. In addition, open softswitch software architectures allow carriers to expand service offerings, spreading fixed costs over more services. See, e.g., J., *Softswitch: Architecture for VoIP*, McGraw-Hill, New York, NY, 2003, especially chapter 11; Florida PSC *USF/ICC Transformation NPRM* Comments at 7-8; see also Letter from Jason J. Dandridge, CEO, Palmetto Rural Telephone Cooperative, to Albert M. Lewis, Chief, Pricing Policy Division, Wireline Competition Bureau, at 5 (filed Sept. 9, 2009) (“The new softswitch will help to position the Cooperative to use VoIP if it chooses to do so in the future, which will generate substantial cost savings for Palmetto.”). We therefore reject concerns raised by the rate-of-return carriers that the recovery mechanism disincentivizes investment in softswitches. See, Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 2 (filed October 17, 2011); Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 5 (filed Oct. 19, 2011). To the contrary, evidence overwhelmingly indicates that such switches are significantly more efficient and carriers that reap the benefits of efficiencies, including for example by sharing a softswitch, will be able to retain additional revenues. See, e.g., Viaro Wireless *August 3 PN* Comments, Exh. 2 at 17, 39-40, 45-46.

<sup>1731</sup> NTCA Sept. 9, 2011 *Ex Parte* Letter, Attach. 3 at 1.

compensation revenue.<sup>1732</sup> In particular, aggregate data from more than 600 rate-of-return carriers reveals an average decline in intrastate MOUs of approximately 11 percent, and an average decline in intrastate access revenues of approximately 10 percent annually.<sup>1733</sup> Our recovery mechanism accounts for this existing revenue loss, which would continue to occur under the *status quo* path absent reform, as illustrated in the figure below.<sup>1734</sup>

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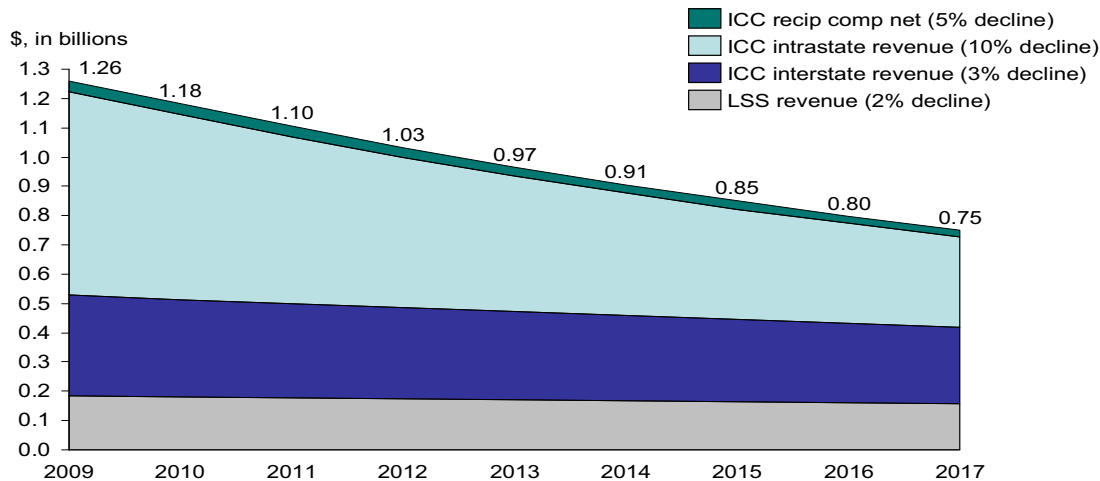
<sup>1732</sup> We are aware of only a few states conduct some form of annual review to allow incumbent LECs to modify intrastate intercarrier compensation in response to changes in demand or to otherwise replace those revenues through other processes in whole or in part. See, e.g., *Alaska Exchange Carrier's Ass'n v. Regulatory Comm'n of Alaska*, No. S-13528, 2011 WL 4715209 (Alaska rel. Oct. 7, 2011); *Fourteen Small Incumbent Local Exchange Carriers and the California High Cost Fund-A Administrative Committee Fund*, Resolution T-17298, 2011 WL 660558 (Cal. PUC rel. Jan. 27, 2011); *Implementation of House Bill 168*, Docket No. 32235, Order Implementing House Bill 168, 2010 WL 4925826 (Ga. Pub. Serv. Comm'n rel. Nov. 23, 2010); KAN. STAT. ANN. § 66-2005(c). The record does not indicate that most states have such a process. Rather, in other states, there are not automatic annual true-ups, whether because carriers instead must request permission to increase rates through a formal rate case or a less formal process, because rates are specified by statute, or because interstate rate-of-return carriers are subject to some alternative form of regulation at the state level. See, e.g., ABC Plan Proponents *August 3 PN Comments* at 5; Florida PSC *USF/ICC Transformation NPRM Comments* at 5; Cincinnati Bell *2008 Order and ICC/USF FNPRM Comments* at 15-16; *Investigation Into Streamlining the Procedures and Filing Requirements For Intrastate Access Tariffs that Implement or Maintain Parity with Interstate Tariffs*, Cause No. 44004, Order, 2011 WL 2908623 (Ind. Util. Reg. Comm'n rel. July 13, 2011); *Application of Highland Telephone Cooperative, Inc. for an Adjustment of Rates*, Case No. 2010-00227, Order, 2011 WL 2678154 (Ky. Pub. Serv. Comm'n rel. July 7, 2011); *Intrastate Access Charge Policies*, Application No. C-4145/NUSF-74/PI-147, Order, 2010 WL 2650347 (Ne. Pub. Serv. Comm'n rel. Apr. 20, 2010); *Investigation into the Earnings of Citizens Telephone Company of Higginsville, Missouri*, Case No. IR-2005-0024, Order Approving Stipulation and Agreement, 2004 WL 1855412 (Mo. Pub. Serv. Comm'n rel. Aug. 12, 2004); *Illinois Independent Telephone Association*, Docket 01-0808, Order, 2003 WL 23234577 (Il Commerce Comm'n rel. Nov. 25, 2003); 65-407 ME CODE Ch. 280 § 8; Mich. Comp. Laws ch. 484.2310 § 310(12); 2007 Nevada Laws Ch. 216 (A.B. 518); Tenn. Code Ann. § 65-5-302; Wis. Stat. § 196.212; Wy Stat. § 37-15-203(j); see also James C. Bonbright, et al., *PRINCIPLES OF PUBLIC UTILITY RATES* at 96, 198 (2d ed. 1988) (discussing regulatory lag as a common feature of rate regulation); W. Kip Viscusi, et al., *Economics of Regulation and Antitrust* at 432-33 (4th ed. 2005) (discussing regulatory lag and its effects).

<sup>1733</sup> Letter from Regina McNeil, VP of Legal, General Counsel & Corporate Secretary, NECA to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket No. 01-92 (filed May 25, 2011).

<sup>1734</sup> See *infra* Figure 11.

Figure 11<sup>1735</sup>

## Rate of return ICC projected revenue under status quo



894. Accounting for both the declining interstate revenue requirement and the ongoing loss of intrastate revenue with declining MOU, the record establishes a range of reasonable potential annual reductions in the Baseline from which Rate-of-Return Eligible Recovery is calculated; within that range we initially adopt a five percent annual decrease. At the lower end of the range, an annual decrease of three percent would represent rate-of-return carriers' approximate annual interstate revenue decline absent reform.<sup>1736</sup> Limiting our Baseline adjustment to three percent would make these carriers substantially better off with respect to their intrastate access revenues, however. As discussed above, carriers in many states do not have annual true-ups under state access rate regulations so as MOU decline, intrastate access revenues decline as well. Data indicate that this intrastate access revenue decline has been approximately 10 percent.<sup>1737</sup> Combining these interstate and intrastate declines weighted by the relative portion of aggregate rate-of-return revenues subject to the mechanism attributable to each category could justify a possible Baseline reduction of approximately seven percent annually.<sup>1738</sup> Because we recognize that our

<sup>1735</sup> NECA Dec. 29, 2010 *Ex Parte* Letter; NECA May 25, 2011 *Ex Parte* Letter; NECA Aug. 29, 2011 *Ex Parte* Letter; FCC staff analysis of data available at <http://www.usac.org/hc/tools/disbursements/default.aspx>. For purposes of this chart, trends in reciprocal compensation MOUs are assumed to follow trends for intrastate access MOUs.

<sup>1736</sup> See NTCA Sept. 9, 2011 *Ex Parte* Letter Attach. 3 at 1. We note that this revenue requirement includes a prescribed rate of return of 11.25 percent. Although the rate-of-return carriers proposed a 10 percent rate of return as part of their reform proposal, rate prescription is addressed in the FNPRM and is not part of this analysis. See *infra* Section XVII.C.

<sup>1737</sup> Letter from Regina McNeil, VP of Legal, General Counsel & Corporate Secretary, NECA to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket No. 01-92 (filed May 25, 2011).

<sup>1738</sup> According to NECA, intrastate access is approximately 56 percent of these revenues, interstate access is approximately 28 percent of these revenues, and LSS is approximately 16 percent of these revenues. See Letter (continued...)

approach to recovery may require adjustments by rate-of-return carriers, we initially adopt a conservative approach and limit the decline in the Baseline amount from which Rate-of-Return Eligible Recovery is calculated to five percent annually.<sup>1739</sup>

895. Moreover, we note that the annual five percent decline does not include the proposal in the *USF/ICC Transformation NPRM* and from the Rural Associations to apply the corporate operations expense limitation to LSS.<sup>1740</sup> LSS offsets a portion of rate-of-return carriers' interstate switched access revenue requirement. Applying the corporate operations expense limitations to LSS, or more generally to the entire switched access interstate revenue requirement, would have resulted in one-time reduction of almost three percent.<sup>1741</sup> By foregoing this reduction before setting the Baseline, we ensure that the five percent decline is appropriately conservative, while still consistent with our overall goals to encourage efficiency and cost savings.

896. Rate-of-return carriers will receive each year's Baseline revenue amount from three sources. First, they will continue to have an opportunity to receive intercarrier compensation revenues, pursuant to the rate reforms described above. Second, they will have an opportunity to collect ARC revenue from their customers, subject to the consumer protection limitations set forth below. Third, they will have an opportunity to collect any remaining Baseline revenue from the CAF. Together, the second and third sources comprise the Rate-of-Return Eligible Recovery.

897. Specifically, Rate-of-Return Eligible Recovery will be calculated from the Rate of Return Baseline by subtracting an amount equal to each carrier's opportunity to collect ICC from the rate elements reformed by this Order. In each year, this ICC opportunity will be calculated as actual demand for each reformed rate element times the default intercarrier compensation rate for that element in that year. The intercarrier glide path adopted above sets default transitional ICC rates, and permits carriers to negotiate alternatives.<sup>1742</sup> In computing the opportunity to collect ICC, we will use the default rates rather than any actual rate to prevent carriers from negotiating low rates simply to prematurely shift intercarrier compensation revenues to the CAF. Thus, in the event that a carrier negotiates intercarrier compensation

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from Joe A. Douglas, Vice President, Government Relations, NECA, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 80-286, GN Docket No. 09-51 at Attach. (filed Dec. 30, 2010) (providing revenue figures); NTCA Sept. 9, 2011 *Ex Parte* Letter Attach. 3 at 1 (providing revenue and LSS change projections). Using a 10 percent annual decline for intrastate access revenues, 3 percent annual decline for the interstate access revenue requirement, and 2 percent annual decline for LSS yields a weighted annual decline of approximately 7 percent.

We note that some commenters have projected an 8 percent decline in intrastate access MOUs. See NTCA Sept. 9, 2011 *Ex Parte* Letter, Attach. 4 ("RLEC RM Price-Out by State and Interstate Component") (8 percent estimate). Although we find the trend based on actual historical results more reliable, even if we instead used that lower projected MOU loss as a proxy for associated intrastate revenue loss (i.e., an 8 percent revenue loss), this still would yield a weighted annual decline of approximately 6 percent.

<sup>1739</sup> We seek comment in the FNPRM asking whether we should change this baseline reduction after five years by either moving to a decline based on MOUs or increasing the decline by one percent per year up to a 10 percent decline. See *infra* para. 1329.

<sup>1740</sup> See *USF/ICC Transformation NPRM*, 26FCC Rcd at 4624, para. 198. See Letter from Joshua Seidemann, Director of Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90; GN Docket No. 09-51; WC Docket Nos. 07-135, 05-377; CC Docket No. 01-92, Attach. at 1 (filed Aug. 26, 2011).

<sup>1741</sup> Staff analysis of local switching support data provided by NECA (submitted by NECA as confidential). See, *NECA Data Filings*.

<sup>1742</sup> See *infra* Section XII.C.

rates lower than those specified, we will still impute the full default rates, for the purpose of computing the amount each carrier has an opportunity to collect from ICC.<sup>1743</sup>

898. Carriers will annually estimate their anticipated MOU for each relevant intercarrier compensation rate capped or reduced by this Order. We note that carriers already use forecasts today in their annual access filings to determine interstate switched access charges and we are requiring carriers to use similar methodology to forecast intercarrier compensation for use in determining Rate-of-Return Eligible Recovery. Because estimated minutes likely will differ from actual minutes, there will be a true-up in two years to adjust the carrier's Rate-of-Return Eligible Recovery for that year to account for the difference between forecast MOU and actual MOU in the year being true-up.<sup>1744</sup> These data on MOU will establish the Base Minutes for each relevant category, and shall not include MOU for which revenues were not recovered, for whatever reason.<sup>1745</sup> Rate-of-return carriers will be required to submit to the states the data used in these calculations,<sup>1746</sup> allowing state regulators to monitor implementation of the recovery mechanism.<sup>1747</sup> A rate-of-return incumbent LEC that is eligible to receive CAF shall also file this information with USAC, and we delegate to the Wireline Competition Bureau authority to work with to USAC to develop and implement processes for administration of CAF ICC support.<sup>1748</sup> In support of the carriers' annual access tariff filing, each carrier will provide the necessary data used to justify any ARC to the Commission.

899. *Rate-of-Return Eligible Recovery.* A rate-of-return carrier's baseline for recovery ("Rate-of-Return Baseline") is its 2011 interstate switched access revenue requirement, plus its FY2011<sup>1749</sup> intrastate switched access intercarrier compensation revenues for rates capped or reduced by this Order, plus its FY2011 net reciprocal compensation revenues. A rate-of-return carrier's Eligible Recovery ("Rate-of-Return Eligible Recovery"), in turn, is: (a) its Rate-of-Return Baseline reduced by five percent each year; less (b) its ICC recovery opportunity for that year, defined as: (i) its estimated MOU for each

<sup>1743</sup> To do so, carriers are required to file data annually to ensure that carriers do not recover more than they are entitled under the recovery mechanism we adopt today.

<sup>1744</sup> In the FNPRM we seek comment on when the true-up process should end, and what the appropriate replacement should be. See *infra* para. 1329.

<sup>1745</sup> Carriers may, however, request a waiver of our rules defining the Baseline to account for revenues billed for terminating switched access service or reciprocal compensation provided in FY2011 but recovered after the March 31, 2012 cut-off as the result of the decision of a court or regulatory agency of competent jurisdiction. The adjusted Baseline will not include settlements regarding charges after the March 31, 2012 cut-off, and any carrier requesting such modification to its Baseline shall, in addition to otherwise satisfying the waiver criteria, have the burden of demonstrating that the revenues are not already included in its Baseline, including providing a certification to the Commission to that effect. Any request for such a waiver also should include a copy of the decision requiring payment of the disputed intercarrier compensation. Any such waiver would be subject to the Commission's traditional "good cause" waiver standard, rather than the Total Cost and Earnings Review specified below. See 47 C.F.R. § 1.3.

<sup>1746</sup> See *supra* paras. 812-813. Upon request, carriers will also be required to file this data with the Commission.

<sup>1747</sup> As discussed above, rate-of-return carriers may elect to have NECA or another entity perform and submit the annual analysis. See *supra* note. 1690.

<sup>1748</sup> USAC plays a critical role in the day-to-day administration of universal service support mechanisms, see, e.g., *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4595, para. 116 n.192, including the ICC-replacement CAF support that is part of our recovery mechanism.

<sup>1749</sup> I.e., October 1, 2010 through September 30, 2011.



rate element subject to reform times; (ii) the default transition rate for that rate element for that year; plus (3) any necessary true-ups based on the prior year's actual MOUs.

**Rate of Return Example.**<sup>1750</sup> A rate-of-return carrier has a 2011 interstate switched access revenue requirement of \$200,000, FY2011 intrastate switched access revenues of \$50,000, and net reciprocal compensation revenues of \$5,000. Its Eligible Recovery would be determined as follows:

*Year 1.* The carrier is entitled to collect \$242,250 ( $\$255,000 \times .95$ ). The carrier will subtract from this total its ICC recovery opportunity from switched access charges capped or reduced in this Order (both intrastate and interstate) and net reciprocal compensation, defined as its forecast MOU times the default rates specified by this Order. The remainder is Eligible Recovery.

*Year 2.* Prior to adjustment for any under- or over-estimation of minutes in Year 1, the carrier is entitled to recover \$230,137.50 ( $\$242,250 \times .95$ ). This figure is adjusted up or down in the annual true-up to reflect any difference between forecast minutes in Year 1 and actual minutes in Year 1. For example, if the carrier had fewer minutes than estimated in Year 1, such that its ICC recovery opportunity was \$500 less than forecast, its recovery in Year 2 would be adjusted upward by \$500 and it would be permitted to recover \$230,637.50 in Year 2 ( $\$230,137.50 + \$500$ ). Conversely, if the carrier had a higher number of MOU than had been forecast and provided the carrier an opportunity for \$500 more ICC recovery, its recovery in Year 2 would be adjusted downward to \$229,637.50 ( $\$230,137.50 - \$500$ ). The carrier will then subtract from this total its Year 2 ICC recovery opportunity, based on its Year 2 forecast minutes and the Year 2 default rates specified by this Order. The remainder is Eligible Recovery.

900. *This Approach to Recovery for Interstate Rate-of-Return Carriers Provides Certainty, Minimizes Burdens to Consumers, and Constrains the Size of USF.* Exercising our flexibility under the Act to design specific regulatory tools,<sup>1751</sup> we adopt an approach to Rate-of-Return Eligible Recovery that takes interstate rate-of-return carriers off of rate-of-return based recovery specifically for interstate switched access revenues,<sup>1752</sup> but provides them more predictable recovery than exists under the *status quo*.<sup>1753</sup> Price cap carriers today already bear the risk that costs increase and have no true up

<sup>1750</sup> This is a simplified example of the calculation of Rate-of-Return Eligible Recovery for a rate-of-return carrier's reduction in intrastate terminating access resulting from the reforms we adopt for illustrative purposes only. It is not intended to encompass all necessary calculations applicable in determining Rate-of-Return Eligible Recovery in the periods discussed in the example for all possible rates addressed by our Order.

<sup>1751</sup> See *supra* para. 889.

<sup>1752</sup> In addition, to the extent that any interstate rate-of-return carriers also are subject to rate-of-return regulation at the state level, our recovery mechanism for switched access services replaces that, as well. We observe that our recovery mechanism otherwise leaves unaltered the preexisting rate regulations for these carriers' other services, such as common line (as modified by Sections VIII.C and D. of this Order) and special access. Nonetheless, we recognize that this approach represents a potentially significant regulatory change for those carriers and adopt a longer transition for these carriers for this reason. In addition to the benefits of the standard recovery mechanism discussed below, the Total Cost and Earnings Review mechanism we adopt today will ensure that this recovery mechanism will not deprive any carrier of the opportunity to earn a reasonable return.

<sup>1753</sup> See, e.g., Mo STCG *USF/ICC Transformation NPRM* Reply at 10 ("[A]ny changes to small rate-of-return ILEC's revenue streams must be accompanied by a predictable and sufficient replacement mechanism."); FCC Universal Service Fund and Intercarrier Compensation Workshop, April 6, 2011, CC Docket No. 01-92 at 97, transcript available at <http://www.fcc.gov/events/universal-service-fundintercarrier-compensation-reform-workshop> (comments of Paul Gallant, Senior Vice President and Telecom Analyst, MF Global, discussing the importance of certainty of access revenue to allow continued investor support for broadband build-out).

mechanism for declines in demand. For this reason, the recovery mechanism we adopt for rate-of-return carriers is different than the recovery mechanism we adopt for price cap carriers. Although rate-of-return carriers have a true up process to the Eligible Recovery for actual demand, this is akin to how such carriers are regulated today.<sup>1754</sup> At the same time, however, we decline to conduct true-ups with regard to rate-of-return carriers' switched access costs; accordingly, carriers will have incentives to become more efficient and to reduce switching costs, including by investing in more efficient technology and by sharing switches. Carriers that are more efficient will be able to retain the benefits of the cost savings. We believe the rural LEC forecast with regard to reduced switched access costs is conservative, and carriers will have additional opportunities to recognize efficiencies with regard to these costs. We discuss these issues in greater detail below.

901. As discussed above, incumbent LECs are experiencing consistent, substantial, and accelerating declines in demand for switched access services.<sup>1755</sup> The effect of current interstate rate regulation is to insulate rate-of-return carriers from revenue loss due to competitive pressures that result in declining lines and MOU, but rapidly increasing access rates have exacerbated these carriers' risk of revenue uncertainty due to arbitrage,<sup>1756</sup> and carriers themselves project declining costs—and thus declining revenues—under the *status quo*. In the intrastate jurisdiction, as described above, carriers are often unable to automatically increase rates as they experience a decline in demand caused by competition and changing consumer usage, leading to declining intrastate revenues.<sup>1757</sup>

902. Our framework allows rate-of-return carriers to profit from reduced switching costs and increased productivity, ultimately benefitting consumers.<sup>1758</sup> We note in this regard that the transition to broadband networks affords smaller carriers opportunities for efficiencies not previously available. For example, small carriers may be able to realize efficiencies through measures such as sharing switches, measures that preexisting regulations, such as the thresholds for obtaining LSS support, may have deterred.<sup>1759</sup> Under the new recovery framework, carriers that realize these efficiencies will not experience a resulting reduction in support. In addition, our new recovery framework—in conjunction

<sup>1754</sup> The true-up process also protects carriers resulting from changes with regard to, for example, reforms related to various arbitrage schemes. The record does not allow us to quantify with precision the impact of these arbitrage-related reforms on rate-of-return carriers.

<sup>1755</sup> See *supra* paras. 885-856.

<sup>1756</sup> See, e.g., Letter from Michael R. Romano, Sr. V.P. – Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, Docket No. 01-92, Attach. (filed July 18, 2011); Letter from Gregory W. Whiteaker, Herman & Whiteaker, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, Attach. at 3 (filed Sept. 23, 2011) (NECA et al. Sept. 23, 2011 *Ex Parte* Letter).

<sup>1757</sup> See *supra* para. 893.

<sup>1758</sup> Our analysis is informed by the Commission's prior findings regarding the advantages that can arise from regulatory frameworks that encourage more efficient investment. See, e.g., *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6789, para. 21 (1990) (*LEC Price Cap Order*). “[A] properly-designed system of incentive regulation will be an improved form of regulation, generating greater consumer benefits . . .” *Id.* at 5 FCC Rcd 6786, para. 1. Not only have carriers been denied the benefits of increased efficiency under the current system, in some instances our rules actively discourage efficiencies. See, e.g., 47 C.F.R. § 36.125(f). Competition is not a precondition for incentive-based regulation; the Commission previously has concluded that where there is limited competition there is “little incentive to become more productive. Applying incentive regulation to LECs is arguably a more significant regulatory reform in terms of its ability to generate consumer benefits than applying incentive regulation to a carrier or industry that faces substantial competition.” *LEC Price Cap Order*, 5 FCC Rcd at 6790-91, para. 33.

<sup>1759</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4565, para. 21.

with the overall reforms adopted in this Order—provides revenue certainty, stability, and predictable support,<sup>1760</sup> as well as promoting continued investment,<sup>1761</sup> consistent with advantages some historically have associated with rate-of-return regulation.<sup>1762</sup>

903. Importantly, our approach also avoids the risk of unconstrained escalation in the burden on end-user customers and universal service contributors. We agree with commenters that, absent incentives for efficiency, determining recovery based on the historical approach to these carriers' rate regulation could cause the Connect America Fund to grow significantly and without constraint.<sup>1763</sup> This prediction is consistent with the Commission's past recognition that rate-of-return regulation can create incentives for inefficient investment, which would flow through to our recovery mechanism.<sup>1764</sup> Although some commenters contend that Commission accounting regulations and oversight adequately protect against inefficient investment,<sup>1765</sup> the effectiveness of Commission accounting regulations and oversight is limited in certain respects,<sup>1766</sup> as the Commission itself previously has recognized.<sup>1767</sup> More

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<sup>1760</sup> See *supra* para. 858.

<sup>1761</sup> See *supra* Section VI.B.

<sup>1762</sup> See, e.g., *MAG Order*, 16 FCC Rcd at 19705, para. 220; *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, First Order on Reconsideration, CC Docket No. 00-256, Twenty-Fourth Order on Reconsideration, CC Docket No. 96-45, Report and Order, 17 FCC Rcd 5635, 5636, para. 2 (2002). We also observe that carriers will be able to continue to participate in NECA pooling. See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4741-42, para. 597 (citing the benefits of NECA pooling as a risk sharing mechanism for rate-of-return carriers).

<sup>1763</sup> See, e.g., *Ad Hoc August 3 PN Comments* at 24 & n.39; *CTIA August 3 PN Comments* at 19; *XO August 3 PN Comments* at 15-16; *Viaero Wireless August 3 PN Comments* at 15-17 & Exh. 2. at 10-12, 15-20, 36-40, 43-51; *Verizon USF/ICC Transformation NPRM Reply* at 55; Letter from David L. Sieradzki, counsel for Alltel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-337, CC Docket Nos. 01-92, 96-45, RM-10822, at 1-2 & Attach. (filed Mar. 6, 2007); *Mercatus Center Intercarrier Compensation FNPRM Comments* at 15, 22-23; *Western Wireless Feb. 13, 2004 Comments*, CC Docket No. 96-45, RM-10822 at Attach. As the Commission observed in the *USF/ICC Transformation NPRM*, "[o]ver time, aggregate high-cost support for rate-of-return carriers has increased, while such support for carriers that have chosen to move to price cap regulation has declined." *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4611-12, para. 166 & Figure 7.

<sup>1764</sup> The Commission has found, for example, that because both decreases and increases in company costs are passed on to consumers, a rate-of-return regulated carrier has little incentive to manage inputs efficiently. See, e.g., *LEC Price Cap Order*, 5 FCC Rcd at 6789, para. 22; *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 87-313, 4 FCC Rcd 2873, 2889-90, para. 30 (1989) (*AT&T Price Cap Order*); *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Notice of Proposed Rulemaking, 2 FCC Rcd 5208 (1987); *Further Notice of Proposed Rulemaking*, CC Docket No. 87-313, 3 FCC Rcd 3195, 3218-19, 3222, paras. 38, 43 (1988) (*Price Cap Further Notice*). The Commission also has observed that if the authorized rate of return exceeds the carrier's actual cost of capital, it may have an incentive to expand its rate base uneconomically. See, e.g., *Price Cap Further Notice*, 3 FCC Rcd at 3219-20, paras. 39-40; *AT&T Price Cap Order*, 4 FCC Rcd at 2889-90, para. 30. In addition, as the *USF/ICC Transformation NPRM* observed, other regulators likewise have trended away from rate-of-return regulation in recent years. *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4740, para. 596 & n.888.

<sup>1765</sup> See, e.g., *Rural Broadband Alliance August 3 PN Comments* at 23-24.

<sup>1766</sup> See, e.g., *Viaero Wireless August 3 PN Comments*, Exh. 2. at 15-16 (citing backward-looking nature of regulatory constraints on investment, the relative information disparity between carriers and regulators, and the potential for cost-shifting or other actions that seek to evade constraints on certain costs); *id.*, Exh. 2 at 37-38 ("While it is possible to adopt a variety of constraints that would apply to specific expenditures, it is impossible to ascertain the effectiveness of those constraints absent an external benchmark.").

broadly, as commenters observe, retaining rate-of-return regulation as historically employed by the Commission risks “perpetuat[ing the] isolated, ILEC-as-an island operation,” thus increasing the costs subject to recovery to the extent that, for example, each individual incumbent LEC purchases its own facilities, rather than sharing infrastructure with other carriers where efficient.<sup>1768</sup> Of particular relevance here, as one commenter observes, under the preexisting regulatory framework “there is little evidence of shared investment in local switching, even though such sharing would be engaged in by rational carriers subject to market incentives,” while, “[i]n contrast, there is evidence of at least some efforts to engage in joint ventures to invest in transport and tandem switching assets for which there are fewer regulatory incentives for rate-of-return carriers to invest in their own equipment and facilities.”<sup>1769</sup> We are committed to constraining the growth of the CAF, and the recovery mechanism we adopt for interstate rate-of-return carriers advances that goal. To this end, states that have jurisdiction over intrastate access rates should monitor intrastate tariffs filed pursuant to the rules and reforms adopted in this Order to ensure carriers do not shift costs from services subject to incentive regulation to services still subject to rate-of-return regulation.

904. We decline to adopt the recovery mechanism proposed by associations of rate-of-return carriers.<sup>1770</sup> Although these carriers contend that their approach would allow intercarrier compensation reform for rate-of-return carriers that would limit the burdens placed on the CAF, we are not persuaded by a number of the assumptions that lead them to this conclusion. The rate-of-return carriers project that their revenue requirement for switched access will decline three percent annually for the next five years.<sup>1771</sup> Our approach locks in this historical trend, adjusted to account for the intrastate *status quo*. In the absence of locking in this historical trend, however, we have concerns about whether such declines in

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<sup>1767</sup> For example, where regulated prices reflect reported costs, a carrier may have an incentive to exaggerate costs to secure higher prices. *See, e.g., LEC Price Cap Order*, 5 FCC Rcd at 6789, para. 22 (“Under rate of return, carriers are allowed to set their rates based on the costs—investment and expense—of providing a service. Carriers are given fairly wide latitude in the costs they can claim as the basis for their rates.”) (citation omitted); *see also, e.g., LEC Price Cap Order*, 5 FCC Rcd at 6790, paras. 29-30; *AT&T Price Cap Order*, 4 FCC Rcd at 2889-90, paras. 30-31. Rate-of-return regulation also can enable carriers to shift some of the costs of their non-regulated, competitive services to the customers of their rate-of-return regulated services. *See, e.g., Price Cap Further Notice*, 3 FCC Rcd at 3223-24, para. 48.

<sup>1768</sup> *See, e.g., Viera Wireless August 3 PN Comments*, Exh. 2. at 18-19; *see also id.*, Exh. 2 at 19-20 (discussing discouragement of efficient consolidation among carriers).

<sup>1769</sup> *Viera Wireless August 3 PN Comments*, Exh. 2. at 17 n.11; *see also id.*, Exh. 2 at 39-40, 45-46.

<sup>1770</sup> Letter from Walter B. McCormick, Jr., United States Telecom Ass’n, Robert S. Quinn, Jr., Senior Vice President—Federal Regulatory, AT&T, Melissa Newman, Vice President—Federal Regulatory Affairs, CenturyLink, Michael T. Skrivan, Vice President—Regulatory, FairPoint Communications, Kathleen Q. Abernathy, Chief Legal Officer and Executive Vice President—Regulatory and Government Affairs, Frontier, Kathleen Grillo, Senior Vice President—Federal Regulatory Affairs, Verizon, Michael D. Rhoda, Senior Vice President—Government Affairs, Windstream, Shirley Bloomfield, Chief Executive Officer, National Telecommunications Cooperative Association, John Rose, President, OPASTCO, Kelly Worthington, Executive Vice President, Western Telecommunications Alliance, to Chairman Genachowski, Commissioner Copps, Commissioner McDowell, and Commission Clyburn, at 2 (filed Jul. 29, 2011). (Submitted attached to Letter from Jonathan Banks, USTelecom, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92; WC Docket Nos. 05-337, 07-135, 10-90; GN Docket No. 09-51; CC Docket No. 96-45; WC Docket No. 06-122; CC Docket Nos. 99-200, 96-98, 99-68; WC Docket No. 04-36 (filed July 29, 2011)).

<sup>1771</sup> NECA et al. Aug. 29, 2011 *Ex Parte* Letter), Attach. 2 at 1 (Preliminary RLEC CAF Computations; Assumptions and Computations).

the revenue requirement actually will occur. As commenters observe, because ICC costs will be shifted primarily to the CAF to make rate-of-return carriers whole, carriers would face incentives for inefficient investment, and such incentives could be heightened to the extent that carriers seek to offset the effects of intercarrier compensation rate reductions.<sup>1772</sup> A more realistic view of the assumptions underlying the associations' projections suggests that the financial impact on the CAF of the associations' proposal is likely far greater than they project. Consequently, adopting their proposal appears likely to lead to one of two results—the CAF would grow significantly, or intercarrier compensation reform would stop once CAF demands outstripped the available budget.<sup>1773</sup>

#### F. Recovering Eligible Recovery

905. We now explain the two-step mechanism by which carriers will be allowed to recover their Eligible Recovery. First, incumbent LECs will be permitted to recover Eligible Recovery through limited end-user charges. If these charges are insufficient, carriers will be entitled to CAF support equal to the remaining Eligible Recovery.<sup>1774</sup> Because we view our recovery mechanism as a transitional tool, we implement several measures to ensure it is truly temporary in nature. First, the Eligible Recovery that incumbent LECs are permitted to recover phases down over time, based on a predetermined glide path for price cap carriers and a more gradual framework for rate-of-return carriers. Second, ICC-replacement CAF support for price cap carriers is subject to a defined sunset date. Finally, in the FNPRM, we seek further comment on the timing for eliminating the recovery mechanism—including end-user recovery—in its entirety. Carriers recovering eligible recovery will be required to certify annually that they are entitled to receive the recovery they are claiming and that they are complying with all rules pertaining to such recovery.

##### 1. End User Recovery

906. The *USF/ICC Transformation NPRM* sought comment on the role that interstate SLCs should play in intercarrier compensation reform and the ongoing relevance of the SLC as the marketplace moves to IP networks.<sup>1775</sup> The subsequent *Public Notice* sought further comment on particular

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<sup>1772</sup> See, e.g., CTIA *August 3 PN* Comments at 18; Free State Foundation *August 3 PN* Comments at 4; US Cellular *August 3 PN* Comments at 10-11.

<sup>1773</sup> As stated in the Joint Letter: “To the extent, however, that sufficient funding is not expected for any reason to be available to provide the necessary levels of high-cost support and/or intercarrier compensation restructuring for carriers in any given year, any and all reductions in intercarrier compensation rates shall be deferred until such sufficient funding is confirmed to be available.” Joint Letter at 2-3. Similar concerns would arise from other proposals that rely on rate of return-based recovery in conjunction with more limited intercarrier compensation rate reforms. See, e.g., NECA et al. *USF/ICC Transformation NPRM* Comments at 12-27; see also, Letter from Colin Sandy, Government Relations Counsel, NECA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 1-2 (filed Oct. 21, 2011).

<sup>1774</sup> Carriers electing to forego recovery from the ARC or the CAF must indicate their intention to do so in their 2012 tariff filing. Carriers may also elect to forego CAF reform in any subsequent tariff filing. A carrier cannot, however, elect to receive CAF funding after a previous election not to do so. Notwithstanding a carrier's election to forego recovery from the ARC or the CAF, tariff filings may require carriers to provide the information necessary to justify the rates and terms in the tariff.

<sup>1775</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4736, para. 579; see also, e.g., 2008 *USF/ICC FNPRM*, 24 FCC Rcd at 6497, App. A, paras. 298-310 (seeking comment on a recovery mechanism that would rely on certain SLC increases); *Inter-carrier Compensation FNPRM*, 20 FCC Rcd at 4706-4734, paras. 42, 49, 51, 53, 54, 56, 59, 88, 101-02, 106, 108, 111 (seeking comment on recovery alternatives that would rely on SLC increases or other new end-user charges).

alternatives for using SLCs as part of any recovery mechanism.<sup>1776</sup> Although the record reveals a wide variety of proposals, most parties commenting on the matter supported an increase in end-user charges as a necessary part of ICC reform.<sup>1777</sup> In developing the recovery mechanism, we seek to balance the interests of both end-user customers and USF contributors. We thus agree that it is appropriate to first look to customers paying lower rates for some limited, reasonable recovery, and adopt a number of safeguards to ensure that rates remain affordable and that consumers are not required to contribute an inequitable share of lost intercarrier revenues.

907. In addition to balancing the needs of ratepayers and USF contributors, we also account for differences among different ratepayers, adopting particular protections for consumers. For example, some proposals in the record would require that end-user recovery be borne in the first instance by consumers.<sup>1778</sup> Instead, acknowledging that all end users benefit from the network, and consistent with the Commission's approach to end-user recovery in prior intercarrier compensation reform, we conclude that all end users should contribute to reasonable end-user recovery from the beginning of ICC reform.<sup>1779</sup>

908. We adopt a transitional ARC that is subject to three important constraints. First, in no case will the monthly ARC increase more than \$0.50 per year for a residential or single-line business customer, or more than \$1.00 (per line) per year for a multi-line business customer. Price cap incumbent LECs are allowed to increase ARCs for no more than five years; rate-of-return incumbent LECs for no more than six years.<sup>1780</sup> Second, in no case will the consumer ARC increase if that increase would result in certain residential end-user rates exceeding the Residential Rate Ceiling, which we discuss below. Third, ARCs can only be charged in a particular year to recover an incumbent LEC's Eligible Recovery for that year; total revenue from ARCs cannot exceed Eligible Recovery. Thus if a carrier's Eligible Recovery decreases from one year to the next, the total amount of ARCs it may charge its end users may also decrease. Importantly, carriers also are *not* required to charge the ARC.<sup>1781</sup>

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<sup>1776</sup> *August 3 PN* at 10-16.

<sup>1777</sup> See, e.g., Cbeyond et al. *USF/ICC Transformation NPRM Comments* at 15-16; CenturyLink *USF/ICC Transformation NPRM Comments* at 67, 69; Comcast *USF/ICC Transformation NPRM Comments* at 20; COMPTEL *USF/ICC Transformation NPRM Comments* at 36; Cox *USF/ICC Transformation NPRM Comments* at 14-15; Fidelity *USF/ICC Transformation NPRM Comments* at 13; ICore *USF/ICC Transformation NPRM Comments* at 21-22; Madison Telephone *USF/ICC Transformation NPRM Comments* at 14; Michigan PSC *USF/ICC Transformation NPRM Comments* at 18; Nebraska Rural Independent Companies *USF/ICC Transformation NPRM Comments* at 41; Sprint *USF/ICC Transformation NPRM Comments* at 13; T-Mobile *USF/ICC Transformation NPRM Comments* at 27; Vitelco *USF/ICC Transformation NPRM Comments* at 17; Wheat State *USF/ICC Transformation NPRM Comments* at 14; XO *USF/ICC Transformation NPRM Comments* at 49. But see Ad Hoc *USF/ICC Transformation NPRM Comments* at 56-62.

<sup>1778</sup> See, e.g., ABC Plan Proponents *August 3 PN Comments* at 34-35.

<sup>1779</sup> See, e.g., *Access Charge Reform Order*, 12 FCC Rcd at 16005 para. 58-60; *CALLS Order*, 15 FCC Rcd at 12978, para. 41; *MAG Order*, 16 FCC Rcd at 19634-35, paras. 43-44.

<sup>1780</sup> We believe that the consumer ARC adopted here, which, even if fully imposed, represents a smaller percentage increase than SLC increases adopted by the Commission in prior reforms, strikes the proper balance. *CALLS Order*, 15 FCC Rcd at 12991, 13004, paras. 76, 105-06; *MAG Order*, 16 FCC Rcd at 19634, 19638, paras. 42, 51.

<sup>1781</sup> Incumbent LECs may be unable to charge ARCs in whole or in part based on competitive constraints or other considerations, or may choose not to. See, e.g., Letter from Jonathan Banks, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 07-135; WC Docket No. 05-337; CC Docket No. 01-92; CC Docket No. 96-45; WC Docket No. 04-36 at 1 (filed Oct. 17, 2011). Although we will impute the full permitted ARC revenues to those carriers for purposes of evaluating the need for additional recovery of Eligible Recovery, some commenters have suggested that carriers facing competition may choose to refrain from (continued...)

909. To minimize the consumer burden, we limit increases in the monthly consumer ARC to \$0.50 per year.<sup>1782</sup> Furthermore, while some commenters advocate end-user charges only for residential and single-line business customers, we reject requests to place the entire recovery burden on consumers. We provide for increases in the monthly ARC for multi-line business customers of \$1.00 (per line) per year, and we will require potential revenue from such increases to be imputed to carriers, reducing the total amount of consumer ARCs they may charge. Doing so is consistent with the Commission's prior intercarrier compensation reforms, which recognized that "universal service concerns are not as great for multi-line business lines."<sup>1783</sup> Consequently, in previous reforms, the Commission has adopted higher increases in end-user charges for multi-line business customers than for consumers, and on a more accelerated timeline. For example, in the *Access Charge Reform Order*, the Commission did not raise the SLC cap for primary residential and single-line business users,<sup>1784</sup> but concluded that universal service concerns were not as great for multi-line business users, for example, and raised the SLC caps for such users from \$6.00 to \$9.00 per line.<sup>1785</sup> In the *2008 ICC/USF Order and NPRM*, the Commission proposed increasing the residential and single-line business and the non-primary residential line SLC by \$1.50 and the multi-line business SLC by \$2.30.<sup>1786</sup> In the *USF/ICC Transformation NPRM* the Commission sought comment on those amounts again.<sup>1787</sup> Commenters supported this increase.<sup>1788</sup> In fact, some commenters advocated for a higher SLC increase.<sup>1789</sup> The ARC adopted today, which is lower on an annual basis than the annual SLC increase proposed in 2008, balances the burdens on consumers and businesses. However, we have taken measures to ensure that charges for multi-line businesses remain just and reasonable. In particular, to ensure that multi-line businesses' total SLC plus ARC line items are just and reasonable and to minimize the burden on businesses, we limit the maximum SLC plus ARC fee to \$12.20.<sup>1790</sup> This limits the ARC for multi-line businesses for entities at the current \$9.20 cap to \$3.00, comparable to the overall limit on residential ARCs.

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charging the ARC, and we preserve carriers' flexibility to do so. *See, e.g., AT&T USF/ICC Transformation NPRM Comments at 32.*

<sup>1782</sup> We also make clear that carriers may not charge any Lifeline customers an ARC. As a result, incumbent LECs' calculation of ARCs for purposes of the recovery mechanism must identify and exclude such customers. Given that our intercarrier compensation reforms also do not alter the operation of the existing SLC, these intercarrier compensation reforms will not affect the Lifeline universal service support mechanism.

<sup>1783</sup> *MAG Order*, 16 FCC Rcd at 19638-39, para. 52.

<sup>1784</sup> *Access Charge Reform Order*, 12 FCC Rcd at 16010-11 para. 73.

<sup>1785</sup> *Access Charge Reform Order*, 12 FCC Rcd at 16005 para. 58-60.

<sup>1786</sup> *See 2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6630, para. 298.

<sup>1787</sup> *See USF/ICC Transformation NPRM*, 26 FCC Rcd at 4737, para. 582.

<sup>1788</sup> *See, e.g., Frontier 2008 Order and ICC/USF FNPRM Comments at 6; GVNW 2008 Order and ICC/USF FNPRM Comments at 9; Cbeyond, et al. USF/ICC Transformation NPRM Comments at 15; Frontier USF/ICC Transformation NPRM Comments at 10; XO USF/ICC Transformation NPRM Comments at 49.*

<sup>1789</sup> *See OPASTCO 2008 Order and ICC/USF FNPRM Comments at 9-11.*

<sup>1790</sup> Several commenters urged the Commission to adopt some sort of cap on the overall multi-line business charges from the existing SLC and any new recovery charge. *See e.g., Letter from Henry Hultquist, VP, Federal Regulatory, AT&T Services, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; GN Docket No. 09-51; CC Docket Nos. 01-92, 96-45 (filed Oct. 21, 2011); Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 4 (filed Oct. 17, 2011).*

910. We permit carriers to determine at the holding company level how Eligible Recovery will be allocated among their incumbent LECs' ARCs.<sup>1791</sup> By providing this flexibility, carriers will be able to spread the recovery of Eligible Recovery among a broader set of customers, minimizing the increase experienced by any one customer.<sup>1792</sup> This also will enable carriers to more fully recover Eligible Recovery from end-users with rates below the \$30 Residential Rate Ceiling, limiting the potential impact on the CAF.<sup>1793</sup> For carriers that elect to receive CAF support, we will impute to each carrier the full ARC revenues they are permitted to collect, regardless of whether they actually collect any or all such revenues. If the imputed amount is insufficient to cover all their Eligible Recovery, they are permitted to recover the remainder from CAF ICC support.

911. In the event a carrier elects not to receive CAF ICC support,<sup>1794</sup> we take measures to limit the burden on residential and single-line business customers. Absent doing so, carriers potentially could use their holding company-level flexibility to target their ARC recovery primarily or exclusively to residential and single-line business customers, rather than larger multi-line business customers. We therefore require that a carrier allocate its Eligible Recovery by a proportion of a carrier's mix of residential versus business lines. However, because line counts alone would not reflect the fact that there is a lower cap on ARC increases for residential and single-line business lines (\$0.50 per line) than for multi-line business lines (\$1.00 per line), we adopt a double-weighting of multi-line business lines for purposes of this calculation. The percentage of ARC revenues a carrier is eligible to recover from residential and single-line business customers cannot exceed the percentage of total residential lines assessed a SLC by such customers where multi-line business lines are given double weight.<sup>1795</sup> For example, if a carrier had 1000 residential and single-line business lines and 200 multi-line business lines, and Eligible Recovery of \$600 monthly, under our limitation, it would be permitted to collect no more than 71.43 percent of that amount—approximately \$429—from residential and single line business

<sup>1791</sup> See, e.g., ABC Plan, Attach. 1 at 12. The ARC's modest and capped size, its interim nature, and the requirement to impute revenue from charging ARCs to multi-line business customers as well as to consumers, together with the \$30 Residential Rate Ceiling, will ensure that overall rates remain affordable and set at reasonable levels. Further, while it may be that holding companies will allocate ARC amounts to markets where their incumbent LECs face less competitive pressure, those markets would likely be ones that are relatively costly to serve. See Letter from Chris Miller, Assistant General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WC Docket No. 04-36, at 1-2 (filed Oct. 20, 2011).

<sup>1792</sup> In the *USF/ICC Transformation NPRM* we sought comment on allowing carriers to vary the end-user charges based upon network usage, and on further differentiating the magnitude of end-user recovery beyond the categories of customers associated with existing SLC caps. We also sought comment regarding the National Broadband Plan's suggestion that the Commission consider whether to deregulate end user charges in areas where states have deregulated local service rates. See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4737, para. 583. There was little support for such changes. Particularly given the minimal record support, as well as the possibility for consumer confusion resulting from too many variations of SLCs and potential burdens on end users, we find our approach to recovery more appropriate.

<sup>1793</sup> We decline to adopt other flexibility proposals in the record. For instance, in the *August 3 Public Notice*, we sought comment on the ABC Plan proposal that price cap carriers be allowed to choose between different SLC options depending on whether or not they choose to take ICC revenue recovery from the CAF in addition to end-user charges. See *August 3 Public Notice*, 26 FCC Rcd at 11124-28. We do not find a basis in the record for such differential treatment of customers, and instead adopt a uniform approach for price cap carriers.

<sup>1794</sup> The decision to elect not to receive ICC replacement CAF support, discussed below, is distinct from the decision to assess the full authorized ARC.

<sup>1795</sup> In addition, this calculation will exclude lines for Lifeline customers because we prevent carriers from assessing an ARC on any Lifeline customer.



customers based on the calculation: 1000 residential and single line business lines/(1000 residential and single-line business lines + 2 x 200 multi-line business lines) = 71.43 percent.

912. We decline to implement end user recovery through increases to the pre-existing SLC, as some commenters suggest.<sup>1796</sup> SLCs today are designed to recover common line revenues as defined by Commission regulation. We are not formally recategorizing any costs or revenues to be included in that regulatory category, and the calculation of Eligible Recovery for purposes of the reforms we adopt today is completely independent of SLC rate calculations. As a result, we leave current SLCs unmodified for now.<sup>1797</sup> Instead, the new ARC will be separately calculated, reduced over time, and separately tariffed and reported to the Commission to enable monitoring to ensure carriers are not assessing ARCs in excess of their Eligible Recovery.<sup>1798</sup> Moreover, we find that it is appropriate to reevaluate our SLC rules, and do so in the attached FNPRM.<sup>1799</sup>

913. *Residential Rate Ceiling.* In the *Public Notice*, we sought comment on the appropriate level and operation of a ceiling to limit rate increases in states that already had undertaken some intercarrier compensation reforms.<sup>1800</sup> To ensure that consumer telephone rates remain affordable and to recognize states that have already undertaken reform, we adopt a Residential Rate Ceiling of \$30 per month for all incumbent LECs, both price cap and rate-of-return. Although the Residential Rate Ceiling does not generally limit rates carriers can charge, it prevents carriers from charging an ARC on residential consumers already paying \$30 or more.

914. For purposes of comparison with the Residential Rate Ceiling, we consider the rate for basic local service, including additional charges that a consumer actually pays each month in conjunction with that service (referred to collectively as rate ceiling component charges). The rate ceiling component charges consist of the federal SLC and the ARC; the flat rate for residential local service,<sup>1801</sup> mandatory extended area service charges; state subscriber line charges; per-line state high cost and/or access replacement universal service contributions;<sup>1802</sup> state E911 charges; and state TRS charges. Carriers are not permitted to charge ARCs to the extent that ARCs would result in rate ceiling component charges exceeding the Residential Rate Ceiling for any residential customer. For example, a consumer in Parsons,

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<sup>1796</sup> See, e.g., Alexicon *USF/ICC Transformation NPRM* Reply at 8; ABC Plan, Attach. 1 at 11-12. See also, e.g., *USF/ICC Transformation NPRM*, 26 FCC Rcd at 436-38, paras. 579-84.

<sup>1797</sup> Carriers whose current SLCs are below the caps are not otherwise permitted to increase their SLCs to recover revenues reduced by interstate and intrastate access charge reforms, i.e., we are not permitting carriers to raise their SLCs beyond the level they are currently authorized to charge, even if that level is below the relevant regulatory SLC cap. We seek comment in the accompanying FNPRM regarding whether existing regulation of SLCs is appropriate, including whether SLCs should be reduced or phased-out over time. See *infra* paras. 1330-1333.

<sup>1798</sup> The ARC can, however, be combined in a single line item with the SLC on the customer's bill.

<sup>1799</sup> See *infra* paras. 1330-1333; NASUCA *USF/ICC Transformation NPRM* Comments at 98; Free Press *August 3 PN* Comments at 12-13.

<sup>1800</sup> *Further Inquiry Into Certain Issues in the Universal Service-Inter-carrier Compensation Transformation Proceeding*, 26 FCC Rcd 11112 at 11122-23 (2011) (*August 3 Public Notice*) (discussing proposals ranging from \$25-30, and their associated implementation).

<sup>1801</sup> This is sometimes known as the "1FR" or "R1" rate. See, e.g., Letter from the Supporters of the Missoula Plan to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, Attach. 1 at 3 (filed Jan. 30, 2007) (Missoula Plan Corrected Jan. 30 *Ex Parte* Letter) (referencing "the basic residential local rate (1FR or equivalent)").

<sup>1802</sup> ABC Plan, Attach. 1 at 12 (describing the rates used for the benchmark comparison).

Kansas may have a rate of \$13.90,<sup>1803</sup> a SLC of \$6.40, a mandatory contribution to the Kansas Universal Service Fund of \$6.75, a mandatory EAS charge of \$1.70, and a TRS charge of \$1.00—his or her aggregate rate ceiling component charges before the ARC would be \$29.75. Accordingly, a carrier could only charge this consumer an ARC of \$0.25 before reaching the \$30 Residential Rate Ceiling.<sup>1804</sup> (The carrier could still charge multi-line business customers a \$1.00 per line ARC, provided that any multi-line business customer's total SLC plus ARC does not exceed \$12.20). After the ARC, any additional Eligible Recovery would have to be recovered from the CAF rather than from end-users.

915. The Residential Rate Ceiling particularly helps protect consumers in states that have already begun state intercarrier compensation reform.<sup>1805</sup> As part of such reform, some states are rebalancing rates, with local rate increases phasing in over time, including potentially after January 1, 2012.<sup>1806</sup> These local rate increases will be included in the calculation of end-users rates for comparison to the Residential Rate Ceiling. Further, as part of our universal service reforms, we are adopting an intrastate rate minimum benchmark designed to avoid over-subsidizing carriers whose intrastate rates are not minimally reasonable.<sup>1807</sup> To ensure that states are not disincented from rebalancing artificially low local retail rates after January 1, 2012, and to ensure that our Residential Rate Ceiling continues to protect consumers in those states, we will use the *higher of* the relevant rates in effect on January 1, 2012 or of January 1 in the year in which the ARC is to be charged for comparison to the Residential Rate Ceiling, thus accounting for possible increases in consumer rates over time.<sup>1808</sup>

916. We find the \$30 Residential Rate Ceiling will help ensure that consumer rates remain affordable and set at reasonable levels by preventing any ARC increases to consumers who already pay \$30 or more.<sup>1809</sup> Although some commenters propose using a \$25 (or lower) rate,<sup>1810</sup> we note that several

<sup>1803</sup> See U.S. General Accounting Office, *Telecommunications: Federal and State Universal Service Programs and Challenges to Funding*, at 52 (GAO-02-187, Feb. 4, 2002), <http://www.gao.gov/new.items/d02187.pdf> (“GAO Report”).

<sup>1804</sup> Consistent with the goal of the Residential Rate Ceiling, because non-primary residential SLC lines are charged to residential customers we limit carriers' ARC for non-primary residential SLC lines to an amount equal to the ARC charged for such consumers' primary residential lines. Thus, to the extent that the Residential Rate Ceiling limits the ARC that can be assessed on residential customers' primary lines, it effectively will limit the ARC that can be charged on their non-primary lines, as well.

<sup>1805</sup> See, e.g., Letter from Joel Shifman, Maine Public Utilities Commission, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 1 (filed October 14, 2011) (urging the Commission to recognize early adopter states that have already undertaken intrastate access reform and rate rebalancing).

<sup>1806</sup> See, e.g., Pennsylvania PUC *August 3 PN* Comments at 17.

<sup>1807</sup> See *supra* Section VII.

<sup>1808</sup> See ABC Plan Proponents *August 3 PN* Comments at 21-22. Because this approach protects consumers in states that are in the process of rebalancing local rates, we believe it is preferable to the “snapshot” approach others have proposed. See, e.g., ABC Plan, Attach. 1 at 12; Joint Letter at n.1. Although states are free to lower intrastate access rates more quickly than specified by our reform, doing so would not increase the ARC or ICC-replacement CAF support available to carriers in such states. If it accomplished that reform by rebalancing local rates, however, those increased local rates would be accounted for in our Residential Rate Ceiling.

<sup>1809</sup> We note that we also adopt a “local rate benchmark” as part of universal service reform of HCLS and HCMS. See *supra* Section VII.D.5. The CAF benchmark serves a different purpose and has a different function from the Residential Rate Ceiling. The CAF benchmark is focused on ensuring that universal service does not overly subsidize carriers with artificially low local rates. As a result, it focuses more narrowly on the specific rates of concern, especially flat-rated local service charges, state SLCs, and state USF contributions and sets a lower bound to encourage carriers to charge reasonably comparable local rates. HCLS and HCMS are federal universal service (continued...)

states that have rebalanced rates already have rates above \$30, suggesting that this rate is affordable and set at reasonable levels.<sup>1811</sup> To the extent that prior surveys of urban rates yielded an average of approximately \$25, we observe that the surveys encompassed a more limited set of charges than our Residential Rate Ceiling.<sup>1812</sup> As demonstrated by the rates in a number of states that have undertaken significant intercarrier compensation reform—which we find to be a more relevant data set in this context than average urban rates—rates including the full ranges of charges can be close to or more than \$30.<sup>1813</sup> We also decline to adopt separate rate ceilings for different carriers, and instead agree with commenters that it would “be inappropriate—and inconsistent with Section 254—for the Commission to adopt different benchmarks for different geographic areas or providers.”<sup>1814</sup> Such an approach would mandate rate disparities between geographic areas, contrary to the Commission’s goal of promoting reasonably comparable rates throughout the country.<sup>1815</sup> We thus conclude that the \$30 Residential Rate Ceiling

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mechanisms that pick up intrastate loop costs, and we will not use limited universal service funding to subsidize artificially low rates. The CAF benchmark therefore serves as a floor.

We do not use the Residential Rate Ceiling for other purposes, such as an imputed level of revenue to limit a carrier’s recovery from the CAF, as some commenters suggest. *See, e.g., NASUCA August 3 PN Comments at 60.* The CAF benchmark includes an imputation and imputing those same revenues twice could be problematic. Moreover, the ICC Residential Rate Ceiling acts as a cap on any federal ARC increases resulting from intercarrier compensation reform, ensuring that overall consumer rates remain affordable. The Residential Rate Ceiling thus considers a wider range of end-user charges and is set at a higher level than the CAF benchmark. Although the Residential Rate Ceiling also helps target end-user rate increases for recovering Eligible Recovery to consumers in states with the lowest rates, those increases alone do not ensure that consumers in those states will ultimately pay rates more comparable to other areas. Thus, the HCLS/HCMS rate benchmark plays a complementary role.

<sup>1810</sup> *See, e.g., NECA et al. August 3 PN Comments at 46; Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 4 (filed Oct. 17, 2011).*

<sup>1811</sup> *See, e.g., supra para. 859; see also, e.g., Letter from Brian J. Benison, Director-Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-337, CC Docket No. 01-92, GN Docket No. 09-51, Attach. 2 (filed Oct. 25, 2010); Missoula Plan Corrected Jan. 30 Ex Parte Letter, Attach. 2 at 1-2 (identifying 27 states estimated to receive proposed universal service funding where “Residential Revenues Per Line” already were greater than \$25).*

<sup>1812</sup> For example, it did not include state universal service contributions. *See, e.g., IATD, WCB, Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service, App. at 1 (rel. Aug. 2008) (describing information collected in 2007 urban rate survey).*

<sup>1813</sup> *See supra para. 859.*

<sup>1814</sup> Time Warner Cable *August 3 PN Comments at 14, 15.*

<sup>1815</sup> Nor are we persuaded that other considerations justify such disparate treatment of customers based on whether they obtain service from a price cap carrier or a rate-of-return carrier. For example, some commenters contend that rate-of-return carriers have smaller local calling areas, and therefore fewer of their calls are encompassed by local retail rates. *See, e.g., MoSTCG USF/ICC Transformation NPRM Comments at 10; North Dakota PSC USF/ICC Transformation NPRM Comments at 3.* As an initial matter, the record contains no reliable data regarding relative local calling area sizes for rate-of-return and price cap carriers generally. In addition, the retail residential rates encompassed by the Residential Rate Benchmark cover both telephone exchange service (i.e., the ability to make calls within a given local calling area) and exchange access (i.e., the ability to connect to an IXC to make long distance calls).

strikes the right balance between ensuring that consumers pay their fair share of recovery and protecting consumers in states that already have undertaken substantial reforms.<sup>1816</sup>

## 2. CAF Recovery

917. The Commission has recognized that, as we move away from implicit support, some high cost, rural areas may need new explicit support from the universal service fund. Consequently, in the *USF/ICC Transformation NPRM*, the Commission sought comment on the appropriate role of universal service support to offset some intercarrier revenues lost through reform.<sup>1817</sup> We agree with the many commenters advocating that transitional recovery should, in part, come through the CAF. In particular, the limits on ARCs and the Residential Rate Ceiling we adopt above place important constraints on end user recovery. Consequently, we anticipate that end user recovery alone will not provide the full recovery permitted by our mechanism for many incumbent LECs, particularly rate-of-return carriers. Given our desire to ensure a measured, predictable transition, we thus find it appropriate to supplement end user recovery with transitional ICC-replacement CAF support.

918. To that end, as part of the new CAF universal service mechanism, we permit incumbent LECs to recover Eligible Recovery that they do not have the opportunity to recover through permitted ARCs.<sup>1818</sup> The same oversight and accountability obligations we adopt above apply to CAF support received as part of the recovery mechanism.<sup>1819</sup> In addition, all rate-of-return CAF ICC recipients, whether a current recipient of high cost universal service support or not, must satisfy the same public interest obligations as carriers receiving high-cost universal service support. All price cap CAF ICC recipients must use such support for building and operating broadband-capable networks used to offer

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<sup>1816</sup> Some commenters express concerns that our rate ceiling will not absolutely guarantee that states will not have rates that exceed the \$30 Residential Rate Ceiling. To the extent that commenters express concern that states subsequently might increase local rates and/or state universal service fund contributions, *see, e.g., Kansas Commission August 3 PN Reply* at 5-7, we note that our rate ceiling will account for future increases in local rates and per line universal service contributions, counting those higher amounts toward the benchmark. The Kansas Corporation Commission also observes that some states have deregulated basic local phone service rates, and thus “a carrier may face no constraint whatsoever in increasing basic local rates.” *Kansas Commission August 3 PN Reply* at 6. If carriers were unconstrained in their ability to increase particular rates, it is not clear why they would not already have set them at the profit-maximizing level, such that further increases would not be profitable. States also remain free to reconsider their regulatory approach if problems arise with respect to particular rates.

<sup>1817</sup> *See, e.g., USF/ICC Transformation NPRM*, 26 FCC Rcd at 4738-41, paras. 585-94. *See also, e.g., 2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6634-41, App. A, paras. 311-25; *2005 Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4706-4734, paras. 42-44, 51, 53, 55, 58, 59, 101, 104, 109-11.

<sup>1818</sup> The ICC-replacement CAF support for carriers that are eligible and elect to receive it is the remainder of Eligible Recovery not recovered through ARCs. As a result, those same data will enable USAC to calculate CAF support as well. Thus, we direct carriers to file those same data with USAC for purposes of CAF distribution under our recovery mechanism. We note that although incumbent LECs will experience intercarrier compensation reductions on a study area-by-study area basis, they have flexibility at the holding company level to determine where and how to charge ARCs. Thus, USAC needs an approach to attributing those revenues to particular study areas to determine the amount of CAF funding to provide to each such area. In this regard, we note that one benefit of our universal service reform is the greater accountability associated with the CAF support mechanism. Given that, we direct USAC to attribute ARC revenue to all of the holding company’s study areas in proportion to the Eligible Recovery associated with that study area. This will ensure that some study areas are not insulated from the CAF accountability measures by having sufficient ARC revenue attributed to meet their entire Eligible Recovery need.

<sup>1819</sup> These obligations are subject to waiver pursuant to the Total Cost and Earnings Review. *See infra* Section XIII.G.

their own retail broadband service in areas substantially unserved by an unsubsidized competitor of fixed voice and broadband services.<sup>1820</sup> We believe it is appropriate to adopt slightly different obligations for receipt of CAF ICC support for price cap and rate-of-return carriers. For one, the price cap CAF support is transitional, and phasing out completely over time as we have adopted a long-term phase II CAF support for areas served by price cap carriers. Thus, we have a mechanism to advance our goal of universal voice and broadband to areas served by price cap carriers that are unserved today. For rate-of-return carriers, however, we have not adopted a different long-term approach for receipt of universal service support. Therefore, we believe it is appropriate to impose the same obligations that such carriers have for receipt of all universal service support that we adopt above, which requires carriers to extend broadband upon reasonable request.<sup>1821</sup> Finally, we allow a carrier to elect not to receive ICC replacement CAF support (and therefore to avoid the obligations that accompany support) even if it would otherwise be entitled to do so under the Eligible Recovery calculation.<sup>1822</sup>

919. Providing CAF recovery is consistent with our mandate under section 254<sup>1823</sup> and the Commission's use of universal service funding as a component of prior intercarrier compensation reforms.<sup>1824</sup> In light of the broadband obligations we adopt, our decision to establish this funding mechanism is also consistent with our general authority under section 4(i) of the Act,<sup>1825</sup> and section 706 of the 1996 Act,<sup>1826</sup> because it furthers our universal service objectives and promotes the deployment of advanced services.<sup>1827</sup>

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<sup>1820</sup> Consistent with our discussion of obligations associated with frozen high-cost support for price cap carriers in Section VII.C.1 above, while we expect CAF ICC recipients to use support in areas without an unsubsidized competitor, to the extent support is used to serve any geographic area that is partially served by an unsubsidized competitor, the recipient must certify that at least 50 percent of the locations served are in census blocks shown as unserved by an unsubsidized competitor, as shown on the National Broadband Map. *See supra* note 168. *See also* Letter from Jonathan Banks, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 07-135; WC Docket No. 05-337; CC Docket No. 01-92; CC Docket No. 96-45; WC Docket No. 04-36 at 1-2 (filed Oct. 21, 2011).

<sup>1821</sup> CAF ICC support must also be used to support the speed, latency and usage levels adopted above. *See supra* Section VII.D.

<sup>1822</sup> The election to decline CAF support will be made in the carrier's July 1, 2012 tariff filing. A carrier that elects not to receive CAF cannot subsequently change this election. A carrier can, however, initially elect to receive CAF support but elect to end that support at any time. Moreover, like forgone ARC recovery, forgone CAF will be imputed to a carrier seeking any additional recovery under the Total Cost and Earnings Review, discussed below. *See infra* Section XIII.G.

<sup>1823</sup> 47 U.S.C. § 254(i) (requiring that "[t]he Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable"); 47 U.S.C. § 254(b)(1) (stating that "[q]uality services should be available at just, reasonable, and affordable rates").

<sup>1824</sup> *See, e.g., CALLS Order*, 15 FCC Rcd at 12971, para. 24; *MAG Order*, 16 FCC Rcd at 19669–70, para. 132.

<sup>1825</sup> Section 4(i) provides that the Commission may "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Prior to the enactment of section 254 (as part of the 1996 Act), sections 1 and 4(i) provided authority for the Commission's adoption of a universal service fund. *See Rural Telephone Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988). *See also New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101, 1107 (D.C. Cir. 1987) (describing section 4(i) as a "wide-ranging source of authority"), *cert. denied*, 490 U.S. 1039 (1989).

<sup>1826</sup> 47 U.S.C. § 1302.

<sup>1827</sup> *See supra* Section V.

920. For price cap carriers that elect to receive ICC-replacement CAF support, such support is transitional and phases out in three years, beginning in 2017.<sup>1828</sup> Although we do not adopt a similar sunset for rate-of-return carriers' ICC-replacement CAF support in this Order, we seek comment on alternatives in this regard in the FNPRM.<sup>1829</sup>

### 3. Monitoring Compliance with Recovery Mechanism

921. To monitor compliance with this Order, we require all incumbent LECs that participate in the recovery mechanism, including by charging any end user an ARC, to file data on an annual basis regarding their ICC rates, revenues, expenses, and demand for the preceding fiscal year.<sup>1830</sup> All such information may be filed under protective order and will be treated as confidential.

922. These data are necessary to monitor compliance with the provisions of this Order and accompanying rules, including to ensure that carriers are not charging ARCs that exceed their Eligible Recovery and that ARCs are reduced as Eligible Recovery decreases. The data are also needed to monitor the impact of the reforms we adopt today and to enable the Commission to resolve the issues teed up in the FNPRM regarding the appropriate transition to bill-and-keep and, if necessary, the appropriate recovery mechanism for rate elements not reduced in this Order, including originating access and many transport rates. Such data will enable the Commission to determine the impact that any transition would have on a particular carrier or group of carriers, and to evaluate the trend of ICC revenues, expenses, and minutes and compare such data uniformly across all carriers.

923. To minimize any burden, filings will be aggregated at the holding company level, limited to the preceding fiscal year, and will include data carriers must monitor to comply with our recovery mechanism rules. For carriers eligible and electing to receive CAF ICC support, we will ensure that the data filed with USAC is consistent with our request, so that carriers can use the same format for both filings. To ensure consistency and further minimize any burden on carriers, we delegate to the Wireline Competition Bureau the authority to adopt a template for submitting the data, which should be done in conjunction with the development of data necessary to be filed with USAC for receipt of CAF ICC support, which has also been delegated to the Wireline Competition Bureau.<sup>1831</sup> Given that carriers must be monitoring these data to comply with our revised tariff rules, we require incumbent LECs to file electronically annually at the same time as their annual interstate access tariff filings.

### G. Requests for Additional Support

924. Although we provide an opportunity for revenue recovery to promote an orderly transition away from terminating access charges, we decline to adopt a revenue-neutral approach as advocated by some commenters.<sup>1832</sup> Rather, we agree with commenters who maintain that the

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<sup>1828</sup> See, e.g., ABC Plan, Attach. 1 at 12-13.

<sup>1829</sup> See *infra* para. 1328.

<sup>1830</sup> We also encourage, but do not require, all competitive LECs and CMRS providers to similarly file such data.

<sup>1831</sup> Although the Commission requested such data in the *USF/ICC Transformation NPRM*, such submission was often incomplete and not filed in the same format by all carriers. See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4733, para. 572 and n.853.

<sup>1832</sup> See, e.g., CenturyLink *USF/ICC Transformation NPRM* Comments at 63 ("All carriers should have an opportunity to replace all ICC revenue lost as a result of rate reform."); Mississippi Public Commission *USF/ICC Transformation NPRM* Comments at 15 ("[W]ireline carriers, incurring both intrastate and interstate access reductions, should be 'made whole.'"); Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to (continued...)

Commission has no legal obligation to ensure that carriers recover access revenues lost as a result of reform, absent a showing of a taking.<sup>1833</sup> We establish a rebuttable presumption that the reforms adopted in this Order, including the recovery of Eligible Recovery from the ARC and CAF, allow incumbent LECs to earn a reasonable return on their investment. We establish a “Total Cost and Earnings Review,” through which a carrier may petition the Commission to rebut this presumption and request additional support.<sup>1834</sup> We identify below certain factors in addition to switched access costs and revenues that *may* affect our analysis of requests for additional support, including: (1) other revenues derived from regulated services provided over the local network, such as special access; (2) productivity gains; (3) incumbent LEC ICC expense reductions and other cost savings, and (4) other services provided over the local network.<sup>1835</sup> Particularly given these factors, it is our predictive judgment that the limited recovery permitted will be more than sufficient to provide carriers reasonable recovery for regulated services, both as a matter of the constitutional obligations underlying our rate regulation and as a policy matter of providing a measured transition away from incumbent LECs’ historical reliance on intercarrier compensation revenues to recovery that better reflects today’s marketplace.<sup>1836</sup> Nonetheless, we also adopt a Total Cost and Earnings Review to allow individual carriers to demonstrate that this rebuttable presumption is incorrect and that additional recovery is needed to prevent a taking.

925. To show that the standard recovery mechanism is legally insufficient, a carrier would face a “heavy burden,”<sup>1837</sup> and need to demonstrate that the regime “threatens [the carrier’s] financial integrity or otherwise impedes [its] ability to attract capital.”<sup>1838</sup> As the Supreme Court has long  
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Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 3 (filed Oct. 18, 2011).

<sup>1833</sup> Ad Hoc *USF/ICC Transformation NPRM* Comments at 51; AT&T *USF/ICC Transformation NPRM* Comments at 32; NASUCA *USF/ICC Transformation NPRM* Reply at 12; Letter from Scott Bergman, CTIA, to Marlene H. Dortch, Secretary, FCC GN Docket No. 09-51; WC Docket Nos. 96-45, 05-337, 10-90; CC Docket No. 01-92 (filed Sept. 9, 2011).

<sup>1834</sup> We believe the Total Cost and Earnings Review procedure alone is sufficient to meet our legal obligations with regard to recovery.

<sup>1835</sup> See *infra* Section XIII.G. See also *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4729, para. 562 (seeking comment on the extent of the Commission’s legal obligation to provide a recovery mechanism); *id.* at 4730, para. 563 (the relationship with jurisdictional separations considerations); *id.* at 4731, para. 567 (the relevant revenues to include for recovery purposes); *id.* at 4731-32, paras. 568-69 (the implications for recovery of other services provided using the same multi-purpose networks); *id.* at 4732, para. 570 (the appropriate baseline, including disputed revenues); *id.* at 4732-33, para. 571 (the role of cost savings); see also *August 3 Public Notice*, 26 FCC Rcd at 11125-26 (seeking comment on an approach that would incorporate specified reductions in the recovery baseline, allowing carriers to realize the benefits of reduced costs and/or greater efficiency); *id.* at 16 (whether carriers seeking recovery should have to demonstrate need based on their operations more broadly); *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6640, App. A, para. 324 (seeking comment on a recovery mechanism that would consider all a carrier’s costs and revenues when evaluating the need for recovery); *2005 Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4730-31, paras. 99-100 (seeking comment on the scope of any legal obligation to provide a recovery mechanism, including the relevance of revenues from a carrier’s other services and of cost savings).

<sup>1836</sup> See *Time Warner Entertainment Co., L.P. v. F.C.C.*, 240 F.3d 1126, 1133 (D.C. Cir. 2001) (“Substantial evidence does not require a complete factual record—we must give appropriate deference to predictive judgments that necessarily involve the expertise and experience of the agency.”) citing *Turner II*, 520 U.S. at 196, *Federal Communications Commission v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 at 814 (1978).

<sup>1837</sup> *Hope Natural Gas*, 320 U.S. at 602.

<sup>1838</sup> *Illinois Bell Telephone Co. v. FCC*, 988 F.2d 1254, 1263 (D.C. Cir. 1993).

recognized, when a regulated entity's rates "enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed," the company has no valid claim to compensation under the Takings Clause, even if the current scheme of regulated rates yields "only a meager return" compared to alternative rate-setting approaches.<sup>1839</sup> For the reasons described above, we believe that our recovery mechanisms provide recovery well beyond any constitutionally-required minimum, and we find no convincing evidence in the record here that the standard recovery mechanism will yield confiscatory results.

926. Specifically, a carrier can petition for a Total Cost and Earnings Review to request additional CAF ICC support and/or waiver of CAF ICC support broadband obligations.<sup>1840</sup> In analyzing such petitions, the Commission will consider the totality of the circumstances, to the extent permitted by law.<sup>1841</sup> Our analysis will consider all factors affecting a carrier and its ability to earn a return on its relevant investment, including the factors described below. As a result of this analysis of costs and revenues, the Commission will be able to determine the constitutionally required return and will not be bound by any return historically used in rate-setting nor any specific return resulting from the intercarrier compensation recovery mechanism adopted in this Order,<sup>1842</sup> or possible rate represetion as discussed in the FNPRM.<sup>1843</sup>

927. As we seek to protect consumers from undue rate increases or increases in contributions to USF, we will conduct the most comprehensive review of any requests for additional support allowed by law. Our recovery mechanism goes beyond what might strictly be required by the constitutional takings principles underlying historical Commission regulations. Therefore, although our standard recovery mechanism does not seek to precisely quantify and address all considerations relevant to resolution of a takings claim, carriers will need to address these considerations to the extent that they seek to avail themselves of the Total Cost and Earnings Review procedure based on a claim that recovery is legally insufficient.<sup>1844</sup>

928. *Revenues Derived from Other Regulated Services Provided Over the Local Network.* We agree with those who argue that it is appropriate for the Commission to consider the implications of services other than switched access that are provided using supported facilities,<sup>1845</sup> to the extent

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<sup>1839</sup> *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944).

<sup>1840</sup> *See supra* para. 918.

<sup>1841</sup> *See, e.g.*, Comcast August 3 PN Comments at 16-19 (claiming that "there is no Congressional or FCC prohibition against the Commission's consideration of unregulated revenues when determining the appropriate level of subsidies for regulated services").

<sup>1842</sup> Given the extensive discussion of reform proposals over the years, a carrier could not reasonably "rely indefinitely" on the existing system of intercarrier compensation, "but would simply have to rely on the constitutional bar against confiscatory rates" in the event the Commission revised its compensation rules. *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 528 (2002).

<sup>1843</sup> *See infra* Section XVII.C.

<sup>1844</sup> *See infra* Section XIII.G.

<sup>1845</sup> *See, e.g.*, ITTA USF/ICC Transformation NPRM Comments at 38 ("It is, of course, reasonable to require CAF recipients to account for the expected revenues from supported services."); CBeyond et al. USF/ICC Transformation NPRM Comments at 16. *But see* NECA et al. USF/ICC Transformation NPRM Comments at 18 ("any decision by the Commission to take into consideration the extent to which RLECs or other regulated carriers earn revenues from non-regulated services would appear to represent a dramatic about-face in Commission regulatory policy, which has for more than forty years emphasized the importance of keeping regulated and non-regulated costs and revenues separate. This principle has been one of the cornerstones of the Commission's regulatory policy, on which its Part 64 Joint Cost Rules and numerous orders dealing with activities as diverse as (continued...)")



constitutionally permitted.<sup>1846</sup> Notwithstanding our intercarrier compensation reform, carriers will continue to receive revenues from other uses of the local network. For example, although the reforms adopted in this Order will bring many intercarrier compensation rates into a bill-and-keep framework, other intercarrier compensation rates will be subject to minimal—or no—reforms at this time.<sup>1847</sup> Consequently, incumbent LECs will continue to collect intercarrier compensation for originating access and dedicated transport, providing continued revenue flows—including the underlying implicit subsidies—from those sources during the transition outlined in this Order, although we have determined that such rates ultimately will reach bill-and-keep as well. Carriers acknowledge that the subsidies in these remaining intercarrier compensation rates are used for investment in their network to provide regulated services such as special access service. In addition, there was debate in the record regarding whether, and how, to consider special access revenues in this regard.<sup>1848</sup> At this time we do not prescribe general rules considering such revenue, but, as with other services that rely on the local network, we will consider such earnings and may reconsider this decision if warranted upon conclusion of the Commission’s ongoing special access proceeding.<sup>1849</sup>

929. *Productivity Gains.* As discussed above, although incentive regulation commonly involves sharing the benefits of productivity gains between carriers and ratepayers, such a mechanism has not been in place for many years.<sup>1850</sup> Our standard recovery mechanism adopts a 10 percent reduction in *CALLS* price cap incumbent LECs’ baseline revenues, initially for *CALLS* price cap study areas, and after five years for non-*CALLS* price cap study areas to reflect this. However, because we believe that is a conservative approach, we find it appropriate to consider efficiency gains for particular price cap carriers on an individual basis in our Total Cost and Earnings Review, as well.

930. *LEC Cost Savings and Increased Revenue.* Currently, carriers are frequently embroiled in costly litigation over payment, jurisdiction, and type of traffic.<sup>1851</sup> The reforms we adopt today should substantially reduce such disputes,<sup>1852</sup> and we anticipate that comprehensive intercarrier compensation

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Yellow Pages advertising to Video Dialtone Services to wireline broadband Internet access services rest.” (footnotes omitted)).

<sup>1846</sup> See, e.g., *Hope Natural Gas*, 320 U.S. at 602 (when performing a takings analysis, it is necessary to consider “the total effect” of the challenged regulation); see also, e.g., *Baltimore & Ohio Railroad Co. v. United States*, 345 U.S. 146, 148 (1953); *Puget Sound Traction, Light & Power Co. v. Reynolds*, 244 U.S. 574, 579-81 (1917); *Consolidated Edison Co. v. Pataki*, 292 F.3d 338, 351 (2d Cir. 2002).

<sup>1847</sup> See *supra* Section XII.A.

<sup>1848</sup> Compare, e.g., Ad Hoc USF/ICC Transformation NPRM Comments at 51-53; NASUCA August 3 PN Reply at 151 with, e.g., CenturyLink USF/ICC Transformation NPRM Comments at 68; ITTA August 3 PN Reply at 11.

<sup>1849</sup> See generally *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005).

<sup>1850</sup> See *supra* para. 881.

<sup>1851</sup> See, e.g., Letter from Paul Kouroupas, Vice President, Regulatory Affairs, Global Crossing North America, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 1 (filed Dec. 17, 2010) (Global Crossing Dec. 17, 2010 *Ex Parte* Letter) (estimating that disputes regarding intercarrier compensation may represent \$450,000,000 annually).

<sup>1852</sup> See Sections XI.A and B, XIV, and XV. See also USF/ICC Transformation NPRM, 26 FCC Rcd at 4702, 4710, paras. 493, 507.

reform will further reduce carriers' costs of administering intercarrier compensation.<sup>1853</sup> Likewise, our actions regarding phantom traffic and intercarrier compensation for VoIP traffic may increase the proportion of traffic for which intercarrier compensation can be collected. Finally, we note that our reforms should result in expense savings in other lines of business, such as the provision of long distance services. Although we do not adopt a "net revenues" approach as part of our standard recovery mechanism,<sup>1854</sup> in appropriate circumstances we believe an analysis of intercarrier expenses could be warranted in the examination of an individual carrier's claim under the more fact- and carrier-specific Total Costs and Earnings Review mechanism.<sup>1855</sup> We will consider these factors to the extent legally permissible, including but not limited to the following categories:

- *Revenue for Exchanging VoIP Traffic.* A number of carriers have alleged that they are not receiving compensation for exchanging VoIP traffic.<sup>1856</sup> In this Order we adopt rules clarifying the obligation of VoIP traffic to pay intercarrier compensation charges during the transition to bill and keep.<sup>1857</sup> The decisions we adopt today will provide LECs, including incumbent LECs, with more certain revenue throughout the transition, and will also allow them to avoid the litigation expense associated with attempts to collect access charges for VoIP traffic.<sup>1858</sup>
- *Reduced Phantom Traffic.* Similarly, the rules adopted in this Order will enable carriers to identify and bill for phantom traffic.<sup>1859</sup> These rules thus should enable carriers to collect intercarrier compensation charges throughout the transition that they are not currently able to collect. We also anticipate that incumbent LECs will be able to reduce administrative and litigation costs associated with such traffic.<sup>1860</sup>
- *Other Reduced Litigation Costs and Administrative Expenses.* In addition to reduced litigation costs and administrative expense associated with VoIP and phantom traffic as a result of the reforms we adopt in this Order, the record indicates that carriers will benefit more generally from the clarity and

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<sup>1853</sup> See, e.g., *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4732, para. 570 (seeking comment on the appropriate baseline, including disputed revenues); *2005 Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4730-31, paras. 99-100 (seeking comment on the scope of any legal obligation to provide a recovery mechanism, including the relevance of revenues from a carrier's other services and of cost savings); *id.* at 4767, para. 193 (discussing benefits to small entities from ICC reform due to reduced administrative expenses and disputes).

<sup>1854</sup> See *supra* paras. 874-878.

<sup>1855</sup> See, e.g., *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements; 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, WC Docket No. 02-112; CC Docket No. 00-175, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440 (2007) (permitting certain incumbent LECs to integrate their LEC and IXC operations without becoming subject to dominant carrier regulation of those interexchange services); *Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160 from Enforcement of Certain of the Commission's Cost Assignment Rules*, WC Docket Nos. 07-21, 05-342, Memorandum Opinion and Order, 23 FCC Rcd 7302, 7312-13, para. 19 n.71 (2008) (quoting AT&T Reply comments stating that "a price cap ILEC raising a confiscation claim may find it more difficult to prove such a claim without separated cost data").

<sup>1856</sup> See *infra* Section XIV.B.

<sup>1857</sup> See *infra* Section XIV.C.

<sup>1858</sup> See *infra* paras. 937-939.

<sup>1859</sup> See *supra* Section XI.B.

<sup>1860</sup> See *supra* para. 705.

relative simplicity of the rules we adopt today. We anticipate that this will be reflected in additional savings in litigation and administration costs.<sup>1861</sup>

- *Other Services Provided Over the Local Network.* In addition to regulated services provided over the local network, many carriers also provide unregulated services, such as broadband and video. Although parties have identified some uncertainty regarding the Commission's ability to consider revenues from such services in calculating a carrier's return on investment in the local network,<sup>1862</sup> the Commission will, at a minimum, carefully scrutinize the allocation of costs associated with such services. As one commenter states, "[i]t simply no longer makes any sense (if it ever did) for the agency to allow rural carriers to spend as much as they can on their networks, earning a rate of return on these historical costs while only considering the small sliver of regulated local telephony revenues earned using these USF subsidized networks."<sup>1863</sup>

931. We note that some carriers argued that the Commission should not rely on revenue from unregulated services to offset a carrier's defined eligible revenue, but that if it did, it should only use net unregulated revenue, considering both the costs and revenues from those services.<sup>1864</sup> In addition, although there are a range of possible approaches for allocating many types of costs, a number of commenters recognized that historical accounting underlying intercarrier compensation rates and other charges fails to reflect the marketplace reality of the number and types of services provided over the local network.<sup>1865</sup> For example, the record revealed concerns about the extent to which loop costs have been allocated to regulated services such as voice telephone service versus services such as broadband Internet access service.<sup>1866</sup> Consequently, we will give appropriate consideration to these services as part of the Total Cost and Earnings Review, including an analysis of both the revenue generated by such other services and whether the cost of such services, both regulated and unregulated, have been properly allocated.

932. *Cost Allocation.* The *USF/ICC Transformation NPRM* sought comment on the implications of the jurisdictional separations process, including ongoing reform efforts, on intercarrier

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<sup>1861</sup> See Global Crossing Dec. 17, 2010 *Ex Parte* Letter at 2 (filed Dec. 17, 2010) ("Global Crossing spends approximately 2,290 man hours per month managing the inter-carrier compensation regime. Bill reconciliation and disputes constitutes approximately 750 man-hours per month. Management of the inter-carrier compensation regime through contract negotiation, routing, costing, pricing, and product support constitutes an additional 1,540 man-hours per month. Time and resources devoted to inter-carrier compensation is time and resources that cannot be devoted to customer service and network management.").

<sup>1862</sup> See, e.g., Alexicon August 3 *PN* Comments at 9. But see California PUC *USF/ICC Transformation NPRM* Comments at 20.

<sup>1863</sup> Free Press *USF/ICC Transformation NPRM* Comments at 8. See also, e.g., NASUCA *USF/ICC Transformation NPRM* Reply at 154-155 ("[T]argeting the SLC for rate increases is not appropriate, especially if such an increase is pursued outside of a full evaluation of the regulated and non-regulated operations of the LEC.").

<sup>1864</sup> NECA *et al.* *USF/ICC Transformation NPRM* Comments at 19; CenturyLink *USF/ICC Transformation NPRM* Comments at 68.

<sup>1865</sup> See, e.g., Comcast *USF/ICC Transformation NPRM* Comments at 19 (in assessing the need for high-cost support in the future, the Commission should look at the carriers' regulated and non-regulated revenues as well as technological advances and the efficiencies that companies realize when they provide multiple services over a single network").

<sup>1866</sup> See, e.g., Ad Hoc *USF/ICC Transformation NPRM* Comments at 51-52; Free Press *USF/ICC Transformation NPRM* Comments at 8; NASUCA August 3 *PN* Comments at 70-71.

compensation reforms.<sup>1867</sup> The jurisdictional separations process, which has been frozen for some time, is currently the subject of a referral to the Separations Joint Board.<sup>1868</sup> Any carrier seeking additional recovery will be required to conduct a separations study to demonstrate the current use of its facilities. Although this is a burdensome requirement, it is not unduly so given the importance of protecting consumers and the universal service fund.

#### XIV. INTERCARRIER COMPENSATION FOR VOIP TRAFFIC

933. Under the new intercarrier compensation regime, all traffic—including VoIP-PSTN traffic—ultimately will be subject to a bill-and-keep framework. As part of our transition to that end point, we adopt a prospective intercarrier compensation framework for VoIP traffic. In particular, we address the prospective treatment of VoIP-PSTN traffic by adopting a transitional compensation framework for such traffic proposed by commenters in the record.<sup>1869</sup> Under this transitional framework:

- We bring all VoIP-PSTN traffic within the section 251(b)(5) framework;
- Default intercarrier compensation rates for toll VoIP-PSTN traffic are equal to interstate access rates;
- Default intercarrier compensation rates for other VoIP-PSTN traffic are the otherwise-applicable reciprocal compensation rates; and
- Carriers may tariff these default charges for toll VoIP-PSTN traffic in the absence of an agreement for different intercarrier compensation.

We also make clear providers' ability to use existing section 251(c)(2) interconnection arrangements to exchange VoIP-PSTN traffic pursuant to compensation addressed in the providers' interconnection agreement, and address the application of Commission policies regarding call blocking in this context.

934. Although we adopt an approach similar to that proposed by some commenters, our approach to adopting and implementing this framework differs in certain respects. For one, we are not persuaded on this record that all VoIP-PSTN traffic must be subject exclusively to federal regulation, and as a result, to adopt this prospective regime we rely on our general authority to specify a transition to bill-and-keep for section 251(b)(5) traffic.<sup>1870</sup> As a result, tariffing of charges for toll VoIP-PSTN traffic can occur through both federal and state tariffs.<sup>1871</sup> In addition, given the recognized concerns with the use of telephone numbers and other call detail information to establish the geographic end-points of a call, we decline to mandate their use in that regard, as proposed by some commenters.<sup>1872</sup> We do, however, recognize concerns regarding providers' ability to distinguish VoIP-PSTN traffic from other traffic, and,

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<sup>1867</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4730, para. 563. *See also, e.g., 2008 Order and USF/ICC FNPRM*, 24 FCC Rcd at 6632, App. A, para. 304 (seeking comment on an approach that would refer certain recovery questions to the Separations Joint Board give the cross-jurisdictional implications of the possible approach to recovery).

<sup>1868</sup> *See, e.g., Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 26 FCC Rcd 7133 (2011)

<sup>1869</sup> ABC Plan, Attach. 1 at 10; Joint Letter at 3; NCTA July 29, 2011 *Ex Parte* Letter at 2; New York PSC *August 3 PN* Comments at 18-19; TCA *August 3 PN* Comments at 10-11.

<sup>1870</sup> *See infra* paras. 954-955.

<sup>1871</sup> *See infra* paras. 961-963.

<sup>1872</sup> *See infra* para. 962.

consistent with the recommendations of a number of commenters, we permit LECs to address this issue through their tariffs, much as they do with jurisdictional issues today.<sup>1873</sup>

935. We believe that this prospective framework best balances the competing policy goals during the transition to the final intercarrier compensation regime. By declining to apply the entire preexisting intercarrier compensation regime to VoIP-PSTN traffic prospectively, we recognize the shortcomings of that regime. At the same time, we are mindful of the need for a measured transition for carriers that receive substantial revenues from intercarrier compensation. Although our action clarifying the prospective intercarrier compensation treatment of VoIP-PSTN traffic does not resolve the numerous existing industry disputes, it should minimize future uncertainty and disputes regarding VoIP compensation, and thereby meaningfully reduce carriers' future costs.<sup>1874</sup>

#### A. Background

936. Questions regarding the appropriate intercarrier compensation framework for VoIP traffic have been raised in a number of previous rulemaking notices from varying perspectives and in varying levels of detail.<sup>1875</sup> Most recently, in the *USF/ICC Transformation NPRM* the Commission sought "comment on the appropriate treatment of interconnected VoIP traffic for purposes of intercarrier compensation," asking about "a range of approaches, including how to define the precise nature and timing of particular intercarrier compensation payment obligations."<sup>1876</sup> To inform this analysis, the Commission sought comment on how best to balance competing policy concerns, the possible need to clarify or modify any aspects of existing law to enable the adoption of a particular VoIP intercarrier compensation regime, and how any such regime would be administered, including the appropriate scope of traffic that should be addressed by the Commission.<sup>1877</sup> In addition, in the *August 3 PN*, we sought comment on measures to clarify the operation of one proposed approach to intercarrier compensation for VoIP-PSTN traffic.<sup>1878</sup>

#### B. Widespread Uncertainty and Disagreement Regarding Intercarrier Compensation for VoIP Traffic

937. As the Commission recognized in the *USF/ICC Transformation NPRM*, the lack of clarity regarding the intercarrier compensation obligations for VoIP traffic has led to significant billing

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<sup>1873</sup> See *infra* para. 963.

<sup>1874</sup> This Order does not address intercarrier compensation payment obligations for VoIP-PSTN traffic for any prior periods. See, e.g., Letter from Grace Koh, Policy Counsel, Cox, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, Attach. at 1 (filed July 1, 2011) (Cox July 1, 2011 *Ex Parte* Letter).

<sup>1875</sup> See, e.g., *Inter-carrier Compensation NPRM*, 16 FCC Rcd at 9613, 9621, 9629, para. 6 n.5, paras. 24, 52 (seeking comment on comprehensive intercarrier compensation reform, including issues presented by "IP telephony"); *IP-Enabled Services NPRM*, 19 FCC Rcd at 4904-05, paras. 61-62 (seeking comment on the application of intercarrier compensation charges to VoIP or other IP-enabled services); *Inter-carrier Compensation FNPRM*, 20 FCC Rcd at 4710, 4722, 4743-44, 4750, paras. 51, 80, 133 & n. 384, 148; *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6589-91, 6594, App. A, paras. 209-11, 218 n.703; *id.* at 6787-89, 6792, App. C, paras. 203-06, 213 n.1844.

<sup>1876</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4745, para. 609.

<sup>1877</sup> *Id.* at 4747-48, paras. 612-13.

<sup>1878</sup> See *August 3 Public Notice*, 26 FCC Rcd at 11128. For instance, we sought comment on mechanisms for distinguishing "toll" VoIP-PSTN traffic from other traffic, including possible alternatives to the use of call detail information as proposed by the ABC Plan and Joint Letter. *Id.* at 11129.

disputes and litigation.<sup>1879</sup> Both state commissions and courts have been called upon to address disputes regarding intercarrier compensation for VoIP traffic in a range of contexts and with a range of outcomes. For example, some states have held that the same intrastate access charges that apply in the context of traditional telephone service also apply to at least some VoIP traffic.<sup>1880</sup> Others have applied lower intercarrier compensation charges in certain circumstances,<sup>1881</sup> and still others have deferred to the Commission.<sup>1882</sup> Courts likewise have addressed disputes about the intercarrier compensation payments associated with VoIP traffic, reaching divergent outcomes.<sup>1883</sup> In a number of cases, the state commission's or court's decision hinged in part on the language of particular tariffs or agreements.<sup>1884</sup> Disputes also remain pending in a number of courts and state commissions.<sup>1885</sup>

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<sup>1879</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4745-47, 4748, paras. 610-11, 614.

<sup>1880</sup> See, e.g., *Sprint v. Iowa Telecom*, Docket No. FCU-2010-0001, Order (Ia. Util. Bd. rel. Feb. 4, 2011) (applying intrastate access charges); *Re Southwestern Bell Telephone Company dba AT&T Kansas*, Docket No. 10-SWBT-419-ARB, Order Adopting Arbitrator's Determination of Unresolved Interconnection Agreement Issues Between AT&T and Global Crossing (Kan. Corp. Comm'n rel. Aug. 13, 2010) (same); *Palmerton v. Global NAPS*, Docket No. C-2009-2093336, Motion of Chairman James H. Cawley (Pa. PUC rel. Feb. 11, 2010) (same); *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Tel. Co., and Wilton Telephone Co.*, DT 08-28, Order No. 25,043 (NH PUC Nov. 10, 2009) (same).

<sup>1881</sup> See, e.g., *Petition of UTEX Communications Corporation For Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act and PURA for Rates, Terms, and Conditions of Interconnection Agreement With Southwestern Bell Telephone Company*, Docket No. 26381, Arbitration Award (Tx. PUC rel. Jan. 27, 2011) (holding that AT&T may not charge for traffic covered by the ESP exemption, and that for other traffic compensation should be paid pursuant to the interconnection agreement's terms, as applicable). Other state commissions have held that reciprocal compensation rates apply, but subsequent legislative actions have raised questions about those decisions. Letter from VON et al, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 06-122, 05-337, 04-36, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51 at 3 n.9 (filed Aug. 3, 2011) (VON et al. Aug. 3, 2011 *Ex Parte* Letter) (discussing circumstances in Missouri and Wisconsin).

<sup>1882</sup> See, e.g., *Re Level 3 Communications*, Docket UT-063006, Order 12 (Wa. UTC rel. June 7, 2007) (deferring to the Commission); *Re Level 3 Communications LLC*, Docket Nos. 70043-TK-05-10, 70000-TK-05-1132, Memorandum Opinion, Findings and Order, Record No. 9891 (Wy. PSC rel. Apr. 30, 2007) (same); *Re Florida Digital Network, Inc. dba FDN Communications*, Docket No. 041464-TP, Order on Arbitration, PSC-06-0027-FOF-TP (Fl. PSC rel. Jan. 10, 2006) (same).

<sup>1883</sup> See, e.g., *Global NAPS California v. Pub. Util. Comm'n of State of Calif.*, 624 F.3d 1225, 1231-32 (9th Cir. 2010) (affirming state commission decision that access charges apply); *Central Tel. Co. of Va. v. Sprint Communications Co. of Va.*, Civil Action No. 3:09cv720, Slip Op., 2011 WL 778402, \*8 (E.D. Va. rel. Mar. 2, 2011) (holding that access charges apply); *Manhattan Telecommunications Corp. v. Global NAPS*, No. 08 Civ. 3829(JSR), Slip Op., 2010 WL 1326095, \*3-4 (S.D.N.Y. rel. Mar. 31, 2010) (holding that, as a matter of equity, interstate access rates apply); *Global NAPS III. v. Il. Commerce Comm'n*, 749 F.Supp.2d 804, 814-16 (N.D. Il. 2010) (upholding state commission decision applying intercarrier compensation charges even if traffic was VoIP); *PAETEC v. CommPartners*, No. 08-0397, slip op., 2010 WL 1767193, \*5 (D.D.C. Feb. 18, 2010) (finding that "the access charge regime is inapplicable to VoIP originated traffic").

<sup>1884</sup> See, e.g., *Global NAPS v. Pub. Util. Comm'n of State of Calif.*, 624 F.3d at 1231-32; *Central Tel. Co. of Va. v. Sprint*, 2011 WL 778402, \*8; *Global NAPS v. Il. Commerce Comm'n*, 749 F.Supp.2d at 814-16.

<sup>1885</sup> XO Section XV Comments at 9-10 (citing cases and proceedings); Letter from J.G. Harrington, counsel for Cox, to Sharon Gillett, Chief, Wireline Competition Bureau, FCC, CC Docket No. 01-92, Attach. (filed Sept. 29, 2011) (same).

938. In addition to formal litigation, the record reveals numerous informal disputes in this area.<sup>1886</sup> In some cases, carriers may receive some intercarrier compensation payments at something less than the full intercarrier compensation rates charged in the case of traditional telephone service.<sup>1887</sup> In other cases, terminating carriers state that they receive no intercarrier compensation payments at all for traffic that is, or is alleged to be, VoIP traffic.<sup>1888</sup> Further, some providers cite asymmetries in payments, where, for example, some VoIP providers' wholesale carriers charge full access charges while refusing to pay them to the terminating LEC.<sup>1889</sup>

939. Against this backdrop, and the fact that the current uncertainty and associated disputes are likely deterring innovation and introduction of new IP services to consumers, we find it appropriate to address the prospective intercarrier compensation obligations associated with VoIP-PSTN traffic. Indeed, despite the varied opinions in the record regarding the appropriate approach to VoIP-PSTN intercarrier compensation, there is widespread agreement that the Commission needed to act to address that issue now.<sup>1890</sup>

### **C. Prospective Intercarrier Compensation Obligations for VoIP-PSTN Traffic**

#### **1. Scope of VoIP-PSTN Traffic**

940. The prospective intercarrier compensation regime we adopt for a LEC's exchange of VoIP traffic with another carrier focuses on what we refer to as "VoIP-PSTN" traffic.<sup>1891</sup> For purposes of

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<sup>1886</sup> In at least some cases, parties have reached negotiated resolutions regarding the intercarrier compensation payments for VoIP traffic. For example, Verizon cites agreements it reached to exchange VoIP traffic at a rate of \$0.0007 per minute. Verizon Section XV Comments at 11; Verizon Reply at 10-11; *see also* XO Section XV Comments at 33; Letter from John Nakahata, Counsel for Level 3, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 99-68, CC Docket No. 01-92, Attach. 1, Part B at 2 (filed Aug. 18, 2008) (Level 3 Aug. 18, 2008 *Ex Parte* Letter); *Re Level 3 Communications*, ARB 665, Order No. 07-098 (Or. PUC rel. Mar. 14, 2007).

<sup>1887</sup> *See, e.g.*, Bright House Section XV Comments at 7; Frontier Section XV Comments at 7-8; Nebraska Rural Independent Companies Section XV Comments at 5, 14-15; State Members of the USF Joint Board Comments at 21.

<sup>1888</sup> GVNW Section XV Comments at 4; NECA et al. Section XV Comments at 6; State Members of the USF Joint Board Comments at 21; Letter from Colin Sandy, Government Relations Counsel, NECA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-36, CC Docket No. 01-92, at 1 & Attach. (filed Sept. 23, 2009); Letter from Joe A. Douglas, Vice President, Government Relations, NECA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-36, CC Docket No. 01-92, Attach. at 2-4 (filed May 15, 2009).

<sup>1889</sup> *See, e.g.*, AT&T Section XV Comments at 26, 29-30; *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4745-46, para. 610 & n.920.

<sup>1890</sup> "While there are choices that we would prefer, we frankly think that the industry can survive and thrive on any of the likelier outcomes provided the Commission does act expeditiously and thoroughly." TEXALTEL Section XV Comments at 1. *See also, e.g.*, AT&T Section XV Comments at 28-29; Cablevision-Charter Section XV Comments at 3-13; Cbeyond et al. Section XV Comments at 4-16; NECA et al. Section XV Comments at 4-6, 8-13; Sprint Section XV Comments at 2; Washington UTC Section XV Comments at 2-5. We are unpersuaded by commenters expressing concern about the transitional VoIP-PSTN intercarrier compensation framework becoming effective upon the effective date of the rules, when the tariff changes to effectuate the broader intercarrier compensation rate reforms will not take effect until July 1, 2012. *See, e.g.*, EarthLink August 3 *PN* Comments at 14. Given the importance of providing clarity regarding intercarrier compensation for VoIP-PSTN traffic going forward, we do not find it appropriate to delay its effectiveness.

<sup>1891</sup> We use the term "VoIP-PSTN" as shorthand. We recognize that carriers have been converting portions of their networks to IP technology for years. *See, e.g.*, *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC (continued...)

this Order, we adopt the definition of traffic proposed in the Joint Letter: “VoIP-PSTN traffic” is “traffic exchanged over PSTN facilities that originates and/or terminates in IP format.”<sup>1892</sup> In this regard, we focus specifically on whether the exchange of traffic between a LEC and another carrier occurs in Time-Division Multiplexing (TDM) format (and not in IP format), without specifying the technology used to perform the functions subject to the associated intercarrier compensation charges.<sup>1893</sup>

941. Although the *USF/ICC Transformation NPRM* proposed focusing specifically on interconnected VoIP services, we note that the Commission’s existing definition of interconnected VoIP would exclude traffic associated with some VoIP services that are originated or terminated on the PSTN, such as “one-way” services that allow end-users either to place calls to, or receive calls from, the PSTN, but not both.<sup>1894</sup> Although these one-way services do not meet the definition of interconnected VoIP, carriers are likely to be providing origination or termination functions with respect to this traffic comparable to that of “two-way” traffic that meets the existing definition of interconnected VoIP. Moreover, intercarrier compensation disputes have encompassed all forms of what we define as VoIP-PSTN traffic, and addressing this traffic more comprehensively helps guard against new forms of arbitrage. Various commenters recommended including such traffic within the scope of our intercarrier compensation framework for VoIP<sup>1895</sup> or otherwise expressed support for the approach taken in the ABC

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Rcd 10245, 10257-59, para. 24 & n.77 (2005) (*IP-Enabled Services Order*); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11541-43, para. 84 (1998). Nonetheless, many carriers today continue to rely extensively on circuit-switched technology particularly for the exchange of traffic subject to intercarrier compensation rules. See, e.g., Cablevision-Charter Section XV Comments at 4; Cbeyond et al. Section XV Comments at 12 n.35; TCA Section XV Comments at 2; Cox July 21, 2011 *Ex Parte* Letter, Attach. at 1. Likewise the definition of “interconnected VoIP” uses the term “PSTN” as distinct from at least certain types of VoIP services. See, e.g., 47 C.F.R. § 9.3. Thus, in the context of our VoIP-PSTN intercarrier compensation rules, our reference to “PSTN” refers to the exchange of traffic between carriers in (Time Division Multiplexing) TDM format. See ABC Plan, Attach. 1 at 10 n.9.

<sup>1892</sup> Joint Letter at 3. See also ABC Plan, Attach. 1 at 10. Some commenters question the scope of traffic that “originates and/or terminates in IP format.” See, e.g., CRUSIR *August 3 PN* Comments at 20; Level 3 *August 3 PN* Comments at 12-13. Although our prospective VoIP-PSTN intercarrier compensation is not circumscribed by the definition of “interconnected VoIP service” in section 3(25) of the Act (referencing section 9.3 of the Commission’s rules) or the definition of “non-interconnected VoIP service” in section 3(36) of the Act, nonetheless, informed by those definitions, we believe it is appropriate to focus on traffic for services that require “Internet protocol-compatible customer premises equipment.” See 47 U.S.C. § 153(25) (referencing 47 C.F.R. § 9.3); 47 C.F.R. § 9.3 (subpart (3) in the definition of “interconnected VoIP”); 47 U.S.C. § 153(36)(A)(ii) (discussing services that “require[] Internet protocol compatible customer premises equipment”). Sections 3(25) and 3(36) of the Act were adopted in section 101 of the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, § 103(b), 124 Stat. 2751 (2010).

<sup>1893</sup> See, e.g., NECA et al. *USF/ICC Transformation NPRM* Comments at 24-25 n.54; Letter from Matthew M. Polka, President/CEO, ACA, and Michael K. Powell, President and CEO, NCTA, to Hon. Julius Genachowski, Chairman, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, at 2 (Aug. 23, 2011). We discuss in greater detail below the issues regarding what particular charges competitive LECs can impose in particular circumstances. See *infra* para. 942.

<sup>1894</sup> See 47 C.F.R. § 9.3 (defining “interconnected VoIP service”). See also *IP-Enabled Services Order*, 20 FCC Rcd at 10277, para. 58.

<sup>1895</sup> See, e.g., Consolidated Section XV Comments at 10-11; Nebraska Rural Independent Companies Section XV Comments at 3-4; XO Section XV Comments at 13. See also Letter from Christopher W. Savage, Counsel for Bright House, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, at 3 (filed May 27, 2011). XO also proposes that the intercarrier compensation framework extend to “IP-enabled services that do not involve two-way voice communications, such (continued...) ”



Plan and Joint Letter.<sup>1896</sup> Based on the foregoing considerations, we are persuaded to adopt that approach.<sup>1897</sup>

942. We agree with concerns raised by NCTA and find it appropriate to adopt a symmetrical framework for VoIP-PSTN traffic, under which providers that benefit from lower VoIP-PSTN rates when their end-user customers' traffic is terminated to other providers' end-user customers also are restricted to charging the lower VoIP-PSTN rates when other providers' traffic is terminated to their end-user customers. We thus decline to adopt an asymmetric approach that would apply VoIP-specific rates for only IP-originated or only IP-terminated traffic, as some commenters propose.<sup>1898</sup> The Commission has recognized concerns about asymmetric payment associated with VoIP traffic today, including marketplace distortions that give one category of providers an artificial regulatory advantage in costs and revenues relative to other market participants.<sup>1899</sup> An approach that addressed only IP-originated traffic would perpetuate—and expand—such concerns. Commenters advocating a focus solely on IP-originated

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as electronic fax-to-email services and IP-based voicemail services . . . because such traffic is indistinguishable from two-way voice calling.” XO Section XV Comments at 13. However, XO does not clarify the precise definition that would be needed to encompass the specific traffic at issue, given the possible breadth of services encompassed by “IP-enabled services.” See, e.g., *IP-Enabled Services NPRM*, 19 FCC Rcd at 4869-79, 4886-90, paras. 8-22, 35-37. We believe that our definition, which itself goes beyond the *USF/ICC Transformation NPRM*'s proposed focus on interconnected VoIP, strikes the appropriate balance for purposes of the transitional intercarrier compensation framework.

<sup>1896</sup> See, e.g., ABC Plan, Attach. 1 at 10; Joint Letter at 3; NCTA July 29, 2011 *Ex Parte* Letter at 2; New York PSC *August 3 PN* Comments at 18-19; TCA *August 3 PN* Comments at 10-11.

<sup>1897</sup> We reject claims that applying our prospective VoIP-PSTN intercarrier compensation regime to this scope of traffic is procedurally improper. See, e.g., Letter from Donna N. Lampert, Counsel for Google, et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, 07-135, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, Attach. at 6 (filed Sept. 30, 2011) (Google et al. Sept. 30, 2011 *Ex Parte* Letter). The *USF/ICC Transformation NPRM* specifically sought comment on the scope of any VoIP intercarrier compensation rules, including “whether the proposed focus on interconnection VoIP is too narrow or whether the Commission should consider intercarrier compensation obligations associated with other forms of VoIP traffic, as well.” *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4747, para. 612. In response, commenters proposed approaches that would encompass the scope of VoIP traffic covered by our prospective VoIP-PSTN intercarrier compensation framework, and the Commission sought comment on how it could implement such an approach. *August 3 Public Notice*, 26 FCC Rcd at 11128 (seeking comment “on the implementation of the ABC Plan’s proposal for VoIP intercarrier compensation”); *id.* at 17 n.57 (discussing the scope of VoIP traffic that would be encompassed by the ABC Plan’s proposal).

<sup>1898</sup> See, e.g., Letter from Steven F. Morris and Jennifer K. McKee, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51 Attach. at 4-5 (filed July 29, 2011) (NCTA July 29, 2011 *Ex Parte* Letter); Comcast Section XV Comments at 4-7; ZipDX Section XV Comments at 2. We note that our VoIP-PSTN intercarrier compensation framework only addresses intercarrier compensation traditionally associated with intrastate and interstate traffic (i.e., access charges and reciprocal compensation), and does not address other compensation associated with international calls. See Comcast Section XV Comments at 4 n.4. A separate regulatory regime governs how U.S. carriers negotiate with foreign carriers for the exchange of international traffic. See, e.g., *International Settlements Policy Reform, et al.*, IB Docket Nos. 11-80, 05-254, 09-10, RM-11322, Notice of Proposed Rulemaking, 26 FCC Rcd 7233, 7234-41, paras. 3-10 (2011).

<sup>1899</sup> See *supra* note 1889. See also, e.g., NCTA July 29, 2011 *Ex Parte* Letter at 2.

traffic implicitly recognize as much, noting that providers with IP networks could benefit relative to providers with TDM networks under such an intercarrier compensation regime.<sup>1900</sup>

## 2. Intercarrier Compensation Charges for VoIP-PSTN Traffic

943. We adopt a prospective intercarrier compensation framework that brings all VoIP-PSTN traffic within the section 251(b)(5) framework. As discussed below, the Commission has authority to bring all traffic within the section 251(b)(5) framework for purposes of intercarrier compensation, including traffic that otherwise could be encompassed by the interstate and intrastate access charge regimes,<sup>1901</sup> and we exercise that authority now for all VoIP-PSTN traffic.

944. We adopt transitional rules specifying, prospectively, the default compensation for VoIP-PSTN traffic:

- Default charges for “toll”<sup>1902</sup> VoIP-PSTN traffic will be equal to interstate access rates applicable to non-VoIP traffic, both in terms of the rate level and rate structure;
- Default charges<sup>1903</sup> for other VoIP-PSTN traffic will be the otherwise-applicable reciprocal compensation rates;<sup>1904</sup> and
- LECs are permitted to tariff these default charges for toll VoIP-PSTN traffic in relevant federal and state tariffs in the absence of an agreement for different intercarrier compensation.

945. Our intercarrier compensation framework for VoIP-PSTN traffic will apply prospectively, during the transition between existing intercarrier compensation rules and the new regulatory regime adopted in this Order, and is subject to the reductions in intercarrier compensation rates required as part of that transition. We do not address preexisting law, including whether or how the ESP exemption might have applied previously, and we make clear that, whatever its possible relevance historically, the ESP exemption is not relevant or applicable prospectively in determining the intercarrier

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<sup>1900</sup> See, e.g., Comcast Section XV Comments at 5-6 (arguing that the relative advantages for providers with IP networks would create incentives for providers with TDM networks to convert to IP); Comcast Section XV Reply at 10 (same).

<sup>1901</sup> See *supra* Section XII.A.2. Our transitional intercarrier compensation framework for VoIP-PSTN traffic applies to all LECs, including LECs that are wholesale partners of VoIP providers.

<sup>1902</sup> The Act defines “telephone toll service” as “telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.” 47 U.S.C. § 153(55). The Commission previously has described toll services as “services that enable customers to communicate outside of their local exchange calling areas,” and that, for wireless providers, this means outside the customer’s plan-defined home calling area. See, e.g., *Universal Service Contribution Methodology*, WC Docket Nos. 06-122, 04-36, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 at 7543, para. 29 (*Interim Universal Service Contribution Methodology Order*). Although the Commission has referred to toll services as “telecommunications services” in some other contexts, see, e.g., *id.*, our use of the term “toll” VoIP-PSTN traffic here does not prejudice the classification of VoIP services.

<sup>1903</sup> The default rate applicable to all non-toll VoIP-PSTN traffic is whatever rate applies to other section 251(b)(5) traffic exchanged between the carriers.

<sup>1904</sup> In addition to ISP-bound traffic, section 251(b)(5) traffic historically included all local traffic. In the case of traffic both originated and terminated by a LEC, the local area is defined by the state. *Local Competition First Report and Order*, 11 FCC Rcd at 16013-14, para. 1035. In the case of traffic to or from a CMRS network, section 251(b)(5) applies to traffic that originates and terminates in the same Major Trading Area (MTA). *Id.*, at 16014, para. 1036.

compensation obligations for VoIP-PSTN traffic.<sup>1905</sup>

**a. The Prospective VoIP-PSTN Inter-carrier Compensation Framework Best Balances the Relevant Policy Considerations**

946. We believe that our prospective, inter-carrier compensation regime for VoIP-PSTN traffic best balances the relevant policy considerations of providing certainty regarding the prospective inter-carrier compensation obligations for VoIP-PSTN traffic while acknowledging the flaws with preexisting inter-carrier compensation regimes, and providing a measured transition to the new inter-carrier compensation framework. Our framework for VoIP-PSTN traffic will also reduce disputes and provide greater certainty to the industry regarding inter-carrier compensation revenue streams while also reflecting the Commission's move away from the pre-existing, flawed inter-carrier compensation regimes that have applied to traditional telephone service.<sup>1906</sup>

947. Although commenters did not all agree on the treatment of VoIP-PSTN traffic, there was widespread consensus among commenters that, whatever the outcome, it was essential that the Commission address that issue now.<sup>1907</sup> Our framework also seeks to facilitate discussions among the providers exchanging VoIP-PSTN traffic, lessening the need for prescriptive Commission regulations. At the same time, the *USF/ICC Transformation NPRM* recognized the disruptive nature of some providers' unilateral actions regarding VoIP inter-carrier compensation,<sup>1908</sup> and we seek to prevent such actions here going forward.

948. We are not persuaded by the arguments of some commenters to subject VoIP traffic to the pre-existing inter-carrier compensation regime that applies in the context of traditional telephone service, including full interstate and intrastate access charges.<sup>1909</sup> For one, many of the advocates of such

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<sup>1905</sup> Compare, e.g., Letter from Charles McKee, Vice-President, Government Affairs, Sprint, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 4-6 (filed July 29, 2011) (Sprint July 29, 2011 *Ex Parte* Letter) with, e.g., AT&T Section XV Reply at 23-24. Because we are bringing all traffic within section 251(b)(5), the ESP Exemption from interstate access charges does not apply by its terms. Nonetheless, in this Order, we preserve the equivalent of the ESP Exemption outside of the VoIP-PSTN traffic context. In light of the need for clarity on a prospective basis given the ongoing disputes regarding VoIP inter-carrier compensation, as well as the other policy considerations discussed below, we disagree that, as a policy matter, we should adopt the equivalent of the ESP Exemption in this context. See, e.g., Google et al. Sept. 30, 2011 *Ex Parte* Letter, Attach. at 8.

<sup>1906</sup> As in prior Orders, we use the term "traditional telephone service" here colloquially as distinct from VoIP service without reaching any conclusions regarding the classification of VoIP services. See, e.g., *Telephone Number Requirements for IP-Enabled Services Providers; et al.*, WC Docket Nos. 07-243, 07-244, 04-36, CC Docket No. 95-116, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531, 19547, para. 28 (2007) (recognizing that interconnected VoIP services increasingly are viewed by consumers as a substitute for traditional telephone services).

<sup>1907</sup> *Supra* para. 939 & note 1890.

<sup>1908</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4748, para. 614. See also, e.g., NECA et al. Section XV Comments at 6; Letter from William A. Haas, Vice President of Public Policy and Regulatory, PAETEC et al., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Feb. 1, 2011).

<sup>1909</sup> See generally, e.g., Cablevision-Charter Section XV Comments at 3; Cbeyond et al. Section XV Comments at 4-6; Cox Section XV Comments at 8; NECA et al. Section XV Comments at 6; AT&T Section XV Reply at 21-22; Consolidated Reply at 10-12.

an approach subsequently endorsed the ABC Plan and Joint Letter.<sup>1910</sup> Further, such an outcome would require the Commission to enunciate a policy rationale for expressly imposing that regime on VoIP-PSTN traffic in the face of the known flaws of existing intercarrier compensation rules and notwithstanding the recognized need to move in a different direction. Moreover, requiring payment of all existing intercarrier compensation rates applicable to traditional telephone service traffic as part of a transitional regime for VoIP-PSTN traffic would, in the aggregate, increase providers' reliance on intercarrier compensation at the same time the Commission's broader reform efforts seek to move providers away from reliance on intercarrier compensation revenues.<sup>1911</sup> Nor are we persuaded that such an outcome is necessary to advance competitive or technological neutrality.<sup>1912</sup> As discussed above, our prospective regime for VoIP-PSTN intercarrier compensation is symmetrical, and thus avoids the marketplace distortions that could arise from an asymmetrical approach to compensation.<sup>1913</sup> In particular, the record does not demonstrate that our approach advantages in the aggregate providers relying on TDM networks relative to VoIP providers or vice versa,<sup>1914</sup> nor that it advantages in the aggregate certain IXC's relative to others.<sup>1915</sup> Further, to the extent that particular carriers historically have relied on access revenues to subsidize local services,<sup>1916</sup> the record is clear that many providers did not pay the same intercarrier compensation rates for VoIP traffic that would have applied to traditional telephone service traffic.<sup>1917</sup> Additionally, our

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<sup>1910</sup> See, e.g., Joint Letter at 4 (indicating support by the USTelecom, AT&T, CenturyLink, Fairpoint, Frontier, Verizon, Windstream, NTCA, OPASTCO, and WTA); NCTA July 29, 2011 *Ex Parte* Letter at 2 (noting NCTA's support for the VoIP proposal).

<sup>1911</sup> See *supra* Section XII.C.

<sup>1912</sup> See, e.g., Bright House Section XV Comments at 4; CenturyLink Section XV Comments at 13; Frontier Section XV Comments at 9; NARUC Section XV Comments at 4-5; Pac-West Section XV Comments at 5; Cbeyond *et al.* Section XV Reply at 4.

<sup>1913</sup> See *supra* para. 942.

<sup>1914</sup> The transitional VoIP-PSTN intercarrier compensation regime we adopt here can reduce both the intercarrier compensation revenues and long distance and wireless costs associated with VoIP-PSTN traffic. The record does not quantify the net effect of the revenue reduction and cost savings either for VoIP providers and their wholesale carrier partners or for traditional LECs and their wholesale carrier partners. Thus, the record does not demonstrate that, by virtue of our transitional VoIP-PSTN intercarrier compensation regime, VoIP or TDM providers or VoIP or TDM technologies would be advantaged in the marketplace relative to one another.

<sup>1915</sup> The record does not indicate that particular IXC's currently carry a disproportionately large or small portion of VoIP-PSTN traffic today, nor that they would be precluded from competing to carry such traffic in the future. The record thus does not demonstrate a disparate financial impact on particular IXC's from the transitional VoIP-PSTN intercarrier compensation regime.

<sup>1916</sup> See, e.g., Nebraska Rural Independent Companies Section XV Reply at 5. To the extent that high access rates historically have been used to subsidize artificially low rates for other services, we thus are not persuaded that, viewed in that light, access charges can be seen as "100 percent profit" as some contend. See, e.g., Sprint July 29, 2011 *Ex Parte* Letter at 2. Given the flexibility the Commission has under section 201(b), see, e.g., *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 91-213, Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd 16606, 16619-20, para. 44 (1997) (citing *Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996)), we also disagree that transitional rates above incremental cost are inherently unjust and unreasonable under section 201(b), as some contend. See, e.g., Google *et al.* Sept. 30, 2011 *Ex Parte* Letter, Attach. at 12-14.

<sup>1917</sup> See *supra* paras. 937-938 (discussing current disputes and alleged non-payment or under-payment of intercarrier compensation for VoIP traffic). See also, e.g., XO Section XV Comments at 34; GVNW Section XV Comments at 4; NECA *et al.* Section XV Comments at 6; State Members of the USF Joint Board Comments at 21.

(continued...)

transitional VoIP-PSTN intercarrier compensation framework provides the opportunity for some revenues in conjunction with other appropriate recovery opportunities adopted as part of comprehensive intercarrier compensation and universal service reform.<sup>1918</sup>

949. Many of these commenters also argue that comparable uses of the network should be subject to comparable intercarrier compensation charges.<sup>1919</sup> We agree with that policy principle, but observe that the intercarrier compensation regime applicable to traditional telephone service—which they seek to apply to VoIP-PSTN traffic—is at odds with that policy. The pre-existing intercarrier compensation regime imposes significantly different charges for the same use of the network depending upon, among other things, the jurisdiction of the traffic at issue.<sup>1920</sup> A more uniform intercarrier compensation framework for all uses of the network will arise from the end-point of reform adopted in this Order. For purposes of the transition, we conclude that our approach best balances the relevant policy considerations.<sup>1921</sup>

950. We also are unpersuaded by concerns that an intercarrier compensation regime for VoIP-PSTN traffic could lead to further arbitrage or undermine the Commission-established transition adopted

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Some VoIP providers state that they believe that full intercarrier compensation rates have applied to IP-originated or terminated traffic, *see, e.g.*, Cablevision-Charter Section XV Comments at 2 n.2; although, depending upon the nature of their wholesale agreements with long distance providers, VoIP providers might have limited direct knowledge of what compensation was paid for their traffic in some cases, *see, e.g.*, *Inter-carrier Compensation NPRM*, 16 FCC Rcd at 9644, para. 96 (discussing certain types of wholesale long distance agreements that incorporate flat, negotiated rates that do not vary with the intercarrier compensation charges actually paid by the IXC). Similarly, some LECs contend that full intercarrier compensation rates commonly have been paid for all VoIP traffic, *see, e.g.*, Apr. 6, 2011 Workshop Transcript, CC Docket No. 01-92 at 77-78 (filed Apr. 25, 2011); although many LECs contend that there has been no mechanism by which they could reliably identify which traffic was VoIP, *see, e.g.*, NECA *et al.* Section XV Comments at 5; PAETEC *et al.* Section XV Comments at 31-33; Windstream Section XV Comments at 7.

<sup>1918</sup> “As one investment analyst has recognized, if rural and mid-size LECs ‘can achieve adequate new cost recovery,’ then intercarrier compensation reform ‘could still be helpful by reducing regulatory uncertainties and *ameliorating the downside* caused by already-eroding ICC revenues (principally access charges).” Verizon Section XV Reply at 19-20 (quoting Rebecca Arbogast *et al.*, Stifel Nicolaus, *FCC Looks To Shift USF-ICC Reform Drive into Overdrive; August Order Eyed*, at 1 (Mar. 15, 2011) (emphasis added)).

<sup>1919</sup> *See, e.g.*, Cablevision-Charter Section XV Comments at 12; Missouri Small Telephone Company Group Section XV Comments at 3; Nebraska Rural Independent Companies Section XV Reply at 6-7, 9-10. Some commenters observe that in the *Access Charge Reform Order* the Commission cited ESPs’ different usage of the local network than IXCs in supporting continued application of the ESP exemption and contend that, by contrast, VoIP traffic uses the network in a manner as other traffic that historically has been subject to intercarrier compensation charges. *See, e.g.*, Hawaiian Telcom Section XV Comments at 8-9. The framework we adopt for VoIP-PSTN traffic is transitional, however, and such traffic will pay most of the same rates as all other traffic in the second year of reform. *See supra* Section XII.C.

<sup>1920</sup> *See supra* Section X.

<sup>1921</sup> *See, e.g.*, *Southwestern Bell Tel. Co. et al. v. FCC*, 153 F.3d 523 at 542 (8th Cir. 1998) (upholding Commission intercarrier compensation rules and concluding that “the FCC has made a rational choice regarding the treatment of ISPs from a number of alternatives that are each imperfect. When an agency has gone to considerable lengths to amass information, sift through the record for pertinent facts, and reach a temporary conclusion, it has not acted arbitrarily or capriciously.”).

for intercarrier compensation reform more broadly.<sup>1922</sup> An underlying assumption of those arguments is that the carriers delivering traffic for termination will be able to unilaterally determine the portion of their traffic to be subject to the VoIP-PSTN regime. As discussed in greater detail below, the implementation mechanisms for our approach protect against that outcome, both through protections that can be implemented in tariffs and through the option of negotiated agreements, subject to arbitration, regarding the portion of traffic subject to the VoIP-PSTN intercarrier compensation regime. We also permit LECs to include language in their tariffs to address the identification of VoIP-PSTN traffic, much as they do to identify the jurisdiction of traffic today.<sup>1923</sup>

951. States continue to play an important role under our prospective intercarrier compensation framework for VoIP-PSTN traffic, including arbitration of disputes between carriers seeking to enter alternative arrangements. However, we are not persuaded to leave regulation of intercarrier compensation for intrastate toll VoIP-PSTN traffic entirely to the states. Our transitional framework for VoIP-PSTN traffic reflects the fact that our comprehensive intercarrier compensation reforms are gradually moving away from jurisdictionalized intercarrier compensation charges that have led to arbitrage and marketplace distortions,<sup>1924</sup> and reflects the importance of a uniform, predictable transition away from historical intercarrier compensation regimes.<sup>1925</sup> At the same time, our universal service reforms continue to provide for an important state role, consistent with the basic underlying objectives of state commenters.<sup>1926</sup>

952. We also reject requests to immediately adopt a bill-and-keep methodology for VoIP traffic.<sup>1927</sup> Although this would clearly facilitate the Commission's transition away from existing intercarrier compensation regimes, we do not believe that the immediate adoption of bill-and-keep for all forms of VoIP-PSTN traffic appropriately balances other competing policy objectives. In particular, our approach to broader reform seeks a more measured transition away from carriers' reliance on intercarrier compensation as a significant revenue source.<sup>1928</sup> The immediate adoption of bill-and-keep for all VoIP-PSTN traffic would appear to be, in the aggregate, a more significant departure from the intercarrier compensation payments for VoIP traffic that have been made in the recent past.<sup>1929</sup> Our approach also

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<sup>1922</sup> See, e.g., Cablevision-Charter Section XV Comments at 5; PAETEC *et al.* Section XV Comments at 31-33; EarthLink Section XV Comments at 3; Bright House Section XV Reply at 5 & n.9; Cox Section XV Reply at 2-4; State Members July 14, 2011 *Ex Parte* Letter at 10.

<sup>1923</sup> See *infra* Section XIV.C.2.c.

<sup>1924</sup> In light of these concerns with intercarrier compensation charges that vary by jurisdiction, we thus disagree that this approach is inherently inconsistent with the Commission's treatment of VoIP in other contexts. See, e.g., State Members July 14, 2011 *Ex Parte* Letter at 10.

<sup>1925</sup> See *supra* Section XII.C.

<sup>1926</sup> See *supra* Sections VII-IX. See also, Letter from James Bradford Ramsay, General Counsel, NARUC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 96-45, 01-92 at 2 (filed Sept. 22, 2011); see generally NARUC Legislative Task Force Report on Federalism and Telecom, July 2005, [http://www.dps.state.ny.us/federalism\\_s0705.pdf](http://www.dps.state.ny.us/federalism_s0705.pdf).

<sup>1927</sup> See, e.g., CTIA Section XV Comments at 11; Google Section XV Comments at 8; MegaPath-Covad Section XV Comments at 5-8; Sprint Section XV Comments at 6-7; T-Mobile Section XV Comments at 9-12; VON Section XV Comments at 3-5; Vonage Section XV Comments at 3-13.

<sup>1928</sup> See *supra* Section XII.C.

<sup>1929</sup> See *supra* note 1917.

helps limit the initial burden that the intercarrier compensation reform recovery mechanism places on the Universal Service Fund.<sup>1930</sup>

953. Similarly, we conclude that other proposed VoIP-specific approaches to intercarrier compensation do not advance the relevant policy objectives as well as our approach. For example, some of the proposed approaches likely would be almost as significant a departure from the intercarrier compensation payments for VoIP traffic that have been made in the recent past as a bill-and-keep approach.<sup>1931</sup> Nor are such approaches compelled by section 706 of the 1996 Act, as some contend.<sup>1932</sup> Although we seek to ensure that our policies do not hinder the ongoing migration to all-IP networks, and take many actions in this Order to advance the goals of section 706, we also weigh the need to transition carriers away from reliance on intercarrier compensation revenues, which potentially help support some providers' deployment of broadband networks today. Other approaches, which would bring VoIP traffic within the intercarrier compensation regime at a future point in the glide path,<sup>1933</sup> would not increase marketplace certainty in the near term to the same extent as our framework. In sum, we believe that our transitional framework for VoIP-PSTN intercarrier compensation strikes the best balance among the relevant policy goals during the reform transition, while accounting for the flaws in the preexisting intercarrier compensation regimes and the overall direction of comprehensive intercarrier compensation reform.

#### **b. Legal Authority**

954. *Authority To Address VoIP-PSTN Traffic Under Section 251(b)(5).* Although the Commission has not classified interconnected VoIP services or similar one-way services<sup>1934</sup> as "telecommunications services" or "information services," VoIP-PSTN traffic nevertheless can be encompassed by section 251(b)(5).<sup>1935</sup> As discussed in greater detail above,<sup>1936</sup> section 251(b)(5) includes "the transport and termination of all telecommunications exchanged with LECs" with the exception of "traffic encompassed by section 251(g) . . . except to the extent that the Commission acts to bring that traffic within its scope."<sup>1937</sup> The Commission previously has recognized that interconnected VoIP

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<sup>1930</sup> See *supra* Section XIII.

<sup>1931</sup> See, e.g., Verizon Section XV Comments at 15-19. Similarly, approaches that would adopt reciprocal compensation charges for VoIP Traffic, see, e.g., Comcast Section XV Comments at 4, 13-14; XO Section XV Comments at 14, 19, 22-24, effectively could have as significant a result for many carriers, given the number of carriers exchanging reciprocal compensation traffic at \$0.0007 today in light of the ISP-bound traffic rules, see 2008 Order and ICC/USF FNPRM, 24 FCC Rcd at 6486-89, paras. 23-29.

<sup>1932</sup> See, e.g., Sprint July 29, 2011 *Ex Parte* Letter at 1-3 (arguing that imposing access charges on VoIP traffic would be inconsistent with section 706); Google *et al.* Sept. 30, 2011 *Ex Parte* Letter, Attach. at 9-11 (same). See also, e.g., Letter from Richard S. Whitt, Director and Managing Counsel, Telecom and Media Policy, Google, *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-92 *et al.* at 2-6 (filed Oct. 18, 2011) (Google Oct. 28, 2011 *Ex Parte* Letter) (contending that requiring intercarrier compensation payment for VoIP traffic could negatively impact certain providers' business models).

<sup>1933</sup> Public Knowledge *USF/ICC Transformation NPRM* Comments at 25 n.62.

<sup>1934</sup> See *supra* Section XIV.C.1.

<sup>1935</sup> We thus are not persuaded by claims that the prospective VoIP-PSTN intercarrier compensation regime must categorically exclude traffic from VoIP services that are claimed to be information services. See, e.g., Google Oct. 28, 2011 *Ex Parte* Letter at 6-7.

<sup>1936</sup> See *supra* Section XII.A.2.

<sup>1937</sup> 2008 Order and ICC/USF FNPRM, 24 FCC Rcd at 6482-83, paras. 15-16.

providers are providers of telecommunications.<sup>1938</sup> Moreover, the Commission has previously concluded that interconnected VoIP services involve “transmission of [voice] by aid of wire, cable, or other like connection” and/or “transmission by radio,”<sup>1939</sup> and went on to conclude that “[t]he telecommunications carriers involved in originating or terminating a [VoIP] communication via the PSTN are by definition offering ‘telecommunications.’”<sup>1940</sup> Further, although classification questions remain regarding retail VoIP services, commenters observe that the exchange of VoIP-PSTN traffic that is relevant to our intercarrier compensation regulations typically occurs between two telecommunications carriers, one or both of which are wholesale carrier partners of retail VoIP service providers.<sup>1941</sup> Nor does anything in the record persuade us that a different conclusion is warranted in the context of other VoIP-PSTN traffic.<sup>1942</sup>

955. *Authority To Adopt Transitional Rates for VoIP-PSTN Traffic.* The legal authority that enables us to specify transitional rates for comprehensive intercarrier compensation reform also enables us to adopt our transitional VoIP-PSTN intercarrier compensation framework pending the transition to bill-and-keep.<sup>1943</sup> For one, the Commission’s pre-existing regimes for establishing reciprocal compensation rates for section 251(b)(5) traffic have been upheld as lawful,<sup>1944</sup> and can be applied to non-toll VoIP-PSTN traffic as provided by our transitional intercarrier compensation rules. We also have authority to adopt the transitional framework for toll VoIP-PSTN traffic based on our rulemaking authority to implement section 251(b)(5).<sup>1945</sup> As discussed above,<sup>1946</sup> interpreting our rulemaking authority in this manner is consistent with court decisions recognizing that avoiding “market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule.”<sup>1947</sup>

<sup>1938</sup> *Interim Universal Service Contribution Methodology Order*, 21 FCC Rcd at 7539-40, para. 41.

<sup>1939</sup> *Id.* (quoting *VoIP 911 Order*, 20 FCC Rcd at 10261-62, para. 28).

<sup>1940</sup> *Id.*

<sup>1941</sup> See, e.g., Cablevision-Charter Section XV Comments at 7-8; CenturyLink Section XV Comments at 5-6; PAETEC *et al.* Section XV Comments at 37; Time Warner Cable Section XV Comments at 8; AT&T Section XV Reply at 23; Bright House Section XV Reply at 3 n.6. Whether the service the carrier is providing as an input to the retail VoIP service is an interexchange service or exchange access depends upon the particular facts. See, e.g., *AT&T IP-in-the-Middle Order*, 19 FCC Rcd at 7469-70, para. 19 n.80 (“Depending on the nature of the traffic, carriers such as commercial mobile radio service (CMRS) providers, incumbent LECs, and competitive LECs may qualify as interexchange carriers for purposes of [the access charge] rule.”).

<sup>1942</sup> Because our prospective VoIP-PSTN intercarrier compensation rules typically involves traffic exchanged between carriers, and because intercarrier compensation disputes have tended to involve all forms of VoIP traffic, we are not persuaded that the Commission should draw additional distinctions among traffic associated with different types of VoIP services, as some commenters recommend. See, e.g., Google *et al.* Sept. 30, 2011 *Ex Parte* Letter, Attach. at 4-6 (arguing that there is significant variability among VoIP services’ features and functions, and that intercarrier compensation should not apply to traffic associated with such services for example because of historical policies that information services generally should remain unregulated and the provisions of section 230 regarding the preservation of “the Internet and other interactive computer services, unfettered by Federal or State regulation”).

<sup>1943</sup> See *supra* Section XII.A.2.

<sup>1944</sup> See, e.g., *AT&T v. Iowa Utilities Board*, 525 U.S. 382, 384-85 (1999) (upholding the Commission’s authority to adopt a pricing methodology for section 251(b)(5) traffic); *Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010) (upholding the Commission’s reciprocal compensation regime for ISP-bound traffic).

<sup>1945</sup> See *supra* Section XII.A.2.

<sup>1946</sup> *Id.*

<sup>1947</sup> *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1106 (D.C. Cir. 2009) (quoting *Competitive Telecomm’s Ass’n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002)).



Sections 201 and 332 provide additional legal authority specifically for interstate traffic and all traffic exchanged with CMRS providers.<sup>1948</sup>

956. *Application of Section 251(g).* Additionally, as described above,<sup>1949</sup> section 251(g) supports our view that the Commission has authority to adopt transitional intercarrier compensation rules, preserving the access charge regimes that pre-dated the 1996 Act “until [they] are explicitly superseded by regulations *prescribed by the Commission*.”<sup>1950</sup> We reject the claims of some commenters that VoIP-PSTN traffic did not exist prior to the 1996 Act, and thus cannot be part of the access charge regimes “grandfathered” by section 251(g).<sup>1951</sup> This argument flows from a mistaken interpretation of section 251(g). The essential question under section 251(g) is not whether a particular service, or traffic involving a particular transmission protocol,<sup>1952</sup> existed prior to the 1996 Act.<sup>1953</sup> Rather, the question is whether there was a “pre-Act obligation relating to intercarrier compensation for” particular traffic exchanged between a LEC and “interexchange carriers and information service providers.”<sup>1954</sup>

957. *Pre-1996 Act Obligations.* Regardless of whether particular VoIP services are telecommunications services or information services, there are pre-1996 Act obligations regarding LECs’

<sup>1948</sup> See *supra* Section XII.A.2.

<sup>1949</sup> See *supra* paras. 763-766.

<sup>1950</sup> 47 U.S.C. § 251(g) (emphasis added).

<sup>1951</sup> See, e.g., MegaPath-Covad Section XV Comments at 7; Sprint Section XV Comments at 5-6.

<sup>1952</sup> VoIP traffic existed prior to the 1996 Act, although the record here does not reveal whether LECs were exchanging IP-originated or IP-terminated VoIP traffic at that time. See, e.g., Consolidated Section XV Reply at 9 (noting a 1996 American Carrier’s Telecommunication Association (“ACTA”) petition seeking Commission classification of VoIP telephony as a telecommunications service, which included a news report dated before the 1996 Act was enacted that “indicat[ed] that VoIP telephony had at that time been available for over a year”). Because we otherwise reject the claim that intercarrier compensation for VoIP-PSTN traffic is categorically excluded from section 251(g), we need not, and do not, consider further the nature and extent of VoIP traffic that existed prior to the 1996 Act.

<sup>1953</sup> Some commenters cite certain federal district court cases that reached a different conclusion than our statutory analysis above. See, e.g., MegaPath-Covad Section XV Comments at 7 n. 15 (citing *PAETEC Commc’ns, Inc. v. CommPartners, LLC*, CIV-A No. 08-0397, 2010 WL 1767193, at \*3 (D.D.C. Feb. 18, 2010); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm’n*, 461 F. Supp. 2d 1055, 1080 (E.D. Mo. 2006)). However, as other commenters observe, these outcomes conflict with those reached in other decisions. See, e.g., Cablevision-Charter Section XV Reply at 12-13 n.37 (citing state commission decisions). See also *supra* para. 937 (discussing different decisions by state commissions and courts). In any event, we are not bound by those prior decisions, and find our statutory analysis above to be most appropriate.

<sup>1954</sup> *WorldCom v. FCC*, 288 F.3d 429, 433-34 (D.C. Cir. 2002) (citing 47 U.S.C. § 251(g)). Indeed, the contrary interpretation would suggest that a wide range of traffic would have fallen outside the scope of access charges, and have been exclusively subject to section 251(b)(5) today. See, e.g., NATIONAL BROADBAND PLAN at 76 (discussing wireless technologies introduced since 1997); *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5698, para. 63 n.180 (2007) (observing that carriers are migrating to Multiprotocol Label Switching (MPLS)). Cf. Cablevision-Charter Section XV Reply at 13-14 (“No one could seriously contend, for example, that LECs upgrading their circuit-switches to soft switches subsequent to the 1996 Act somehow lost their right to assess access charges. Indeed, the Commission has made clear that the use of VoIP technology in and of itself does not exempt a service from access charges, concluding that AT&T’s IP-in-the-middle service “is subject to interstate access charges.”); GCI 2008 Comments at 14 (“GCI has provided telecommunications services under tariff using a combination of its own copper and fiber facilities, UNEs, and resale. More recently, GCI has also started offering the exact same tariffed services over its cable platform.”).

compensation for the provision of exchange access to an IXC or an information service provider.<sup>1955</sup> Indeed, the Commission has already found that toll telecommunications services transmitted (although not originated or terminated) in IP were subject to the access charge regime,<sup>1956</sup> and the same would be true to the extent that telecommunications services originated or terminated in IP.<sup>1957</sup> Similarly, to the extent that interexchange VoIP services are transmitted to the LEC directly from an information service provider, such traffic is subject to pre-1996 Act obligations regarding “exchange access,” although the access charges imposed on information service providers were different from those paid by IXCs.<sup>1958</sup> Specifically, under the ESP exemption,<sup>1959</sup> rather than paying intercarrier access charges, information service providers were permitted to purchase access to the exchange as end users, either by purchasing special access services or “pay[ing] local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices.”<sup>1960</sup> But although the nature of the charge is different from the access charges paid by IXCs, the Commission has always recognized that information-service providers providing interexchange services were obtaining exchange access from the LECs.<sup>1961</sup> Accordingly, because they were subject to these exchange access charges, interexchange

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<sup>1955</sup> Interexchange VoIP-PSTN traffic is subject to the access regime regardless of whether the underlying communication contained information-service elements.

<sup>1956</sup> *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457, 7466-70, paras. 14-19 (2004) (*IP-in-the-Middle Order*); *Prepaid Calling Card Order*, 21 FCC Rcd at 7300, para. 27.

<sup>1957</sup> As commenters observe, those access charge obligations did not depend upon the transmission protocol associated with the telecommunications service. *See, e.g.*, Cablevision-Charter Section XV Reply at 13-14; ITTA Section XV Reply at 410; GCI 2008 Comments at 13-14. Under Commission precedent, the presence of protocol processing in a service certainly could be relevant to determining whether it is a telecommunications service or an information service. *See, e.g.*, 47 C.F.R. § 64.702(a) (defining enhanced services).

<sup>1958</sup> 47 U.S.C. § 251(g). *See supra* paras. 763-766.

<sup>1959</sup> In developing the access charge regime, the Commission established a so-called “ESP exemption” because it recognized that certain “users who employ exchange service for jurisdictionally interstate communications, including enhanced service providers (ESPs), had “been paying the generally much lower business service rates” and “would experience severe rate impacts were we immediately to assess carrier access charges up on them.” *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Memorandum Opinion and Order, 97 FCC 2d 682, 715, para. 83 (1983) (*First Reconsideration of 1983 Access Charge Reform Order*); *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, CC Docket 87-215, Order, 3 FCC Rcd 2631, 2631, para. 2 n.8 (1988) (*ESP Exemption Order*).

<sup>1960</sup> *ESP Exemption Order*, 3 FCC Rcd at 2631, para. 2 n.8.

<sup>1961</sup> *See, e.g.*, Section 272(b)(1)’s “Operate Independently” Requirement for Section 272 Affiliates, WC Docket No. 03-228, CC Docket Nos. 96-149, 98-141, 96-149, 01-337, Report and Order, Memorandum Opinion and Order, 19 FCC Rcd 5102, 5111-12, para. 17 (2004); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Remand, 15 FCC Rcd 385, 406, para. 45 (1999), *aff’d in part and rev’d in part on other grounds*. *WorldCom v. FCC*, 246 F.3d 690 (D.C. Cir. 2001); *Enhanced Telemanagement, Inc. v. Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company*, File Nos. E-89-183, E-89-184, 11 FCC Rcd 19669, 19670-71, para. 3 (1996). Note that access services include both carrier’s carrier access charges and the subscriber line charge. *See, e.g.*, *Petitions of Qwest Corporation for Forbearance Pursuant To 47 U.S.C. § 160(C) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Memorandum Opinion and Order, 23 FCC Rcd 11729, 11747-48, para. 25 (2008). We note that the Commission at times has used the term “access charges” colloquially as synonymous with carrier’s carrier access charges, notwithstanding the fact that access charges actually encompass a broader category of charges. *Compare, e.g.*, *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241, 249-50, para. 23 (1983) (“Terms such as access, access service and access charges will be used in this *Third* (continued...)”).

information service traffic was subject to the over-arching Commission rules governing exchange access prior to the 1996 Act, and therefore subject to the grandfathering provision of section 251(g).

958. The D.C. Circuit's *WorldCom* decision, cited by some commenters, does not compel a different result.<sup>1962</sup> In *WorldCom*, the court considered whether dial-up, ISP-bound traffic was covered by section 251(g)'s grandfathering provision. Consistent with the language of section 251(g), the court focused on whether there was a "pre-Act obligation relating to intercarrier compensation for ISP-bound traffic" and found it "uncontested—and the Commission declared in the Initial Order"—that there was not.<sup>1963</sup> Although the court also stated that "[t]he best the Commission can do" in indentifying a pre-1996 Act obligation "is to point to pre-existing LEC obligations to provide interstate access for ISPs,"<sup>1964</sup> the discussion in the initial *ISP-Bound Traffic Order* cited by the court emphasized the uncertainty at that time regarding the regulatory classification of the functions provided by the carrier serving the ISP—i.e., whether it was providing local service, interexchange service, or exchange access.<sup>1965</sup> As the D.C. Circuit ultimately observed, the fact that the carrier serving the ISP was acting as a LEC—rather than an interexchange carrier or information service provider—would be dispositive that compensation for that traffic exchange could not be encompassed by section 251(g).<sup>1966</sup> Here, by contrast, there is no evidence that the exchange of toll VoIP-PSTN traffic inherently involves the exchange of traffic between two LECs. Moreover, we note that to the extent VoIP-PSTN traffic is not "toll" traffic, it is subject to the preexisting reciprocal compensation regime under section 251(b)(5) rather than the transitional framework for toll VoIP-PSTN traffic that we adopt in this Order.

959. *Other Proposed Approaches.* Based on the present record, and given the framework we adopt, we do not rely on the contention that the Commission has legal authority to adopt this regime because all VoIP-PSTN traffic should be treated as interstate.<sup>1967</sup> Some commenters contend that, under the analysis of the *Vonage Order*, VoIP services are subject to exclusive federal jurisdiction.<sup>1968</sup> As a

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*Report and Order* to encompass both end user and carrier's carrier charges.") with, e.g., *Inter-carrier Compensation FNPRM*, 20 FCC Rcd at 4688-89, para. 6 n.13 ("Although the access charge regime adopted in 1983 and contained in the Commission's Part 69 access charge rules includes charges that LECs impose on their subscribers, in this item we generally use the term 'access charges' to mean charges imposed by a LEC on another carrier").

<sup>1962</sup> See, e.g., Sprint Section XV Comments at 5-6.

<sup>1963</sup> *WorldCom*, 288 F.3d at 433-34.

<sup>1964</sup> *Id.* Despite mentioning the ESP exemption in the *ISP Remand Order*, the Commission did not rely on those exchange access regulations, including compensation obligations, that existed under that pre-1996 Act framework. *ISP Remand Order*, 16 FCC Rcd at 9164, paras. 27-28. Rather, it held that the exchange of such traffic was "information access" and encompassed by section 251(g) on that basis. *ISP Remand Order*, 16 FCC Rcd at 9171, para. 44.

<sup>1965</sup> *Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996; Inter-carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 at 3695, para. 9 (1999).

<sup>1966</sup> *WorldCom*, 288 F.3d at 433-34. See also, e.g., Consolidated Section XV Reply at 8.

<sup>1967</sup> See, e.g., ABC Plan, Attach. 5 at 18 (proposing that the Commission find that "all VoIP traffic . . . is inseverable and, therefore, interstate for jurisdictional purposes"). We do not prejudge how services might develop in the future, and how this analysis might apply at that time. At the same time, nothing in this Order alters the *status quo* with respect to the jurisdictional treatment of VoIP traffic or services under existing precedent.

<sup>1968</sup> See, e.g., XO Section XV Comments at 14-18; Verizon Section XV Comments at 19-31, Verizon Section XV Reply at 21.

threshold matter, the *Vonage Order* addressed a retail VoIP service.<sup>1969</sup> By contrast, VoIP-PSTN intercarrier compensation typically involves the exchange of traffic between two carriers, one (or both) of which are providing wholesale inputs to a retail VoIP service—not the retail VoIP service itself.<sup>1970</sup> In addition, under the framework adopted here, most default rates actually paid for toll VoIP-PSTN traffic—equal to interstate access rates—will be the same regardless of whether the VoIP-PSTN toll traffic were considered to be solely interstate or both interstate and intrastate. Commenters likewise contend that it is possible to make the distinctions necessary to implement such a framework, whether directly in some cases<sup>1971</sup> or through the use of proxies or factors or the like.<sup>1972</sup>

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<sup>1969</sup> *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22406-08, paras. 4-9 (2004) (*Vonage Order*). Nothing in this Order impacts the holding of the *Vonage Order*. Nor does anything in this item impact the holding of the *Kansas/Nebraska Contribution Order*. See *Universal Service Contribution Methodology; Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, WC Docket No. 06-122, Declaratory Ruling, 25 FCC Rcd 15651, 15652-53, para. 5 (2010) (*Kansas/Nebraska Contribution Order*). The *Kansas/Nebraska Contribution Order* performed the relevant preemption analysis for the limited purposes of evaluating state universal service contribution obligations for nomadic interconnected VoIP providers and, based on that analysis and considering that the Commission had already adopted a safe harbor assuming [64.9 percent] of VoIP revenues were intrastate for purposes of contributions to the federal universal service fund, concluded that they would not be preempted in certain circumstances. See generally *Kansas/Nebraska Contribution Order*, 25 FCC Rcd 15651.

<sup>1970</sup> See *supra* note 1941. For example, as cable operators explain, their retail VoIP provider partners with a LEC for the exchange of traffic with other carriers. See, e.g., Cablevision-Charter Section XV Comments at 7-8; Time Warner Cable Section XV Comments at 7-8; Bright House Section XV Reply at 3 n.6; Letter from Mary McManus, Senior Director, FCC and Regulatory Policy, Comcast, *et al.*, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 07-135, GN Docket No. 09-51 at 2 (filed Oct. 24, 2011) (Comcast *et al.* Oct. 24, 2011 *Ex Parte* Letter).

<sup>1971</sup> Some commenters contend that the challenges in identifying the jurisdiction of VoIP traffic – particularly on a call-by-call basis – arise to a greater extent for nomadic VoIP, while compliance with jurisdictionalized intercarrier compensation charges is comparatively more straightforward for certain facilities-based VoIP services. See, e.g., Cbeyond *et al.* Section XV Reply at 9-10; Rural LEC Section XV Group Section XV Comments at 4-5; Bright House *August 3 PN* Comments at 8.

<sup>1972</sup> There appears to be broad support for the principle that VoIP providers and their wholesale carrier partners can comply with an intercarrier compensation regime with charges that differ at least to some degree based on where the calls originate and terminate. See, e.g., ABC Plan, Attach. 1 at 10 (proposing intercarrier compensation rules for VoIP traffic that impose differing charges depending upon whether the traffic is toll traffic or traditional reciprocal compensation traffic). Even beyond that, a number of commenters contend that factors or traffic studies have proved workable in addressing the jurisdiction of other traffic and similar approaches can be used for VoIP-PSTN traffic as well. See, e.g., AT&T Section XV Reply at 20; Cbeyond *et al.* Reply at 10; Nebraska Rural Independent Companies Section XV Reply at 8; Pennsylvania PUC *August 3 PN* Comments at 22-23. We also note, for example, that “[t]he Commission has long endorsed the use of [percentage of interstate usage (PIU) factors] to determine the jurisdictional nature of traffic for access charge purposes.” *Prepaid Calling Card Order*, 21 FCC Rcd at 7302, para. 32. We do not adopt a jurisdictional safe harbor based on the safe harbor for interconnected VoIP providers’ universal service contributions, see, e.g., Cbeyond *et al.* *August 3 PN* Comments at 15, because that is based on a percentage of revenues, rather than a percentage of traffic, and also does not further differentiate between intrastate toll traffic and other intrastate traffic. Nor do we otherwise have data to justify setting an industry-wide jurisdictional safe harbor.

### c. Implementation

960. As discussed below, carriers may tariff charges at rates equal to interstate access rates for toll VoIP-PSTN traffic in federal or state tariffs but remain free to negotiate interconnection agreements specifying alternative compensation for that traffic instead.<sup>1973</sup> Other VoIP-PSTN traffic will be subject to otherwise-applicable reciprocal compensation rates. Because telephone numbers and other call detail information do not always reliably establish the geographic end-points of a call, we do not mandate their use. However, to address concerns about identifying VoIP-PSTN traffic, we allow LECs to include tariff language addressing that issue, much as they do to address jurisdiction questions today.

961. *Role of Tariffs.* During the transition, we permit LECs to tariff reciprocal compensation charges for toll VoIP-PSTN traffic equal to the level of interstate access rates.<sup>1974</sup> Although we are addressing intercarrier compensation for all VoIP-PSTN traffic under the section 251(b)(5) framework, we are doing so as part of an overall transition from current intercarrier compensation regimes—which rely extensively on tariffing specifically with respect to access charges—and a new framework more amenable to negotiated intercarrier compensation arrangements. We therefore permit LECs to file tariffs that provide that, in the absence of an interconnection agreement,<sup>1975</sup> toll VoIP-PSTN traffic will be subject to charges not more than originating<sup>1976</sup> and terminating interstate access rates. This prospective regime thus facilitates the benefits that can arise from negotiated arrangements<sup>1977</sup> without sacrificing the

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<sup>1973</sup> Consistent with the ABC Plan's proposal, nothing in our VoIP-PSTN intercarrier compensation framework alters or supersedes the reciprocal compensation rules for CMRS providers, including the intraMTA rule. ABC Plan, Attach. 1 at 10 n.6. *See also infra* Section XV.D.

<sup>1974</sup> CMRS providers currently are subject to detariffing, and nothing in our intercarrier compensation framework VoIP-PSTN traffic disrupts that regulatory approach. *See Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, Declaratory Ruling, 17 FCC Rcd 13192, 13198, para. 12 (2002) (*Sprint/AT&T Declaratory Ruling*), *petitions for review dismissed*, *AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. Cir. 2003). Under our permissive tariffing regime, providers likewise are free not to file federal and/or state tariffs for VoIP-PSTN traffic, and instead seek compensation solely through interconnection agreements (or, if they wish, to forgo such compensation).

<sup>1975</sup> We use the term “interconnection agreement” broadly in this context to encompass agreements that might not address all aspect of section 251's requirements beyond intercarrier compensation, and regardless of the terminology that the parties use to describe the arrangement. *See, e.g.*, Texas Statewide Telephone Cooperative Aug. 19, 2002 Reply at 4 (describing a “template Transport and Termination Agreement . . . developed at the direction of the Texas Public Utility Commission” that was an “abbreviated 251(b)(5) transport and termination agreement”).

<sup>1976</sup> As the Commission has observed, “section 251(b)(5) refers only to transport and termination of telecommunications, not to origination.” *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4713-14, para. 517. The Commission also has held that origination charges are inconsistent with section 251(b)(5). *See, e.g., Local Competition First Report and Order*, 11 FCC Rcd at 16016, para. 1042 (“Section 251(b)(5) specifies that LECs and interconnecting carriers shall compensate one another for termination of traffic on a reciprocal basis. This section does not address charges payable to a carrier that originates traffic. We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic.”). Although we consequently do not believe that a permanent regime for section 251(b)(5) traffic could include origination charges, on a transitional basis we allow the imposition of originating access charges in this context, subject to the phase-down and elimination of those charges pursuant to a transition to be specified in response to the FNPRM. *See infra* Section XVII.M. *See also USF/ICC Transformation NPRM*, 26 FCC Rcd at 4713-14, para. 517.

<sup>1977</sup> Both the Commission and commenters previously have considered deviating from a pure tariffing regime in favor of more expansive use of negotiated arrangements as part of intercarrier compensation reform. *See, e.g.*, (continued...)

revenue predictability traditionally associated with tariffing regimes.<sup>1978</sup> For interstate toll VoIP-PSTN traffic, the relevant language will be included in a tariff filed with the Commission, and for intrastate toll VoIP-PSTN traffic, the rates may be included in a state tariff.<sup>1979</sup> In this regard, we note that the terms of an applicable tariff would govern the process for disputing charges.<sup>1980</sup>

962. Contrary to some proposals, however, we do not require the use of particular call detail information to dispositively distinguish toll VoIP-PSTN traffic from other VoIP-PSTN traffic, given the recognized limitations of such information.<sup>1981</sup> For example, the Commission has recognized that telephone numbers do not always reflect the actual geographic end points of a call.<sup>1982</sup> Further, although our phantom traffic rules are designed to ensure the transmission of accurate information that can help enable proper billing of intercarrier compensation, standing alone, those rules do not ensure the transmission of sufficient information to determine the jurisdiction of calls in all instances.<sup>1983</sup> Rather, consistent with the tariffing regime for access charges discussed above, carriers today supplement call detail information as appropriate with the use of jurisdictional factors or the like when the jurisdiction of traffic cannot otherwise be determined.<sup>1984</sup> We find this approach appropriate here, as well.

963. We do, however, clarify the approach to identifying VoIP-PSTN traffic for purposes of complying with this transitional intercarrier compensation regime. Although intercarrier compensation rates for VoIP-PSTN traffic during the transition will differ from other rates for only a limited time, we recognize commenters' concerns regarding the mechanism to distinguish VoIP-PSTN traffic, and thus

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*Inter-carrier Compensation NPRM*, 16 FCC Rcd at 9656-57, para. 130. See also, e.g., AT&T *USF/ICC Transformation NPRM* Comments at 30-31 (advocating detariffing of access charges); AT&T Section XV Comments at 13-15; Verizon *Inter-carrier Compensation FNPRM* Comments at 6-14.

<sup>1978</sup> See, e.g., XO Section XV Comments at 32 (arguing that the Commission should ensure that terminating carriers have the right to assess intercarrier compensation charges for VoIP-PSTN traffic "even in the absence of an agreement so that VoIP providers cannot refuse to negotiate a reciprocal compensation agreement to avoid paying any rate for termination of their traffic"); NECA *et al.* Section XV Reply at 6 (arguing that small carriers can have difficulty getting larger carriers to come to the negotiating table at all).

<sup>1979</sup> We note that the Commission has, in the past, regulated services that were offered through state tariffs. See, e.g., *Wisconsin Public Service Commission*, 17 FCC Rcd 2051, 2060-71, paras. 31-65 (2002) (regulating BOCs' state-tariffed payphone access line rates); *Open Network Architecture Plans of the Bell Operating Companies*, 4 FCC Rcd 1, 162-71, paras. 309-25 (1988) (regulating state-tariffed ONA services in various respects).

<sup>1980</sup> See *supra* para. 700.

<sup>1981</sup> See, e.g., ABC Plan, Attach. 1 at 10; Joint Letter at 3.

<sup>1982</sup> See, e.g., *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123 & CC Docket No. 92-105, Order, 23 FCC Rcd 5707, 5712-13, paras. 9-10 (CGB Oct. 9, 2007); ABC Plan, Attach. 5 at 22. See also, e.g., CRUSIR *August 3 PN* Comments at 20-21; Sprint *August 3 PN* Comments at 17; CenturyLink Section XV Comments at 23; CTIA Section XV Comments at 9-10; TEXALTEL Section XV Comments at 2; Verizon Section XV Comments at 24; ZipDX Section XV Comments at 4.

<sup>1983</sup> See *supra* Section XI.B.

<sup>1984</sup> See *supra* para. 959. See also, e.g., Level 3 *August 3 PN* Comments at 25; NECA *et al.* *August 3 PN* Comments at 50; Bright House Section XV Comments at 5 n.7; CenturyLink Section XV Comments at 23; CTIA Section XV Comments at 10; XO Section XV Comments at 33; Letter from Charon Phillips, Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 1-2 (filed Mar. 13, 2007).

sought specific comment on that issue.<sup>1985</sup> In response, a number of commenters<sup>1986</sup> argued that the industry should be permitted to “work cooperatively,”<sup>1987</sup> to address this issue, recognizing that “[o]ver the years, carriers have developed reasonable methods for distinguishing between calls for billing purposes . . . and can be expected to do so here.”<sup>1988</sup> We agree that, “to help manage the transition” LECs should be permitted to incorporate specific tariff provisions in their intrastate tariffs<sup>1989</sup> that “could, for example, require carriers delivering traffic for termination to identify the percentage of traffic that is” subject to the transitional VoIP-PSTN intercarrier compensation regime “and to support those figures with traffic studies or other reasonable analyses that are subject to audit.”<sup>1990</sup> Just as such a tariffing framework already is used to address jurisdiction of traffic,<sup>1991</sup> such an approach is a reasonable tool (in addition to information the terminating LEC has about VoIP customers it is serving) to identify the relevant traffic subject to the VoIP-PSTN intercarrier compensation regime. In addition, one commenter noted the potential to rely on interconnected VoIP subscriber and wireline line count data from Form 477 to develop a safe harbor.<sup>1992</sup> Thus, as an alternative, we permit the LEC instead to specify in its intrastate tariff that the default percentage of traffic subject to the VoIP-PSTN framework is equal to the percentage of VoIP subscribers in the state based on the Local Competition Report, as released periodically,<sup>1993</sup>

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<sup>1985</sup> See *August 3 PN* at 17.

<sup>1986</sup> See, e.g., AT&T *et al. August 3 PN* Comments at 36; Comcast *August 3 PN* Comments at 20; NECA *et al. August 3 PN* Comments at 50-51; XO *August 3 PN* Comments at 10.

<sup>1987</sup> AT&T *et al. August 3 PN* Comments at 36.

<sup>1988</sup> NECA *et al. August 3 PN* Comments at 50. See also Vonage Section XV Reply at 14 (observing that although “[t]o date, there has not been a business, regulatory or other reason to justify developing a universal method for identifying VoIP traffic,” the industry likely will be able to identify “viable solutions that would make the identification of VoIP traffic relatively easy without requiring onerous or costly billing system changes” once it undertakes to do so).

<sup>1989</sup> As Comcast observes, the only context where there is a default VoIP-specific intercarrier compensation rate is with respect to intrastate toll VoIP-PSTN traffic. Comcast *August 3 PN* Comments at 20 n.57.

<sup>1990</sup> AT&T *et al. August 3 PN* Comments at 36. See also, e.g., XO Section XV Comments at 33 (observing that factors could be used to indicate the percentage of terminated traffic that is VoIP, much as is done in the industry for jurisdictional purposes today); Verizon Section XV Reply at 24 (citing “standard and reliable traffic factoring methods already used today for intercarrier compensation billing purposes” as well as “certifications” and “audits”); Comcast Section XV Reply at 11 (providers could certify the percentage of traffic that is VoIP, subject to auditing); XO *August 3 PN* Comments at 10 (asserting that “the Commission must ensure that LECs have the right to audit any factors or percentages that are self-provided by carriers delivering VoIP traffic to ensure they are accurate”).

<sup>1991</sup> As the Commission has observed, “in their tariffs, LECs require IXCs to report PIUs to identify the percentage of interstate traffic on interconnection trunks.” *Prepaid Calling Card Order*, 21 FCC Rcd at 7306, para. 32; see also Comcast *August 3 PN* Comments at 20. To the extent that the approach we adopt would not identify all variations in traffic in real time, see Cox Section XV Reply at 3-4, the record does not demonstrate this to be a more significant issue in the case of identification of VoIP-PSTN traffic than it would be with respect to the identification of the jurisdiction of traffic for which such approaches are used today.

<sup>1992</sup> Cox *August 3 PN* Comments at 7 (“Form 477 requires filers to identify their voice service lines by technology, and the proportion of voice service lines served by a particular technology is a good proxy for the proportion of long distance minutes served by that technology.”).

<sup>1993</sup> In particular, under this approach, the default percentage of VoIP-PSTN traffic in a state would be the total number of incumbent LEC and non-incumbent LEC VoIP subscriptions in a state divided by the sum of those reported VoIP subscriptions plus incumbent LEC and non-incumbent LEC switched access lines. See, e.g., IATD, Wir. Comp. Bur., *Local Telephone Competition: Status as of December 31, 2010*, Table 8 (rel. Oct. 2011). See also (continued...)

unless rebutted by the other carrier.<sup>1994</sup> Further, although we do not mandate other approaches as part of our tariffing regime, individual providers remain free to rely on signaling or call detail information,<sup>1995</sup> or other measures, to the extent that they enter alternative compensation arrangements through interconnection agreements.<sup>1996</sup> In particular, contrary to some suggestions, we do not require filing of certifications with the Commission regarding carriers' reported VoIP-PSTN traffic.<sup>1997</sup> Such certifications would be required from not only IXCs but also originating and terminating providers nationwide, even though these issues may be of little or no practical concern in states with intrastate access rates that already are at or near interstate rates. Given the likely significant overbreadth in the burden that would impose, we decline to adopt such a requirement.

964. Although we will allow tariffs during the transition to bill-and-keep, we reaffirm our decision in the *T-Mobile Order* that good-faith negotiations generally are preferable to tariffing as a means of implementing carriers' compensation obligations.<sup>1998</sup> In the *T-Mobile Order*, we addressed wireless termination tariffs that applied only in the absence of interconnection agreements.<sup>1999</sup> The Commission found that such tariffs were not precluded by the Act or preexisting Commission rules, but prohibited the use of such tariffs on a going-forward basis,<sup>2000</sup> recognizing that the section 251 and 252 framework of the Act, which encompassed the traffic at issue there, reflected a clear preference for negotiated arrangements.<sup>2001</sup> Nonetheless, under the circumstances here, we do not believe that the policies underlying the prohibition of wireless termination tariffs for non-access traffic in the *T-Mobile Order* requires us to prohibit use of tariffs for toll VoIP-PSTN traffic during the transition. Although we likewise are moving to facilitate negotiated arrangements for intercarrier compensation more broadly,

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Cox *August 3 PN Comments* at 7 (noting the availability of state-specific data). In the event that data are not available for the relevant state, the LEC may instead use the nationwide data.

<sup>1994</sup> Although some commenters assert that there is significant variability in the volume of VoIP-PSTN traffic carried provider-to-provider, *see, e.g., AT&T et al. August 3 PN Comments* at 36; *XO August 3 PN Comments* at 10, we observe that this "safe harbor" is optional on the part of the LEC imposing the charges, and also can be rebutted by the other carrier. In addition, the magnitude of the variability could itself make rebuttal easier, at least in some cases. *See, e.g., Verizon Section XV Reply* at 24 (noting that certain providers exclusively provide service using VoIP).

<sup>1995</sup> We recognize that signaling or call detail information could be a tool for identifying VoIP-PSTN traffic, and that some providers have reached agreements to use it in this way. *See, e.g., XO Section XV Comments* at 33; *Vonage Section XV Comments* at 13-14; *InCharge Systems August 3 PN Comments* at 1. Because there currently are no industry standards in this regard, however, we decline to mandate this approach industry-wide. *See, e.g., Level 3 August 3 PN Comments* at 13-14.

<sup>1996</sup> Thus, to the extent that some commenters are concerned about the burden of implementing particular approaches or otherwise view them as undesirable, *see, e.g., Time Warner USF/ICC Transformation NPRM Comments* at 16; *Consolidated August 3 PN Comments* at 22 n.30, *EarthLink August 3 PN Comments* at 15, they are free to negotiate alternatives that they view as less burdensome or more appropriate.

<sup>1997</sup> *See, e.g., Verizon Section XV Reply* at 24 ("[i]f there are additional concerns, the Commission could address VoIP traffic identification through certifications"); *Comcast August 3 PN Comments* at 20 ("the Commission should require providers to certify to the accuracy of the factors they supply for VoIP-originated traffic").

<sup>1998</sup> *See supra* Section XII.C.5

<sup>1999</sup> *T-Mobile Order*, 20 FCC Rcd at 4862-63, para. 13.

<sup>2000</sup> *Id.* at 4860-64, paras. 9-14.

<sup>2001</sup> *Id.* at 4863-64, para. 14.



significant portions of the legacy intercarrier compensation regime have traditionally relied on tariffs, and we believe flash cutting the whole industry to a new regime would be unduly disruptive. Further, in place of tariffing, the *T-Mobile Order* required CMRS providers to negotiate interconnection agreements in good faith subject to section 252 negotiation and arbitration processes at the request of incumbent LECs—a set of requirements that we have not extended more broadly.<sup>2002</sup> Thus, maintaining a continuing role for tariffs during the transition to a new intercarrier compensation framework is a reasonable approach. Further, CMRS providers had expressed concerns about potentially excessive rates in wireless termination tariffs.<sup>2003</sup> Here, rates are ultimately subject to Commission oversight, including the mandated reductions in those charges as part of comprehensive intercarrier compensation reform. We thus conclude that this approach strikes the right balance here.

965. *Reliance on Interconnection Agreements and SGATs.* As discussed above, our transitional intercarrier compensation framework permits tariffing of charges for toll VoIP-PSTN traffic, but permits carriers to negotiate agreements that reflect alternative rates.<sup>2004</sup> In this regard, we note that reciprocal compensation charges generally have been imposed through interconnection agreements or state-approved statements of generally available terms and conditions (SGATs),<sup>2005</sup> which carriers may accept in lieu of negotiating individual interconnection agreements.<sup>2006</sup> Various commenters also describe the benefits that can arise from an interconnection and intercarrier compensation framework that allows parties to negotiate mutually agreeable outcomes, rather than all parties being categorically bound to a single regime.<sup>2007</sup> Likewise, the interconnection and intercarrier compensation framework adopted in sections 251 and 252 of the 1996 Act reflect a policy favoring negotiated agreements, where possible.

966. We recognize the concerns of some commenters that instances of disparate negotiating leverage can occur and that, absent an appropriate regulatory backstop, a regime purely relying on commercial negotiations could systematically disadvantage providers with limited negotiating

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<sup>2002</sup> We deny requests to reconsider the *T-Mobile Order* above. See *supra* Section XII.C.5.b. Some commenters also have asked the Commission to extend the *T-Mobile Order* requirement that parties negotiate and arbitrate agreements pursuant to the section 252 framework to additional circumstances, and we seek comment on those requests in the FNPRM. See *supra* para 1323.

<sup>2003</sup> *T-Mobile Order*, 20 FCC Rcd at 4855-56, para. 1. See also T-Mobile USA, Inc. *et al.* Petition for Declaratory Ruling: Lawfulness of Incumbent Local Exchange Carrier Wireless Termination Tariffs, CC Docket Nos. 01-92, 95-185, 96-98, at 5-6 (filed Sept. 6, 2002).

<sup>2004</sup> In the case of incumbent LECs, they must negotiate in good faith in response to requests for agreements addressing reciprocal compensation for VoIP-PSTN traffic. See 47 U.S.C. § 251(c)(1).

<sup>2005</sup> See, e.g., *Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., For Authorization to Provide In-Region, InterLATA Services in Connecticut*, CC Docket No. 01-100, Memorandum Opinion and Order, 16 FCC Rcd 14147, 14176, para. 67 (2001) (noting the inclusion of reciprocal compensation in the SGAT); *Application of Bellsouth Corporation, Bellsouth Telecommunications, Inc., and Bellsouth Long Distance, Inc., For Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20599, para. 300 (1998) (same).

<sup>2006</sup> See, e.g., *Core Communications, Inc. v. Verizon Maryland, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 7962, 7971, para. 24 (2003) (explaining that Core accepted the terms of Verizon's Maryland SGAT; Core and Verizon signed a schedule to the SGAT entitled "Request for Interconnection;" and, therefore, the Maryland SGAT served as the parties' interconnection agreement).

<sup>2007</sup> See, e.g., RNK Communications Section XV Comments at 8; Verizon Section XV Comments at 13-14; Bandwidth.com *USF/ICC Transformation NPRM* Reply at 11, 15-17. As discussed above, certain state commissions also have relied on negotiated agreements for intercarrier compensation for the exchange of VoIP traffic. See *supra* para. 937.

leverage.<sup>2008</sup> These concerns arise in part based on the variations in size and make-up of the customers of different networks, and in part based on certain underlying legal requirements, including the general policy against blocking traffic and the lack of a statutory compulsion for certain entities to enter interconnection agreements.<sup>2009</sup>

967. Our transitional regime for VoIP-PSTN intercarrier compensation accommodates these disparities in several ways. For one, the ability to tariff these charges ensures that LECs have the opportunity to obtain the intercarrier compensation provided for by our rules. In addition, the section 252 framework applicable to interconnection agreements provides procedural protections. For example, it provides carriers the opportunity, outside the tariffing framework, to specify a mutually-agreeable approach for determining the amount of traffic that is VoIP-PSTN traffic.<sup>2010</sup> To this end, carriers could include an alternative approach in a state-approved SGAT or negotiate such an approach as part of an interconnection agreement. To the extent that the parties pursue a negotiated agreement but cannot agree upon the particular means of determining the amount of traffic that is VoIP-PSTN traffic, this can be subject to arbitration. Although most incumbent LECs are subject to this duty by virtue of the Act, while other carriers, such as competitive LECs, are not,<sup>2011</sup> we note that the Commission's rules already

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<sup>2008</sup> See, e.g., Cox Section XV Reply at 5 n.10; Nebraska Rural Independent Companies Section XV Reply at 16-17; PAETEC *et al.* Section XV Reply at 18-19.

<sup>2009</sup> See, e.g., NECA *et al.* Section XV Comments at 30; Cox Section XV Reply at 5 n.10; Nebraska Rural Independent Companies Section XV Reply at 16-17; PAETEC *et al.* Section XV Reply at 18-19; XO *USF/ICC Transformation NPRM* Comments at 27. For example, IXC's, which pay access charges today, are not compelled to negotiate interconnection agreements subject to state arbitration under the terms of section 252 of the Act. See 47 U.S.C. § 252.

<sup>2010</sup> The record reveals a variety of alternatives for how providers might identify such traffic, including some in place in arrangements between particular providers today. For example, XO reports that, pursuant to some agreements addressing intercarrier compensation for VoIP traffic, it uses the JIP field on the call record to identify VoIP traffic. XO Section XV Comments at 33. See also Vonage Section XV Comments at 13-14 (noting possibility of including an indicator in signaling or billing information to identify VoIP traffic); *Inter-carrier Compensation FNPRM*, 20 FCC Rcd at 4743-44, para. 133 n.384 (noting Level 3's proposal to use "the Originating Line Information (OLI), also known as ANI II, SS7 call set-up parameter to identify IP-enabled services traffic"). Alternatively, commenters also identify the potential to use factors or ratios—much as is done for jurisdictional purposes today—as a means of identifying the portion of overall traffic that is (or reasonably is considered to be) VoIP-PSTN traffic. See, e.g., XO Section XV Comments at 33 (observing that factors could be used to indicate the percentage of terminated traffic that is VoIP, much as is done in the industry for jurisdictional purposes today); Verizon Section XV Reply at 24 (citing "standard and reliable traffic factoring methods already used today for intercarrier compensation billing purposes" as well as "certifications" and "audits"); Comcast Section XV Reply at 11 (providers could certify the percentage of traffic that is VoIP, subject to auditing). To the extent that these approaches would not identify all variations in traffic in real time, see Cox Section XV Reply at 3-4, the record does not demonstrate this to be a more significant issue in the case of identification of VoIP-PSTN traffic than it would be with respect to the identification of the jurisdiction of traffic today. Further, to the extent that some commenters are concerned about the burden of implementing particular approaches, see, e.g., Time Warner Comments at 16, they are free to negotiate alternatives that they view as less burdensome. See, e.g., Vonage Section XV Reply at 14 (observing that although "[t]o date, there has not been a business, regulatory or other reason to justify developing a universal method for identifying VoIP traffic," the industry likely will be able to identify "viable solutions that would make the identification of VoIP traffic relatively easy without requiring onerous or costly billing system changes" once it undertakes to do so).

<sup>2011</sup> See, e.g., *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended et al.*, WC Docket No. 10-143, GN Docket No. 09-51, CC Docket No. 01-92, Declaratory Ruling, 26 FCC Rcd 8259 (2011); 47 U.S.C. § 252 (expressly addressing only state arbitration of interconnection agreements involving incumbent LECs).

anticipate the possibility that two non-incumbent LECs might elect to bring a reciprocal compensation dispute before a state for arbitration under the section 252 framework.<sup>2012</sup> To the extent that a state fails to arbitrate a dispute regarding VoIP-PSTN intercarrier compensation, it will be subject to Commission arbitration.<sup>2013</sup>

968. *Scope of Charges Imposed by Retail VoIP Providers' LEC Partners.* Some commenters express concern that, absent Commission clarification, certain LECs that provide wholesale inputs to retail VoIP services might not be able to collect all the same intercarrier compensation charges as LECs relying entirely on TDM networks.<sup>2014</sup> In particular, providers cite disputes arising from their use of IP technology as well as the structure of the relationship between retail VoIP service providers and their wholesale carrier partners.<sup>2015</sup> For the reasons described above, we believe a symmetric approach to VoIP-PSTN intercarrier compensation is warranted for all LECs.<sup>2016</sup> One of the goals of our reform is to promote investment in and deployment of IP networks. Although we believe that our comprehensive reforms best advance this goal, during the transition we do not want to disadvantage providers that already have made these investments. Consequently, we allow providers that have undertaken or choose to undertake such deployment the same opportunity, during the transition, to collect intercarrier compensation under our prospective VoIP-PSTN intercarrier compensation regime as those providers that have not yet undertaken that network conversion.<sup>2017</sup> Further, recognizing that these specific questions have given rise to disputes, we believe that addressing this issue under our transitional intercarrier compensation framework will reduce uncertainty and litigation, freeing up resources for investment and innovation.<sup>2018</sup> We therefore adopt rules clarifying LECs' ability to impose charges in such circumstances under our transitional regime, as discussed below.

969. Our transitional VoIP-PSTN intercarrier compensation rules focus specifically on whether the exchange of traffic occurs in TDM format (and not in IP format), without specifying the technology used to perform the functions subject to the associated intercarrier compensation charges. We thus adopt rules making clear that origination and termination charges may be imposed under our transitional intercarrier compensation framework, including when an entity "uses Internet Protocol facilities to transmit such traffic to [or from] the called party's premises."<sup>2019</sup>

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<sup>2012</sup> See, e.g., 47 C.F.R. § 51.711(a)(2) ("In cases where both parties are incumbent LECs, *or neither party is an incumbent LEC*, a state commission shall establish the symmetrical rates for transport and termination based on the larger carrier's forward-looking costs.") (emphasis added).

<sup>2013</sup> See 47 C.F.R. §§ 51.801, 51.803.

<sup>2014</sup> See, e.g., Comcast *August 3 PN* Comments at 5-8; NCTA *August 3 PN* Comments at 17-19; Time Warner Cable *August 3 PN* Comments at 9-10.

<sup>2015</sup> See, e.g., Comcast *August 3 PN* Comments at 5-8; NCTA *August 3 PN* Comments at 17-19; Time Warner Cable *August 3 PN* Comments at 9-10.

<sup>2016</sup> See *supra* para. 942.

<sup>2017</sup> See, e.g., Level 3 *August 3 PN* Comments at 23; NCTA *August 3 PN* Comments at 17-19; Time Warner Cable *August 3 PN* Comments at 9.

<sup>2018</sup> See, e.g., Comcast *August 3 PN* Comments at 6; NCTA *August 3 PN* Comments at 18-19; Time Warner Cable *August 3 PN* Comments at 9; Letter from Matthew A. Brill, counsel for Time Warner Cable, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92; WC Docket Nos. 10-90, 07-135, 05-337; GN Docket No. 09-51 at 1-2 (filed Sept. 21, 2011) (Time Warner Cable-Cox Sept. 21, 2011 *Ex Parte* Letter).

<sup>2019</sup> Letter from Mary McManus, Comcast, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45; WC Docket Nos. 10-90, 07-135, 05-337, 03-109; GN Docket No. 09-51, Attach. 1 (Proposed Rule Revisions) at 2 (filed Sept. 22, 2011) (Comcast Sept. 22, 2011 *Ex Parte* Letter).

970. With respect to the issue of whether particular functions are performed by the wholesale LEC or its retail VoIP partner, we recognize that under the Commission's historical approach in the access charge context, when relying on tariffs, LECs have been permitted to charge access charges to the extent that they are providing the functions at issue.<sup>2020</sup> When multiple providers jointly provided access, the Commission was concerned that, for example, permitting a single competitive LEC to impose via tariff all the same charges as an incumbent LEC, regardless of the functions that competitive LEC performs, could result in double billing.<sup>2021</sup> In light of the policy considerations implicated here, we adopt a different approach to address concerns about double billing.<sup>2022</sup> As discussed above, we believe that a symmetrical approach to VoIP-PSTN intercarrier compensation is the best policy,<sup>2023</sup> and thus believe that competitive LECs should be entitled to charge the same intercarrier compensation as incumbent LECs do under comparable circumstances. Because the Commission has not broadly addressed the classification of VoIP services, however, retail VoIP providers that take the position that they are offering unregulated services therefore are not carriers that can tariff intercarrier compensation charges. Consequently, just as retail VoIP providers rely on wholesale carrier partners for, among other things, interconnection, access to numbers, and compliance with 911 obligations—a type of arrangement the Commission has endorsed in the past<sup>2024</sup>—so too do they rely on wholesale carrier partners to charge tariffed intercarrier compensation charges. Given these distinct circumstances, we adopt rules that permit a LEC to charge the relevant

<sup>2020</sup> As the Commission held in the *Eighth Report and Order*, “our long-standing policy with respect to incumbent LECs is that they should charge only for those services that they provide” and “[w]e believe that a similar policy should apply to competitive LECs.” *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers; Petition of Z-Tel Communications, Inc. for Temporary Waiver of Commission Rule 61.26(d) To Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, CC Docket No. 96-262, CCB/CPD File No. 01-19, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9118-19, para. 21 (2004) (*Eighth Report and Order*). Thus, for example, the Commission clarified that “the competing incumbent LEC switching rate is the end office switching rate when a competitive LEC originates or terminates calls to end-users and the tandem switching rate when a competitive LEC passes calls between two other carriers. Competitive LECs also have, and always had, the ability to charge for common transport when they provide it, including when they subtend an incumbent LEC tandem switch. Competitive LECs that impose such charges should calculate the rate in a manner that reasonably approximates the competing incumbent LEC rate.” *Id.*

<sup>2021</sup> This is because *each* of the LECs potentially could impose the full transport and termination charges on IXC— even though each was providing only part of those functions—and because they are tariffed charges, the IXC has no way to avoid them. *Eighth Report and Order*, 19 FCC Rcd at 9118-19, para. 21.

<sup>2022</sup> As discussed above, we bring all access traffic within section 251(b)(5), and the Commission had not previously addressed LECs' rights to tariff such charges in that context. Nonetheless, for convenience, our transitional intercarrier compensation framework builds upon rules, or rule language, from the access charge context in a number of ways, and we therefore modify aspects of that language in the manner discussed above, based on the record received on this issue. *See, e.g., USF/ICC Transformation NPRM*, 26 FCC Rcd at 4747-48, para. 613 (seeking comment on how to administer any approach to VoIP intercarrier compensation, including any aspect of existing law that would need to be addressed); *id.* at 4748-49, para. 616 (seeking comment on how to administer an approach adopting VoIP-specific intercarrier compensation rates).

<sup>2023</sup> *See supra* paras. 942, 967.

<sup>2024</sup> *See, e.g., IP-Enabled Services Order*, 20 FCC Rcd at 10267, para. 38. Given the Commission's endorsement of these arrangements, we find these circumstances distinguishable from those in the CMRS context, where the Commission prohibited CMRS providers from partnering with competitive LECs to collect access charges in the absence of a contract with the IXC. *See, e.g., Time Warner Cable-Cox* Sept. 21, 2011 *Ex Parte* Letter at 2. We thus reject claims that there is no basis for distinguishing the historical treatment of CMRS providers from our actions in this context. *See, e.g., Letter from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135; CC Docket No. 01-92; GN Docket No. 09-51, at 4-5 (filed Oct. 21, 2011) (AT&T Oct. 21, 2011 Ex Parte Letter).*

intercarrier compensation for functions performed by it and/or by its retail VoIP partner,<sup>2025</sup> regardless of whether the functions performed or the technology used correspond precisely to those used under a traditional TDM architecture.<sup>2026</sup> However, our rules include measures to protect against double billing,<sup>2027</sup> and we also make clear that our rules do not permit a LEC to charge for functions performed neither by itself or its retail service provider partner.<sup>2028</sup>

971. Our approach is supported by the fact that we are bringing all traffic within section 251(b)(5). Under Commission precedent in that context, to the extent that a competitive LEC's rates were set based on the incumbent LEC's reciprocal compensation charges, the Commission's rules were not as limiting regarding the scope of those reciprocal compensation charges as historically was the case in the access charge context.<sup>2029</sup> Indeed, in addition to tariffing, providers also remain free to negotiate

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<sup>2025</sup> Going back to dial-up ISP traffic, when two telecommunications carriers exchanged traffic subject to section 251(b)(5) this was subject to intercarrier compensation even though it was an input into a connection to the Internet. *See generally ISP Remand Order*, 16 FCC Rcd 9151. Just as that order did not involve imposing intercarrier compensation requirements on the Internet, we likewise reject claims that permitting the LEC partners of a retail VoIP provider to charge the same intercarrier compensation as other LECs would be broadly imposing access charges on the Internet. *See, e.g., AT&T Oct. 21, 2011 Ex Parte Letter* at 5-6.

<sup>2026</sup> We note that, notwithstanding our rules, to the extent that these charges are imposed via tariff, a carrier may not impose charges other than those provided for under the terms of its tariff. *See, e.g., AT&T v. Ymax*, 26 FCC Rcd 5742 (2011).

<sup>2027</sup> *See Appendix A. See also, e.g., Comcast Sept. 22, 2011 Ex Parte Letter*, Attach. 1 at 2 (proposing limits to the total charges that a LEC and an affiliated or unaffiliated provider assess for jointly transporting and terminating traffic); *id.* (proposing limitations on when a competitive LEC could charge for certain services, depending on whether it is listed in the Number Portability Administration Center database as providing the calling party or dialed number); Comcast Oct. 5, 2011 *Ex Parte Letter* Attach. at 1 (same); Comcast *et al.* Oct. 24, 2011 *Ex Parte Letter* at 3 (discussing ways to protect against double billing or arbitrage).

<sup>2028</sup> *Cf. AT&T v. Ymax*, 26 FCC Rcd at 5757, 5758-59, paras. 41, 44 & n.120; Level 3 *August 3 PN Comments* at 21 (distinguishing its proposed approach to symmetry for imposing access charges from the *Ymax* decision, which was based on "the specific configuration of YMax's network architecture"); Level 3 *August 3 PN Comments* at 23 (advocating that LECs should be precluded, "for example, from receiving end office compensation for service provided to the calling or called party by another carrier"). Thus, although access services might functionally be accomplished in different ways depending upon the network technology, the right to charge does not extend to functions not performed by the LEC or its retail VoIP service provider partner. We thus reject claims that it is unreasonable for an IXC to pay for the functions that are performed pursuant to the intercarrier compensation framework, including the rate transition, we adopt in this Order. *See, e.g., AT&T Oct. 21, 2011 Ex Parte Letter*.

<sup>2029</sup> *See, e.g., Local Competition First Report and Order*, 11 FCC Rcd at 16040-41, paras. 1085-86 (describing the presumption of symmetry in reciprocal compensation rates); *id.* at 16040, para. 1085 (observing that this approach "is consistent with section 252(d)(2)(B)(ii), which prohibits 'establishing with particularity the additional costs of transporting or terminating calls'"). Although state arbitrations could set reciprocal compensation rates that "that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch," *id.* at 16042, para. 1090, within that framework, the Commission did not more narrowly limit competitive LECs and CMRS providers to charging only for the functions they provide to the same degree as in the access charge context. *See, e.g., id.* (directing state commission to "consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch"); *id.* at 16042-43, para. 1091 (recognizing that carriers with different network architectures than the incumbent LEC would charge the same rate as the incumbent LEC absent a showing "that the costs of efficiently configured and operated systems are not symmetrical and justify different compensation rates, instead of being based on competitors' network architectures").

compensation arrangements for this traffic through interconnection agreements, and to define the scope of charges by mutual agreement or, if relevant, arbitration.

**d. Other Issues**

**(i) Interconnection and Traffic Exchange**

972. *Use of Section 251(c)(2) Interconnection Arrangements.* Although we bring all VoIP-PSTN traffic within section 251(b)(5), and permit compensation for such arrangements to be addressed through interconnection agreements, we recognize that there is potential ambiguity in existing law regarding carriers' ability to use existing section 251(c)(2) interconnection facilities to exchange VoIP-PSTN traffic, including toll traffic. Consequently, we make clear that a carrier that otherwise has a section 251(c)(2) interconnection arrangement with an incumbent LEC is free to deliver toll VoIP-PSTN traffic through that arrangement, as well, consistent with the provisions of its interconnection agreement. The Commission previously held that section 251(c)(2) interconnection arrangements may not be used solely for the transmission of interexchange traffic because such arrangements are for the exchange of "telephone exchange service" or "exchange access" traffic – and interexchange traffic is neither.<sup>2030</sup> However, as long as an interconnecting carrier is using the section 251(c)(2) interconnection arrangement to exchange some telephone exchange service and/or exchange access traffic, section 251(c)(2) does not preclude that carrier from relying on that same functionality to exchange other traffic with the incumbent LEC, as well. This interpretation of section 251(c)(2) is consistent with the Commission's prior holding that carriers that otherwise have section 251(c)(2) interconnection arrangements are free to use them to deliver information services traffic, as well.<sup>2031</sup> Likewise, it is consistent with the Commission's interpretation of the unbundling obligations of section 251(c)(3), where it held that, as long as a carrier is using an unbundled network element (UNE) for the provision of a telecommunications service for which UNEs are available, it may use that UNE to provide other services, as well.<sup>2032</sup> With respect to the broader use of section 251(c)(2) interconnection arrangements, however, it will be necessary for the interconnection agreement to specifically address such usage to, for example, address the associated compensation.<sup>2033</sup>

973. *No Blocking.* In addition to the protections discussed above to prevent unilateral actions disruptive to the transitional VoIP-PSTN intercarrier compensation regime, we also find that carriers' blocking of VoIP calls is a violation of the Communications Act and, therefore, is prohibited just as with the blocking of other traffic.<sup>2034</sup> As such, it is appropriate to discuss the Commission's general policy

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<sup>2030</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 15598-99, paras. 190-91.

<sup>2031</sup> *Id.* at 15990, para. 995 ("We also conclude that telecommunications carriers that have interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3), may offer information services through the same arrangement, so long as they are offering telecommunications services through the same arrangement as well.").

<sup>2032</sup> *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2550, para. 29 n.83 (2005) (*Triennial Review Remand Order*).

<sup>2033</sup> For example, this would include provisions addressing the intercarrier compensation for any toll VoIP-PSTN traffic delivered via a section 251(c)(2) interconnection arrangement. We note that some carriers appear to have implemented such an approach already. *See, e.g.*, Level 3 Aug. 18, 2008 *Ex Parte* Letter, Attach. 1, Part C at 2 (Level 3-Embarq interconnection agreement providing that: "After the Parties implement interconnection arrangements for the exchange of Local Traffic, ISP-Bound Traffic, interLATA traffic and intraLATA traffic over the same interconnection trunks, Level 3 may also send VOIP Traffic, as defined below, over those trunks").

<sup>2034</sup> *See supra* para. 734.

against the blocking of such traffic.<sup>2035</sup> As the Commission has long recognized, permitting blocking or the refusal to deliver voice telephone traffic,<sup>2036</sup> whether as a means of “self-help” to address perceived unreasonable intercarrier compensation charges or otherwise, risks “degradation of the country’s telecommunications network.”<sup>2037</sup> Consequently, “the Commission, except in rare circumstances[,] . . . does not allow carriers to engage in call blocking”<sup>2038</sup> and “previously has found that call blocking is an unjust and unreasonable practice under section 201(b) of the Act.”<sup>2039</sup> Although the Commission generally has not classified VoIP services, as discussed above, the exchange of VoIP-PSTN traffic implicating intercarrier compensation rules typically involves two carriers.<sup>2040</sup> As a result, those carriers are directly bound by the Commission’s general prohibition on call blocking with respect to VoIP-PSTN traffic, as with other traffic.

974. We recognize, however, that blocking also could be performed by interconnected VoIP providers, or by providers of “one-way” VoIP service that allows customers to receive calls from, or place calls to the PSTN, but not both. Just as call blocking concerns regarding interexchange carriers and wireless providers arose in an effort to avoid high access charges, VoIP providers likewise could have incentives to avoid such rates, which they would pay either directly or through the rates they pay for wholesale long distance service.<sup>2041</sup> If interconnected VoIP services or one-way VoIP services are telecommunications services, they already are subject to restrictions on blocking under the Act. If such services are information services,<sup>2042</sup> we exercise our ancillary authority and prohibit blocking of voice traffic to or from the PSTN by those providers just as we do for carriers.<sup>2043</sup>

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<sup>2035</sup> The Commission has sought comment on whether a shift from a tariffing regime to a regime relying on commercial arrangements for intercarrier compensation could create incentives for blocking. *Inter-carrier Compensation NPRM*, 16 FCC Rcd at 9656-57, para. 130.

<sup>2036</sup> By this, we mean “block[ing], chok[ing], reduc[ing] or restrict[ing] traffic in any way.” *Call Blocking Declaratory Ruling*, 22 FCC Rcd 11629, 11631, para. 6.

<sup>2037</sup> *Access Charge Reform Seventh R&O and NPRM*, 16 FCC Rcd at 9932-33 para. 24.

<sup>2038</sup> *Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11632, para. 7. As the Commission noted, the *Call Blocking Declaratory Ruling* had “no effect on the right of individual end users to choose to block incoming calls from unwanted callers.” *Id.* at para. 7 n.21.

<sup>2039</sup> *Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11631, para. 5.

<sup>2040</sup> See *supra* note 1969 and accompanying text.

<sup>2041</sup> See, e.g., *Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11629.

<sup>2042</sup> We do not decide the classification of such services in this Order.

<sup>2043</sup> For example, an interexchange carrier that is a wholesale partner of such a VoIP provider could evade our directly-applicable restrictions on blocking under section 201 of the Act by having the blocking performed by the VoIP provider instead. An IXC generally would be prohibited from refusing to deliver calls to telephone numbers associated with high intercarrier compensation charges. If that IXC’s VoIP provider wholesale customer were free to block calls to such numbers, the IXC thus could evade the directly-applicable restrictions on blocking (and the VoIP provider would benefit from lower wholesale long distance costs to the extent that, for example, its agreement provided for a pass-through of the intercarrier compensation charges paid by the IXC). In addition, blocking or degrading of a call from a traditional telephone customer to a customer of a VoIP provider, or vice-versa, would deny the traditional telephone customer the intended benefits of telecommunications interconnection under section 251(a)(1).

(ii) **Other Pending Matters**

975. Our conclusions in this Order effectively address, in whole or in part, certain pending petitions. For one, Global NAPS filed a petition for declaratory ruling regarding the manner and extent to which VoIP traffic could be subject to access charges generally, and intrastate access charges in particular.<sup>2044</sup> AT&T also filed a petition requesting that, on a transitional basis, the Commission declare that interstate and intrastate access charges may be imposed on VoIP traffic in certain circumstances, as well as limited waivers that would enable it to offset forgone revenues from voluntary reductions in intrastate terminating access charges.<sup>2045</sup> In addition, Vaya Telecom (Vaya) filed a petition seeking a declaration that “a LEC’s attempt to collect intrastate access charges on LEC-to-LEC VoIP traffic exchanges is an unlawful practice.”<sup>2046</sup> Because our transitional intercarrier compensation framework for VoIP-PSTN declines to apply all existing intercarrier compensation regimes as they currently exist, Global NAPS’s and Vaya’s petitions are granted in part and AT&T’s is denied in part.<sup>2047</sup> To the extent that AT&T proposes a specific approach for alternative rate reforms and revenue recovery, we find the mechanisms adopted in this Order to be more appropriate for the reasons discussed above, and thus deny its requests in that regard.<sup>2048</sup> Further, Grande filed a petition seeking a Commission declaration that carriers categorically may rely on a customer’s certification that traffic originated in IP and therefore is enhanced and not subject to access charges.<sup>2049</sup> To the extent that this would deviate from the regime we adopt, the petition is denied.<sup>2050</sup> We decline to address the classification of VoIP services generally at this time, nor do we otherwise elect to grant the other requests for declaratory rulings raised by the Global NAPS, Vaya, AT&T, and Grande petitions.<sup>2051</sup>

**XV. INTERCARRIER COMPENSATION FOR WIRELESS TRAFFIC**

**A. Introduction**

976. In this section, we address compensation for non-access traffic exchanged between LECs and CMRS providers. As discussed further below, two compensation regimes currently apply to non-access LEC-CMRS traffic. Under section 20.11, LECs have a duty to provide interconnection to CMRS providers and LECs and CMRS providers must pay each other “reasonable compensation” in connection with traffic that originates on the other’s network.<sup>2052</sup> Under the reciprocal compensation regime in

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<sup>2044</sup> See Global NAPS Petition for Declaratory Ruling and for Preemption of the PA, NH and MD State Commissions, WC Docket No. 10-60 (filed Mar. 5, 2010).

<sup>2045</sup> See AT&T Petition for Interim Declaratory Ruling and Limited Waivers, WC Docket No. 08-152 (filed July 17, 2008).

<sup>2046</sup> Petition of Vaya Telecom, Inc. Regarding LEC-to-LEC VoIP Traffic Exchanges, CC Docket No. 01-92 at 1 (filed Aug. 26, 2011).

<sup>2047</sup> See generally *supra* Section XIV.C.1.

<sup>2048</sup> See *supra* Section XIII.

<sup>2049</sup> See Grande Petition for Declaratory Ruling, WC Docket No. 05-283 (filed Oct. 3, 2005).

<sup>2050</sup> See generally paras. 964-966 (establishing an approach under which terminating carriers can use interconnection agreements to obtain compensation for toll VoIP-PSTN traffic, including a means to identify VoIP-PSTN traffic).

<sup>2051</sup> It is well-established that the Commission has broad discretion whether to issue such a ruling. See 47 C.F.R. § 1.2; *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973) (Commission did not abuse its discretion by declining to grant a declaratory ruling.).

<sup>2052</sup> 47 C.F.R. § 20.11.



section 251(b)(5), LECs have an obligation to establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic,<sup>2053</sup> and CMRS providers that have entered into a reciprocal compensation arrangement with a LEC must compensate the LEC for terminating traffic originating on the CMRS provider's network.<sup>2054</sup>

977. The Commission has not addressed the relationship between these two regimes and has not clarified what "reasonable compensation" pursuant to 20.11 means. As a result, application of these provisions has been a continuing and growing source of confusion and dispute. Moreover, following the Commission's 2009 *North County Order*, which addressed a competitive LEC's complaint against a CMRS provider seeking "reasonable compensation" under section 20.11, requests to clarify this area of intercarrier compensation have increased.<sup>2055</sup> The *North County Order* held that the state public utility commission was the appropriate forum under the rule for determining a reasonable rate for termination of the CMRS provider's intrastate, intraMTA traffic, and also declined to establish any federal methodology governing how the state should determine a reasonable rate.<sup>2056</sup> CMRS providers have raised concerns that as a result, costly litigation is proliferating and the incidence of intraMTA traffic stimulation is growing.<sup>2057</sup>

978. As part of our comprehensive ICC reform, we believe it is now appropriate for the Commission to clarify the system of intercarrier compensation applicable to non-access traffic exchanged between LECs and CMRS providers. Accordingly, as described herein, we clarify that the compensation obligations under section 20.11 are coextensive with the reciprocal compensation requirements under section 251. In addition, consistent with our overall reform approach, we adopt bill-and-keep as the default compensation for non-access traffic exchanged between LECs and CMRS providers. To ease the move to bill-and-keep for rural, rate-of-return regulated LECs, we adopt an interim default rule limiting their responsibility for transport costs for this category of traffic. We find that these steps are consistent with our overall reform and will support our goal of modernizing and unifying the intercarrier compensation system.

979. We also address certain pending issues and disputes regarding what is now commonly known as the intraMTA rule, which provides that traffic between a LEC and a CMRS provider that originates and terminates within the same Major Trading Area (MTA) is subject to reciprocal compensation obligations rather than interstate or intrastate access charges.<sup>2058</sup> We resolve two issues that have been raised before the Commission regarding the correct application of this rule to specific traffic patterns. First, one wireless service provider claims that calls that it receives from other carriers, routes through its own base stations, and passes on to third-party carriers for termination have "originated" at its

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<sup>2053</sup> 47 U.S.C. § 251(b)(5); *see also* 47 C.F.R. § 51.703.

<sup>2054</sup> *See Local Competition First Report and Order*, 11 FCC Rcd at 16016-18, paras. 1041-45. Specifically, the Commission determined that, pursuant to section 251(b)(5), CMRS providers will "receive reciprocal compensation for terminating certain traffic that originates on the networks of other carriers, and will pay such compensation for certain traffic that they transmit and terminate to other carriers." *Id.* at 16018, para. 1045.

<sup>2055</sup> *See North County Communications Corp. v. MetroPCS California, LLC*, Order on Review, 24 FCC Rcd 14036 (2009) (*North County Order*), *aff'd*, *MetroPCS California LLC v. FCC*, 644 F.3d 410 (D.C. Cir. 2011).

<sup>2056</sup> *See North County Order*, 24 FCC Rcd at 14036-37, para. 1, 14044, para. 21.

<sup>2057</sup> *See, e.g.*, CTIA Section XV Comments at 4.

<sup>2058</sup> *See Local Competition First Report and Order*, 11 FCC Rcd at 16014, para. 1036; *see also* 47 C.F.R. § 24.202(a) (defining the term "Major Trading Area").

own base stations for purposes of applying the intraMTA rule.<sup>2059</sup> As explained below, we disagree. Second, we affirm that all traffic routed to or from a CMRS provider that, at the beginning of a call, originates and terminates within the same MTA, is subject to reciprocal compensation, without exception. In addition to these clarifications, we also deny requests that the intraMTA rule be modified to encompass a larger geographic license area, the regional economic area grouping, or REAG.<sup>2060</sup>

## B. Background

980. There are currently two regimes affecting intercarrier compensation for non-access traffic exchanged between LECs and CMRS providers. Before the 1996 Act was passed, the Commission, pursuant to section 332 and 201(a) of the Act, adopted rule 20.11 to govern LEC interconnection with CMRS providers.<sup>2061</sup> Section 20.11(a) required a LEC to provide the type of interconnection reasonably requested by a CMRS provider, and section 20.11(b) required mutual and reasonable compensation for the exchange of traffic between LECs and CMRS providers.<sup>2062</sup> In particular, Section 20.11(b) required the originating carrier, whether LEC or CMRS provider, to pay “reasonable compensation” to the terminating carrier in connection with traffic that terminates on the latter’s network facilities.<sup>2063</sup>

981. As noted elsewhere, section 251(b)(5), part of the 1996 Act, obligates LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications.<sup>2064</sup> In the *Local Competition First Report and Order*, the Commission determined that, pursuant to that provision, “traffic to or from a CMRS network that originates and terminates within the same MTA is subject to [reciprocal compensation obligations] under section 251(b)(5) rather than interstate and intrastate access charges.”<sup>2065</sup>

982. At the same time, the Commission amended section 20.11 to provide that LECs and CMRS providers “shall also comply with applicable provisions of part 51 of this chapter.”<sup>2066</sup> Thus, the “reasonable compensation” requirements under section 20.11 continued to apply in parallel with the new

<sup>2059</sup> Letter from W. Scott McCollough, Counsel for Halo Wireless, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, Attach. at 9 (filed Aug. 12, 2011) (Halo Aug. 12, 2011 *Ex Parte* Letter); Letter from W. Scott McCollough, Counsel for Halo Wireless, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 (filed Oct. 17, 2011) (Halo Oct. 17, 2011 *Ex Parte* Letter). *But see* Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, Secretary, FCC, CC Docket 01-92, Attach. at 7 (filed July 18, 2011) (NTCA July 18, 2011 *Ex Parte* Letter); ERTA July 8, 2011 *Ex Parte* Letter at 1, 3; NECA et al. Sept. 23, 2011 *Ex Parte* Letter at 1.

<sup>2060</sup> T-Mobile August 3 PN Comments at 11-14.

<sup>2061</sup> See *Implementation of Sections 3(n) and 332 of the Communications Act and Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1499, paras. 231-32 (1994) (*CMRS Second Report and Order*) (subsequent history omitted). Section 332(c)(1)(B) provides in part that “[u]pon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this Act.” 47 U.S.C. § 332(c)(1)(B).

<sup>2062</sup> *CMRS Second Report and Order*, 9 FCC Rcd at 1498, paras. 231-32; *see also* 47 C.F.R. § 20.11(a), (b).

<sup>2063</sup> 47 C.F.R. § 20.11(b).

<sup>2064</sup> 47 U.S.C. § 251(b)(5); *see* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act). *See also Local Competition First Report and Order*, 11 FCC Rcd at 16016, para. 1041.

<sup>2065</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 16014, para. 1036; *see also* 47 C.F.R. § 51.701(b)(1).

<sup>2066</sup> 47 C.F.R. § 20.11(c).

obligations under section 251(b)(5) and implementing rules in Part 51.<sup>2067</sup> The Commission has not, however, clarified what “reasonable compensation” pursuant to section 20.11 means.

983. The Commission’s decision not to interpret “reasonable compensation” has led to disputes. In 2009, the Commission addressed a complaint brought by North County Communications Corp. (North County), a competitive LEC, against MetroPCS California, LLC (MetroPCS), a CMRS provider, alleging that, although there was no compensation agreement between the parties, MetroPCS had violated section 20.11(b) of the Commission’s rules by failing to pay reasonable compensation to North County for terminating its traffic and asking the Commission to prescribe a termination rate and award appropriate damages.<sup>2068</sup>

984. In an Order reviewing an earlier decision by the Enforcement Bureau, the Commission affirmed the Bureau’s finding that the California PUC was the more appropriate forum for determining a reasonable termination rate under section 20.11 for the intrastate traffic at issue and that the competitive LEC therefore was required to obtain a rate determination by the state before its section 20.11 claim before the Commission could proceed.<sup>2069</sup> In declining to establish an applicable rate, the Commission noted its previous decision to interpret section 20.11 to preserve state authority over intrastate traffic and concluded that if the Commission decides to depart from this precedent, it should do so in “a more general rulemaking proceeding.”<sup>2070</sup> The Commission also declined to provide guidance to the California PUC about how to establish a reasonable termination rate.<sup>2071</sup> The U.S. Court of Appeals for the D.C. Circuit upheld the Commission’s decision, finding that even if the Commission had authority under sections 201 and 332 of the Act to regulate intrastate rates for mobile termination, the Commission was not required to exercise this authority in every instance.<sup>2072</sup> The court also noted with approval the Commission’s determination to defer reconsideration of its policy under section 20.11 to a general rulemaking proceeding.<sup>2073</sup>

985. CMRS providers have argued that the Commission’s *North County Order*, by declining to determine reasonable compensation under section 20.11 and deferring such determinations to the states without providing any guidance, has caused the problem of traffic stimulation to grow. They argue that the Commission’s decision has led to competitive LECs seeking terminating compensation rates far above cost and to a dramatic increase in litigation as competitive LECs seek to establish or enforce termination rates in state administrative and judicial forums.<sup>2074</sup> They have asked the Commission to address the issue as part of its comprehensive effort to reform the intercarrier compensation system.

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<sup>2067</sup> See 47 C.F.R. §§ 51.701-51.717; *Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855, 4863, para. 14 (2005) (*T-Mobile Order*), *petitions for review pending*, *Ronan Tel. Co. et al. v. FCC*, No. 05-71995 (9<sup>th</sup> Cir. filed Apr. 8, 2005). We address pending petitions for reconsideration of these provisions elsewhere in this order.

<sup>2068</sup> *North County Order*, 24 FCC Rcd at 14040, para. 12.

<sup>2069</sup> *Id.*

<sup>2070</sup> *Id.* at 14039, para. 10, 14042, para. 16 (internal quotations omitted).

<sup>2071</sup> *Id.* at 14044, para. 21.

<sup>2072</sup> *MetroPCS California v. FCC*, 644 F.3d 410, 412, 414 (D.C. Cir. 2011).

<sup>2073</sup> *Id.* at 414.

<sup>2074</sup> See CTIA Section XV Comments at 4 (asserting that the *North County Order* has “reduced the LECs’ incentives to negotiate reasonable agreements and created confusion among state commissions and federal courts, leading to an upsurge in costly litigation”); Leap Section XV Comments at 5; MetroPCS Section XV Comments at 11-12 (continued...)

986. In the *USF/ICC Transformation NPRM*, we sought comment on a number of issues relating to the reform of our rules regulating wireless termination charges. As part of a general reduction of intercarrier compensation rates to eventually eliminate per-minute rates, we sought comment on whether to set a specific rate for wireless termination charges, and whether we should address certain pending compensation disputes, including disputes over the application of section 20.11.<sup>2075</sup> We also sought comment on allegations that traffic stimulation involving reciprocal compensation between CMRS providers and competitive LECs was increasing,<sup>2076</sup> and we sought comment on the steps that could be taken to address this activity.<sup>2077</sup> We also sought comment on the impact of the *North County* decisions on traffic stimulation and asked whether, as an interim measure, we should adopt any procedural or substantive rules governing competitive LEC-CMRS compensation arrangements under section 20.11 of the Commission's rules, such as establishing a default compensation rate.<sup>2078</sup>

987. We also sought comment on the proper interpretation of the intraMTA rule, which provides that traffic between a LEC and a CMRS provider that originates and terminates within the same Major Trading Area (MTA) is subject to reciprocal compensation obligations rather than interstate or intrastate access charges.<sup>2079</sup> The Commission had previously sought comment on this question in 2005, finding that rural LECs took the position that traffic between a LEC and a CMRS provider that must be routed through an IXC should be treated as access traffic even if it is intraMTA, while CMRS providers argued that all such traffic was subject to reciprocal compensation.<sup>2080</sup> In the *USF/ICC Transformation NPRM*, we invited parties to refresh the record, and sought comment on how issues involving the intraMTA rule were affected by our broader proposals for intercarrier compensation reform.<sup>2081</sup>

### C. LEC-CMRS Non-Access Traffic

988. Given our adoption of a uniform, federal framework for comprehensive intercarrier compensation reform, we believe it is now appropriate to clarify the system of intercarrier compensation applicable to non-access traffic exchanged between LECs and CMRS providers. First, we clarify that the scope of compensation obligations under section 20.11 is coextensive with the scope of the reciprocal compensation requirements under section 251 of the Act. Next, we exercise our authority to set a pricing methodology for LEC-CMRS intraMTA traffic and adopt bill-and-keep as the immediately applicable (Continued from previous page) \_\_\_\_\_

(asserting CMRS providers must “continuously monitor innumerable LEC and CLEC filings at the state level and be compelled to defend themselves against unreasonable rates before 50 separate state utilities commissions”); Sprint Nextel Section XV Comments at 22 (between 2009 and 2010, charges for Sprint Nextel's intraMTA traffic terminating to Tekstar increased by 71 percent); Verizon Section XV Comments at 36-39 (“[T]raffic pumping schemes have flourished in the wake of the *North County Order*, which opened the door to pumping of intraMTA CMRS traffic by CLECs.”).

<sup>2075</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4721-22, paras. 539, 540.

<sup>2076</sup> *Id.* at 4771, para. 672 (citing CTIA Aug. 26, 2010 *Ex Parte* Letter, Attach. at 5).

<sup>2077</sup> *Id.*

<sup>2078</sup> *Id.* at 4771, para. 673 (citing Letter from Tamara Preiss, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket no. 01-92, WC Docket No. 07-135 at 3 (filed June 28, 2010) (Verizon June 28, 2010 *Ex Parte* Letter) (proposing an immediate rate of \$0.0007/minute for all intraMTA CLEC-CMRS traffic)).

<sup>2079</sup> *Id.* at 4777, para. 684.

<sup>2080</sup> See *Inter-carrier Compensation FNPRM*, 20 FCC Rcd at 4744-46, paras. 134-38.

<sup>2081</sup> *Id.* The Commission also sought comment in 2005 on whether to eliminate or modify the intraMTA rule. See *id.*

default compensation methodology for non-access traffic between LECs and CMRS providers under section 20.11 and Part 51 of our rules.

989. As outlined above, two compensation regimes currently apply to non-access LEC-CMRS traffic, and the Commission has not clarified the intersection between the two.<sup>2082</sup> We conclude, based on the record, that it is appropriate for the Commission to clarify the relationship between the obligations in sections 20.11 and 251(b)(5).

990. To bring the 20.11 and section 251 obligations in line, we first harmonize the scope of the compensation obligations in section 20.11 and those in Part 51. We accordingly conclude that section 20.11 applies only to LEC-CMRS traffic that, since the *Local Competition First Report and Order*, has been subject to the reciprocal compensation framework under section 251(b)(5) of the Act. Thus, section 20.11 does not apply to access traffic that, prior to this Order, was subject to section 251(g). Furthermore, we clarify that the terms “mutual compensation” in section 20.11 and “reciprocal compensation” in section 251(b)(5) and Part 51 are synonymous when applied to non-access LEC-CMRS traffic.<sup>2083</sup>

991. Next, we find that it is in the public interest to establish a default federal pricing methodology for determining reasonable compensation under section 20.11. Commenters urge the Commission to address the current absence of guidance on compensation rates for traffic between competitive LECs and CMRS providers and to address the growing problem of traffic stimulation.<sup>2084</sup> They argue that the decision in the *North County Order* to defer setting of reasonable compensation under section 20.11 for intrastate traffic to the states without providing any guidance has led to CLECs seeking terminating compensation rates far above cost and to a dramatic increase in litigation as CLECs seek to establish or enforce termination rates in state administrative and judicial forums.<sup>2085</sup> They recommend that the Commission resolve this problem by establishing a default federal termination rate for CLEC-CMRS traffic of \$0.0007 or by adopting a bill-and-keep methodology.<sup>2086</sup>

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<sup>2082</sup> See *supra* paras. 980-982.

<sup>2083</sup> See 47 C.F.R. § 51.701(b)(2) (providing that traffic exchanged between a LEC and a CMRS provider is subject to reciprocal compensation if “at the beginning of the call, [it] originates and terminates within the same Major Trading Area”). Because they are coextensive, we use the terms “reciprocal compensation” and “mutual compensation” synonymously.

<sup>2084</sup> See CTIA Section XV Comments at 4-5; Sprint Nextel Section XV Comments at 22; Verizon Section XV Comments at 35, 45. See also Leap Section XV Comments at 6 (traffic pumping involving reciprocal compensation rates for traffic between CMRS providers and LECs is “indeed increasing”); MetroPCS Section XV Comments at 2 (traffic pumping is a “growing problem” for wireless services); T-Mobile Section XV Comments at 4 (“T-Mobile has observed traffic stimulation involving intraMTA traffic, resulting from reciprocal compensation rates that exceed the actual costs of terminating traffic.”).

<sup>2085</sup> See CTIA Section XV Comments at 4 (asserting that *North County* has “reduced the LECs’ incentives to negotiate reasonable agreements and created confusion among state commissions and federal courts, leading to an upsurge in costly litigation”); Leap Section XV Comments at 5; MetroPCS Section XV Comments at 11-12 (asserting CMRS providers must “continuously monitor innumerable LEC and CLEC filings at the state level and be compelled to defend themselves against unreasonable rates before 50 separate state utilities commissions”); Sprint Nextel Section XV Comments at 22 (between 2009 and 2010, charges for Sprint Nextel’s intraMTA traffic terminating to Tekstar increased by 71 percent); Verizon Section XV Comments at 36-39 (“[T]raffic pumping schemes have flourished in the wake of the *North County Order*, which opened the door to pumping of intraMTA CMRS traffic by CLECs.”).

<sup>2086</sup> See Verizon Section XV Comments at 45 (arguing that “the Commission must close, once and for all, the longstanding gap in its intercarrier compensation regime and adopt rules to actually govern CMRS-CLEC intraMTA compensation arrangements,” and proposing a default rate of \$.0007); MetroPCS *USF/ICC Transformation NPRM* Comments at 22 (proposing immediate bill-and-keep for all traffic to or from wireless carriers); see also Sprint (continued...)

992. Currently, reciprocal compensation under the Part 51 rules is subject to a federal pricing methodology. Reciprocal compensation under section 20.11, however, is not currently subject to a federal pricing methodology. As we recently explained in the *North County Order*, we have instead traditionally regarded state commissions as the “more appropriate forum for determining the reasonable compensation rate [under section 20.11] for . . . termination of intrastate, intraMTA traffic,” and have to date declined to provide guidance to the states on how to carry out that responsibility.<sup>2087</sup> We have long made clear, however, that we “would not hesitate to preempt any rates set by the states that would undermine the federal policy that encourages CMRS providers and LECs to interconnect.”<sup>2088</sup> And we observed in the *North County Order* that the various “policy arguments” in favor of a greater federal role in implementing section 20.11 were “better suited to a more general rulemaking proceeding,” citing this proceeding in particular.<sup>2089</sup>

993. We now conclude, based on the record in this proceeding, that we should establish a federal methodology for implementing section 20.11’s reasonable compensation mechanism.<sup>2090</sup> Although we believed in the *North County Order* that the interconnection process under section 20.11 would likely not be “procedurally onerous,”<sup>2091</sup> the record shows that the absence of a federal methodology has been a growing source of confusion and litigation.<sup>2092</sup> MetroPCS, for example, states that it is embroiled in disputes over traffic stimulation schemes in a number of jurisdictions and notes other proceedings in New York and Michigan. The California commission, the state commission implicated by the *North County Order*, also “recommends that the FCC provide guidance on what factors should be considered in setting a ‘reasonable rate’ for such arrangements.”<sup>2093</sup> Adoption of a federal pricing methodology promotes the policy goals outlined in this Order of avoiding wasteful arbitrage opportunities caused by disparate intercarrier compensation rates and modernizing and unifying the intercarrier compensation system to promote efficiency and network investment.<sup>2094</sup> It is also necessary

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Nextel Section XV Comments at 22 (arguing that CMRS-CLEC traffic should be subject to reciprocal compensation regime, and that in the absence of an interconnection agreement, all traffic should be subject to bill-and-keep).

<sup>2087</sup> *North County Order*, 24 FCC Rcd at 14040, para. 12, 14044, para. 21.

<sup>2088</sup> *MetroPCS California, LLC v. FCC*, 644 F.3d 410, 413 (D.C. Cir. 2011) (citing *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Servs.*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd. 1411, 1497, para. 228 (1994)).

<sup>2089</sup> *North County Order*, 24 FCC Rcd at 14042, para. 16 (internal quotation marks omitted).

<sup>2090</sup> See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (holding that an agency need not show that “reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates”).

<sup>2091</sup> See *North County Order*, 24 FCC Rcd at 14041-42, para. 15.

<sup>2092</sup> See CTIA Section XV Comments at 4-5 & Attach. A; MetroPCS Section XV Comments at 9-10.

<sup>2093</sup> CPUC Section XV Comments at 9.

<sup>2094</sup> We note that North County, which argues that the Commission should continue to defer to the states to establish a rate for section 20.11 claims, has itself noted in another proceeding that the overall process under section 20.11 as a consequence of the current deferral to states is time-consuming and burdensome. See *North County Order*, 24 FCC Rcd at 14041-42, para. 15. See also California PUC Section XV Comments at 9 (recommending that the FCC provide guidance on setting a “reasonable rate” for such arrangements); RNK Section XV Comments at 12-13 (the Commission should provide a federal pricing methodology for reciprocal compensation between CMRS providers and CLECs, and states should implement that methodology).

to effectuate our decision to harmonize section 20.11 with section 251(b)(5), which, as noted, has long been governed by a federal pricing methodology.

994. We have already concluded above that a bill-and-keep methodology for intercarrier compensation, including reciprocal compensation, best serves our policy goals and requirements of the Act.<sup>2095</sup> Consistent with that determination and our clarification above that compensation obligations under section 20.11 are coextensive with reciprocal compensation requirements, we conclude that bill-and-keep should also be the default pricing methodology between LECs and CMRS providers under section 20.11 of our rules.<sup>2096</sup> Thus, we conclude that bill-and-keep should be the default applicable to LEC-CMRS reciprocal compensation arrangements under both section 20.11 and Part 51. We reject claims that a default rate set via a bill-and-keep methodology under any circumstances would be inadequate because it would be less than the actual cost of terminating calls that originate with a CMRS provider.<sup>2097</sup> As we explain above, a bill-and-keep regime requires each carrier to recover its costs from its own end-users.<sup>2098</sup>

995. We further conclude that, under either section 20.11 or the Part 51 rules, for traffic to or from a CMRS provider subject to reciprocal compensation under either section 20.11 or the Part 51 rules, the bill-and-keep default should apply immediately. Although we have adopted a glide path to a bill-and-keep methodology for access charges generally and for reciprocal compensation between two wireline carriers, we find that a different approach is warranted for non-access traffic between LECs and CMRS providers for several reasons. First, we find a greater need for immediate application of a bill-and-keep methodology in this context to address traffic stimulation. The record demonstrates there is a significant and growing problem of traffic stimulation and regulatory arbitrage in LEC-CMRS non-access traffic.<sup>2099</sup> In contrast, we find little evidence of such problems with regard to traffic between two LECs, where traffic stimulation appears to be occurring largely within the access regime, rather than for traffic currently subject to reciprocal compensation payments. This likely reflects in part the fact that the applicable “local calling area” for CMRS providers within which calls are subject to reciprocal

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<sup>2095</sup> See *supra* Section XII.A.1-A.2.

<sup>2096</sup> By default, we mean that bill-and-keep will satisfy terminating compensation obligations except where carriers mutually agree to the contrary.

<sup>2097</sup> North County Section XV Reply at 8, 9; *see also, e.g.*, Core Section XV Comments at 13-14 (reciprocal compensation rates are set by state commissions pursuant to TELRIC, and use of a lower rate would require carriers to terminate traffic below cost, resulting in a windfall for originating carriers); Earthlink Section XV Reply at 11 (footnote omitted) (arguing that “a bill-and-keep arrangement does not ‘comply with the principles of mutual compensation’ under FCC Rule 20.11(b)”; PAETEC Section XV Reply at 23 (arguing that “[t]he Commission should not reverse rule 20.11 in this proceeding. Instead, the Commission should affirm the right to mutual compensation at reasonable rates”).

<sup>2098</sup> See *supra* para. 742.

<sup>2099</sup> See, *e.g.*, MetroPCS Section XV Comments at 8 (“Access stimulation . . . is not confined to the long-distance market. The local terminating compensation market also has proven to be a troubling source of regulatory arbitrage.”), 11-12; Sprint XV Comments at 22 (noting an increase in intraMTA traffic pumping); Verizon Section XV Reply at 27 (“Verizon and other carriers have seen a large increase in intraMTA arbitrage in the wake of the Commission’s *North County Order*”). See also Letter from Scott Bergman, CTIA-The Wireless Association, to Marlene H. Dortch, Secretary, FCC, WC Docket 07-135, CC Docket 01-92 (filed Nov. 24, 2010); *see generally* Verizon June 28, 2010 *Ex Parte* Letter; Leap Wireless Access Stimulation NPRM Reply; MetroPCS Access Stimulation NPRM Comments.

compensation is much larger than it is for LECs.<sup>2100</sup> Thus, what would be access stimulation if between a LEC and an IXC will in many cases arise under reciprocal compensation when a CMRS provider is involved.<sup>2101</sup> For similar reasons, CMRS providers are more likely to be exposed to traffic stimulation that is not subject to the measures we adopt above to address this problem within the access traffic regime. Further, although the record reflects that LEC-CMRS intraMTA traffic stimulation is growing most rapidly in traffic terminated by competitive LECs,<sup>2102</sup> we are concerned that absent any measures 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. For these reasons, we find addressing the traffic stimulation problem in reciprocal compensation is more urgent for LEC-CMRS traffic, and the bill-and-keep default methodology we adopt today should eliminate the opportunity for parties to engage in such practices in connection with such traffic.<sup>2103</sup>

996. Although, as discussed above, we find that adopting a gradual glide path to a bill-and-keep methodology for intercarrier compensation generally, including reciprocal compensation between LECs, will help avoid market disruption to service providers and consumers, we conclude that an immediate transition for reciprocal compensation traffic exchanged between LECs and CMRS providers presents a far smaller risk of market disruption than would an immediate shift to a bill-and-keep methodology for intercarrier compensation more generally. First, for reciprocal compensation between CMRS providers and competitive LECs, we have until recently had no pricing methodology applicable to competitive LEC-CMRS traffic, as reflected in the fact that the carriers in the recent *North County Order* had specifically asked the Commission to establish one for the first time. Competitive LECs thus had no basis for reliance on such a methodology in their business models, and we see no reason why, in setting a methodology for the first time, we should not require competitive LECs to meet that methodology immediately, particularly given that competitive LECs are not subject to retail rate regulation in the manner of incumbents, and therefore have flexibility to adapt their businesses more quickly.

997. Even for incumbent LECs, we are confident the impact is not significant, particularly when balanced against the overall benefits of providing the clarification. For one, incumbent LECs and

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<sup>2100</sup> More specifically, the area within which a LEC-CMRS call is subject to reciprocal compensation rather than access is the Major Trading Area (MTA), which is generally much larger than the applicable local calling area for LEC-LEC calls. See *TSR Wireless, LLC v. U.S. West Communications, Inc.*, 15 FCC Rcd 11166, 11178 para. 31 (2000) (noting MTAs typically are large areas that may encompass multiple LATAs, and often cross state boundaries). Thus traffic that would be subject to access rules if exchanged between LECs falls under the reciprocal compensation regime when exchanged with a CMRS provider.

<sup>2101</sup> See *Leap Wireless Access Stimulation NPRM Reply*, at 9 (arguing against proposals that “fail to even consider the circumstances in which the stimulated traffic is access traffic for landline carriers but intraMTA or ‘local’ traffic for the wireless carrier that originates the traffic”).

<sup>2102</sup> See, e.g., *CTIA Access Stimulation NPRM Reply*, at 4 (“CLECs now account for more traffic stimulation than ILECs, as access stimulation schemes have shifted from ILECs to CLECs to avoid increased Commission oversight of rural ILECs.”).

<sup>2103</sup> See *Leap Wireless Access Stimulation NPRM Reply*, at 2 (asserting that traffic stimulation is a significant and growing problem in both access and local traffic and proposing adoption of bill-and-keep to address the problem). In light of our decision to adopt a default bill-and-keep methodology for traffic exchanged between LECs and CMRS providers, we find it is not necessary to adopt special rules proposed by some commenters to curb traffic stimulation with respect to such traffic. See, e.g., *CTIA Section XV Comments* at 7-8; *AT&T Section XV Comments* at 21; *Leap Section XV Comments* at 6-7; *MetroPCS Section XV Comments* at 4-5, 10; *T-Mobile Section XV Comments* at 8-9; *Verizon Section XV Reply Comments* at 31. Further, such measures would not be as effective in eliminating regulatory arbitrage schemes, as we note above. See also *Leap Wireless Access Stimulation NPRM Reply*, at 7 (“the only truly effectively global resolution of these issues is for the Commission to adopt bill and keep compensation for all traffic”).



CMRS providers that fail to pursue an interconnection agreement do not receive any compensation for intraMTA traffic today.<sup>2104</sup> For incumbent LECs that do have agreements for compensation for intraMTA traffic, most large incumbent LECs have already adopted \$0.0007 or less as their reciprocal compensation rate.<sup>2105</sup> For rate-of-return carriers, there is no allegation in the record that reforming LEC-CMRS reciprocal compensation obligations in this manner would have a harmful impact on them. And, in any event, we have adopted mechanisms that should address any such impacts. First, we adopt a new recovery mechanism, which includes recovery for net reciprocal compensation revenues, to provide all incumbent LECs with a stable, predictable recovery for reduced intercarrier compensation revenues.<sup>2106</sup> Second, we adopt an additional measure to further ease the move to bill-and-keep LEC-CMRS traffic for rate-of-return carriers. Specifically, we limit rate-of-return carriers' responsibility for the costs of transport involving non-access traffic exchanged between CMRS providers and rural, rate-of-return regulated LECs.

998. Some commenters proposed a rule allocating the responsibility for transport costs for non-access traffic to the non-rural terminating provider, stating that in the absence of such a rule, rural LECs could be forced to incur unrecoverable transport costs at a time when ICC reforms may already have a negative impact on network cost recovery.<sup>2107</sup> We recognize that immediately moving to a default bill-and-keep methodology for intraMTA traffic raises issues regarding the default point at which financial responsibility for the exchange of traffic shifts from the originating carrier to the terminating carrier.<sup>2108</sup> Therefore, in the attached FNPRM, we seek comment on whether and how to address this aspect of bill-and-keep arrangements.<sup>2109</sup> We find it appropriate, however, to establish 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 to provide a gradual transition for such carriers. Given our commitment to providing a measured transition, we believe it is appropriate to help ensure no flash cuts for rate-of-return carriers. We note that price cap carriers did not raise concerns about transport costs, and we conclude that no particular transition is required or warranted for traffic exchanged between

<sup>2104</sup> See *T-Mobile Order*, 20 FCC Rcd at 4863-65, paras. 14-16. See also *id.* at 4863 n.57 ("Under the amended rules, . . . in the absence of a request for an interconnection agreement, no compensation is owed for termination.").

<sup>2105</sup> See, e.g., T-Mobile Section XV Comments at n.16 (stating that "in T-Mobile's experience, the vast majority of RBOC agreements provide for terminating rates at or below \$0.0007 per minute").

<sup>2106</sup> For a detailed description of the recovery mechanism, see *supra* Section XIII.

<sup>2107</sup> See, e.g., NECA et al. *August 3 PN Comments* at 41-42 (proposing a "Rural Transport Rule"); see also Letter from Michael Romano, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket 10-90, CC Docket 01-92, at 6 (filed Oct. 19, 2011); Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 2 (filed Oct. 20, 2011).

<sup>2108</sup> AT&T *USF/ICC Transformation NPRM Reply* at 24-25. See also CTIA *USF/ICC Transformation NPRM Comments* at 39 (proposing that the originating carrier would be responsible for assuming the costs of delivering a call, including securing any necessary transport services, to the terminating carrier's network edge).

<sup>2109</sup> See *infra* Section XVII.N. We have previously sought comment on the allocation of transport costs for non-access traffic on several occasions. See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4774-76 paras. 680-82; *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6619-20, App.C, para 270 (seeking comment on interconnection proposal including "rural transport rule" that would have limited the transport and provisioning obligations of a rural rate-of-return regulated incumbent LEC to its meet point when the non-rural terminating carrier's point of presence is located outside of the rural rate-of-return incumbent LEC's service area); *Inter-carrier Compensation FNPRM*, 20 FCC Rcd at 4727 para. 90, 4729 para. 93 (seeking comment on a proposal to require competitive carriers seeking to exchange traffic with an incumbent LEC to be responsible for transport costs outside the incumbent's local calling area).

CMRS providers and these carriers.

999. Specifically, for such traffic, the rural, rate-of-return LEC will be responsible for transport to the CMRS provider's chosen interconnection point<sup>2110</sup> when it is located within the LEC's service area.<sup>2111</sup> When the CMRS provider's chosen interconnection point is located outside the LEC's service area, we provide that the LEC's transport and provisioning obligation stops at its meet point and the CMRS provider is responsible for the remaining transport to its interconnection point. Although we do not prejudge our consideration of what allocation rule should ultimately apply to the exchange of all telecommunications traffic, including traffic that is considered access traffic today, under a bill-and-keep methodology, we believe that this rule is warranted for the interim period to help minimize disputes and provide greater certainty until rules are adopted to complete the transition to a bill-and-keep methodology for all intercarrier compensation.<sup>2112</sup>

1000. Beyond adopting these measures, we also emphasize that, although we establish bill-and-keep as an immediately applicable default methodology, we are not abrogating existing commercial contracts or interconnection agreements or otherwise allowing for a "fresh look" in light of our reforms.<sup>2113</sup> Thus, incumbent LECs may have an extended period of time under existing compensation arrangements before needing to renegotiate subject to the new default bill-and-keep methodology. As a result, while we are concerned that an immediate transition from reciprocal compensation to a bill-and-keep methodology more generally would risk overburdening the universal service fund that underlies the interim recovery mechanism, we think that the impact on the fund resulting from an immediate transition for LEC-CMRS reciprocal compensation alone will not do so.<sup>2114</sup> For the reasons discussed, we find that an immediate transition away from reciprocal compensation to a bill-and-keep methodology in this context is practical.

1001. As we found above, we believe that sections 251 and 252 affirmatively provide us authority to establish bill-and-keep as the default methodology applicable to traffic within the scope of section 251(b)(5), including for traffic exchanged between LECs and CMRS providers.<sup>2115</sup> Further, as we have concluded above that we have authority under section 332 to regulate intrastate access traffic exchanged between LECs and CMRS providers and thus authority to specify a transition to bill-and-keep for such traffic, we conclude for similar reasons that we have authority to regulate intrastate reciprocal

<sup>2110</sup> See 47 C.F.R. § 51.701(c)(defining transport as "from the interconnection point between the two carriers to the terminating carrier's end office switch").

<sup>2111</sup> See 47 U.S.C § 214(e)(5)(defining "service area" in the context of universal service).

<sup>2112</sup> We note that some commenters proposed a similar but broader rule that would have applied to traffic exchanged between a rural, rate-of-return LEC and any other provider, CMRS or not. See NECA et al. *August 3 PN Comments* at 41-42 (proposing a "Rural Transport Rule"); Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 2 (filed Oct. 20, 2011). Because we adopt this as an interim rule to address concerns arising from our immediate adoption of bill-and-keep for non-access traffic with CMRS providers, a narrower rule that applies only to traffic between rural, rate-of-return LECs and CMRS providers is warranted.

<sup>2113</sup> See *supra* para. 815.

<sup>2114</sup> Adoption of bill-and-keep for this subset of traffic will also inform our understanding of the potential impact that the larger transition to bill-and-keep will have and, although we do not envision any concerns arising based on the reforms adopted in this Order, would enable us, if necessary, to make any adjustments as part of that larger transition. See *MetroPCS Comments* at 22-23 (arguing that "[m]oving just wireless traffic immediately to bill-and-keep would provide a worthwhile reference without having a major disruptive effect on the intercarrier compensation regime" and supporting immediate application of bill-and-keep to LEC-CMRS traffic).

<sup>2115</sup> See *supra* Section XII.A.2.

compensation between LECs and CMRS providers.<sup>2116</sup> Indeed, in *Iowa Utilities Board*, the Eighth Circuit specifically upheld Commission rules regulating LEC-CMRS reciprocal compensation based on these provisions.<sup>2117</sup>

1002. In the *North County Order*, the Commission found that any decision to reverse course and regulate intrastate rates under section 20.11 at the federal level was more appropriately addressed in a general rulemaking proceeding.<sup>2118</sup> Now that we are considering the issue in the context of this rulemaking proceeding, we find it appropriate to take this step for the reasons discussed above, and we conclude that our decision to establish a federal default pricing methodology for termination of LEC-CMRS intraMTA traffic as part of our broader effort in this proceeding to reform, modernize, and unify the intercarrier compensation system is consistent with our authority under the Act.

#### D. IntraMTA Rule

1003. In the *Local Competition First Report and Order*, the Commission stated that calls between a LEC and a CMRS provider that originate and terminate within the same Major Trading Area (MTA) at the time that the call is initiated are subject to reciprocal compensation obligations under section 251(b)(5), rather than interstate or intrastate access charges.<sup>2119</sup> As noted above, this rule, referred to as the “intraMTA rule,” also governs the scope of traffic between LECs and CMRS providers that is subject to compensation under section 20.11(b). The *USF/ICC Transformation NPRM* sought comment, *inter alia*, on the proper interpretation of this rule.

1004. The record presents several issues regarding the scope and interpretation of the intraMTA rule. Because the changes we adopt in this Order maintain, during the transition, distinctions in the compensation available under the reciprocal compensation regime and compensation owed under the access regime, parties must continue to rely on the intraMTA rule to define the scope of LEC-CMRS traffic that falls under the reciprocal compensation regime. We therefore take this opportunity to remove any ambiguity regarding the interpretation of the intraMTA rule.

1005. We first address a dispute regarding the interpretation of the intraMTA rule. Halo Wireless (Halo) asserts that it offers “Common Carrier wireless exchange services to ESP and enterprise customers” in which the customer “connects wirelessly to Halo base stations in each MTA.”<sup>2120</sup> It further

<sup>2116</sup> See *supra* para. 779.

<sup>2117</sup> In *Iowa Utilities Board v. FCC*, the Eighth Circuit found that “[b]ecause Congress expressly amended section 2(b) to preclude state regulation of entry of and rates charged by [CMRS] providers . . . and because section 332(c)(1)(b) gives the FCC the authority to order LECs to interconnect with CMRS carriers, we believe that the Commission has the authority to issue the rules of special concern to the CMRS providers.” *Iowa Utils Bd. v. FCC*, 120 F. 3d 753, 800 n.21 (8<sup>th</sup> Cir. 1997) (vacating the Commission’s pricing rules for lack of jurisdiction except for “the rules of special concern to CMRS providers” based in part upon the authority granted to the Commission in 47 U.S.C. § 332(c)(1)(B)). See also *Qwest v. FCC*, 252 F.3d 462, 465-66 (D.C. Cir. 2001) (describing the Eighth Circuit’s analysis of section 332(c)(1)(B) in *Iowa Utils. Bd. v. FCC* and concluding that an attempt to relitigate the issue was barred by the doctrine of issue preclusion). On this basis, the court upheld several rules relating to reciprocal compensation for LEC-CMRS traffic, including rules governing charges for intrastate traffic. For example, the court upheld on this basis the adoption of section 51.703(b) of our rules, which prohibits LECs from assessing charges on any other telecommunications carrier for non-access traffic that originates on the LEC’s network. 47 C.F.R. § 51.703(b).

<sup>2118</sup> *North County Order*, 24 FCC Rcd at 14039-40, para. 10, 14042, para. 16 (internal quotations omitted).

<sup>2119</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 16014, para. 1036; 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).

<sup>2120</sup> Halo Aug. 12, 2011 *Ex Parte* Letter, Attach. at 7; see also Halo Oct. 17, 2011 *Ex Parte* Letter. Halo is a nationwide licensee of non-exclusive spectrum in the 3650-3700 MHz band.

asserts that its “high volume” service is CMRS because “the customer connects to Halo’s base station using wireless equipment which is capable of operation while in motion.”<sup>2121</sup> Halo argues that, for purposes of applying the intraMTA rule, “[t]he origination point for Halo traffic is the base station to which Halo’s customers connect wirelessly.”<sup>2122</sup> On the other hand, ERTA claims that Halo’s traffic is not from its own retail customers but is instead from a number of other LECs, CLECs, and CMRS providers.<sup>2123</sup> NTCA further submitted an analysis of call records for calls received by some of its member rural LECs from Halo indicating that most of the calls either did not originate on a CMRS line or were not intraMTA, and that even if CMRS might be used “in the middle,” this does not affect the categorization of the call for intercarrier compensation purposes.<sup>2124</sup> These parties thus assert that by characterizing access traffic as intraMTA reciprocal compensation traffic, Halo is failing to pay the requisite compensation to terminating rural LECs for a very large amount of traffic.<sup>2125</sup> Responding to this dispute, CTIA asserts that “it is unclear whether the intraMTA rules would even apply in that case.”<sup>2126</sup>

1006. We clarify that a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the call has done so through a CMRS provider. Where a provider is merely providing a transiting service, it is well established that a transiting carrier is not considered the originating carrier for purposes of the reciprocal compensation rules.<sup>2127</sup> Thus, we agree with NECA that the “re-origination” of a call over a wireless link in the middle of the call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation and we disagree with Halo’s contrary position.<sup>2128</sup>

1007. In a further pending dispute, some LECs have argued that if completing a call to a CMRS provider requires a LEC to route the call to an intermediary carrier outside the LEC’s local calling area,<sup>2129</sup> the call is subject to access charges, not reciprocal compensation, even if the call originates and

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<sup>2121</sup> Halo Aug. 12, 2011 *Ex Parte* Letter, Attach. at 8.

<sup>2122</sup> *Id.* Attach. at 9.

<sup>2123</sup> ERTA July 8, 2011 *Ex Parte* Letter, at 3.

<sup>2124</sup> NTCA July 18, 2011 *Ex Parte* Letter at 7.

<sup>2125</sup> NTCA July 18, 2011 *Ex Parte* Letter at 1; ERTA *Ex Parte* Letter at 1, 3 (traffic from Halo includes “millions of minutes of intrastate access, interstate access, and CMRS traffic originated by customers of other companies;” one day study of Halo traffic showed traffic was originated by customers of “176 different domestic and Canadian LECs and CLECs and 63 different Wireless Companies”).

<sup>2126</sup> CTIA *August 3 PN* Comments at 9.

<sup>2127</sup> See *Texcom, Inc. d/b/a Answer Indiana v. Bell Atlantic Corp.*, Order on Reconsideration, 17 FCC Rcd 6275, 6276 para. 4 (2002) (“Answer Indiana’s argument assumes that GTE North receives reciprocal compensation from the originating carrier, but our reciprocal compensation rules do not provide for such compensation to a transiting carrier.”); *TSR Wireless, LLC v. U.S. West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 11166, 11177 n.70 (2000).

<sup>2128</sup> See NECA Sept. 23, 2011 *Ex Parte* Letter Attach. at 1; Halo Aug. 12, 2011 *Ex Parte* Letter at 9. We make no findings regarding whether any particular transiting services would in fact qualify as CMRS. See CTIA *August 3 PN* Comments at 9 & n.29 (“the information available does not reveal whether [Halo’s] offering is a mobile service”).

<sup>2129</sup> This occurs when the LEC and CMRS provider are “indirectly interconnected,” i.e. when there is a third carrier to which they both have direct connections, and which is then used as a conduit for the exchange of traffic between them.

terminates within the same MTA.<sup>2130</sup> One commenter in this proceeding asks us to affirm that such traffic is subject to reciprocal compensation.<sup>2131</sup> We therefore clarify that the intraMTA rule means that 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.<sup>2132</sup> Similarly, intraMTA traffic is subject to reciprocal compensation regardless of whether the two end carriers are directly connected or exchange traffic indirectly via a transit carrier.<sup>2133</sup>

1008. Further, in response to the *USF/ICC Transformation NPRM*, T-Mobile proposed that we expand the scope of the intraMTA rule to reflect the fact that CMRS licenses are now issued for REAGs, geographic areas that are larger than MTAs.<sup>2134</sup> T-Mobile notes that the intraMTA rule was promulgated

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<sup>2130</sup> See, e.g., Letter from Sylvia Lesse, Counsel to the Missouri Companies, to William F. Caton, Acting Secretary, Federal Communications Commission, WT Docket No. 01-316 and CC Docket No. 01-92, Attach. (filed Mar. 22, 2002) (Missouri Companies Mar. 22 *Ex Parte* Letter); Letter from W.R. England, III, Counsel for Citizen Telephone Company of Missouri, *et al.*, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45, and 95-116 (filed Oct. 31, 2003) (Citizen Oct. 31, 2003 *Ex Parte* Letter). See also Letter from Glenn H. Brown, Counsel to Great Plains Communications, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, Attach. at 8 (filed Sept. 23, 2003) (stating that the local exchange is the incumbent LEC's local service area rather than the MTA). We also sought comment on this issue in 2005 but have not since taken action to address it. See *Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4745-46 paras. 137-38.

<sup>2131</sup> T-Mobile *August 3 PN* Comments at 11.

<sup>2132</sup> In a letter filed on Oct. 21, 2011, Vantage Point Solutions alleged "difficulties associated with the implementation of intraMTA local calling" between LECs and CMRS providers, and, while not advocating repeal of the rule, urged the Commission to "proceed with substantial caution" when "handling the rating and routing of intraMTA calls" that involve an interexchange carrier. Letter from Larry D. Thompson, Vantage Point Solutions, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, at 1-2 (filed Oct. 21, 2011) (Vantage Point Oct. 21, 2011 *Ex Parte* Letter). We find that the potential implementation issues raised by Vantage Point do not warrant a different construction of the intraMTA rule than what we adopt above. Although Vantage Point questions whether the intraMTA rule is feasible when a call is routed through interexchange carriers, many incumbent LECs have already, pursuant to state commission and appellate court decisions, extended reciprocal compensation arrangements with CMRS providers to intraMTA traffic without regard to whether a call is routed through interexchange carriers. See, e.g., *Alma Communications Co. v. Missouri Public Service Comm'n*, 490 F.3d 619, 623-34 (8th Cir. 2007) (noting and affirming arbitration decision requiring incumbent LEC to compensate CMRS provider for costs incurred in transporting and terminating land-line to cell-phone calls placed to cell phones within the same MTA, even if those calls were routed through a long-distance carrier); *Atlas Telephone Co. v. Oklahoma Corp. Comm'n*, 400 F.3d 1256 (10th Cir. 2005). Further, while Vantage Point asserts that it is not currently possible to determine if a call is interMTA or intraMTA, Vantage Point Oct. 21, 2011 *Ex Parte* Letter at 2-3, the Commission addressed this concern when it adopted the rule. See *Local Competition First Report and Order*, 11 FCC Rcd at 16017, para. 1044 (stating that parties may calculate overall compensation amounts by extrapolating from traffic studies and samples).

<sup>2133</sup> See Sprint Nextel Section XV Comments at 22-23 (arguing that the Commission should reaffirm that all intraMTA traffic to or from a CMRS provider is subject to reciprocal compensation). This clarification is consistent with how the intraMTA rule has been interpreted by the federal appellate courts. See *Alma Communications Co. v. Missouri Public Service Comm'n*, 490 F.3d 619 (8th Cir. 2007); *Iowa Network Services, Inc. v. Qwest Corp.*, 466 F.3d 1091 (8th Cir. 2006); *Atlas Telephone Co. v. Oklahoma Corp. Commission*, 400 F.3d 1256 (10th Cir. 2005).

<sup>2134</sup> See T-Mobile *August 3 PN* Comments at 11-14. T-Mobile's proposal is also supported by MetroPCS. See MetroPCS *August 3 PN* Reply at 6-7.

at a time the MTA was the largest CMRS license area.<sup>2135</sup> T-Mobile argues that the REAG is currently the largest license being used to provide CMRS and that this change would move more telecommunications traffic under the reciprocal compensation umbrella pending the unification of all intercarrier compensation rates.<sup>2136</sup> We decline to adopt T-Mobile's proposal. Given the long experience of the industry dealing with the current rule, the very broad scope of the changes to the intercarrier compensation rules being made in this Order that will, after the transition period, make the rule irrelevant, and the limited support in the record for the suggested change even from CMRS commenters, we do not believe it is either necessary or appropriate to expand the scope of this rule as proposed by T-Mobile.

## XVI. INTERCONNECTION

1009. Interconnection among communications networks is critical given the role of network effects.<sup>2137</sup> Historically, interconnection among voice communications networks has enabled competition and the associated consumer benefits that brings through innovation and reduced prices.<sup>2138</sup> The voice communications marketplace is currently transitioning from traditional circuit-switched telephone service to the use of IP services, and commenters observe that many carriers "apparently are equipped to receive IP voice traffic but are taking the position they will not use this equipment for years (until a prohibition on current per-minute charges takes effect)."<sup>2139</sup> These parties thus propose that in the immediate future the Commission "should (a) encourage all TDM network operators to investigate the steps they need to take to support IP-IP interconnection, and (b) put all TDM network operators on notice that they will be likely required to support IP-IP interconnection before any phase down of current ICC rates is complete."<sup>2140</sup>

1010. We anticipate that the reforms we adopt herein will further promote the deployment and use of IP networks. However, IP interconnection between providers also is critical. As such, we agree with commenters that, as the industry transitions to all IP networks, carriers should begin planning for the transition to IP-to-IP interconnection, and that such a transition will likely be appropriate before the completion of the intercarrier compensation phase down. We seek comment in the accompanying FNPRM regarding specific elements of the policy framework for IP-to-IP interconnection. We make clear, however, that our decision to address certain issues related to IP-to-IP interconnection in the FNPRM should not be misinterpreted to suggest any deviation from the Commission's longstanding view

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<sup>2135</sup> See T-Mobile *August 3 PN* Comments at 12.

<sup>2136</sup> *Id.* at 13.

<sup>2137</sup> See, e.g., *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, WT Docket Nos. 04-70, 04-254, 04-323, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21578, para. 143 (2004) (citing Carl Shapiro and Hal Varian, *Information Rules*, Harvard Business School Press, Boston, 1999, at 13).

<sup>2138</sup> See, e.g., *Interconnection Clarification Order*, 26 FCC Rcd at 8265-66, paras. 12-13; *Local Competition First Report and Order*, 11 FCC Rcd at 15506, para. 4; *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Third Report and Order, Transport Phase II, 9 FCC Rcd 2718, 2724, para. 25 (1994).

<sup>2139</sup> Sprint Nextel *USF/ICC Transformation NPRM* Comments at 28. See also, e.g., Letter from Howard J. Symons, counsel for Cablevision, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket No. 01-92, 96-45, GN Docket No. 09-51, Attach. at 1-4 (filed Oct. 20, 2011); Letter from Thomas Jones, counsel for Cbeyond et al., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 11-119, 10-90, 07-135, 05-337, 03-109, CC Docket No. 01-92, 96-45, GN Docket No. 09-51, Attach. A at 5 (filed Oct. 3, 2011).

<sup>2140</sup> Sprint Nextel *USF/ICC Transformation NPRM* Comments at 28.

regarding the essential importance of interconnection of voice networks.<sup>2141</sup>

1011. In particular, even while our FNPRM is pending, we expect all carriers to negotiate in good faith in response to requests for IP-to-IP interconnection for the exchange of voice traffic. The duty to negotiate in good faith has been a longstanding element of interconnection requirements under the Communications Act and does not depend upon the network technology underlying the interconnection, whether TDM, IP, or otherwise. Moreover, we expect such good faith negotiations to result in interconnection arrangements between IP networks for the purpose of exchanging voice traffic. As we evaluate specific elements of the appropriate interconnection policy framework for voice IP-to-IP interconnection in our FNPRM, we will be monitoring marketplace developments, which will inform the Commission's actions in response to the FNPRM.<sup>2142</sup>

## XVII. FURTHER NOTICE OF PROPOSED RULEMAKING

### A. Broadband Public Interest Obligations

1012. In this section, we seek further comment on the public interest obligations of funding recipients.

#### 1. Measuring Broadband Service

1013. In the Order, we adopt a rule requiring that actual speed and latency be measured on each ETC's access network from the end-user interface to the nearest Internet access point, and we require that ETCs certify to and report the results to USAC on an annual basis. Here, we seek comment on whether the Commission should adopt a specific measurement methodology beyond what is described in the Order and the format in which ETCs should report their results.

1014. The *Measuring Broadband America Report* concludes that "a standardized set of broadband measurements can be implemented across a range of ISPs and scaled to support detailed regional assessments of broadband deployment and performance."<sup>2143</sup> We note that commercial hardware and software as well as some free, non-commercial options are available. Should we adopt a uniform methodology for measuring broadband performance? If so, should that methodology be uniform across different technologies? We note that the Commission has requested more information on measurement approaches for mobile broadband and seeks to incorporate that proceeding's record with ours.<sup>2144</sup> How should wireless providers measure speed? Should we require fixed funding recipients to install SamKnows-type white boxes at consumer locations in order to monitor actual performance in a standardized way?

1015. Should we specify a uniform reporting format? Should test results be recorded in a format that can be produced to USAC and auditable such that USAC or the state commissions may confirm that a provider is, in fact, providing broadband at the required minimum speeds?

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<sup>2141</sup> See, e.g., *Interconnection Clarification Order*, 26 FCC Rcd at 8265-66, paras. 12-13; *CLEC Access Charge Order*, 16 FCC Rcd at 9960, para. 92; *Local Competition First Report and Order*, 11 FCC Rcd at 15506, para. 4; *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Third Report and Order, Transport Phase II, 9 FCC Rcd 2718, 2724, para. 25 (1994); *MTS & WATS Market Structure*, Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 FCC 2d 177 (1980); *Lincoln Tel. & Tel. Co.*, Declaratory Order, 72 FCC 2d 724 (1979). See also *infra* Section XVII.P.1.

<sup>2142</sup> See *infra* Section XVII.P.

<sup>2143</sup> *Measuring Broadband America Report* at 28.

<sup>2144</sup> *Comment Sought on Measurement of Mobile Broadband Network Performance and Coverage*, CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36, Public Notice, 25 FCC Rcd 7069 (2010).

1016. Should providers be required to provide the underlying raw measurement data to USAC? Are there legitimate concerns with confidentiality if such data are made public? Is it sufficient to have a provider certify to USAC that its network is satisfying the minimum broadband metrics and retain the results of its own performance measurement to be produced on request in the course of possible future audits?

1017. Should we consider easing the performance measuring obligations on smaller broadband providers? If so, what would be the appropriate threshold for size of provider before granting relief for measuring broadband? If we ease performance measuring obligations on smaller broadband providers, how can we ensure that their customers are receiving reasonably comparable service?

## **2. Reasonably Comparable Voice and Broadband Services**

1018. In the Order, we direct the Wireline Competition Bureau and Wireless Telecommunications Bureau (the Bureaus) to develop and conduct a survey of voice and broadband rates in order to compare urban and rural voice and broadband rates. Here, we seek comment on the components of the survey.

1019. With respect to determining reasonable comparability of voice service rates for universal service purposes, should we separately collect data on fixed and mobile voice telephony rates? Should fixed and mobile voice services have different benchmarks for purposes of reasonable comparability?

1020. In the landline context, we have previously surveyed the basic R-1 voice rate. What would the equivalent basic offering be in the mobile context? How should we take into account packages that offer varying numbers of minutes of usage and/or additional features such as texting?

1021. With respect to determining reasonable comparability of broadband services, should we separately collect data on fixed and mobile broadband pricing and capacity requirements (if any)? For purposes of that analysis, how should we consider, if at all, data cards provided by mobile providers?

1022. In the Order, we conclude that services meeting our public interest standard should be reasonably comparable to comparable offerings in urban areas in terms of pricing, speed, and usage limits (if any).<sup>2145</sup> For fixed broadband offerings subject to our initial CAF requirements of 4 Mbps downstream/1 Mbps upstream, should we survey advertised rates for such service, or the closest available offering in urban areas? How should we take into account promotional pricing that may require a specific contractual commitment for a period of time?

1023. Should fixed and mobile broadband services have different or the same benchmarks for purposes of reasonable comparability?

1024. We also seek comment on how to compare mobile broadband to fixed broadband as product offerings evolve over time.

1025. In the Order, we also determine that rural rates for broadband service would be “reasonably comparable” to urban rates under section 254(b)(3) if rural rates fall within a reasonable range of the national average urban rate for broadband service. Here, we seek comment on how specifically to define that reasonable range for broadband.

1026. We note that in the voice context, today we require states to certify that basic R-1 voice rates for non-rural carriers are no more than two standard deviations above the national average R-1

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<sup>2145</sup> As explained in the Order, by limiting reasonable comparability to “comparable services,” we intend to ensure that fixed broadband services in rural areas are compared with fixed broadband services in urban areas, and similarly that mobile broadband services in rural areas are compared with mobile broadband services in urban areas.



rate.<sup>2146</sup> Would using two standard deviations be the appropriate measure for reasonable comparability in the broadband context, or should we adopt a different methodology for establishing such a reasonable range? Do unregulated broadband prices show relatively small variations, making another methodology more appropriate? For example, would prices normalized to disposable income be appropriate?

1027. Should we adopt a presumption that if a given provider is offering the same rates, terms and conditions (including capacity limits, in any) to both urban and rural customers, that is sufficient to meet the statutory requirement that services be reasonably comparable?

### 3. Additional Requirements

1028. Some commenters have proposed to require CAF recipients to comply with certain interconnection requirements.<sup>2147</sup> We seek comment on whether the Commission should require CAF recipients to offer IP-to-IP interconnection for voice service, beyond whatever framework it adopts more broadly.<sup>2148</sup> If so, what would the scope and nature of any such requirement be? Should any obligations be based on the requirements of section 251(a)(1), since, as ETCs, the providers subject to these requirements will be telecommunications carriers? How would any such obligations be enforced?

1029. We also seek additional comment on the proposal of Public Knowledge and the Benton Foundation that CAF recipients be required to make interconnection points and backhaul capacity available so that unserved high-cost communities could deploy their own broadband networks.<sup>2149</sup> How would such a requirement operate? Is it sufficient to require CAF recipients to negotiate in good faith with community broadband networks to determine a point of interconnection? If there are disputes, who should resolve them? Should there be reporting requirements associated with such an obligation (i.e., should CAF recipients be required to report annually on unfulfilled requests for interconnection from community broadband networks)? What benefits might such a requirement bring that the Commission's other universal service policies are not meeting? What would the costs of such a requirement be, on funding recipients and on administration of the requirement?

1030. We also seek comment on the proposal of Public Knowledge and the Benton Foundation that the Commission should create a fund for a Technology Opportunities Program in order to assist communities with deploying their own broadband networks. How much money should the Commission set aside for such a program? Are there any legal impediments to the Commission running such a pilot program out of the Universal Service Fund? We acknowledge the important role that WISPs, non-profits, and other small and non-traditional communications providers play in extending broadband in rural America, including in areas where traditional commercial providers have not deployed. Are there other things the Commission should be doing to enable such entities to further extend broadband coverage, particularly in currently unserved areas?

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<sup>2146</sup> The standard deviation is a measure of dispersion. The sample standard deviation is the square root of the sample variance. The sample variance is calculated as the sum of the squared deviations of the individual observations in the sample of data from the sample average divided by the total number of observations in the sample minus one. In a normal distribution, about 68 percent of the observations lie within one standard deviation above and below the average and about 95 percent of the observations lie within two standard deviations above and below the average.

<sup>2147</sup> Public Knowledge and Benton *USF/ICC Transformation NPRM* Comments at 5-7; Hypercube *August 3 PN* Comments at 12-13.

<sup>2148</sup> See *infra* section XVII.P (IP-to-IP interconnection issues).

<sup>2149</sup> Public Knowledge and Benton *USF/ICC Transformation NPRM* Comments at 5-7; Letter from John Bergmayer, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. (filed July 28, 2001); Public Knowledge and Benton *August 3 PN* Comments at 6-10.

**B. Connect America Fund for Rate-of-Return Carriers**

1031. In the Order, we establish the CAF and begin the transition of legacy high-cost universal service support to a broadband-focused CAF.<sup>2150</sup> We conclude that all universal high-cost support should ultimately be distributed through CAF for all recipients. Starting in 2012, rate-of-return carriers will receive CAF ICC support. In the near term, such carriers will receive the remainder of their universal service support through existing high-cost support mechanisms, as reformed in the Order.

1032. In response to the *USF/ICC Transformation NPRM*, the Rural Associations proposed the creation of a new broadband-focused CAF mechanism that ultimately would entirely replace existing support mechanisms for rate-of-return carriers. We sought comment in the *August 3rd Public Notice* on this proposal, but received limited response.<sup>2151</sup> Subsequently, the Rural Associations provided draft rules that provide additional context regarding the operation of their proposed CAF.<sup>2152</sup> We now seek focused comment on this proposal and ask whether and how it could be modified consistent with the framework adopted in the Order to provide a path forward for rate-of-return or carriers to invest in extending broadband to unserved areas. We set forth in Appendix G draft rules, modified to take into account the rule changes adopted in this Order, and seek comment on those draft rules.

1033. Under the Rural Association Plan, loop costs would be allocated to the interstate jurisdiction based on the current 25 percent allocator or the individual carrier's broadband adoption rate, whichever is greater. This would have the practical effect of reducing over time the size of legacy support mechanisms, like HCLS, that offset some intrastate costs. The new interstate revenue requirement would also include certain key broadband-related costs (*i.e.*, middle mile facilities and Internet backbone access). In conjunction with this proposal, the Rural Associations also propose that their authorized rate-of-return be reduced from 11.25 percent to 10 percent. CAF support would be provided under this new mechanism for any provider's broadband costs that exceeded a specified benchmark representing wholesale broadband costs in urban areas. In particular, under this proposal CAF funding would be computed by subtracting the product of an urban broadband transmission cost benchmark times the number of broadband lines in service, from the actual company broadband network costs (which would be the sum of last mile, second mile, middle mile, and Internet connection costs). The broadband transmission benchmark would have a fixed component that would increase from \$19.25 in the first year to \$24.75 in the eighth year, and a variable component that is tied to an individual company's broadband take rate. In addition, there would be certain provisions to mitigate the impact on companies that would receive reduced support under the modified mechanism. The purpose of the transitional stability mechanism would be to ensure that no study area would experience a reduction in total support of more than five percent, on an annual basis, which would be funded by carriers that receive a net increase in support.<sup>2153</sup>

1034. The Rural Associations explain that their plan is calibrated to aim for a budget target of \$2.05 billion in combined funding for USF and their suggested access restructure mechanism in the first year of implementation, and may grow to \$2.3 billion by the sixth year. In the Order, we adopt an overall budget target for rate-of-return companies of \$2 billion over the next six years. Given that, how could we best accommodate the Rural Association Plan within the budgetary framework adopted today? If savings are realized in other components of the CAF—for example, if competitive bidding leads to less support

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<sup>2150</sup> See *supra* Section VII.

<sup>2151</sup> *August 3 Public Notice*, 26 FCC Rcd at 11112-11113.

<sup>2152</sup> Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. (filed Oct. 5, 2011).

<sup>2153</sup> Rural Associations *USF/ICC Transformation NPRM* Comments at 27-36.

being disbursed through the CAF for price cap areas than has been budgeted for—should those savings be used to increase funding for rate-of-return carriers under the Rural Association Plan? Could we more quickly transition existing support mechanisms to the framework proposed by the Rural Associations in order to stay within the overall budget? We seek year-by-year financial projections of any new mechanisms and the related impact on legacy support mechanisms, as well as the associated data and assumptions supporting those projections.

1035. With respect to plan specifics, we seek comment on the benefits and the costs of providing support for “middle mile” facilities and access to the Internet backbone under the Rural Associations’ proposal. On average for smaller carriers, approximately what proportion of the costs to deploy broadband networks and provide broadband services are attributable to middle mile and Internet backbone costs today? Commenters are encouraged to provide factual information to support any projections they submit into the record. Consistent with the overall framework adopted in the Order to impose reasonable limits on recovery of loop expenses, how could we impose a constraint on the recovery of middle mile costs under this proposal?<sup>2154</sup>

1036. The Rural Associations propose that costs be shifted to the interstate jurisdiction based on an individual carrier’s “Broadband Take Rate,” which equals its total broadband lines divided by its total working access lines. Should this calculation be limited to residential lines? The Associations define “Broadband Line” to include any line that supports voice and broadband, or only broadband, at a minimum speed of 256 Kbps downstream. We seek comment on that proposal, and ask whether broadband lines should be defined consistent with the broadband characteristics required in our public interest obligations. What would be the impact of a more stringent definition of a broadband line in this context? If we were to adopt this proposal but shift costs to the interstate jurisdiction only for loops that provide speeds of at least 4 Mbps downstream and 1 Mbps upstream, how would that affect the financial projections regarding this proposal? Are there any legal, policy or practical implications to providing CAF support for lines where the end user customer does not subscribe to voice service from the ETC?<sup>2155</sup> The Rural Associations Plan contemplates that rate-of-return carriers may offer standalone broadband; to the extent they do so, absent any other rule changes, what would be the impact on USF support for rate-of-return carriers? What rule changes would help provide appropriate incentives for investment in broadband-capable networks, while limiting unrestrained growth in support provided to rate-of-return companies?

1037. How does the Rural Associations’ proposal to alter the current 25 percent allocation of loop costs fit within, or inform, the Federal-State Joint Board on Jurisdictional Separations’ ongoing work to reform the separations process?<sup>2156</sup> Are there components of the Rural Association plan that should be referred to the Separations Joint Board and examined directly in that ongoing process?

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<sup>2154</sup> See *supra* Section VII.D.3 and *infra* Section XVII.E.

<sup>2155</sup> Today, incumbent local exchange carriers are required to allocate amounts recorded in their Part 32 accounts between regulated and nonregulated activities. 47 C.F.R. § 64.901. The costs and revenues allocated to nonregulated activities are excluded from the jurisdictional separations process. However, rate-of-return companies offer broadband transmission as a Title II common carrier service through a NECA tariff. The cost of loops that provide both voice and broadband is included in cost studies that determine whether and how much HCLS and ICLS a rate-of-return company receives.

<sup>2156</sup> *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Notice of Proposed Rulemaking, 24 FCC Rcd 4227, 4229 (2009). Pursuant to section 36.154(a), 25 percent of the cost of cable and wire facilities used to provide voice telephony is deemed interstate, and 75 percent is deemed intrastate. Wholesale broadband transmission is considered a special access service, however, which is classified as 100 percent interstate.

(continued...)

1038. In the Order, we adopt a requirement that rate-of-return carriers offer speeds of 4 Mbps downstream and 1 Mbps upstream upon reasonable request. Should we adopt a rule that rate-of-return carriers are not required to serve any location within their study area that is served by an unsubsidized competitor and will not receive support for those lines to the extent they choose to extend service to areas of competitive overlap? How would we implement the Rural Associations' proposal in conjunction with such a rule? In particular, what would be the methodology for removing the broadband costs associated with areas of competitive overlap from the calculation of the proposed CAF support?

1039. Is a broadband urban wholesale benchmark the right approach to determine support under a new rate-of-return mechanism, or would another approach be more in keeping with the statute and our prior precedent? How does comparing wholesale urban costs relate to our obligation to ensure that rural retail rates are reasonable? Should such a benchmark be based on the wholesale cost of providing broadband, or another metric? Can wholesale broadband costs be calculated reliably, particularly where wholesale broadband services are not typically offered in urban areas? As an alternative, should the relevant benchmark be set based on the price of comparable retail services in a sample of urban areas?

1040. The Rural Associations' benchmark proposal contemplates a fixed and variable component of the rural benchmark. How should the Commission establish the levels for those components, and should there be a company-specific component of the benchmark? If the benchmark is tied in any manner to NECA tariff rates or another industry metric, does that proposal bear any risks of gamesmanship by carriers to raise or lower individual rates to maximize universal service receipts?

1041. What information would we need to require from carriers in order to evaluate and implement that Rural Association proposal? Prior to implementation, should we, for instance, require carriers to submit analyses showing their broadband adoption trends for service at varying speeds for the last five years in order for us to develop reasonable projections regarding broadband penetration in the future? What information should we obtain regarding their middle mile costs in order to better understand the implications of the proposal to include middle mile costs in support calculations?

1042. How would the proposed "transitional stability plan" mechanism operate? What would be the distributional impact of this proposal in terms of the number of companies that would see increases in support, compared to the number of companies that would see decreases in support?

1043. The Rural Associations propose that incremental broadband build-out commitments would be tied to an individual company's ability to receive incremental CAF support for new investment, subject to prospective capital investment constraints and the budget target adopted by the Commission. If the Commission were to adopt such an approach, what specific metrics or build-out milestones should be established, and what reporting and certifications should be imposed to improve the Commission's ability to enforce such commitments? How should CAF associated with intercarrier compensation reform be incorporated into any rate-of-return CAF mechanism? Would the public interest obligations for CAF associated with intercarrier compensation reform be updated to reflect any new obligations? We seek comment more broadly on how our universal service policies can best accelerate broadband deployment to consumers served by rate-of-return carriers, many of whom reside in rural America. In the long term, should universal service support for rate-of-return carriers be distributed through separate mechanisms from the mechanisms used to distribute support for other types of carriers, or is a uniform national approach preferable to achieve our universal service objectives? We seek comment on any other proposals to transition areas served by rate-of-return carriers to CAF, or any other analysis or recommendations that could facilitate this process.

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### C. Interstate Rate of Return Represcription

1044. As explained in the Order, rate-of-return carriers will continue to receive for some time a modified version of their legacy universal service support. The level of support they receive depends, in part, on the interstate rate of return allowed for plant in service. As a result, we concluded it was necessary to evaluate the authorized interstate rate of return for rate-of-return carriers, which has not been updated in over 20 years.<sup>2157</sup> Three major associations representing rate-of-return carriers, as well as the State Members of the Federal-State Joint Board on Universal Service, have proposed a reduction in the current rate of return, which is currently set at 11.25 percent, in the context of overall reform.<sup>2158</sup> We agree that it is appropriate at this time to reexamine the rate of return as part of comprehensive reform of the universal service fund. We seek comment more generally on how this prescription fits within the broader reform framework for rate-of-return carriers, and specifically in what manner this prescription process should be linked to other proposals in this FNPRM, including the separate CAF support mechanism for rate-of-return carriers.<sup>2159</sup>

1045. With respect to the prescription process itself, our statutory authority under section 205 provides “the power to determine and prescribe those elements that make up the charge,” including the interstate rate of return.<sup>2160</sup> The rate of return must be high enough to provide confidence in the “financial integrity” of the carrier, so that it can maintain its credit and attract capital.<sup>2161</sup> The return should also be “commensurate with returns on investments in other enterprises having corresponding risks.”<sup>2162</sup> On the other hand, “[t]he return should not be higher than necessary for this purpose.”<sup>2163</sup>

1046. The Commission last prescribed the authorized interstate rate of return in 1990, reducing it from 12 percent to 11.25 percent.<sup>2164</sup> We believe fundamental changes in the cost of debt and equity since 1990 no longer allow us to conclude that a rate of return of 11.25 percent is necessarily “just and reasonable” as required by section 201(b).<sup>2165</sup> The rate-of-return carrier associations propose a reduction in the interstate rate of return from the current 11.25 percent to 10 percent.<sup>2166</sup> The State Members of the Federal-State Joint Board propose that the rate be reduced further to 8.5 percent.<sup>2167</sup> The State Members highlight that the interest rate on a three month Treasury Bill has fallen from 7.83 percent in 1990 to 0.15

<sup>2157</sup> This prescription will be limited to interstate common line and special access services as the rules adopted in the Order remove switched access services from rate-of-return regulation. See *supra* Section XIII.E.3.

<sup>2158</sup> ABC Plan Joint Letter Attachs. 1, 2; State Members *USF/ICC Transformation NPRM* Comments at 36-37.

<sup>2159</sup> See *supra* Section XVII.B.

<sup>2160</sup> *Nader v. FCC*, 520 F.2d 182, 204 (D.C. Cir. 1975).

<sup>2161</sup> *U.S. v. FCC*, 707 F.2d 610, 612 (D.C. Cir. 1983) (quoting *Federal Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944)).

<sup>2162</sup> *Illinois Bell Tel. Co. v. FCC*, 988 F.2d 1254, 1260 (D.C. Cir. 1993) (quoting *Hope Natural Gas Co.*, 320 U.S. at 603).

<sup>2163</sup> *U.S. v. FCC*, 707 F.2d at 612 (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 791-92 (1968)).

<sup>2164</sup> *1990 Prescription Order*, 5 FCC Rcd at 7532.

<sup>2165</sup> “All charges, practices, classifications, and regulations for an in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful . . .” 47 U.S.C. § 201(b).

<sup>2166</sup> Letter from Walter B. McCormick, Jr., US Telecom, to Chairman Genachowski, Commissioner Copps, Commissioner McDowell, and Commission Clyburn, WC Docket No. 10-90, at 2 (filed Jul. 29, 2011).

<sup>2167</sup> State Members *USF/ICC Transformation NPRM* Comments at 36-37.

percent in January 2011.<sup>2168</sup> Further, we observe that the average 10-year treasury constant maturity rate has declined from approximately 8.1 percent in January 1991 to approximately 2 percent in September 2011.<sup>2169</sup>

1047. We find compelling evidence that our presently applied interstate rate-of-return, 11.25 percent, is no longer reflective of the cost of capital. We believe updating the rate of return is necessary for rate-of-return carriers to both attract capital on reasonable terms in today's markets and encourage economically sound network investments. We welcome input from state regulators that may have insights from conducting intrastate rate of return represcriptions in recent years. We also invite comment on how the Commission can ensure that the rate of return over time remains consistent with changes in the financial markets and cost of capital. We seek comment on means by which the rate of return can be adjusted automatically based on some set of financial triggers, and how any such triggers would operate.

1048. When it last initiated an interstate rate of return prescription proceeding in 1998, the Commission sought comment on the methods by which it could calculate incumbent LECs' costs of capital.<sup>2170</sup> Today, we seek comment on the issues raised in the *1998 Prescription Notice* generally and ask parties to provide the data responsive to the previous requests. In particular, we seek comment on the following:

1049. *WACC.* Weighted average cost of capital (WACC) identifies the rate of return required to maintain the current value of a firm; alternatively, it is the minimum rate of return the firm needs to offer to investors to maintain access to its current supply of capital. WACC is the key component for prescribing the rate of return. We seek comment on how to calculate the WACC for the relevant companies. We ask whether the formula to determine the WACC in sections 65.301-305 of the Commission's rules is the proper framework for this represcription, and whether any modification or update to the formula or inputs is warranted or necessary.<sup>2171</sup> Specifically, the Commission's rules provide that WACC is the sum of the cost of debt, the cost of preferred stock, and the cost of equity, each weighted by its proportion in the capital structure.<sup>2172</sup> Does this remain the correct approach? Should the Commission augment, or replace, its WACC calculation with any other analysis or approaches? Looking to the WACC calculated for an entire company, rather than for a specific line of business, is appropriate, for example, when thinking about setting an allowed rate-of-return for an entire company. In contrast, this overall WACC would not in general inform a business as to whether to undertake a specific project. Typically, specific projects that have greater risk and therefore a greater cost of capital than the entire company are only undertaken when much higher rates of return are expected. Given that many rate-of-return companies have diversified beyond regulated voice services, for example to offer broadband, video, or wireless services, should the WACC be computed for only the regulated portion of the company's business, or at the level of the entire company? We seek comment on this analysis, and how, if at all, it should impact our rate-of-return calculation, and use of WACC for these purposes.

1050. *Data.* We seek comment on the appropriate data and methodologies the Commission should use to calculate the WACC. We note that some of the formulas in the rules rely on ARMIS data,

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<sup>2168</sup> See *id.* at n.79.

<sup>2169</sup> See 10-Year Treasury Constant Maturity Rate (GS10), Federal Reserve Bank of St. Louis, *available at* <http://research.stlouisfed.org/fred2/series/GS10> (last visited Oct. 21, 2011).

<sup>2170</sup> See *1998 Prescription Notice*, 13 FCC Rcd at 20563.

<sup>2171</sup> 47 C.F.R. §§ 65.301-305.

<sup>2172</sup> 47 C.F.R. § 65.305.

which are no longer collected.<sup>2173</sup> In the absence of ARMIS data, what additional data should the Commission require and rely upon, and who should be required to file the data? Are there other publicly available data that could provide the necessary information? Does the absence of any particular data necessitate a different approach to any of the necessary calculations?

1051. *Capital Structure.* Under the Commission's WACC calculation, the estimated cost of debt, preferred stock, and equity of a company are all weighted relative to their proportion in the firm's capital structure. A firm's capital structure can be measured on a "book" basis or "market" basis. We seek comment on whether the formula in section 65.304 of the Commission's rules based on book values remains the correct approach, and whether any modification to the formula or inputs is warranted or necessary.<sup>2174</sup> Are there other components of the cost of capital that should be included in the capital structure, and should any of the elements listed in the rules be excluded?

1052. *Surrogates.* Because the vast majority of rate-of-return carriers are not publicly traded, the Commission must select an appropriate set of surrogate firms, for which financial data is available publicly, to use as a basis for the cost of capital analysis. To do so, the Commission must select a group of companies for which there is available financial data and that face similar risks to rate-of-return carriers. The Commission's rules provide that the proper group of surrogates is all local exchange carriers with annual revenues equal to or above the indexed revenue threshold, which is \$146 million this year.<sup>2175</sup> In the *1998 Prescription Notice* the Commission sought comment on what group of companies should be selected as surrogates and tentatively concluded at that time that the Regional Bell Operating Companies' (RBOCs) risk most closely resembled the risk encountered by the rate-of-return carriers.<sup>2176</sup> We seek comment on whether that group should be used as surrogates here, or whether another group of providers, for example smaller publicly traded carriers, not including the RBOCs, would better serve this purpose. Should the surrogate group include publicly traded rate-of-return companies only, or a mixture of publicly traded rate-of-return companies and smaller price-cap companies? Commenters proposing a particular surrogate group should clearly define that group, identify the publicly available financial data for that group, and explain how that group best reflects the business risks and cost of capital of rate-of-return carriers.

1053. *Cost of Debt.* A firm's cost of debt can be estimated by dividing its total annual interest expense by its average outstanding debt measured on a historic "book" basis, or alternatively, on a "market" basis using the current yield to maturity. We seek comment on the cost of debt formula in section 65.302 of the Commission's rules based on book values.<sup>2177</sup> We have previously noted that the "book" basis is more objectively ascertainable, but may not fully reflect current investor expectations. We seek comment on that assessment, and the relative weight either the "book" or "market" approach should be given in our calculations. The Commission's rules provide that this measurement should occur for the most recent two years.<sup>2178</sup> Is this the correct time period, or is a longer or shorter period warranted?

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<sup>2173</sup> See, e.g., *Petition of Qwest Corporation for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 07-204, Memorandum Opinion and Order, 23 FCC Rcd 18483 (2008).

<sup>2174</sup> 47 C.F.R. § 65.304.

<sup>2175</sup> 47 C.F.R. § 65.300.

<sup>2176</sup> *1998 Prescription Notice*, 13 FCC Rcd at 20570-71, paras. 19-20.

<sup>2177</sup> 47 C.F.R. § 65.302.

<sup>2178</sup> 47 C.F.R. § 65.302.

1054. *Cost of Preferred Stock.* A firm's cost of preferred stock can be calculated by dividing the total annual preferred dividends by the total proceeds from the issuance of preferred stock. We ask whether the formula in section 65.303 of the Commission's rules remains the correct one, and whether any modification to the formula or inputs is warranted or necessary. The Commission's rules provide that this measurement should occur for the most recent two years.<sup>2179</sup> Is this the correct time period, or is a longer or shorter period warranted?<sup>2180</sup> Can the WACC calculation be simplified by ignoring the cost of preferred stock (and the amount of preferred stock in the capital structure) without significantly affecting the accuracy of the WACC?

1055. *Cost of Equity.* A firm's cost of equity can be estimated using a number of different approaches. The Commission's rules do not provide a specific formula for determining the cost of equity. In 1990, the Commission relied heavily on the discounted cash flow (DCF) methodology, which assesses a firm's stock price and dividend rate and forecasted growth rates to determine the cost of equity.<sup>2181</sup> There are a number of different variations of DCF, including historic and classic calculations.<sup>2182</sup> Alternatively, a firm's cost of equity can be calculated using the capital asset pricing model (CAPM).<sup>2183</sup> To use the CAPM, estimates of the risk free rate, the market risk premium, and the correlation of surrogate companies' common stock returns with the returns of the entire market of securities (or "betas") must be made. We seek comment on these approaches, and ask whether any other methodologies should be incorporated into our analysis. For instance, should we rely upon any cost of equity calculations made in state proceedings addressing intrastate rate of return, or other benchmarks based on the stock market as a whole, or a subset of companies or industries? Proponents of any particular methodology should detail their preferred approach and the relevant data required to perform the necessary calculations. Commenters should also justify the relative weight any particular methodology or comparison should have in our ultimate calculation. We also seek comment on the need, if any, to make adjustments with respect to flotation costs (i.e., costs of selling new securities in the market) or dividends.

1056. *Zone of Reasonableness.* The cost of equity, based on different methodologies and sets of reasonable assumptions and input values, as well as the WACC calculation using the inputs described above, can be used to develop a range from which the Commission can prescribe the new authorized interstate rate of return. This "zone of reasonableness" allows the Commission to take into account additional policy considerations before finalizing the new rate of return.<sup>2184</sup> We seek comment on the factors the Commission should consider in determining the rate of return from within that "zone of reasonableness." We ask how infrastructure deployment, particularly broadband deployment, and today's reforms should be accounted for in our analysis. Is the deployment of broadband significantly more risky than the voice telephony business, and does it have a significantly greater cost of capital? We note, for instance, that voice telephony has nearly universal penetration, while broadband adoption is more than 65 percent nationally. If some or all of the surrogates on which the WACC estimates are based are large companies such as Verizon and AT&T, should unique competitive and market conditions for rate-of-return carriers be reflected, and should any differences in diversification in rate-of-return carrier offerings compared to large carrier offerings, which now may include voice, video, wireless, and data services, be reflected, if at all? Should any allowances made in 1990, or proposed in 1998, apply here? We also seek

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<sup>2179</sup> 47 C.F.R. § 65.303.

<sup>2180</sup> 47 C.F.R. § 65.303.

<sup>2181</sup> See 1990 Prescription Order, 5 FCC Rcd at 7508, para. 9.

<sup>2182</sup> 1998 Prescription Notice, 13 FCC Rcd at 20573-75, paras. 26-30.

<sup>2183</sup> 1998 Prescription Notice, 13 FCC Rcd at 20576, para. 33.

<sup>2184</sup> 1998 Prescription Notice, 13 FCC Rcd at 20578-80, paras. 39-42.



comment on the need to make any adjustments to capture changes in the telecommunications market generally, and ask commenters proposing any such adjustments to explain why they are necessary to prescribe the allowable rate of return for multi-use plant that can provide voice, data, video and other services, in particular, and how any such adjustments should be structured. Lastly, we ask whether any of these policy considerations should also be reflected in any other components of the WACC calculation, and, if so, in what manner.

1057. *Preliminary Analysis.* We estimate, using recent public data, the WACC for AT&T and Verizon and find it in the range of 6 to 8 percent.<sup>2185</sup> This range is consistent with other analysts' estimates.<sup>2186</sup> We find a similar range when considering other mid-size and competitive carriers.<sup>2187</sup> Even if the interest rate were to increase by 1.5 percent,<sup>2188</sup> which seems unlikely in today's economy,<sup>2189</sup> the WACC would remain in the range of approximately 7 to 8 percent. This preliminary analysis would conservatively suggest that the authorized interstate rate of return should be no more than 9 percent. We seek comment on this analysis and note that this preliminary analysis does not prejudice the Commission's ability to select a higher or lower rate of return in this proceeding.

1058. *Impact on Universal Service Funding.* We propose that any reduction in the rate of return be reflected in our universal service rules by reducing the HCLS cap by a corresponding amount, and repurposing that funding amount consistent with the CAF framework and budget adopted today. We also propose that ICLS support be reduced by a corresponding amount as well. We seek comment on these proposals and how to calculate any such reductions. We seek comment on whether any savings realized from reducing the rate of return should be used to establish a new CAF mechanism for rate of return companies that would support new broadband investment. How would a change in the rate of return impact the Rural Association's CAF proposal discussed in this FNPRM, and does this prescription process impact the timing or operation of that proposal or any other transition of rate-of-return carriers to CAF-based support?<sup>2190</sup> In the alternative, we seek comment on the potential benefits of retaining the HCLS cap at the same amount even if the rate of return is reduced, which would have the effect of allowing funding to be redistributed to lower cost rate-of-return carriers that are ineligible for HCLS support today. Are there any other changes to other universal service distribution mechanisms that should be made to reflect a change to the rate of return?

1059. *Tribally-Owned and Operated Carriers.* We seek comment on how to account for Tribally-owned and operated carriers in this prescription, and whether a different rate of return is warranted for these carriers. Tribal governments, and by extension, Tribally-owned and operated carriers,

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<sup>2185</sup> AT&T, 2010 Annual Report, available at <http://www.att.com/gen/investor-relations?pid=19234>; Verizon, 2010 Annual Report, available at [http://www22.verizon.com/investor/app\\_resources/interactiveannual/2010/index.html](http://www22.verizon.com/investor/app_resources/interactiveannual/2010/index.html).

<sup>2186</sup> See, e.g., Bernstein Research—US TELECOMMUNICATIONS AND CABLE & SATELLITE: CAPITAL PUNISHMENT, (December 2010 and May 25, 2011).

<sup>2187</sup> See, e.g., Windstream 2011 Annual Report, available at <http://investors.windstream.com/drip.aspx?iid=4121400> (visited Oct. 6, 2011); Frontier 2010 Annual Report, available at <http://corporate.frontier.com/default.aspx?m=4&p=4> (visited Oct. 6, 2011); TDS 2010 Annual Report, available at [http://media.corporate-ir.net/media\\_files/irol/67/67422/tds2010AR/index.html](http://media.corporate-ir.net/media_files/irol/67/67422/tds2010AR/index.html) (visited Oct. 25, 2011); Cincinnati Bell 2010 Annual Report, available at <http://investor.cincinnati-bell.com/phoenix.zhtml?c=111332&p=irol-reportsAnnual> (visited Oct. 25, 2011).

<sup>2188</sup> McKinsey and Company, *Farewell to cheap capital?*, 6-8 (December 2010).

<sup>2189</sup> See Binyamin Appelbaum, *Its Forecast Dim, Fed Vows to Keep Rates Near Zero*, N.Y. Times (August 9, 2011).

<sup>2190</sup> See *supra* Section XVII.B.

play a vital role in serving the needs and interests of their local communities, often in remote, low-income, and underserved regions of the country.<sup>2191</sup> Tribally-owned and operated carriers serve cyclically impoverished communities with a historical lack of critical infrastructure. Reservation-based economies lack fundamental similarities to non-reservation economies and are among the most impoverished economies in the country. Tribal Nations also cannot collateralize trust land assets, and as a result, have more limited abilities to access credit and capital. We seek comment on how such considerations should be reflected in our analysis.

1060. *Other Considerations.* Finally, we ask commenters to address any other changes that are needed to: (1) the data used in the prescription process; or (2) the calculations the Commission must perform to prescribe a new interstate rate of return. We also invite commenters to provide any other relevant evidence or studies that could assist in this represcription.

#### **D. Eliminating Support for Areas with an Unsubsidized Competitor**

1061. In the Order above, we conclude that we will phase out all high-cost support received by incumbent rate-of-return carriers over three years in study areas where an unsubsidized competitor, or combination of unsubsidized competitors, offering voice and broadband service that meets our performance obligations serves 100 percent of the residential and business locations in the incumbent's study area.<sup>2192</sup> In this FNPRM, we seek comment on a proposed methodology for determining the extent of overlap, a process for preliminary determinations of such overlap, a process for the affected ETC to challenge the accuracy of the purported overlap, with input from the relevant state commission and the public, and how to adjust support levels in situations with less than 100 percent overlap.<sup>2193</sup>

1062. To determine what rate-of-return study areas have 100 percent overlap by an unsubsidized competitor, staff performed a preliminary analysis as described below. The analysis relies on two sets of data: TeleAtlas Wire Center Boundaries (6/2010) and data from the State Broadband Initiative (SBI) program administered by NTIA as of December, 2010.<sup>2194</sup>

1063. First, staff identified which census blocks are in each rate-of-return study area, including a census block in a study area if the centroid of that census block is within the TeleAtlas boundaries for a wire center associated with the study area. Next, staff identified study areas where a wired provider other than the incumbent local exchange carrier offered broadband service at speeds of at least 3 Mbps

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<sup>2191</sup> See *Telecommunications Carriers Eligible for Universal Service Support; Standing Rock Telecommunications, Inc. Petition for Designation as an Eligible Telecommunications Carrier; Petition of Standing Rock Telecommunications, Inc. to Redefine Rural Service Areas; Petition for Reconsideration of Standing Rock Telecommunications, Inc.'s Designation as an Eligible Telecommunications Carrier on the Standing Rock Sioux Reservation*, WC Docket No. 09-197, Memorandum Opinion and Order on Reconsideration, 26 FCC Rcd 9160, 9161 (2011) (*Standing Rock Final ETC Designation Order*).

<sup>2192</sup> As discussed above, for purposes of this requirement, broadband service at speeds of at least 3 Mbps downstream/768 kbps upstream, with capacity limits (if any) that are comparable to residential fixed broadband offerings in urban areas, represents a reasonable proxy. See *supra* para. 103.

<sup>2193</sup> We previously sought comment on proposals to utilize a challenge process to identify areas overlapped by unsubsidized facilities-based competitors. See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4674, para. 391; *Aug. 3<sup>rd</sup> Public Notice*, 26 FCC Rcd at 11117-11118.

<sup>2194</sup> See National Broadband Map, Download Data, available at <http://www.broadbandmap.gov/data-download>. All analysis was conducted using 2000 census geographies.

downstream/768 kbps upstream to all of the census blocks in the study area. Staff excluded all resellers as identified in the SBI data and included only xDSL, cable, and fiber technologies.<sup>2195</sup>

1064. We seek comment on whether this is an appropriate methodology for determining areas of overlap, which will result in adjustments to support levels for the rate-of-return ETC.

1065. As summarized in Figure 12 below, using this methodology, staff performed a preliminary analysis examining census blocks smaller than two square miles and identified 18 rate-of-return study areas with 99 percent or greater overlap; and an additional 19 with greater than 95 percent overlap (a total of 37 study areas with greater than 95 percent overlap).<sup>2196</sup>

Figure 12

Percent overlap	Number of study areas	Annual support (2010)	Number of lines supported (2010)*
≥ 99%	18	\$17.0 million	54,952
At least 95% and less than 99%	19	\$16.7 million	71,794
At least 80% and less than 95%	51	\$98.5 million	511,912

\* Maximum number of lines supported by any high-cost universal service mechanism in 2010.

1066. This analysis has several potential limitations. TeleAtlas data may not represent the actual incumbent local exchange carrier footprint in all instances.<sup>2197</sup> In addition, TeleAtlas data generally assign all geographies to one incumbent provider's footprint or another; however, in reality, there are large, generally unpopulated areas not served by any incumbent carrier facilities. As such, this analysis may over-estimate the rate-of-return ETC's footprint and under-estimate the extent to which the populated portions of that footprint are completely overbuilt by competitive networks.

1067. SBI data have their limitations as well, as we acknowledged in our most recent Broadband Progress Report.<sup>2198</sup> In addition, SBI data only measure the availability of broadband capable of delivering at least 768 kbps downstream and 200 kbps upstream. There is no direct measure of the availability of voice service, but we presume that an unsubsidized xDSL, fiber, or cable competitor that has deployed a broadband network that meets the SBI standard also is offering voice services.

<sup>2195</sup> Specifically, staff used technology codes 10, 20, 40, 41, and 50 from the SBI data submission, excluding 30 to reduce the possibility that the competitor would be a business-focused competitive LEC.

<sup>2196</sup> Staff examined blocks smaller than two square miles because of the treatment of such small blocks in SBI data. Small blocks are characterized as either having service at a given speed with a given technology or not. The Commission has noted challenges with this binary treatment of small blocks and taken a lack of reporting about a block as an indication that the block lacks service. *See 2011 Seventh Broadband Progress Report*, 26 FCC Rcd 8008, 8082-83, App. F. at paras. 9-13. Reporting for larger blocks is more complex, incorporating address- and street-segment level reporting. *See id.* at App. F, n.35.

<sup>2197</sup> *See, e.g.,* Letter from David Cosson, Counsel to Accipiter Communications Inc. to Marlene H. Dortch, Secretary, FCC, CC Docket. No. 96-45, App. A (filed Mar. 11, 2011).

<sup>2198</sup> *See, e.g., Seventh 706 Report*, 26 FCC Rcd at 8081-85, App. F (2011)

1068. We note that small blocks could be reported as served if as few as one location in that block has service or could have service within a typical service interval.<sup>2199</sup> We seek comment on whether this could lead us to count areas as served by an unsubsidized competitor even if a meaningful number of locations are, in fact, not served.

1069. We seek comment on how best to deal with data relating to large blocks. Since neither NTIA nor the Commission has access to the actual location of businesses or homes, SBI population estimates data relies on estimating home locations by random placement of locations along roads. While this will provide an accurate view of the fraction of large blocks that are served in aggregate, it will likely lead to over- or under-estimates in any small number of some large blocks. How can the Commission use such data to determine whether a large block is served or not?

1070. As stated in the Order, after receiving further public input on the proposed methodology, the Wireline Competition Bureau will publish a finalized methodology for determining areas of overlap. Using the methodology chosen, the Wireline Competition Bureau will then publish a list of companies for which there is a 100 percent overlap.<sup>2200</sup>

1071. We seek comment on a process for identifying areas with greater than 75 percent overlap. We propose that the Wireline Competition Bureau identify areas with greater than 75 percent overlap, utilizing the finalized methodology, and then publish the results of that analysis. We propose that the Bureau provide the affected ETC an opportunity to challenge the accuracy of the purported overlap and to take public comment for a period of time, such as 45 days. We seek comment on this proposal.

1072. Several commenters supported state involvement in a process to determine areas of overlap.<sup>2201</sup> How could state commissions play a role in determining the extent of overlap? For instance, after the Bureau performs the overlap analysis, should there be a period of time for the relevant state commission to comment on the analysis? What would be a reasonable time frame to request an evaluation from a state commission regarding such overlap? Alternatively, could we establish a process in which state commissions advise us, by a date certain, which study areas served by rate-of-return carriers have unsubsidized facilities-based competitors, and therefore should be subject to potential adjustments in high-cost support?

1073. We also seek comment on whether support levels would need to be adjusted in areas where there is less than 100 percent overlap by an unsubsidized facilities-based provider of terrestrial fixed voice and broadband service. To the extent support levels do need to be adjusted, we seek further comment on how to do so.

1074. In the *Aug. 3<sup>rd</sup> Public Notice*, we sought comment on how to allocate costs between the overlap areas and the ILEC-only areas, including whether we should use a cost model to accomplish that allocation.

1075. In response to the *Aug. 3<sup>rd</sup> Public Notice*, NCTA recommended that “the Commission should identify study areas served by rate-of-return regulated incumbent LECs where (1) unsubsidized broadband providers serve more than 75 percent of homes; and (2) current high-cost support exceeds projected support under the cost model for the remaining areas by more than 10 percent. During the

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<sup>2199</sup> Department of Commerce, NTIA, State Broadband Data and Development Grant Program, Docket No. 0660-ZA29, Notice of Funds Availability, 74 Fed. Reg. 32545, 32548 (July 8, 2009) (*NTIA State Mapping NOFA*), available at [http://www.ntia.doc.gov/frnotices/2009/FR\\_BroadbandMappingNOFA\\_090708.pdf](http://www.ntia.doc.gov/frnotices/2009/FR_BroadbandMappingNOFA_090708.pdf).

<sup>2200</sup> See *supra* para. 284.

<sup>2201</sup> See, e.g., NASUCA *August 3 PN* Comments at 90; New York PSC *August 3 PN* Comments at 7; Missouri PSC *August 3 PN* Comments at 7, n.10.

interim period, in any study area that meets those criteria, the Commission should provide notice to the carrier that support will be reduced to the level suggested by the cost model unless it can demonstrate that a higher amount is necessary.”<sup>2202</sup> We seek comment on this proposal.

1076. We note that in the Order, we are directing the Wireline Competition Bureau to develop and finalize a cost model for use in price cap territories. Would it be appropriate to use such a model, after appropriate public input, in the way described by NCTA to create a presumptive reduction in support levels for rate-of-return carriers? For purposes of determining whether model-determined support in the “remaining areas” (*i.e.*, the areas of no overlap) exceeded current support by more than 10 percent, would we need to allocate the current high-cost support between the areas of overlap and the areas where there is no overlap? To the extent that support would need to be allocated between areas of overlap and no overlap, what criteria or standards would govern any such allocation? Should there be a rebuttable presumption that all costs are divided pro rata among access lines, and allocated to the census block in which that access line is located, so that absent an appropriate showing the recipient would receive the same support amounts per line, but only for those lines that fall outside the area of overlap? Cablevision suggests that only costs solely attributable to the non-competitive area should be supported, and that most of the costs of overhead (which presumably are largely associated with customers in the areas where there is competitive overlap) should not be recoverable.<sup>2203</sup> Would that be a workable approach? How should the Commission allocate costs associated with cable and wire facilities, and central office equipment, between competitive and non-competitive areas?

1077. NCTA suggests that there be a process in which a carrier subject to reductions could demonstrate that a higher amount is necessary. Should reductions commence within a specified time period, such as 120 days, absent a showing that additional support is necessary? What process should be established for rate-of-return carriers subject to potential support adjustments to contest any such adjustments? For instance, should they be required to show that the adjusted levels would be inadequate to continue to provide voice service to consumers, for example, using the criteria we set forth above for petitions for waiver? Should we undertake a total company earnings review in those circumstances? Should we seek input from the relevant state commission on whether support amounts should be adjusted, and how that would impact consumers in the relevant communities?

1078. If we were to adopt any of these proposals to adjust support levels, over what time period should support levels be transitioned to new levels in situations where there is less than 100 percent overlap?

**E. Limits on Reimbursable Capital and Operating Costs for Rate-of-Return Carriers**

1079. In the Order, we adopt a rule to use benchmarks for reasonable costs to impose limits on reimbursable capital and operating costs for high-cost loop support received by rate-of-return companies. A specific methodology for calculating individual company caps for HCLS is set forth in Appendix H. We seek comment on using this methodology to impose limits on reimbursement from HCLS and propose to implement this methodology for support calculations beginning July 1, 2012.

1080. As described in more detail in Appendix H, the methodology uses quantile regression analyses to generate a set of limits for each rate-of-return cost company study area. These would limit the values used in eleven of the twenty-six steps in NECA’s Cost Company Loop Cost Algorithm, which is

<sup>2202</sup> NCTA *August 3 PN* Comments at 12, Attach. at 10. *See also* Time Warner Cable *August 3 PN* Comments at 25.

<sup>2203</sup> Letter from Howard J. Symons, Counsel to Cablevision, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. (filed Oct. 12, 2011).

used to calculate the study area's total unseparated cost per loop, and ultimately its HCLS.<sup>2204</sup> The regression-derived limits are set at the 90<sup>th</sup> percentile of costs for each individual step in NECA's Cost Company Loop Cost Algorithm, compared to similarly situated companies for each individual step. In other words, a company whose actual costs for a particular step in the algorithm are above the 90<sup>th</sup> percentile, compared to similarly situated companies, would be limited to recovering amounts that correspond to the 90<sup>th</sup> percentile of cost, i.e. the amount of cost that ninety percent of similarly situated companies are at or below when they submit costs for that particular step in the algorithm.<sup>2205</sup> We seek comment on whether the 90<sup>th</sup> percentile is the appropriate dividing line to disallow recovery of cost, or whether we should establish a lower or higher threshold, such as the 85<sup>th</sup> percentile or the 95<sup>th</sup> percentile.

1081. For the dependent variable in the regression analysis, Commission staff limited its analysis to cost data filed by rural rate-of-return companies that submit cost data, and excluded cost data filed by price cap carriers.<sup>2206</sup> For the independent variables, staff used 2010 block-level Census data that it mapped to each study area.<sup>2207</sup> The independent variables included: number of loops, number of housing units (broken out by whether the housing units are in urbanized areas, urbanized clusters, and nonurban areas), as well as several geographic measures such as land area, water area, and the number of census blocks (all broken out by urbanized areas, urbanized clusters, and nonurban areas). The analysis thereby recognizes that many smaller study areas (those with lower populations to serve) and more rural geographies (those with lower population densities) legitimately have higher costs per line (*i.e.*, compared to the national average cost per loop) than larger study areas that contain significant urban populations.

1082. As explained more fully in Appendix H, quantile regression has several advantages over other statistical techniques for identifying outliers. For example, quantile regression estimates the median (or other percentile), rather than the mean, so quantile regression will be more robust in response to large outliers than ordinary least squares regression. Although we find that quantile regression is an appropriate technique to use in setting benchmarks on reimbursable investment and expenses, we invite further comment on alternative statistical techniques.

1083. This methodology utilized variables that are currently available to the Commission. We acknowledge that in their analysis using proprietary cost data, the Nebraska Companies also included

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<sup>2204</sup> See National Exchange Carrier Assoc., Inc., NECA's Overview of Universal Service Fund, Submission of 2010 Study Results, at App. B (filed Sept. 30, 2011) (NECA 2010 USF Overview), *available at* <http://transition.fcc.gov/wcb/iatd/neca.html>; 47 C.F.R. §§ 36.621, 36.631.

<sup>2205</sup> The "costs" in each step of the NECA algorithm are based on the costs in various categories that the cost companies report to NECA, but some of the steps calculate intermediate values that are used in subsequent steps of the algorithm. See Appendix H.

<sup>2206</sup> Rate-of-return study areas affiliated with price cap carriers were excluded because support in those study areas will be frozen at 2011 levels in Phase I CAF and transitioned to Phase II CAF. See *supra* para. 133. Also excluded were the exchanges that were acquired by other carrier study areas. Pursuant to section 54.305 of the Commission's rules, the acquiring carrier receives support for the acquired exchanges at the same per-loop support as calculated at the time of transfer. See 47 C.F.R. § 54.305. Rural carriers who incorporate acquired exchanges into an existing study area are required to provide separately the cost data for the acquired exchanges and the pre-acquisition study area. See NECA 2010 USF Overview, at 5, App. F, <http://transition.fcc.gov/wcb/iatd/neca.html>. The Commission does not have readily available data allowing it to separate these exchanges out from the acquiring exchange, but should be able to do so when running the final analysis. Because of the stable nature of the regression analysis used, staff expects the inclusion of these additional exchanges to have only a small effect on the regression coefficients and therefore on the limits created by the analysis.

<sup>2207</sup> 2010 United States Census Data, [http://www2.census.gov/census\\_2010/01-Redistricting\\_File--PL\\_94-171/](http://www2.census.gov/census_2010/01-Redistricting_File--PL_94-171/) and documentation at <http://www.census.gov/prod/cen2010/doc/pl94-171.pdf>; Study Area Boundaries: Tele Atlas Telecommunications Suite, June 2010.

variables for frost index, wetlands percentage, soils texture, and road intersections frequency. As noted in the Order, the soils data from the Natural Resource Conservation Service (NRCS) that the Nebraska study used do not cover all the study areas used in our regressions.<sup>2208</sup> We seek comment on sources of other soil data that completely cover all the study areas or how to deal with those study areas where the SSURGO data are missing or incomplete. To the extent any commenter advocates use of a methodology that includes additional independent variables, they should identify with specificity the data source and the completeness and cost of the additional data, if not publicly available.

1084. The methodology described in the Appendix establishes limits on recovery from the HCLS mechanism for study areas for which costs in any of the NECA algorithm steps are limited. In the Order, we conclude that support will be redistributed to those carriers whose unseparated loop cost is not limited by operation of the benchmark methodology.<sup>2209</sup> Based on 2010 NECA data filed with the Commission, we estimate this proposed methodology would reduce HCLS payments to about 280 rural rate-of-return cost study areas by an estimated \$110 million, with approximately \$55 million redistributed to approximately 340 cost company study areas whose unseparated loop cost is not limited by operation of the benchmark methodology.<sup>2210</sup> We thus estimate that more study areas could see increases in HCLS than would see decreases.

1085. In the Order, we conclude that we should also limit recovery of excessive capital and operating costs through the interstate common line support mechanism. In this FNPRM, we seek comment on how specifically to implement such a limit for ICLS.

1086. Interstate common line support is calculated as the residual amount of a rate-of-return carrier's interstate common line revenue requirement minus SLCs and other miscellaneous interstate revenues.<sup>2211</sup> Part 69 of the Commission's rules details how carriers are to apportion net investment and expenses in various cost categories for purpose of determining their annual interstate revenue requirements and requires participants in NECA pools and tariffs to file cost data with NECA, but unlike the Part 36 rules, does not require NECA to submit those data to the Commission.<sup>2212</sup> To calculate ICLS, USAC receives only a total interstate revenue requirement amount and the interstate revenue amounts for each ICLS recipient. Although the Commission currently does not receive detailed cost data for determining ICLS, we believe the best approach for calculating benchmarks to limit reimbursable capital and operating costs for ICLS would be to use a methodology similar to the one developed for HCLS, and seek comment on this proposal. As discussed above, we modify our rules to require NECA to provide to the Commission upon request underlying data collected from ETCs to calculate payments under the

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<sup>2208</sup> See *supra* para. 217 and note 349. These data, called the Soil Survey Geographic Database or SSURGO, do not cover about 24 percent of the United States land mass, including Puerto Rico, Guam, American Samoa, US Virgin Islands and Northern Mariana Islands as well as Alaska which accounts for much of the missing land area. Thus, there are some study areas where there is no SSURGO data (such as the study area served by Adak Tel Utility) and other study areas where the SSURGO data not cover the entire study area.

<sup>2209</sup> See *supra* para. 220.

<sup>2210</sup> For purposes of this analysis, we estimate the national average cost per loop for purposes of redistributing support to those carriers not affected by the benchmarks to be approximately \$455. This estimate does not take into consideration the impact on the national average cost per loop of other rule changes that we adopt in this Order, such as the removal of price cap-affiliated study areas from HCLS and the updated corporate operations expense limitation formula. Both of these other changes to HCLS will also affect the distribution of HCLS, making it difficult, at this time, to estimate the combined impact of the proposed benchmark methodology and these other changes. Therefore, the actual redistribution among carriers that continue to receive HCLS may vary.

<sup>2211</sup> See 47 C.F.R. §54.901(a).

<sup>2212</sup> Compare 47 C.F.R. §§ 69.301-69.310, 69.401-69.415, 69.605, with 47 C.F.R. §§ 36.611-36.612.

current support mechanisms, including ICLS.<sup>2213</sup> In the Order, we direct NECA to file the detailed revenue requirement data it receives from carriers no later than thirty days after release of the Order so that the Wireline Competition Bureau can evaluate whether it should adopt a methodology using these data.

1087. In the alternative, we seek comment on two other alternatives that would not use the detailed revenue data from NECA or require carriers to file additional data. First, we could run a single regression using the total interstate revenue requirement for each carrier, but this approach does not distinguish between capital and operating costs. Second, we could use the decrease in cost per loop resulting from the regressions used to limit HCLS to limit a carrier's interstate revenue requirement. While we recognize that there are some differences between the costs used to calculate unseparated loop costs and the common line revenue requirement, and between loops and access lines, we seek comment on whether they are equivalent enough for purposes of establishing benchmarks for reasonable costs.

1088. We seek comment generally on whether network operation and investment by Tribally-owned and operated carriers is significantly different from non-Tribal conditions to warrant special treatment for purposes of establishing benchmarks for permissible capital and operating costs. We seek comment above on whether the 90<sup>th</sup> percentile is the appropriate dividing line to disallow recovery of costs, or whether we should establish a lower or higher threshold, such as the 85<sup>th</sup> percentile or the 95<sup>th</sup> percentile. We seek comment here on whether a different percentile is appropriate for Tribally-owned and operated carriers, or whether we should otherwise alter the methodology to take into account the unique circumstances of Tribally-owned and operated carriers that are just beginning to serve their communities.

#### **F. ETC Service Obligations**

1089. The Connect America Fund will target funding to areas where federal support is needed to maintain and expand modern networks capable of delivering broadband and voice services where people live, work, and travel. In this section, we seek comment on what Commission action may be appropriate to adjust ETCs' existing service obligations as funding shifts to these new, more targeted mechanisms. We aim to ensure that obligations and funding are appropriately matched, while avoiding consumer disruption in access to communications services.

1090. Under section 214 of the Act, the states possess primary authority for designating ETCs and setting their "service area[s],"<sup>2214</sup> although the Commission may step in to the extent state commissions lack jurisdiction.<sup>2215</sup> Section 214(e)(1) provides that once designated, ETCs "shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received . . . offer the services that are supported by Federal universal service support mechanisms under section 254(c)." Although we require providers to offer broadband service as a condition of universal service support, under the legal framework we adopt today, the "services" referred to in section 254(e)(1) means voice service, either landline or mobile.

1091. The Act and the Commission's rules define the term "service area" and how it is established for each ETC. An ETC's "service area" is a geographic area within which an ETC has

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<sup>2213</sup> See *supra* para. 225 (requiring NECA to provide data to the extent USAC does not directly receive such data from carriers).

<sup>2214</sup> 47 U.S.C. § 214(e)(2)–(3). The term "service area" means "a geographic area established by a State commission (or the Commission under section 214(e)(6)) for the purpose of determining universal service obligations and support mechanisms." 47 U.S.C. § 214(e)(5).

<sup>2215</sup> 47 U.S.C. § 214(e)(6).



universal service obligations and may receive universal service support.<sup>2216</sup> Although a carrier seeking to become an ETC usually requests designation in a specific service area, it is the commission designating that carrier—not the ETC itself—that establishes an ETC’s service area.<sup>2217</sup> Nothing in the statute precludes the redefinition of an existing service area, however, for either an incumbent ETC or a competitive ETC at a later date.

1092. The Act defines the service area of each rural telephone company to be that “company’s ‘study area’ unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board . . . establish a different definition of service area for such company.”<sup>2218</sup> When it originally implemented the 1996 Act, acting on the recommendations of the Joint Board, the Commission interpreted this language to mean that “neither the Commission nor the states may act alone to alter the definition of service areas served by rural carriers.”<sup>2219</sup>

1093. In reviewing a potential redefinition of a rural service area when evaluating a request for ETC designation by a competitive ETC, the Commission and the states have traditionally taken into account the three factors recommended by the Joint Board: cream-skimming, the Act’s special treatment of rural telephone companies, and the administrative burdens of redefinition.<sup>2220</sup> The Commission’s rules set forth the procedures for considering redefinition petitions and allow either the state commission or the Commission to propose to redefine a rural telephone company’s service area.<sup>2221</sup> A proposed redefinition, however, does not take effect until the Commission and the appropriate state commission agree upon a new definition.<sup>2222</sup>

1094. Relinquishment of ETC status is governed by section 214(e)(4) of the Act. That provision directs states (or the Commission, for federally designated ETCs) to “permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier.”<sup>2223</sup>

1095. Under the new funding mechanisms established in the Order and proposed in the FNPRM, ETCs may receive reduced support in their existing service areas, and ultimately may no longer receive any federal high-cost support. We seek comment on whether such reductions should be accompanied by relaxation of those carriers’ section 214(e)(1) voice service obligations in some cases. For example, under the CAF Phase II process, an incumbent LEC that declines to undertake a state-level service commitment may lose some or all of its ongoing support in that state. Similarly, we will gradually phase out all high-cost support received by incumbent rate-of-return carriers in study areas

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<sup>2216</sup> See 47 U.S.C. § 214(e)(5); 47 C.F.R. § 54.207(a).

<sup>2217</sup> See 47 U.S.C. § 214(e)(5); 47 C.F.R. § 54.207(a).

<sup>2218</sup> 47 U.S.C. § 214(e)(5); see also 47 C.F.R. § 54.207(b); 47 U.S.C. § 153(44) (defining “rural telephone company”).

<sup>2219</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8880, para. 187 (1997) (*Universal Service First Report and Order*) (subsequent history omitted).

<sup>2220</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd 87, 179–80, paras. 172–74 (1996) (*1996 Recommended Decision*); see also *Highland Cellular Order*, 19 FCC Rcd at 6426, para. 9. A carrier “cream-skims” when it serves only those consumers that are least expensive to serve. See *Universal Service First Report and Order*, 12 FCC Rcd at 8881–82, para. 189.

<sup>2221</sup> 47 C.F.R. § 54.207(c), (d).

<sup>2222</sup> 47 C.F.R. § 54.207(c)(3), (d)(2).

<sup>2223</sup> 47 U.S.C. § 214(e)(4).

where an unsubsidized competitor – or a combination of unsubsidized competitors – offers voice and broadband service that meets the performance requirements for 100 percent of the residential and business locations in the incumbent’s study area. Likewise, competitive ETCs that today receive support under the identical support rule will see funding in their existing service areas phased down over time as set forth in the Order, although those ETCs will be eligible for targeted funding to extend advanced mobile services through the Mobility Fund Phase I and Phase II. Some commenters have proposed that as these reductions occur, the Commission should relax or eliminate ETCs’ voice service obligations.<sup>2224</sup> We seek comment on this suggestion.

1096. In addition, even in service areas where ETCs retain existing support levels or receive greater funding under the Connect America Fund, that funding will increasingly be targeted at the census block level, or to other precisely defined geographic areas. For example, in the Order, we direct the Wireline Competition Bureau to develop a cost model to estimate on a granular level, such as the census block, the amount of support necessary for deployment of a broadband-capable wireline network in high-cost areas above a specified threshold, and to use the output of that model to calculate the support that incumbent price cap companies would receive if they undertake state-level broadband service commitments. These price cap ETCs will still be subject to section 214(e)(1) voice service obligations, however, and the model-derived support amount will not include a separate estimate of support for the cost of providing voice service to locations below the specified threshold or those locations that will receive funding from the Remote Areas Fund. Likewise, competitive ETCs that bid for Phase I Mobility Fund support will be required to offer advanced mobile service in specific unserved census areas, but their state or federally-defined service territory may be substantially larger than their bid areas. We seek comment on whether, in situations such as these, some adjustment in affected ETCs’ section 214(e)(1) obligation to offer service “throughout [their] service area” may be appropriate. Alternatively, we seek comment on whether we should adopt a federal framework for the process to be used in redefining service areas, by the states or this Commission, as appropriate. What specific modifications to section 54.207 of our rules would be appropriate? Should there be uniform procedures for service area redefinition for ETCs that are incumbent carriers, regardless of whether the incumbent is classified as a rural carrier or a non-rural carrier in a particular study area?

1097. We propose that existing ETC relinquishment and service area redefinition procedures, backstopped by the availability of forbearance from federal requirements, provide an appropriate case-by-case framework in which to address these issues in the near term, but we also seek comment on other approaches. To the extent that carriers find that the ETC relinquishment and service area redefinition procedures prove insufficient, we propose that case-by-case federal forbearance would provide an appropriate remedy in the near term, as the Commission gains experience under the new universal service mechanisms established in the Order. Under section 10 of the Act, the Commission must “forbear from applying any regulation or any provision of [the] Act to a telecommunications carrier . . . in any or some of its or their geographic markets,” if we find that three conditions are met. As applicable here, these conditions are: “(1) such regulation or provision is not necessary to ensure that the charges [or] practices . . . for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable . . . [;] (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.”<sup>2225</sup> The Commission has forbore from the section 214(e)(1) requirement that ETCs offer

<sup>2224</sup> Comments of US Telecom Association, GN Docket No. 09-51 et al., at 17 (filed July 12, 2010); ABC Plan Joint Letter, Attach. 1 at 13; Letter from Heather Zachary, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 2-3 (filed Oct. 19, 2011); Letter from Kathleen Grillo, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. (filed Sept. 16, 2011); *but see* Letter from Regina Costa, NASUCA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 3 (filed Oct. 3, 2011).

<sup>2225</sup> 47 U.S.C. § 160(a).

service using at least some of their own facilities and the section 214(e)(5) requirement that the service area of a competitive ETC conform to the service area of any rural telephone company service.<sup>2226</sup> We see no reason why we could not likewise forbear from the section 214(e)(1) requirement that carriers offer service “throughout [their] service area” if the statutory criteria for forbearance are met. In particular, we note that section 10 expressly grants the Commission authority to tailor forbearance relief to “any or some of [telecommunications carriers’] geographic markets,” which we believe would allow the Commission to forbear from enforcing a carrier’s section 214(e)(1) obligations in some parts of its service area, while maintaining those obligations elsewhere. We seek comment on our interpretation of section 10, and on our proposal to use case-by-case forbearance to adjust carriers’ section 214(e)(1) service obligations under our new funding mechanisms as necessary and in the public interest.

1098. We note that some commenters have sought broader modifications to the section 214(e)(1) framework, and we also seek comment on these suggestions as alternatives or supplements to the case-by-case approach we propose. In particular, some commenters suggest that the Commission adopt a rule under section 201 or 254(f) providing that an ETC’s section 214(e)(1) “service area” “should be limited to those specific geographies (e.g., wire centers) where the ETC is receiving universal service support.”<sup>2227</sup>

1099. These commenters also suggest that the Commission grant blanket section 10 forbearance “to the extent [section 214(e)(1) requires ETCs to offer service in areas where they receive no universal service support.”<sup>2228</sup> In the alternative, commenters suggest that the Commission reinterpret section 214(e)(1) to require the provision of service only in areas where those services actually are supported, contending that section 214(e)(1)’s requirement that ETCs offer “the services that *are supported*” suggests that the service obligation only attaches where support actually flows.

1100. We seek comment on each of these proposals. In particular: Do these approaches appropriately balance federal and state roles in the designation and oversight of ETCs? Are they in tension with section 214(e)(4)’s requirement that ETCs may only be allowed to relinquish their designations in “area[s] served by more than one eligible telecommunications carrier,” *i.e.*, areas where service will continue even if relinquishment is permitted? Are they in tension with the statutory language in section 214(e)(5) that the service area of a rural telephone company is its study area, unless the Commission and the states, establish a different definition? Are there ways to address this tension and ensure continued voice service to consumers in all areas of the country, while still taking steps to better align targeted funding with service obligations, as some commenters advocate? Is the above proposed interpretation of section 214(e)(1) consistent with that section’s requirement that carriers offer “the services that are supported” “throughout the service area for which [their ETC] designation is received”?

1101. If the Commission were to establish a general rule that service obligations should only attach in the specific geographies (*e.g.*, wire centers) where the ETC is receiving universal service support, we also seek comment on what would be the appropriate geography to use. Should we use geographies based on the actual network architectures of fund recipients, like wire centers? Or should we pick technology-neutral geographies, such as census blocks, census tracts, or counties? How granular should our definition of the service requirement be? What would be the practical implications of an ETC

<sup>2226</sup> *Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, CC Docket No. 96-45, 20 FCC Rcd 15095 (2005); *Telecommunications Carriers Eligible for Universal Service Support; NTCH, Inc. Petition for Forbearance from 47 U.S.C. § 214(e)(5) and 47 C.F.R. § 54.207(b)*; *Cricket Communications, Inc., Petition for Forbearance*, WCB Docket No. 09-197, Order, 26 FCC Rcd 13723 (2011).

<sup>2227</sup> Letter from Heather Zachary, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 3-5 (filed Oct. 19, 2011).

<sup>2228</sup> *Id.* at 5.

having service obligations in certain census blocks and not others within a community (for instance having obligations outside of town, but not within the footprint of an unsubsidized provider that services only the town), and would that variation in obligation result in consumer confusion?

1102. Finally, we also seek comment on how to ensure that low-income consumers across America continue to have access to Lifeline service, both in urbanized areas that will not, going forward, receive support from the new CAF, and in rural areas that will, over time, receive support from the CAF. As a practical matter, how can the Commission ensure that low-income consumers that only wish to subscribe to voice service continue to have the ability to receive Lifeline benefits? We emphasize our ongoing commitment to ensuring that low-income consumers in all regions of the country have “access to telecommunications and information services.”<sup>2229</sup> Some commenters have suggested that we create Lifeline-only ETCs.<sup>2230</sup> As a matter of federal policy, would it thwart achievement of the objectives established by Congress to relieve an existing ETC of the obligation to provide Lifeline if there was no other ETC in that particular area willing to offer Lifeline services?

### G. Ensuring Accountability

1103. In this section, we seek comment on several additional measures to impose greater accountability on recipients of funding.

1104. In the accompanying Order, we create a rule that entities receiving high-cost universal support will receive reduced support should they fail to fulfill their public interest obligations, such as by failing to meet deployment milestones, to provide broadband at the speeds required by the Order, or to provide service at reasonably comparable rates. In addition, in the Order adopting the first phase of the Mobility Fund, we require recipients to obtain a letter of credit in order to receive funding. A Mobility Fund Phase I recipient that fails to comply with the terms and conditions upon which its support was granted will be required to repay the Mobility Fund all of the support it has received as well as a default payment.<sup>2231</sup> In this FNPRM, we propose various alternative remedies available to the Commission in the event an ETC fails to comply with our rules regarding receipt of high-cost universal service support.

1105. *Financial Guarantees.* The first alternative remedy we propose for non-compliance with our rules is a financial guarantee. We propose that a recipient of high-cost and CAF support should be required to post financial security as a condition to receiving that support to ensure that it has committed sufficient financial resources to complying with the public interest obligations required under the Commission’s rules and that it does in fact comply with the public interest obligations set forth in Section VI of the Order. In particular, we seek comment on whether all ETCs should be required to obtain an irrevocable standby letter of credit (LOC) no later than January 1, 2013.<sup>2232</sup> Our goal in proposing this requirement is to protect the integrity of the USF funds disbursed to the recipient and to secure return of those funds in the event of a default, even in the event of bankruptcy.

1106. In other sections of this FNPRM, we seek comment on applying post-auction procedures, including performance guarantees, to ETCs that apply for funding after a competitive bidding process. In

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<sup>2229</sup> 47 U.S.C. § 254(b)(3).

<sup>2230</sup> See, e.g., ABC Plan Joint Letter, Attach. 1 at 7-9, Sprint *USF/ICC Transformation NPRM* Comments at 42-43, n.91, Comments of AT&T, GN Docket No. 09-51 et al., at 17-18 (filed July 12, 2010).

<sup>2231</sup> See *supra* Section VII.E.1.e.v.

<sup>2232</sup> Our proposal would require ETCs to provide an LOC issued in substantially the same form as set forth in our model Letter of Credit by a bank that is acceptable to the Commission. See Appendix P. We propose that the requirements for a bank to be acceptable to the Commission to issue the LOC would be the same as those we adopt for LOCs obtained by recipients of Mobility Fund support. See 47 C.F.R. § 54.1007.

this section, we seek comment on adopting financial performance guarantee requirements for ETCs that receive funding through processes other than competitive bidding.

1107. Should ETCs that will receive less than a specified amount of support be exempted from any requirement to provide an LOC?<sup>2233</sup> On what basis should we adopt such a blanket exemption? For instance, should it be based on the aggregate amount of support provided on a study area basis, and at what dollar level should we grant such an exemption?

1108. We seek comment on how to determine the amount of the LOC necessary to ensure compliance with the public interest obligations imposed in the Order, as well as the length of time that the LOC should remain in place. For example, the amount of the LOC could be determined on the basis of the ETC's estimated annual funding amount. Should the amount of an initial LOC, or a subsequent LOC, also ensure the continuing maintenance and operation of the network? We also recognize that a recipient's failure to fulfill its obligations may impose significant costs on the Commission and, potentially, on the USF itself if there is a need to provide additional support to another ETC to serve the area. Should the amount of an initial LOC or a subsequent LOC include an additional amount that would serve as a default payment? Under what circumstances should the ETC be required to replenish the LOC? For how long should an ETC be required to keep the LOC in place? Is there a finite time after which the LOC will no longer be necessary to safeguard the Fund?

1109. We propose that under the terms of the LOC, failure to satisfy essential terms and conditions upon which USF support was granted, including failure to timely renew the LOC, will be deemed a failure to properly use USF support and will entitle the Commission to draw the entire amount of the LOC to recover that support and any default payment. The Commission, for example, would draw upon the LOC when the recipient fails to meet its required deployment milestone(s) or other public interest obligations. Are there any situations in which we should deem non-compliance to be non-material, and therefore not warrant a draw on the letter of credit? Should recipients be provided a period of time to cure non-performance before drawing on the letter of credit? We propose that failure to comply will be evidenced by a letter issued by the Chief of either the Wireless Bureau or Wireline Bureau or their designee, which letter, attached to an LOC draw certificate shall be sufficient for a draw on the LOC.<sup>2234</sup>

1110. *Penalties.* We seek comment on alternatives to the financial guarantees discussed above, including whether revocation of ETC designation, denial of certification resulting in prospective loss of support, or recovery of past support amounts is an appropriate remedy for failure to meet the public interest obligations adopted in the Order.<sup>2235</sup> We also seek comment on the specific circumstances in which these alternatives might apply, if they are different than the specific circumstances in which financial guarantees would apply.

1111. We also seek comment on what specific triggers might lead to support reductions, how much support should be reduced, how best to implement support reductions, and how the review and

<sup>2233</sup> We note that in Section VII.E.1.e.v of the accompanying Order, we declined to limit the LOC requirement to a subset of bidders that fall under certain criteria, such as a specified bond rating, debt/equity ratio and minimum level of available capital.

<sup>2234</sup> While such letter may not foreclose an appeal or challenge by the recipient, the appeal or challenge will not prevent a draw on the Letter of Credit.

<sup>2235</sup> In the E-rate program, we recover support that has been disbursed to recipients when it is determined there has been non-compliance with statutory or specified regulations. *See Matter of Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order, 19 FCC Rcd 15808, 15813-23, paras. 15-44 (2004). In some circumstances, all support for a given funding year is recovered for a given violation, while in other circumstances, funding is recovered on a pro-rata basis. *See id.*

appeal process should be revised. If we adopt a framework for partial withholding of support, should we establish “levels” of non-performance that would result in the loss of specific percentages of support? For example, should we establish levels one through four of non-compliance, with corresponding loss of support of 25, 50, 75, and 100 percent? If so, what criteria do we use to determine a carrier’s level of non-performance?

1112. USAC today recovers support when recipients have received support to which they are not entitled, typically accomplishing the recovery through adjustments in future disbursements. Should we adopt rules identifying what constitutes a material failure to perform, warranting recovery of past funding? For instance, should price cap companies be subject to a loss of prospective support for failure to meet intermediate build-out requirements? Should they be subject to recovery of past support amounts if they fail to meet the performance requirements at the end of the five-year term? Should there be a sliding scale for recovery of past amounts depending on the degree to which the carrier fails to meet a specified milestone? Should we continue the current practice of offsetting any support adjustments against future disbursements?

1113. Should we adopt rules that create self-executing reductions in support that would be administered by USAC? We note that under our current rules, any party that disputes action by USAC may seek review by the Commission. What additional processes, if any, should we put in place for ETCs to dispute any support adjustments for non-performance?

1114. We recognize that under section 214, ETC designation is a responsibility shared between the states and this Commission. We welcome input from our state colleagues on the circumstances in which ETC designations have been revoked by states in the past, and what circumstances might warrant revocation under our reformed Connect America Fund. Should we adopt a national framework for when ETC revocation is appropriate?

1115. The State Members of the Universal Service Joint Board suggest that denial of certification – which today results in loss of support for the coming year – is a draconian remedy that should be available if necessary, but avoidable if possible.<sup>2236</sup> We seek comment on what circumstances would justify such a result. The State Members also proposed in their comments that carriers should be disqualified from receiving support during periods in which they fail to provide adequate information to verify continuing eligibility to receive support and adequate to perform support calculations.<sup>2237</sup> We seek comment on this proposal. We particularly welcome input from our state partners on how we can ensure there are significant consequences for material non-compliance.

1116. An alternative approach might be to separately count compliance with each public interest obligation established in Section VI of the Order, with non-compliance with each individual obligation resulting in the ETC losing a set percentage of support for each obligation it fails to meet. Must non-compliance with an obligation be material? If so, how do we define “material” for these purposes?

## **H. Annual Reporting Requirements for Mobile Service Providers**

1117. In the Order, we seek to take several steps to harmonize and update our annual reporting requirements for recipients of USF support, including extending the current annual reporting requirements to all ETCs.<sup>2238</sup> All ETCs that receive high-cost support, except ETCs that receive support solely

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<sup>2236</sup> See State Members *USF/UCC Transformation NPRM* Comments at 140.

<sup>2237</sup> See State Members *USF/UCC Transformation NPRM* Comments at 55.

<sup>2238</sup> See *supra* section VIII.A.2.

pursuant to Mobility Fund Phase I, which has separate annual reporting obligations,<sup>2239</sup> will be required to annually file the information required by new section 54.313 with the Commission, USAC, and the relevant state commission, authority in a U.S. Territory, or Tribal government or authority, as appropriate. In the Order, we also establish new reporting requirements for the annual reports that will ensure that recipients are complying with the new broadband public interest obligations we adopt.<sup>2240</sup> Because Mobility Fund support will differ in some respects from support received under other USF high-cost support mechanisms, in the section of the Order adopting the first phase of the Mobility Fund, we require recipients of Mobility Fund support to file annual reports specific to that program.<sup>2241</sup> Mobility Fund recipients that receive support under other high-cost programs may file a separate Mobility Fund annual report or they may include the required information with respect to their Mobility fund support in a separate section of their annual reports filed pursuant to section 54.313.<sup>2242</sup>

1118. We seek comment here on whether there are certain requirements in our new annual reporting rule for ETCs, new section 54.313, that do not reflect basic differences in the nature and purpose of the support provided for mobile services. Specifically, we seek comment on whether we should revise the section 54.313 reporting requirements or adopt new reporting requirements that would apply to support an ETC receives to provide mobile services. For example, new section 54.313 requires ETCs to include in their annual reports, beginning with their April 1, 2014 report, information regarding their progress on their five-year broadband build-out plan.<sup>2243</sup> What type of similar information would be appropriate to require of mobile service providers who receive support from Phase I or Phase II of the Mobility Fund? ETCs are currently required to report annually on the number of requests for service from potential customers within the ETC's service areas that were unfulfilled during the past year.<sup>2244</sup> Should we continue to require this information from mobile service providers in view of the fact that the measure of performance for ETCs receiving Mobility Fund support is coverage of the supported areas, and not the number of subscribers to the supported service?

1119. ETCs must also include in their annual reports detailed information on outages that meet certain minimum criteria described in the rule, including the geographic areas affected and the number of customers affected.<sup>2245</sup> For mobile service providers, how should the number of affected customers be counted? Should the number of affected customers be the number of customer billing addresses within the affected areas, the average number of customers served by the towers that are out-of-service during the outage, or some other measure?

1120. We seek comment on the annual reporting issues raised above and on any other aspects of our annual reporting requirements that commenters believe do not reflect the nature of mobile services being offered and the objectives of the USF support they receive and that require a new annual reporting rule specifically directed to mobile service providers.

## **I. Mobility Fund Phase II**

1121. The Order we adopt today establishes the Mobility Fund, which will help ensure the

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<sup>2239</sup> See *supra* note 946.

<sup>2240</sup> See *supra* VIII.A.2.

<sup>2241</sup> See *supra* paras. 471-474.

<sup>2242</sup> See *id.*

<sup>2243</sup> 47 C.F.R. § 54.313(a)(1).

<sup>2244</sup> 47 C.F.R. § 54.313(a)(3).

<sup>2245</sup> 47 C.F.R. § 54.313(a)(2).

availability of mobile broadband services across America. This FNPRM addresses specifically the second phase of the Mobility Fund, which provides ongoing support for mobile broadband and high quality voice services.<sup>2246</sup> We anticipate disbursements from the second phase of the Mobility Fund to begin in 2014. The Order establishes an annual budget of \$500 million, up to \$100 million of which will be reserved to support Tribal lands, including Alaska. We propose rules to use the Mobility Fund Phase II to ensure 4G mobile wireless services in areas where such service would not otherwise be available, and seek comment on certain alternative approaches.

## 1. Overall Design

1122. We propose to use a reverse auction mechanism to distribute support to providers of mobile broadband services in areas where such services cannot be sustained or extended without ongoing support. We propose that the reverse auction be designed to support the greatest number of unserved road miles (or other units) within the overall Mobility Fund budget. Assigning support in this way would be consistent with our general decision to use market-driven policies to maximize the value of limited USF resources, and should enable us to identify those providers that will make most effective use of the budgeted funds, thereby benefiting consumers as widely as possible. We discuss the proposed framework for the program and the auction mechanism in more detail below, and seek comment on alternatives, including the use of a model to determine both the areas that would receive support and the level of support.

## 2. Framework for Support Under Competitive Bidding Proposal

### a. Identifying Geographic Areas Eligible for Support

1123. We seek to provide funding only in geographic areas where there is no private sector business case to provide mobile broadband and high quality voice-grade service. We propose to identify such areas by excluding all areas where unsubsidized 3G or better services are available. We propose to use census blocks as the minimum size geographic unit for identifying eligible areas.

1124. *Identifying Areas Eligible for Support.* We propose to identify areas eligible for support on a census block basis, which would permit us to target Phase II support more precisely than if we were to use a larger area. As a proxy for identifying areas where private investment is likely to undertake to provide mobile broadband services, and thus, areas not eligible for support, we propose to use areas where an unsubsidized provider offers 3G or better service based upon the most recent available data prior to auction. Under this proposal, any census block where 3G or better service is available from at least one unsubsidized provider would not be eligible for support.<sup>2247</sup> Census blocks with 2G service available from an unsubsidized provider as well as census blocks where 3G service is provided only by subsidized provider(s) would be eligible. Specifically, we would use American Roamer data to identify areas where there are mobile networks that offer service using EV-DO, EV-DO Rev A, UMTS/HSPA and HSPA+, LTE, and any other technologies offering equivalent speeds or better. As discussed below, we may wish to prioritize support to areas that also lack 2G coverage, and American Roamer data could also be used for this purpose. As with Phase I, we propose to use the centroid method to establish whether service using particular technologies is available to a particular census block. Census blocks that do not have such service would be eligible for Phase II support. We seek comment on these proposals. In particular, we seek comment on whether there are other proxies for determining where private investment will deploy mobile broadband, other data sources, other technologies, or methods other than the centroid method that we should consider in determining whether particular census blocks should be excluded from

<sup>2246</sup> See *supra* section VI (Public Interest Obligations).

<sup>2247</sup> We note that any provider that may be offering 3G or better service at the time of a Mobility Fund Phase II auction in an area for which it receives Mobility Fund Phase I support would not be considered unsubsidized.



eligibility for support to promote our objectives.

1125. We also seek comment on how a cost model could be used to identify areas for which providers would be able to seek support in a Phase II auction. We note here that US Cellular and MTPCS have filed analyses based on cost models for the deployment of wireless services. Elsewhere, we seek comment on their submissions. In particular, we discuss at greater length below how a cost model could be used both to identify areas where support should be offered and, as an alternative to competitive bidding, to determine the amount of support to be offered. Here, we invite comment on the possibility of using a mobile wireless cost model only to identify the areas that would be eligible for Phase II support, with the actual award of support through a reverse auction. We also seek comment on using other criteria – such as the availability of unsubsidized services as discussed above – to refine a model-based definition of areas for which providers will be eligible to seek support in the auction. For example, we could make ineligible for Phase II support areas with unsubsidized providers, or areas where any provider has made a public or regulatory commitment to provide unsubsidized service, even if a cost model indicates that costs are high.

1126. *Minimum Size Unit for Bidding and Support.* We propose to identify eligible areas at the census block level, and we also propose that the census block should be the minimum geographic building block for defining areas for which support is provided. Because census blocks are numerous and can be quite small, we believe that the Phase II auction should provide for the aggregation of census blocks for purposes for bidding. That could be done in a number of ways. We could set out by rule a minimum area for bidding comprised of an aggregation of eligible census blocks. In addition, the auction procedures could provide for bidders to be able to make “all-or-nothing” package bids on combinations of bidding areas. Package bidding procedures could specify certain predefined packages,<sup>2248</sup> or could provide bidders greater flexibility in defining their own areas, here comprised of census blocks. We seek comment on two of the possible approaches to aggregating census blocks.

1127. Under the Census Tract Approach, the Commission would define a minimum aggregation of blocks by rule, for example by aggregating eligible census blocks based on the census tract in which they lie, so that bidders would bid for support for all eligible census blocks within that tract.<sup>2249</sup> Under the Bidder-Defined Approach, the Commission would not require a minimum aggregation of census blocks, but would establish package bidding procedures that would allow bidders to group the specific census blocks on which they wanted to bid.

1128. Census Tract Approach. Under this approach we would create a minimum unit for bidding that is larger than an individual block. For example, we could use a census tract, so bidders would bid for support to serve all the eligible blocks within the census tract. We ask for comment on whether tracts would be an appropriate unit here or whether there is some other minimum grouping of census blocks that would be preferable, such as block groups. Should we use a different minimum geographic unit in areas where census blocks and/or census tracts are especially large? For example, if we group blocks into tracts for bidding, should we consider making an exception if the particular tract is especially large, and use individual blocks or block groups for bidding in those cases, as we have done in Alaska for Mobility Fund Phase I? Regardless of the minimum unit, there are a number of different auction designs that could be used. For example, one possibility would be to use a clock auction format with bidding on tracts. Without package bidding, bidders could manage aggregations of tracts through multiple rounds of bidding. For package bidding, we could allow bidders to flexibly aggregate census

<sup>2248</sup> See 700 MHz Auction Procedures Public Notice, 22 FCC Rcd at 18,179-81, paras. 138-144.

<sup>2249</sup> Census tracts have between 1,500 and 8,000 inhabitants and average about 4,000 inhabitants. Each census tract consists of multiple census blocks and every census block fits within a census tract. There are over 11 million census blocks nationwide.

tracts (or other units) of their choosing or we could allow bidders to place package bids on pre-defined packages of tracts. We seek comment on bidders' interest in and need for package bidding as it relates to our choice of a minimum unit for bidding and support. Under the Census Tract Approach, as explained below, bidders would be required to serve a specified percentage (*e.g.*, 75 percent) of the units (or road miles, as proposed) in the unserved census blocks.

1129. Bidder-Defined Approach. Under this approach, the Commission would not specify a minimum aggregation of census blocks but would provide bidders with considerable flexibility to aggregate the specific census blocks they propose to serve. Bidders would be able to make bids that specify a set of census blocks to be covered, and a total amount of support needed. We seek comment on whether there should be a boundary on bids under such procedures – for example, would it be useful to have a rule that all the census blocks in a given bid must be within a cellular market area (CMA)?<sup>2250</sup> Under this approach, a bidder could be permitted to submit several bids, up to a limit that would be specified in the auctions procedures. Bids by that bidder that contained some geographic overlap would be treated as mutually exclusive, *i.e.*, only one could be awarded. Bids that do not overlap could win simultaneously. The Commission would use a computer optimization to identify the set of bids that maximizes the number of eligible road miles (or other supported units) covered subject to the budget constraint. Under this general approach, there may be some limited scenarios where eligible road miles may be covered by multiple winners – *i.e.*, whenever the optimization determines that the set of winning bids that would maximize the total road miles (or other units) covered within the budget requires limited duplicative coverage, we would permit that coverage. We seek comment on whether such an approach could be sufficiently contained to ensure that we are truly making the most efficient use of the fund given limited resources. We also note that allowing overlap among providers could reduce the revenues a bidder expects from customers, and therefore could increase the support a bidder would seek. We seek comment on whether this is a significant concern, and whether it could be addressed by allowing bidders to make bids contingent on the overlap being less than some percentage. In addition, as discussed below, providers would be required to serve all the units in the census block.

1130. We seek comment on whether a Bidder-Defined Approach, a Census Tract Approach, or another approach would best meet the needs of bidders to take advantage of geographic economies of scale or scope. In order to bid effectively, presumably bidders would need to match eligible census blocks to their business plans, and know the number of road miles (or other supported units) within each census block. As discussed below, prior to an auction, the Wireless and Wireline Bureaus would provide information on the specific eligible census blocks and the units associated with each under the authority we propose to delegate to them. We could provide information through one or more bidder tools on the Commission website. Those tools, for instance, could allow bidders to readily match up their own information on the geographic areas in which they are interested with the blocks available in the auction. Bidder tools could also make readily accessible to potential bidders various online data, including maps, regarding the unserved blocks in which they are interested -- such as associated road mile or population (or other units) data so that bidders could consider potential per-unit bids for coverage of various possible geographic areas. Providing these tools could facilitate participation by small as well as large providers. We seek comment on whether there is additional information or help that the Commission should provide to bidders would need from the Commission or whether the tools needed for this matching and calculation can be developed by bidders.

1131. We invite comment on any other advantages and disadvantages of the Census Tract and Bidder-Defined approaches from a provider's perspective. Commenters should address the minimum scale at which providers may want to incorporate Phase II support into their existing networks; the

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<sup>2250</sup> See *supra* note 586.

simplicity of the auction mechanism; the ability of providers to capture efficiencies, and to formulate and implement bidding strategies; and ease of administration.

1132. *Prioritizing Areas.* In addition, we seek comment on whether we should target areas currently without any mobile service for priority treatment under Phase II. For instance, should we provide a form of bidding credit that would promote the support of areas with no mobile service at all or only mobile service at lower than current generation or 3G levels? We discuss below in a separate section proposals for targeting Phase II support to Tribal lands, including remote areas of Alaska.

1133. We also seek comment on whether we should prioritize coverage to any areas in which previously provided support is being phased down. To the extent that parties believe there is a risk of meaningful loss of coverage, we welcome comments on how to define the areas at risk, and how to address the risk. Once the areas are defined, they could be prioritized, for example, by making available bidding credits for these areas.

#### **b. Establishing Bidding and Coverage Units**

1134. We propose to base the number of bidding units and the corresponding coverage requirement on the number of road miles in each eligible geographic area. Requiring coverage of road miles directly reflects the Mobility Fund's goals of supporting *mobile* services, and indirectly reflects many other important factors – such as business locations, recreation areas, and work sites – since roads are used to access those areas. And while traffic data might be superior to simple road miles as a measure of actual consumer need for mobile coverage, we have not found comprehensive and consistent traffic data across multiple states and jurisdictions nationwide. Because bidders are likely to take potential roaming and subscriber revenues into account when deciding where to bid for support under Phase II, we expect that support will tend to be disbursed to areas where there is greater traffic. We seek comment, however, on the use of other units for bidding and coverage – such as population and workplaces – instead of or in combination with road miles.

1135. We propose to use the TIGER data collected by the Census Bureau to determine the number of road miles associated with each eligible geographic area.<sup>2251</sup> TIGER data is available nationwide on a standardized basis and can be disaggregated to the census block level. We anticipate that the Bureaus would exercise their delegated authority to establish the units associated with each eligible census block and identify the specific road categories within TIGER considered – primary, secondary, local, etc. – to calculate the units associated with a given area.<sup>2252</sup> We seek comment on this proposal.

#### **c. Maximizing Consumer Benefits**

1136. Our goal is to maximize the coverage of mobile broadband services supported with our annual Mobility Fund Phase II budget. In contrast to the former rules, under which multiple providers are entitled to an award of portable, per-subscriber support for the same area, we expect that to maximize coverage within our budget we will generally be supporting a single provider for a given geographic area. As discussed above, we would support more than one provider in an area only if doing so would maximize coverage. In particular, we seek comment on whether allowing overlap among providers would unduly compromise our objective to maximize consumer benefits. And we plan to take into account our experience implementing Mobility Fund Phase I to ascertain whether there are ways to further minimize overlap during the implementation of Mobility Fund Phase II. We are mindful that our

<sup>2251</sup> See 2010 Census TIGER/Line® Shapefiles at <http://www.census.gov/geo/www/tiger/tgrshp2010/tgrshp2010.html>.

<sup>2252</sup> For TIGER road categories, see Appendix F – MAF/TIGER Feature Class Code (MTFCC) Definitions, pages F-186 and F-187 at <http://www.census.gov/geo/www/tiger/tgrshp2010/documentation.html>.

statutory obligation runs to consumers, rather than carriers, and that we must target limited public funds in a way that expands and sustains the availability of mobile broadband services to maximize consumer benefits. To further protect consumer interests, we also propose to adopt certain terms and conditions, discussed below, to promote leveraging of publicly funded investment by other providers operating in the same areas as a recipient of support under Phase II of the Mobility Fund. We invite comment on this approach, which is consistent with one we have taken elsewhere with respect to universal service support.

1137. We also seek comment on whether and to what extent recipients of Mobility Fund Phase II support should be permitted to partner with other providers to fulfill the public interest obligations associated with Phase II. For example, should we permit eligible providers to seek support together, provided that they disclose any such arrangements when applying for a Mobility Fund auction? In addition, we invite comment on whether we should establish any limit on the number of geographic areas for which any one provider may be awarded Phase II support. If we were to do so, what effect would this have on those mobile providers that focus on serving rural areas? Is there another basis on which we should limit the amount of Phase II support that goes to any one provider?

**d. Term of Support**

1138. We propose a fixed term of support of 10 years and, in the alternative, seek comment on a shorter term. In considering the optimal term for ongoing support, we seek to balance providing adequate certainty to carriers to attract private investment and deploy services while taking into account changing circumstances. How should the timeframes for deployment and private investment be synchronized with the pace of new technology? What is the minimum period for making deployment practicable? In light of possible improvements in technology, would it be more practicable to provide for a longer term and require an increase in performance during the term? Or, would it be more appropriate to provide for a shorter term that reflects the likely life cycle of existing technologies? We seek comment on this proposal and on the option for a shorter term.

1139. We also seek comment on whether it is appropriate to establish any sort of renewal opportunity for support, and on what terms. For instance, should we follow our licensing regime which allows for a renewal expectancy if buildout and service obligations have been met? Alternatively, should we take into account the extent to which a recipient utilizes new technologies to exceed the minimum performance requirements established at the outset of the term of support? To what extent should the unforeseen development of new products and services in unsupported areas be taken into account when assessing a support recipient's performance and qualification for renewal?

**e. Provider Eligibility Requirements**

1140. With a narrow exception, discussed *infra*, we propose to require that parties seeking Mobility Fund Phase II support satisfy the same eligibility requirements that we have adopted with respect to Phase I.<sup>2253</sup> We seek comment on this proposal. Is there any reason to alter the requirements previously adopted in light of the differences between Phase I's one-time support and Phase II's ongoing support? Parties providing suggestions should be specific and explain how the eligibility requirements would serve the ultimate goals of Phase II. While we propose eligibility requirements, we also seek comment on ways the Commission can encourage participation by the widest possible range of qualified parties.

**f. Public Interest Obligations**

1141. *Voice.* Today's Order sets out general requirements applicable to all recipients of support from the Connect America Fund, including recipients of Mobility Fund support. Consistent with

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<sup>2253</sup> See *infra* para. 1166.

those requirements, recipients of Mobility Fund support will have to offer voice service that satisfies the public interest obligations shared by all recipients of Connect America Fund support. Likewise, all recipients of Mobility Fund support must offer a standalone voice service to the public.

1142. Mobile Broadband Performance Requirements and Measurement. Unlike requirement for voice service, recipients' public interest obligations with respect to broadband vary depending upon the particular public interest goal being met by the support provided. We propose that, as for Mobility Fund Phase I recipients that elect to offer 4G service, recipients of Mobility Fund Phase II support will be required to provide mobile voice and data services that meet or exceed a minimum bandwidth or data rate of 768 kbps downstream and 200 kbps upstream, consistent with the capabilities offered by representative 4G technologies. We further propose that these data rates should be achievable in both fixed and mobile conditions, at vehicle speeds consistent with typical vehicle speeds on the roads covered. As we noted in our Order on Phase I, the measurement conditions we propose may enable users to receive much better service when accessing the network from a fixed location or close to a base station. These minimum standards must be achieved throughout the cell area, include at the cell edge, at a high probability, and with substantial sector loading. We seek comment on these initial performance metrics. We also seek comment from providers of services used by people with disabilities, such as Internet-based telecommunications relay services, including video relay services (VRS), and point-to-point video communications or videoconferencing services, as to whether these performance metrics will be sufficient to support such services and communications.

1143. In order to assure that recipients offer service that enables the use of real-time applications, we also propose that round trip latencies for communications over the network be low enough for this purpose.

1144. We further seek comment on whether, and if so, in what ways these metrics should be modified during the term of support to reflect anticipated advances in technology. We also seek comment from providers of services used by people with disabilities as to whether or not and how these performance metrics should be modified over time to support such services and communications. In the Order we adopt today we note that we expect obligations applicable to certain Connect America Fund recipients will evolve over time to keep pace with technology. We propose that the performance characteristics required of Mobility Fund Phase II recipients likewise be required to evolve over time, to keep pace with mobile broadband service in urban areas. How exactly should those obligations evolve? Should the term of support provided be synchronized with anticipated changes in obligations?

1145. We further propose that recipients be required to meet certain deployment milestones in order to remain qualified for the ongoing support awarded in Phase II. Specifically, consistent with the approach we are taking for Phase I support used to deploy 4G, we propose that providers be required to construct a network offering the required service in the required area within three years. Commenters are invited to address the feasibility of our proposed three year deployment deadline, given the projected availability of 4G equipment and any other issues that may affect deployment, such as compliance with local, state, or federal laws and requirements, and weather. To the extent we modify recipients' public interest obligations over time, we seek comment on when such metrics must be achieved. Should we also adopt interim deadlines for upgrading service to comply with revised requirements with respect to 50 percent of the covered area?

1146. If we adopt the Census Tract approach, we propose to require Phase II recipients to provide coverage meeting their public service obligations to at least 75 percent of the road miles in all of the unserved census blocks for which they receive support. To the extent that a recipient covers additional road miles or other units beyond the minimum requirement, we propose to provide support based on its bid unit up to 100 percent of the units associated with the specific unserved census blocks

covered by a bid.<sup>2254</sup> If we adopt the Bidder-Defined Area approach, we propose that Phase II recipients should be required to provide coverage meeting their public service obligations to a higher percentage, perhaps to all of the unserved units within the census blocks.

1147. We propose that recipients demonstrate that they have met relevant performance and coverage obligations by submitting drive test data, consistent with the industry norm and the provisions we adopt for Phase I. We seek comment on how frequently such data should be submitted during the term of support.

1148. *Collocation and Voice and Data Roaming Obligations.* We have adopted various conditions with which Phase I Mobility Fund support recipients must comply in order to help assure that they do not use public funds to achieve an unfair competitive advantage. More specifically, we require that Phase I recipients allow the collocation of additional equipment under certain circumstances and condition their receipt of support on compliance with voice and data roaming requirements. We seek comment on adopting similar requirements for Phase II recipients. Are there additional requirements we might consider in order to ensure that publicly funded investment can be leveraged by other providers to the extent they may operate in areas that need universal service support?

1149. *Reasonably Comparable Rates.* We seek comment here on how to implement, in the context of the Mobility Fund Phase II, the statutory principle that supported services should be made available to consumers in rural, insular, and high-cost areas at rates that are reasonably comparable to rates charged for similar services in urban areas.<sup>2255</sup> We propose that recipients of Phase II support will be subject to the same requirements regarding comparable rates that apply to all recipients of CAF support.

1150. We will consider rural rates for service supported by the Mobility Fund to be “reasonably comparable” to urban rates under section 254(b)(3) if rural rates fall within a reasonable range of urban rates for reasonably comparable service. We seek additional comment here with respect to the evaluation of reasonably comparable voice and broadband services for purposes of Mobility Fund Phase II specifically.

1151. For purposes of the Mobility Fund, we propose to focus on mobile broadband service that meets the universal service performance characteristics. For instance, we invite further comment as to whether there are additional sources of information or aspects of service to consider in light of the fact that Mobility Fund support is for mobile service over a geographic area. We also seek comment on whether the mobile nature of the service supported by Mobility Fund Phase II, or the pricing of mobile voice and broadband services, present any unique features for purposes of adopting a methodology for evaluating rates under our reasonable comparability standard. We also note in this context that, as described more fully below, we propose to require recipients of funding under Mobility Fund Phase II to provide information regarding their pricing for mobile broadband service offerings.

### **3. Auction Process Framework**

1152. In this section, we propose general auction rules governing the auction process itself, including options regarding basic auction design, application process, information and competition, and auction cancellation.<sup>2256</sup>

1153. As we did for Mobility Fund Phase I, we propose to delegate to the Bureaus authority to

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<sup>2254</sup> Accordingly, when reserving available support based upon those bids that are determined to be winning bids, the Commission will reserve an amount necessary to pay the support that the recipient would be entitled to in the event that it covered 100 percent of the units in the census blocks.

<sup>2255</sup> 47 U.S.C. § 254(b)(3).

<sup>2256</sup> See Auction Rules included in Appendix A.

establish detailed auction procedures consistent with the auction rules we establish here, take all other actions necessary to conduct a Phase II auction, and conduct program administration and oversight consistent with any rules and policies we establish for this phase. Under this proposal, a public notice would be released announcing an auction date, identifying areas eligible for support through the auction and the road miles associated with each area, and seeking comment on specific detailed auction procedures to be used, consistent with the general auction rules.

**a. Auction Design**

1154. We propose rules outlining various auction design options and parameters, while at the same time proposing that final determination of specific auction procedures to implement a specific design based on these rules be delegated to the Bureaus as part of the subsequent pre-auction notice and comment proceeding.

1155. As a threshold matter, we propose a rule providing that a Phase II auction may be conducted in a single round of bidding or in a multiple round format, or in multiple stages where an additional stage could follow depending upon the results of the previous stage. We also propose that maximum bid amounts, reserve prices, bid withdrawal provisions, bidding activity rules and other terms or conditions of bidding would be established by the Bureaus under the authority we propose to delegate for this purpose. Should reserve prices, for instance, be set using the results of a wireless model for each state, similar to the CAF Phase II auction where price cap carriers decline the state-level commitment? We also propose that the Bureaus may consider various procedures for grouping geographic areas within a bid – package bidding – that could be tailored to the needs of prospective bidders as indicated during the pre-auction notice and comment period.

1156. It appears that some form of package bidding will likely enhance the auction by helping bidders incorporate network-wide efficiencies into their bids. While the Bureaus will establish specific procedures to address this issue later, we invite preliminary comment on whether package bidding may be appropriate for this auction and if so, why. Above, we asked for input on package bidding as it relates to our choice of the Census Tract or Bidder-Defined approaches. Here, we ask for any additional comments on the potential advantages and disadvantages of possible package bidding procedures and formats. In particular, we ask for input on the reasons why certain package bidding procedures would be helpful or harmful to providers bidding in an auction, and what procedures might best meet our goal of maximizing the benefits of Phase II support for consumers. For example, regardless of whether we adopt the Census Tract or Bidder-Defined approach, should we impose some limits on the size or composition of package bids, such as allowing flexible packages of blocks or larger geographic units as long as the geographic units are within the boundaries of a larger unit such as a county or a license area (*e.g.*, a CMA)?<sup>2257</sup> Or, if we adopt the Census Tract approach, should we establish package bidding procedures that allow bidders to place package bids on predetermined groupings of areas that follow a particular hierarchy – such as blocks, tracts, and/or counties, which nest within the census geographic scheme? As noted above, we contemplate that the specific rules to be adopted for this auction would be identified in the public notice process, which will be open to comment.

**b. Potential Bidding Preference for Small Businesses**

1157. We seek comment on whether small businesses should be eligible for a bidding preference in a Phase II auction. If adopted, the preference would act as a “reverse” bidding credit that would effectively reduce the bid amount of a qualifying small business for the purpose of comparing it to other bids. The preference would be available with respect to all census blocks on which a qualified small business bids. We seek comment on this approach. Would a bidding credit be an effective way to

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<sup>2257</sup> See *supra* note 586.

help address concerns regarding smaller carriers' ability to effectively compete at auction for support? Would such a bidding credit be consistent with the objective of the Phase II fund to support the greatest number of unserved road miles within the overall Mobility Fund budget? Should we adopt a preference to assist small businesses even if the bidding credit results in less coverage achieved than would occur without the bidding credit?

1158. We also seek comment on the appropriate size of any small business bidding credit that we decide to adopt. We note that, in the spectrum auction context, the Commission typically awards small business bidding credits ranging from 15 to 35 percent, depending on varying small business size standards.<sup>2258</sup> Should the Commission establish a preference for small businesses, we seek comment on what bidding credit percentage, if any, would be appropriate to increase the likelihood that the small business would have an opportunity to win support in the auction..

1159. We also seek comment on how we should define small businesses if we adopt a small business bidding credit. In the context of our spectrum auctions, we have defined eligibility requirements for small businesses seeking to provide wireless services on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service in establishing the appropriate threshold.

1160. We seek comment on the use of a small business definition in the Mobility Fund Phase II context based on an applicant's gross revenues, as we have done for many wireless services for which we have assigned licenses through competitive bidding.<sup>2259</sup> Specifically, we ask whether a small business should be defined as an entity with average gross revenues not exceeding \$40 million for the preceding three years.<sup>2260</sup> Alternatively, should we consider a larger size definition for this purpose, such as average gross revenues not exceeding \$125 million for the preceding three years?<sup>2261</sup> In determining an applicant's gross revenues under what circumstances should we attribute the gross revenues of the applicant's affiliates? We also invite input on whether alternative bases for size standards should be established in light of the particular circumstances or requirements that may apply to entities bidding for Mobility Fund Phase II support. Commenters advocating alternatives should explain the basis for their proposed alternatives, including whether anything about the characteristics or capital requirements of providing mobile broadband service in unserved areas or other considerations require a different approach.

### c. Application Process

1161. We propose to use a two-stage application process, similar to that used in spectrum license auctions, and as described more completely in the Mobility Fund Phase I Order.<sup>2262</sup> Under this

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<sup>2258</sup> See 47 C.F.R. § 1.2110(f).

<sup>2259</sup> We note that the Small Business Administration's definition of a "small business" for wireless firms within the two broad economic census categories of "Paging" and "Cellular and Other Wireless Telecommunications" is one that has 1,500 or fewer employees. See 13 C.F.R. § 121.201.

<sup>2260</sup> See e.g., *In re Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, *Report and Order*, GN Docket No. 01-74, 17 FCC Rcd 1022, 1087 ¶ 172 (2002).

<sup>2261</sup> The Commission established a size definition for entrepreneurs eligible for broadband PCS C block spectrum licenses based on gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million. *In re Section 309(j) of the Communications Act – Competitive Bidding*, *Fifth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 5532, \*36 ¶ 115 (1994); see also 47 C.F.R. § 24.709(a)(1). Although this definition was used more than a decade ago in the context of spectrum auctions, we seek comment on whether it would be appropriate to use the gross revenues standard of the definition in this universal service context as it would encompass more small businesses.

<sup>2262</sup> See *supra* para. 417.



proposal, we would require a pre-auction “short-form” application from entities interested in participating in a Phase II auction.<sup>2263</sup> After the application deadline, Commission staff would review the short-form applications to determine whether applicants had provided the necessary information required at the short-form stage to be eligible to participate in an auction. Once review is complete, Commission staff would release a public notice indicating which short-form applications were deemed acceptable and which were deemed incomplete. Applicants whose short-form applications were deemed incomplete would be given a limited opportunity to cure defects and to resubmit correct applications.<sup>2264</sup> Only minor modifications to an applicant’s short-form application would be permitted.<sup>2265</sup> The Commission would release a second public notice designating the applicants that qualified to participate in the Phase II auction. We seek comment on our proposal, and on any alternative approaches.

**d. Information and Communications**

1162. We do not see circumstances specific to Phase II that warrant departure from our usual auction policies regarding permissible communications during the auction or the public release of certain auction-related information. Hence, as in Phase I and our spectrum auctions, we propose, in the interests of fairness and maximizing competition, to prohibit applicants from communicating with one another regarding the substance of their bids or bidding strategies. We further propose a rule to provide for auction procedures to limit public disclosure of auction-related information, including certain information from applications and/or the bidding.<sup>2266</sup> Specific details regarding the information to be withheld would be identified during the pre-auction procedures process, upon delegated authority to the Bureaus. We invite comment on this proposal.

**e. Auction Cancellation**

1163. We propose that the Commission’s rules provide discretion to delay, suspend, or cancel bidding before or after a reverse auction begins under a variety of circumstances, including natural disasters, technical failures, administrative necessity, or any other reason that affects the fair and efficient conduct of the bidding. We seek comment on this proposal, which is consistent with our approach in spectrum auctions, as well as Phase I of the Mobility Fund.

**f. Post-Auction Long-Form Application Process for Mobility Fund Phase II**

1164. We propose to apply the same post-auction long-form application process adopted with respect to Phase I for Phase II support. Accordingly, applicants for Phase II support would be required to provide the same showing in their long-form applications that they are legally, technically and financially qualified to receive Phase II support as required of applicants for Phase I support. In addition, we propose that a winning bidder for Phase II support will be subject to the same auction default payment adopted for winning bidders of Phase I support, if it defaults on its bid, including if it withdraws a bid after the close of the auction, fails to timely file a long form application, is found ineligible or unqualified to be a recipient of Phase II support, or its long-form application is dismissed for any reason after the close of the auction. In addition, we propose that a recipient of Phase II support will be subject to the same performance default payment adopted for recipients of Phase I support. We seek comment on these

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<sup>2263</sup> “Long-form” application requirements, required of winning bidders post-auction, are discussed *infra* at para. 1164.

<sup>2264</sup> *Cf.* § 1.2105(b)(2). *See* 47 C.F.R. § 1.21001(d)(5).

<sup>2265</sup> *See* 47 C.F.R. § 1.21001(d)(4). Major modifications would include, for example, changes in ownership of the applicant that would constitute an assignment or transfer of control.

<sup>2266</sup> *Cf.* 47 C.F.R. § 1.2105(c).

proposals.

#### 4. Tribal Issues

1165. In view of the relatively low level of telecommunications deployment, and distinct connectivity challenges on Tribal lands, we reaffirm our commitment to address Tribal needs and establish a separate budget to provide ongoing USF support for mobility in such areas.<sup>2267</sup> The Order we adopt today establishes an annual budget of up to \$100 million to provide ongoing support for mobile broadband services to qualifying Tribal lands. In addition, we note that the Connect America Fund will separately support broadband for homes, businesses, and community anchor institutions, including on Tribal lands.

1166. Consistent with the approach we adopt today for the general and Tribal Mobility Fund Phase I, we propose to apply the same Tribal engagement obligation and a 25 percent bidding credit preference for Tribally-owned or controlled providers in Phase II. We seek comment on this approach. For example, to the extent we adopt a cost model, discussed *infra*, are there particular measures we should take to help ensure that the needs of Tribes are met? What modifications might be needed to the proposed Tribal engagement obligations? Are there other alternatives we should consider?

1167. In addition, to afford Tribes an increased opportunity to participate at auction, in recognition of their interest in self-government and self-provisioning on their own lands, we propose to permit a Tribally-owned or controlled entity to participate at auction even if it has not yet been designated as an ETC. Consistent with the approach we adopted today for the general and Tribal Mobility Fund Phase I, we propose that a Tribally-owned or controlled entity that has an application for ETC designation pending at the relevant short form application deadline, may participate in an auction to seek support for eligible census blocks located within the geographic area defined by the boundaries of the Tribal land associated with the Tribe that owns or controls the entity that has not yet been designated as an ETC. We seek comment on this proposal.

1168. To the extent practicable, we propose to award ongoing support for mobile broadband services on Tribal lands on the same terms and conditions as we propose for the ongoing support mechanism for Phase II in non-Tribal lands.<sup>2268</sup> We recognize, however, that there are several aspects of the challenges facing Tribal lands for which a more tailored approach may be appropriate, as evidenced in the record developed to date in this proceeding. Toward that end, we propose to apply in Phase II for Tribal lands the specific provisions adopted in the context of the Tribal Mobility Fund Phase I.<sup>2269</sup> Are there any differences in our proposals to award ongoing support that would justify an alternative approach here? For example, to the extent that providers in Alaska may be dependent on satellite backhaul for middle mile, should we modify our Mobility Fund II performance obligations for some limited period of time, similar to what we adopt more generally as a performance obligation for ETCs?<sup>2270</sup> Should a similar accommodation be made for areas in which there is no affordable fiber-based terrestrial backhaul capability? If so, how should the Commission define affordability for these purposes? Further, in areas with only satellite backhaul, should we require funded deployments to be able to support continued local connectivity in case of failure in the satellite backhaul? How would such a requirement be structured to ensure continued public safety access?

1169. We seek comment on GCI's proposal that new mobile deployments be given some

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<sup>2267</sup> See *supra* note **Error! Bookmark not defined.**

<sup>2268</sup> See discussion *supra* Section XVII.I.

<sup>2269</sup> See discussion *supra* at paras. 484-491.

<sup>2270</sup> See *supra* para. 101.

priority in Phase II.<sup>2271</sup> Commenters supporting such an approach should explain how such a priority mechanism could work, which deployments would be eligible for prioritization, and any other implementation issues. Similarly, we seek comment on GCI's proposal that priority be given to areas that do not have access to the National Highway System to account for the lack of roads and highways in many remote parts of Alaska.<sup>2272</sup> Are there alternative means in Phase II to account for remote areas, including those in Alaska, where roads and other infrastructure may be lacking?

1170. In addition, to afford Tribes an opportunity to identify their own priorities, we seek further comment on a possible mechanism that would allocate a specified number of "priority units" to Tribal governments. The priority units for each Tribe would be based upon a percentage of the total population in unserved blocks located within Tribal boundaries. Tribes would have the flexibility to allocate these units in whatever manner they choose. Under this mechanism, Tribes could elect to allocate all of their priority units to one geographic area that is particularly important to them (for instance, because of the presence of a community anchor institution, large number of unserved residents, etc.), or to divide the total number of priority units among multiple geographic units according to their relative priority. By giving Tribes the opportunity to allocate a substantial number of additional units to particular unserved geographic areas within the boundaries of their Tribal lands, we would allow Tribes to reduce the per-unit amount of bids covering those unserved areas, so as to increase the likelihood that these areas would receive funding through the proposed competitive bidding process.

1171. We seek further comment on this proposal for possible application in Phase II for Tribal lands. We are mindful that the record developed to date suggests that the effectiveness of this approach depends, in part, on providing a significant number of priority units for Tribes to allocate.<sup>2273</sup> We propose that an allocation in the range of 20 to 30 percent of the population in unserved areas on the Tribal land would provide Tribes a meaningful opportunity to provide input on where support could be effectively targeted. We seek comment on this proposal. Commenters are requested to address whether this approach should apply to both the general and Tribal Mobility Fund Phase II. We also seek comment on how such priority units should be awarded in Alaska, given the unique Alaska Native government structure and the large number of Alaska Native Villages likely to be clustered in any given geographic area. Should the Commission allocate priority units proportionately, according to the relative size and/or number of unserved units of all Alaska Native Villages in any given geographic area? Would a similar approach be warranted for Hawaiian Home Lands, or are there alternative approaches that best reflect conditions in Hawaii? Alternatively, we seek comment on whether the Tribal engagement obligations adopted for Phase I are sufficient to ensure that Tribal priorities are met with respect to ongoing support under Phase II. To the extent we adopt our proposal for Tribal priority units, we seek comment on whether a Tribally-owned and controlled provider should also be eligible to receive a bidding credit within its Tribal land or if the Tribe must choose between one or the other. If we offer a bidding credit to Tribally-owned and controlled providers seeking Phase II support, would a 25 percent bidding credit, like the one we have adopted for Phase I be sufficient, or does it need to be set at a different level to achieve our objectives?

1172. We also seek comment on whether a different approach is warranted for Tribal lands in Alaska given the unique operating conditions in Alaska. We propose that carriers serving Alaska would be eligible for the same funding opportunities as carriers serving Tribal lands in the rest of that nation. Is this right approach? In the alternative, should an amount of any Tribal funding be set aside only for

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<sup>2271</sup> See Letter from John T. Nakahata, Counsel to GCI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, *et al.*, at 2 (filed Oct. 23, 2011).

<sup>2272</sup> *Id.*

<sup>2273</sup> See Smith Bagley *April 18 PN* Comments at 5-6; NPM and NCAI *April 18 PN* Comments at 3.

carriers serving Alaska to ensure some minimal level of funding representative of the need in that state? We seek comment on that proposal, the size of any Alaska-specific set aside, and the need to adjust the total Tribal component of Mobility Fund II to account for any Alaska-specific figure. We also seek comment on whether any Alaska-specific funding should be focused on middle mile connectivity, which is one of the core impediments to 3G and 4G service in Alaska. How could such a mechanism be structured to facilitate the construction of microwave and fiber-based middle mile facilities, which are lacking in portions of remote areas of Alaska.

## **5. Accountability and Oversight**

1173. We propose to apply to Mobility Fund Phase II the same rules for accountability and oversight that will apply to all recipients of CAF support. Thus all recipients of Phase II support would be subject generally to the same reporting, audit, and record retention requirements. Because Mobility Fund support will differ in some respects from support received under other USF high-cost support mechanisms, we also propose here that recipients of Phase II support be required to include in their annual reports the same types of additional information that is required of recipients of Phase I support. Should any of these requirements be modified or omitted for recipients of Mobility Fund Phase II support? Are there additional types of information that should be required? We seek comment on these proposals.

## **6. Economic Model-Based Process**

1174. Instead of determining support for mobile wireless providers through competitive bidding, we could determine support using a model that estimates the costs associated with meeting public interest obligations, as well as a provider's likely revenues from doing so. Regardless of which method is used, the objectives of the Mobility Fund's Phase II remain the same. That is, we seek to maximize the reach of mobile broadband services supported with our established budget in areas where there is no private sector business case for providing such services. Accordingly, commenters advocating for a model should address why a model-based approach would better serve this purpose than our proposal above. Below, we seek more detailed comment on the design of such a model and a framework for support in which a model might be used, as compared with our proposed market-based mechanism for determining the level and distribution of necessary support.

### **a. Model Design**

1175. In considering this alternative to a market-based mechanism, we seek here to develop a more detailed record than we have received to date regarding the possible design of a forward looking economic model of costs and revenues of mobile wireless services. Generally, we observe that cost structures, revenue sources, and available data all may vary in the mobile service context from other services, such as fixed wireline voice or broadband. Accordingly, issues that have been addressed in some detail when modeling costs for setting support for non-rural carrier wireline networks must be considered specifically in the context of mobile wireless services.<sup>2274</sup> What components of a model for mobile wireless services are critical in accurately forecasting costs and revenues? Is the model more or less sensitive to certain potential errors than others? How does the pace of change in the mobile service industry affect the reliability of a model for projections of greater than five years, or seven years, or ten

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<sup>2274</sup> For example, as discussed above, in the CAF broadband context we have decided to use a combination of a forward-looking cost model and competitive bidding processes to award support in price cap territories. We have adopted a framework that focuses on the cost of meeting broadband public interest obligations and does not consider the additional revenues that a provider might obtain by providing other services over a multi-capability network. In the mobile wireless context, given that the materials submitted thus far assert that at least one model is able to model mobile wireless revenues as well as costs, we consider it an open question as to whether it is possible to make a useful estimate of mobile wireless revenues and whether we should attempt to do so.

years?

1176. Two parties already have offered the results of a model-based analysis in selected states to argue for the benefits of a model-based approach, rather than a competitive bidding approach, for the Mobility Fund. In their proposals, both US Cellular and MTPCS have pointed to a CostQuest Associates model for estimating costs and revenues related to mobile service.<sup>2275</sup> We seek comment generally on the model that US Cellular and MTPCS describe in their submissions.

1177. In their model-based analyses, both US Cellular and MTPCS estimated the costs of expanding their existing networks in order to provide service in unserved areas. Taking existing networks into account when modeling costs is sometimes referred to as a “brownfield” approach. A brownfield approach assumes that providers will make use of existing assets. The results of such an analysis may be unreliable if the provider controlling the relevant assets chooses not to receive support and uses those assets for other purposes. Moreover, the costs for one provider may be very different from the costs for another provider, due to differences in their access to existing assets. We seek comment on how best to construct a “brownfield” model when the goal is not to model the costs of individual mobile wireless provider, but of a generic provider in an area.

1178. According to the description of the CostQuest model included in both parties’ submissions, CostQuest’s model also enables users to determine the cost of offering wireless service without using existing assets. Modeling costs of providing service without pre-existing assets is sometimes referred to as a “greenfield” approach. A greenfield approach runs the risk of overestimating the necessary costs of providing service by failing to make efficient use of existing assets. We seek comment on the relative advantages of a brownfield or greenfield approach in the context of mobile services when determining which areas require support and when determining how much support is required.

1179. Modeling also raises concerns regarding the accuracy of data (inputs) used in the model. For example, for mobile service, how critical is it that the model accurately forecast base station locations? In an efficient network providing mobile service, base station locations are interdependent – the signal from one should overlap with another sufficiently to assure effective coverage but not so much as to create interference. Assumptions regarding any base station location in a network may be significant with respect to the final number and location of all base stations, and therefore the cost of the entire network. This is especially true with respect to pure greenfield models, which make assumptions about the possible locations of cell sites without being able to take account of actual constraints in locating such sites. We seek comment on the ways, if any, to assess the sensitivity of model-based results to potential errors regarding site location when estimating costs for providing mobile service. Would the use of a brownfield approach substantially reduce such sensitivity?

1180. In addition to assessing costs, the CostQuest model employed by US Cellular and MTPCS also assesses incremental revenues from expanded mobile coverage when determining an area’s need for support. If a provider can count on generating revenue from the network expansion that meets or exceeds related costs, even the highest cost area may not require support. How could we take into account revenues in a model used for mobile support? Could we develop non-party-specific estimates of incremental revenues? Should we consider potential revenues from non-supported services that could be offered over the network infrastructure that provides supported voice service, including the mobile broadband service required as a condition of Mobility Fund support, or other services, like subscription video services? What estimates could the Commission use with respect to the potential costs and revenues associated with the provision of such services?

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<sup>2275</sup> Both US Cellular and MTCPS have submitted the results of their attempts to model the need for and extent of support required to provide wireless service in unserved areas in selected states.

1181. Notwithstanding their significance in determining the need for support, estimating revenues may be difficult, particularly over longer periods of time. Given difficulties in estimating consumer interest in particular service offerings at particular prices, errors in estimating revenues may be more likely to occur and, when they occur, more likely to result in larger errors in determining the appropriate level of support. We seek comment on the extent to which we might be able to achieve the appropriate balance between the inclusion of revenue estimates and the likely accuracy of the model's outcomes, and, if so, how we would do so.

1182. As mentioned previously, a model might be used simply to determine what areas require support for the public interest obligations to be met, rather than determine that as well as the amount of support to be provided. We seek further comment on whether a mobile wireless model may be sufficiently reliable for purposes more limited than determining support levels. For instance, could a model offer guidance on the appropriate level of support, such as determining a maximum that might be offered in a competitive bidding process in a particular area, without being sufficiently accurate to rely on for determining the actual level of support in that area?

**b. Framework for Economic Model-Based Process**

1183. If we were to use an economic model to determine support levels, the goals and objectives of the Phase II Mobility Fund would continue to be to support next generation mobile service where support is needed in as many areas as possible, given the limited funds available. For example, the public interest obligations attaching to the receipt of support would remain the same. We seek comment generally, however, on which, if any, elements of our proposed framework would need to change if we decided to use a model-based process for determining support.

1184. We also seek comment specifically on whether the granularity with which an economic model produces reliable cost and/or revenue estimates would have any impact on the geographic areas being made available for mobile services support. If a model is more likely to determine support amounts accurately only over an area larger than a census block, does it mean that we should increase the minimum area for which support is offered? Accordingly, we seek comment on the minimum area for offering model-based support. Similarly, would a model be more accurate in estimating support for areas based on resident population instead of road miles? If so, would we have to use resident population as a metric for offering support and measuring compliance with public interest obligations if we adopt a model-based approach?

1185. As we have discussed, in order to extend our limited budget to reach the widest possible coverage, we generally expect to offer support to only one mobile services provider in an area. We seek comment on how to implement that principle under a model-based approach. In contrast to competitive bidding, we note the model-based approach does not include a mechanism for selecting among multiple parties that might be interested in receiving the support offered. We seek comment on how we should address this issue. Should we determine the party that receives support through a qualitative review of would-be providers? If so, what factors should that review take into account? Should we reserve support for a particular area to the provider currently receiving universal service support that has the most extensive network within a defined area? What other method could we use to select among providers? In addition, as noted above, we could use the results of a wireless model to set reserve prices in the context of competitive bidding.<sup>2276</sup> We seek comment here on how we could use the results of a wireless model to distribute the amounts budgeted for Mobility Fund Phase II, consistent with our use of a wireline cost model in CAF-Phase II to target support to high-cost areas subject to our budget.

1186. We note that US Cellular and MTPCS – in their filings - propose using the mobile

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<sup>2276</sup> See *supra* para. 1155.

wireless model to calculate the support required in an area per resident subscriber and permitting multiple providers to receive support for service in the same area. Given the economics of the underlying terrestrial wireless technology, permitting multiple providers to receive support could increase the amount of support required per subscriber, as the number of subscribers per provider will decline. We seek comment on this concern.

1187. We also seek comment on whether using mobile model-based support would change the appropriate length of the term of support. Are there aspects of the model that link its estimates to particular time periods? Is that reason to offer the support for any particular length of time? Is it possible to estimate the cost of meeting the proposed increases in public interest obligations several years in advance? Particularly with respect to a mobile wireless model used to determine ongoing support for a term of years, how should the Commission address potential changes in circumstances or technology over time that would change modeled costs and/or revenues?

1188. Finally, commenters addressing the possible use of a model-based approach in place of competitive bidding for the second phase of the Mobility Fund should discuss whether we would need to make any changes to the management and oversight of the program if we use a model-based approach, as well as any other changes they believe we should make to the framework we propose above for a competitive bidding mechanism.

**J. Competitive Process in Price Cap Territories Where the Incumbent Declines to Make a State-Level Commitment**

1189. Today the Commission adopts a framework for USF reform in areas served by price cap carriers where support will be determined using a combination of a forward-looking broadband cost model and competitive bidding to efficiently support deployment of networks providing both voice and broadband service over the next several years. In each state, each incumbent price cap carrier will be asked to undertake a state-level commitment to provide affordable broadband to all high-cost locations in its service territory in that state, excluding locations served by an unsubsidized competitor, for a model-determined efficient amount of support. In areas where the incumbent declines to make that commitment, we will use a competitive bidding mechanism to distribute support in a way that maximizes the extent of robust, scalable broadband service and minimizes total cost. This FNPRM addresses proposals for this competitive bidding process, which we refer to here as the CAF auction for price cap areas. The FNPRM proposes program and auction rules, consistent with the goals of the CAF and the Commission's broader objectives for USF reform.

**1. Overall Design of the Competitive Bidding Process**

1190. Consistent with the Commission's decision to use incentive-driven policies to maximize the value of scarce USF resources, we propose to use a reverse auction mechanism to distribute support to providers of voice and broadband services in price cap areas where the incumbent ETC declines to accept model-determined support. Assigning support in this way should enable us to identify those providers that will make most effective use of the budgeted funds, thereby extending services to as many consumers, businesses, and community anchor institutions as possible. We propose to use a competitive bidding mechanism to identify those eligible areas – and associated providers – where supported services can be offered at the lowest cost per unit.

**2. Framework for Awarding Support Under Competitive Bidding**

**a. Identifying Geographic Areas Eligible for Competitive Bidding**

1191. *Identifying Eligible Areas.* In any areas where the price cap ETC declines to make a state-level commitment, we propose to conduct competitive bidding to award support using the same

areas identified by the CAF Phase II model as eligible for support.<sup>2277</sup> We also seek comment on other approaches to defining the areas to be used in this auction. For example, the Commission could exclude areas that, based on the most recent data available, are served – at any speed, at 4 Mbps downstream / 1 Mbps upstream, or at 6 Mbps downstream / 1.5 Mbps upstream. In addition, the Commission could use different cost thresholds for defining service, for example, including all unserved areas regardless of cost in the auction. As we did for Phase I of the Mobility Fund and have proposed for Phase II, we propose to use census blocks as the minimum size geographic unit eligible for competitive bidding. As discussed in these other contexts, using census blocks will allow us to target support based on the smallest census geography available. We seek comment on this proposal, as well as on alternatives that commenters may suggest.

1192. *Minimum Size Unit for Bidding and Support.* We propose that the census block should be the minimum geographic building block for defining areas for which support will be provided. In connection with our Mobility Fund Phase II proposals, we noted that because census blocks are numerous and can be quite small, we believe that we will need to provide at the auction for the aggregation of census blocks for purposes for bidding. We discussed a number of ways to permit such aggregation, including the possibility of adopting a rule regarding a minimum area for bidding comprised of an aggregation of eligible census blocks, such as tracts, and/or the use of auction procedures that provide for bidders to be able to make “all-or-nothing” package bids on combinations of bidding areas. We also explained, in some detail for Mobility Fund Phase II, two of the possible approaches to the issue of census block aggregation, namely a Census Tract-type approach and a Bidder-Defined approach. We seek comment here on whether a Census Tract-type approach, Bidder-Defined approach, or another approach would best meet the needs of bidders in the CAF auction for support in price cap areas.

1193. *Prioritizing Areas.* In addition, we seek comment on whether we should target areas currently without any broadband service for priority treatment in whatever competitive bidding mechanism we adopt. For instance, should we provide a form of bidding credit that would promote the support of such areas?

**b. Establishing Bidding and Coverage Units**

1194. In order to compare bids, we propose to assign a number of bidding units to each eligible census block. Consistent with the terms of the public interest obligations undertaken by bidders, we propose to base the number of units in each block on the number of residential and business locations it contains, using the 2010 decennial census data. We seek comment on this proposal, and on any alternatives that commenters may suggest.

**c. Maximizing Consumer Benefits**

1195. The Commission’s objective is to distribute the funds it has available for price cap areas where the incumbent ETC declines to make a state-level commitment in such a way as to bring advanced services to as many consumers as possible in areas where there is no economic business case for the private sector to do so. Where the incumbent declines to make a state-level commitment to provide affordable broadband to all high-cost locations in its service territory in return for model-determined support in each state, we propose to use the competitive bidding mechanism described here, which will be open to any provider able to satisfy the public interest obligations associated with support. Thus, we envision that there may be more than one ETC that seeks such support for any given area. In contrast to the former rules, under which multiple providers are entitled to an award of portable, per-subscriber support for the same area, we expect that to maximize coverage within our budget we will generally be supporting a single provider for a given geographic area through this auction. As noted in our discussion

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<sup>2277</sup> See *supra* paras. 167-170.



of approaches for Mobility Fund Phase II, we would support more than one provider in an area only if doing so would maximize coverage. As with Phase II of the Mobility Fund, we are mindful that our statutory obligation runs to consumers, rather than carriers, and that we must target our limited funds for support in a way that expands and sustains the availability of mobile broadband services to maximize consumer benefits. And as with Phase II of the Mobility Fund, we also propose that a competitive ETC would become ineligible to receive support for any area under our phase down of frozen legacy support formerly distributed pursuant to the identical support rule as soon as it began receiving CAF support for that same area. We seek comment on these issues.

1196. We also seek comment on whether and to what extent ETCs that receive such support through a competitive bidding process should be permitted to partner with other providers to fulfill their public interest obligations. In addition, we invite comment on whether we should establish any limit on the geographic extent to which any one provider may be awarded such support. Is there another basis on which we should limit the amount of support that goes to any one provider?

**d. Term of Support**

1197. We propose a term of support for providers that receive support through this auction that is equal to that adopted for providers that accept state-level model-determined support. Accordingly, we propose a term of support of five years, subject to recipients complying with the obligations of the program. We seek comment on this proposal, and whether a longer time-period, *e.g.*, ten years, would better serve our goals. We also seek comment on whether it is appropriate to establish any sort of renewal opportunity, and on what terms, including whether there should be any difference here from universal service support awarded under a state-level-commitment.

**e. Provider Eligibility Requirements**

1198. To be eligible to receive support through this competitive bidding process, we propose that an ETC must certify that it is financially and technically capable of providing service within the specified timeframe. We anticipate that price cap ETCs that decline model-determined support would remain eligible to participate at auction, but seek comment on the advantages and disadvantages of this approach. Below, we discuss these eligibility requirements and their associated timing.

1199. *ETC Designation.* For the same reasons that apply with respect to other CAF programs, we generally propose to require that applicants for support be designated as ETCs covering the relevant geographic area prior to participating in an auction.<sup>2278</sup> As a practical matter, this means that parties that seek to participate in the auction must be ETCs in the areas for which they will seek support at the deadline for applying to participate in the competitive bidding process. We seek comment on this proposal.

1200. *Certification of Financial and Technical Capability.* We also propose that each party seeking to receive support determined in this auction be required to certify that it is financially and technically capable of providing the required service within the specified timeframe in the geographic areas for which it seeks support. We seek comment on how best to determine if an entity has sufficient resources to satisfy its obligations. Should the Commission require that any entity finance a fixed percentage of any build-out with non-CAF or private funds? We likewise seek comment on certification regarding an entity's technical capacity. Do we need to be specific as to the minimum showing required to make the certification? Or can we rely on our post-auction review and performance requirements?

1201. *Eligibility of Carriers Declining a State-Level Commitment Covering the Area.* We are not inclined to restrict the eligibility of carriers that could have accepted model-determined support for

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<sup>2278</sup> As discussed *infra*, we propose a narrow exception for Tribally-owned or controlled entity that has an application for ETC designation pending at the time of the relevant short-form application deadline.

the area that will be auctioned, but seek comment on this approach. What effect does the opportunity to seek support in a subsequent auction have on incentives to accept or decline a state-level commitment in exchange for model-determined support? How should the differences in potential service areas be taken into account, given that potential bidders in the auction will not be required to bid on the entire territory of the price cap carrier in that state?

1202. *Other Qualifications.* In addition to the minimum qualifications described above, we seek comment on other eligibility requirements for entities seeking to receive support in an auction after the price cap incumbent declines to make a state-level commitment. Parties providing suggestions should be specific and explain how the eligibility requirements would serve our objectives. At the same time that we establish minimum qualifications consistent with these goals, are there ways the Commission can encourage participation by the widest possible range of qualified parties? For example, are there any steps the Commission should take to encourage smaller eligible parties to participate in the bidding for support?

**f. Public Interest Obligations**

1203. *Service Performance Requirements and Measurement.* We propose that recipients of support awarded through this competitive bidding process be obligated to provide service meeting specified performance requirements. Further, we propose that these performance requirements be the same as those required of providers that accept model-determined support. Under this proposal, the Commission would seek to maximize via competitive bidding (both within and across regions) the amount of broadband service being offered at the same full performance levels required above for incumbent providers willing to undertake a state-level broadband commitment. We seek comment on this proposal.

1204. Alternatively, we seek comment on relaxing the minimum performance requirements sufficiently to expand the pool of technologies potentially eligible to compete for support. Under this approach, providers could offer different performance characteristics, such as download and/or upload speeds, latency, and limits on monthly data usage, and the Commission would score such “quality” differences in evaluating bids.<sup>2279</sup> That is, individual providers could propose different prices at which they would be willing to offer services at different performance levels, and the Commission would select the winning bids based on both the prices and the performance scores. To simplify the bidding process, the Commission could limit the set of performance levels that providers could bid to offer – for instance, to a standard broadband offering and a higher quality broadband offering. This general approach would give the Commission the option of making tradeoffs between supporting a higher quality service to fewer locations versus supporting a standard service for more locations. Additionally, such an approach should result in more competitive bidding by allowing more technologies to compete for funding (both within a region and across regions), thereby enabling the Connect America Fund’s budget to yield greater coverage at acceptable broadband performance standards than under the proposal above. We seek comments on how the Commission could best implement this alternative -- including how to score different performance dimensions, and, whether providers should specify as part of their bids the retail prices they would charge consumers and, if so, how to include such prices in scoring the bids. Parties should further address how the Commission should assess the public interest tradeoffs between offering a higher quality to fewer customers and accepting a lower quality for some customers but serving more customers. We also seek comment on whether and how the possibility of obtaining support for a lower quality service would affect the incentives of incumbent providers to accept or decline a state-level broadband commitment. We seek comment from providers of services used by people with disabilities,

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<sup>2279</sup> See ViaSat, Inc. and Wild Blue Communications, Inc., Ex Parte Notice, WC Docket No. 10-90, July 29, 2011, Attach. at 11-12 (“The CAF Auction: Design Proposal,” paras. 33-38).

such as Internet-based telecommunications relay services, including VRS, and point-to-point video communications or video conferencing services, as to the minimum performance requirements needed to support such services and communications.

1205. *Requesting Locations.* We propose that support recipients be required to provide subsidized service to as many locations as request service in their areas during the term of support. Alternatively, we seek comment on whether we should limit the number of locations that must be served in any area based on the number of locations identified at the time of the auction. Such a limit would be consistent with limiting the total amount of support available. However, it would not take into account changes in the number of eligible locations during the term for which support will be provided. In order to take growth into account while maintaining a limit on the total amount of support, should we provide for a presumed growth rate in the number of locations during the term of support? Or should we simply require providers to serve whatever number of future locations there may be, effectively requiring providers to take into account their own estimates of such growth when bidding for support?

1206. *Reasonably Comparable Rates.* We propose that recipients of support through CAF auctions for price cap areas will be subject to the same requirements regarding comparable rates that apply to all recipients of CAF support.<sup>2280</sup>

1207. *Deployment Deadlines.* We propose that recipients be required to meet certain deployment milestones in order to remain qualified for the full amount of any award. Further, we propose that deployment milestones that apply to ETCs through a competitive process be the same as those that apply to price cap ETCs that accept a state-level commitment. We seek comment on whether recipients of CAF auction support should instead be subject to different deployment deadlines.

### 3. Auction Process Framework

1208. In this section, we propose general auction rules governing the competitive bidding process itself, including options regarding basic auction design, application process, information and competition.<sup>2281</sup>

1209. Consistent with the rules we have established for the Mobility Fund Phase I and proposed for Mobility Fund Phase II, we propose to delegate to the Bureaus authority to establish detailed auction procedures, take all other actions to conduct this competitive bidding process, and conduct program administration and oversight consistent with any rules and policies we establish in light of the record we receive based on the proposals made for this CAF auction process for support. We seek comment on this proposal.

#### a. Auction Design

1210. Consistent with the rules established for the Mobility Fund Phase I and proposed for the Mobility Fund Phase II, we are proposing certain general rules outlining various auction design options and parameters, while at the same time proposing that final determination of specific auction procedures to implement a specific design based on these rules be delegated to the Bureaus as part of the subsequent pre-auction notice and comment proceeding. Among other issues, we propose to give the Bureaus discretion to consider various procedures for grouping eligible areas to be covered with one bid – package bidding – that could be tailored to the needs of prospective bidders as indicated during the pre-auction notice and comment period.

1211. We are inclined to believe that some form of package bidding may enhance the auction by helping bidders to incorporate efficiencies into their bids. While the Bureaus will establish specific

<sup>2280</sup> 47 U.S.C. § 254(b)(3). See *supra* paras. 113-114.

<sup>2281</sup> See Auction Rules included in Appendix A.

procedures to address this issue later, we invite preliminary comment on whether package bidding may be appropriate for this auction, and if so, why. Above, we asked for input on package bidding as it relates to our choice of a Census Tract-type or Bidder-Defined approach for the Mobility Fund Phase II. Here, we ask for any additional comments on the potential advantages and disadvantages of possible package bidding procedures and formats in the context of awarding support to ensure the universal availability of modern networks capable of delivering broadband and voice service to homes, businesses, and community anchor institutions. In particular, we ask for input on the reasons why certain package bidding procedures would be helpful or harmful to providers bidding in an auction, and what procedures might best meet our goal of maximizing such universal availability. For example, regardless of whether we adopt the Census Tract-type or Bidder-Defined approach, should we impose some limits on the size or composition of package bids, such as allowing flexible packages of blocks or larger geographic units as long as the geographic units are within the boundaries of a larger unit such as a county or a state? Or, if we adopt the Census Tract-type approach, we could establish package bidding procedures that allow bidders to place package bids on predetermined groupings of eligible areas that follow a particular hierarchy – such as blocks, tracts, counties, and/or states, which nest within the census geographic scheme.

1212. We seek preliminary comment, as well, on determining reserve prices for the auction based on the support amounts estimated by a forward looking broadband cost model that we direct the Bureau to develop and adopt in the coming year, *i.e.*, the model used to determine the amount offered in exchange for state-level commitments.

**b. Potential Bidding Preference for Small Businesses**

1213. We also seek comment on whether small businesses should be eligible for a bidding preference in a CAF auction for support in price cap areas and whether such a bidding preference would be consistent with the objective of providing such support. The preference would be similar to the small business preference on which we seek comment for auctions of Mobility Fund Phase II support, and would act as a “reverse” bidding credit that would effectively reduce the bid amount of a qualifying small business for the purpose of comparing it to other bids.<sup>2282</sup> We also seek comment on the size of any small business bidding credit, should the Commission adopt one, that would be appropriate to increase the likelihood that the small business would have an opportunity to win support in the auction. We also seek comment on how we should define small businesses if we adopt a small business bidding credit for auctions to award support in price cap areas. Specifically, for the reasons provided in our discussion of Mobility Fund Phase II, we seek comment on whether a small business should be defined as an entity with average gross revenues not exceeding \$40 million for the preceding three years.<sup>2283</sup> Alternatively, should we consider a larger size definition for this purpose, such as average gross revenues not exceeding \$125 million for the preceding three years?<sup>2284</sup> In determining an applicant’s gross revenues under what circumstances should we attribute the gross revenues of the applicant’s affiliates? We seek comment on

<sup>2282</sup> Similar to the proposal made for Mobility Fund Phase II, the preference would be available with respect to all census blocks on which a qualified small business bids.

<sup>2283</sup> See *e.g.*, In re Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, GN Docket No. 01-74, 17 FCC Rcd 1022, 1087 ¶ 172 (2002).

<sup>2284</sup> The Commission established a size definition for entrepreneurs eligible for broadband PCS C block spectrum licenses based on gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million. In re Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 5532, \*36 ¶ 115 (1994); see also 47 C.F.R. § 24.709(a)(1). Although this definition was used more than a decade ago in the context of spectrum auctions, we seek comment on whether it would be appropriate to use the gross revenues standard of the definition in this universal service context as it would encompass more small businesses.

these definitions and invite input on whether an alternative basis for a size standard should be established.

**c. Auction and Post-Auction Process**

1214. *Short-Form Application Process.* We propose to use the same two-stage application process described in the Mobility Fund Phase I Order and proposed for Mobility Fund Phase II. We seek comment on this proposal and on whether there are any reasons to deviate from the process already adopted for the Mobility Fund.

1215. *Information and Communications.* We do not expect there to be circumstances specific to this auction that would indicate to us that we should deviate from our usual auction policies with respect to permissible communications during the auction or the public release of certain auction-related information. Hence, we propose to use the same rules and procedures regarding permissible communications and public disclosure of auction-related information adopted in the Mobility Fund Phase I Order and proposed for Mobility Fund Phase II. We seek comment on this proposal.

1216. *Auction Cancellation.* We propose to adopt for price cap CAF auctions the same rule adopted for Mobility Fund Phase I and proposed for Mobility Fund Phase II, which would provide the Bureaus with discretion to delay, suspend, or cancel bidding before or after a reverse auction begins under a variety of circumstances. We seek comment on this proposal.

1217. *Post-Auction Long-Form Application Process.* We propose to apply the post-auction long-form application process for Mobility Fund Phase I to participants in auctions for price cap CAF. Accordingly, applicants that win competitive bidding in such auctions would be required to demonstrate in their long-form applications that they are legally, technically and financially qualified to receive the support. We seek comment on this approach.

1218. In addition, we propose that a winning bidder will be subject to an auction default payment, if it defaults on its bid, including if it withdraws a bid after the close of the auction, fails to timely file a long form application, is found ineligible or unqualified to be a recipient of support, or its long-form application is dismissed for any reason after the close of the auction. In addition, we propose that recipients of support will be subject to a performance default payment. We propose the same rules for both of these default payments as we have adopted for Mobility Fund Phase I. We seek comment on these proposals.

**4. Tribal Issues**

1219. We seek comment on whether to establish special provisions to help ensure service to Tribal lands. To the extent practicable, we anticipate that support is best awarded using the same framework, and on the same terms and conditions, as we propose for other areas where the price cap carrier declines to make a state-level commitment to provide services. We recognize, however, that there are several aspects of the challenges facing Tribal lands for which a more tailored approach may be appropriate, as evidenced in the record developed to date with regard to the Tribal Mobility Fund Phase I and as proposed elsewhere. For example, we seek comment on whether to adopt revisions to identify eligible geographic areas and appropriate coverage units, consistent with the approach we took in the Tribal Mobility Fund Phase I. We also propose Tribal engagement requirements, preferences that reflect our unique relationship with Tribes, including a bidding credit of 25 percent for Tribally-owned and controlled recipients, and ETC designation provisions to allow a Tribally-owned or controlled entity to participate at auction provided that it has an application for ETC designation pending at the short-form application stage. We seek comment on these issues. In addition, we seek comment on establishing a Tribal priority along the lines we proposed for the Tribal Mobility Fund Phase II. We believe that these measures would help to ensure service in a way that acknowledges the unique characteristics of Tribal lands and reflects and respects Tribal sovereignty. To the extent we adopt our proposal for Tribal priority units, we seek comment on whether a Tribally-owned and controlled provider should also be eligible to receive a bidding credit within its Tribal land or if the Tribe must choose between one or the other. If we

offer a bidding credit to Tribally-owned and controlled providers, would a 25 percent bidding credit, like the one we have adopted for Phase I and proposed for Phase II of the Mobility Fund be sufficient, or does it need to be set at a different level to achieve our objectives? Finally, we seek comment on whether to adopt an alternative backstop support mechanism for any Tribal land in which the auction fails to attract a bidder.

## **5. Accountability and Oversight**

1220. We propose that all recipients of CAF support awarded through a competitive process would be subject generally to the same reporting, audit, and record retention requirements adopted in the Order. We seek comment on this proposal.

1221. In structuring support, we are mindful that we must comply with the Anti-Deficiency Act, which prohibits any officer or employee of the U.S. Government from involving the “government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.”<sup>2285</sup> Commenters are invited to address how to structure an award of support for a period of years to provide recipients with the requisite level of funding and certainty, while ensuring that the Commission’s Anti-Deficiency Act obligations are met.

## **6. Areas that Do Not Receive Support**

1222. Any areas that do not receive support either via a price cap carrier accepting a state-level commitment or via the subsequent auction would be eligible for support from the Remote Areas Fund budget.

### **K. Remote Areas Fund**

1223. Today’s Order adopts a number of reforms aimed at ensuring universal availability of robust and affordable voice and broadband services to all Americans. A key element of these reforms is our dedication of an annual budget of at least \$100 million to ensure that the less than one percent of Americans living in remote areas where the cost of deploying traditional terrestrial broadband networks is extremely high can obtain affordable broadband.<sup>2286</sup> We seek comment on how best to implement the Connect America Fund for remote areas (“Remote Areas Fund”).

1224. The obstacles to ensuring that affordable voice and broadband service are available in extremely high-cost areas differ somewhat from the obstacles to ensuring that such services are available in other areas supported by the Connect America Fund. As discussed above, with respect to those latter areas our focus has been on how best to facilitate the deployment of robust fixed and mobile broadband technologies where our universal service fund budget can support such deployment. In contrast, in extremely high-cost areas, available universal service support is unlikely to be sufficient for the deployment of traditional terrestrial networks supporting robust voice and broadband services. The Connect America Fund can help fulfill our universal service goals in these areas by taking advantage of services such as next-generation broadband satellite service or wireless internet service provider (WISP) service, which may already be deployed (or may be deployable with modest upfront investments) but may

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<sup>2285</sup> 31 U.S.C. § 1341(a)(1)(B).

<sup>2286</sup> See *supra* paras. 533-534. We acknowledge that many, but not all, extremely high cost areas are remote, in terms of distance from areas that are not high cost, and that some remote areas are not necessarily extremely high cost. We seek comment throughout this FNPRM on how to ensure that support from the Remote Areas Fund is targeted at areas that would be extremely high cost to serve with traditional terrestrial networks; we refer to these areas throughout this Section as “remote” or “extremely high cost.”

be priced in a way that makes service unaffordable for many consumers.<sup>2287</sup> In addition, we recognize that some of the most likely providers of service to these remote areas have cost structures, price structures, and networks that differ significantly from those of other broadband providers. For instance, the cost of terminal equipment and installation for satellite broadband often is greater than for other broadband offerings. As commenters address the issues raised in this section, we ask them to focus in particular on these characteristics and explain what, if any, impact they should have on the structure of the Remote Areas Fund.

## **1. Program Structure**

1225. We seek comment on how to structure the Remote Areas Fund. We propose that support for remote areas be structured as a portable consumer subsidy. Specifically, we seek comment on CAF support being used to make available discounted voice and broadband service to qualifying residences/households in remote areas,<sup>2288</sup> in a manner similar to our Lifeline and Link Up programs (together, Lifeline). As with Lifeline and Link Up, ETCs providing service in remote areas would receive subsidies only when they actually provide supported service to an eligible customer. Such a program structure would have the effect of making voice and broadband more affordable for qualifying consumers, thus promoting consumer choice and competition in remote areas. We seek further comment on how to implement such a proposal in sections XVII.K.2 and XVII.K.3 below.

1226. We also seek comment on an alternative structure for the Remote Areas Fund, which would use a competitive bidding process. Such a process could be conducted in one of three ways: (a) a per-subscribed-location auction, (b) a coverage auction, or (c) an auction of support that would include not only remote areas but also areas where the incumbent LEC declines to undertake a state-level commitment. We seek further comment on how the Commission could implement such a proposal in sections XVII.K.2 and XVII.K.4 below.

1227. Another alternative would be to structure CAF support for remote areas as a competitive proposal evaluation process, or Request for Proposal (RFP) process. We seek comment on this approach in section XVII.K.5 below.

1228. We also seek comment generally on whether there are other ways to structure CAF support for remote areas. Are there other alternatives that we should consider? Commenters should address considerations of timeliness, ease of administration, and cost effectiveness relative to the proposed portable consumer subsidy and auction approaches. For any proposed alternative, we also seek comment on whether our approach to management and oversight of this program, as described below, should differ.

## **2. General Implementation Issues**

### **a. Definition of Remote Areas**

1229. As discussed above, we intend to use a forward-looking cost model – once finalized – to identify a small number of extremely high-cost areas in both rate-of-return and price cap areas that should

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<sup>2287</sup> Because the Remote Areas Fund is likely to provide support on a per-subscribed location basis to make affordable to consumers service that is likely deployed or relatively easily deployed, we are less concerned that selecting more than one provider will deplete the fund by providing duplicative support than we are in the context of the Mobility Fund, where support is aimed at sustaining and expanding coverage in areas where coverage would be lacking absent support.

<sup>2288</sup> We seek comment on whether support to non-business locations should be made available on a per-residence or a per-household basis. *See infra* section VII.K.3.a. Pending resolution of that issue, we refer to non-business locations as “residences/households.”

receive support from the Remote Areas Fund.<sup>2289</sup> However, given our goal of implementing the program by the end of 2012,<sup>2290</sup> we will not be able to use the model to identify, at least in the first instance, remote areas eligible for CAF support.<sup>2291</sup>

1230. We therefore seek comment on how to identify the areas eligible for the Remote Areas Fund while the model is unavailable. We propose to provide support to those census blocks in price cap territories that are identified by National Broadband Map data as having no wireline or terrestrial wireless broadband service available, subsidized or unsubsidized.<sup>2292</sup> We seek comment on this proposal. Could this test be used as a proxy for identifying extremely high-cost areas? Is the National Broadband Map data sufficiently granular? Given that it is reported voluntarily by broadband providers, may the data be considered reliable enough for this purpose? Is there a risk that use of that metric would result in overlap with areas that likely would be supported by Mobility Fund monies or by funding made available post-state-level commitment? Could any overlap be addressed by making areas ineligible to the extent they are supported by other CAF funds? Given the goal of increasing broadband availability quickly, might the benefits of permitting overlaps for some time period outweigh the costs? Are there other data sources that could be used in conjunction with National Broadband Map data to improve our identification of remote areas? Are there alternative methods to using National Broadband Map data that the Commission could use to identify those remote areas in which CAF support should be available? What would be the advantages and disadvantages of such methods?

1231. Should the Commission switch from its initial method of identifying remote areas eligible for support (e.g., by using National Broadband Map data) to the forward-looking cost model once the model is available? Regardless of the method used, how frequently should the Commission reexamine whether an area is appropriately classified as “remote” for the purposes of Remote Area Fund support? The National Broadband Map is updated approximately every six months – would that be an appropriate interval?<sup>2293</sup> Is a periodic reexamination of the classification of remote areas sufficient to ensure that Remote Areas Fund support is not provided in areas where other carriers are providing broadband supported by other CAF elements? Likewise, is it sufficient to ensure eligibility for the Remote Areas Fund for consumers in areas where a carrier that currently receives USF support ceases to provide broadband service because that support is no longer available in whole or in part?

1232. We note that whether the Remote Area Fund is distributed as one-time awards or as ongoing support may affect the impact of any reexamination of the classification of remote areas. If one-time awards were distributed, up to \$100 million for a given year, additional money would be available in subsequent years. If ongoing support were awarded, and \$100 million were committed for a term of years, it would foreclose the possibility of support for additional areas later identified as “remote” by the model. Therefore, regardless of the distribution mechanism (portable consumer subsidy, auction, or

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<sup>2289</sup> We also propose in the FNPRM that any eligible areas that do not receive CAF Phase II support, either through a state-level commitment or through the subsequent competitive bidding process, would be eligible for support from the Remote Areas Fund. *See supra* para. 1222.

<sup>2290</sup> *See supra* para. 30.

<sup>2291</sup> We expect the CAF Phase II model to be available at the end of 2012. *See supra* para. 25.

<sup>2292</sup> As set forth in the CAF Order, rate-of-return carriers are required to extend broadband on reasonable request, and in the near term, pending fuller development of the record and resolution of these issues, we expect they will follow pre-existing state requirements, if any, regarding service line extensions in their highest-cost areas.

<sup>2293</sup> National Broadband Map, About National Broadband Map, <http://www.broadbandmap.gov/about> (last visited Oct. 17, 2011).



RFP), we propose to use one-time support until the model is complete. Thereafter, the Commission may decide to use one-time support, ongoing support, or a combination of the two.

**b. Provider Qualifications**

1233. To be eligible to receive CAF support for remote areas, we propose that a provider (i) must be an ETC, and (ii) must certify that it is financially and technically capable of providing service within the specified timeframe.

1234. *ETC Designation.* For the same reasons that apply with respect to other components of CAF, we generally propose to require that applicants for CAF support for remote areas be designated as ETCs covering the relevant geographic area as a condition of their eligibility for such support.<sup>2294</sup> We seek comment on this proposal.

1235. We also seek comment on the Commission's authority to designate satellite or other providers as ETCs pursuant to section 214(e)(6). Section 214(e)(6) authorizes the Commission to designate ETCs in the limited cases where a common carrier is not subject to the jurisdiction of a state commission.<sup>2295</sup> Under current procedures, when a carrier seeks ETC designation by the Commission, it must obtain from the relevant state an affirmative statement that the state lacks authority to designate that provider as an ETC.<sup>2296</sup> In order to streamline the implementation of CAF support for remote areas, should the Commission change its determination that carriers seeking non-Tribal land ETC designation must first seek it from the state commissions? Likewise, to the extent that providers may seek to serve remote areas in multiple states, can and should the Commission establish a streamlined process whereby the Commission could grant providers a multi-state or nationwide ETC designation? What modifications, if any, should be made to our ETC regulations in light of the particular characteristics of CAF support for remote areas? Would forbearance from any of the existing obligations be appropriate and necessary?

1236. *Certification of Financial and Technical Capability.* We also propose that each party seeking to receive CAF support for remote areas be required to certify that it is financially and technically capable of providing the required service within the specified timeframe in the geographic areas for which it seeks support. We seek comment on what specific showings should accompany any such certification.

1237. *Other Qualifications.* In addition to the minimum qualifications described above, we seek comment on other eligibility requirements for entities seeking to receive support for remote areas and how such requirements would advance our objectives. At the same time that we establish minimum qualifications consistent with these goals, are there ways the Commission can encourage participation by the widest possible range of qualified parties, including smaller entities?

**c. Term of Support**

1238. We seek comment on whether to establish a term of support in conjunction with the Remote Areas Fund. To the extent we adopt a structure that requires a term of support, we propose a five-year term, and seek comment on alternative terms. We also seek comment on whether it is appropriate to establish any sort of renewal opportunity, and on what terms.

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<sup>2294</sup> See *supra* para. 19, section VI (Public Interest Obligations).

<sup>2295</sup> 47 U.S.C. § 214(e)(6).

<sup>2296</sup> *USF Twelfth Report and Order*, 15 FCC Rcd at 12255, para. 93. This is true even for CMRS, for which the states clearly lack authority to regulate entry or rates. *Id.* at 12,262-63, para. 110. Because of the complex interrelationships among Tribal, state, and federal authority, providers may seek designation directly from the Commission to provide service in Tribal lands without an affirmative statement from the relevant state that it lacks jurisdiction. *Id.* at 12,265-69, paras. 115-27.

**d. Public Interest Obligations****(i) Service Performance Criteria****(a) Voice**

1239. As discussed in the CAF Order, we require all recipients of federal high-cost universal service support (whether designated as ETCs by a state commission or this Commission), as a condition of receiving federal high-cost universal service support, to offer voice telephony service throughout their supported area, and fund recipients must offer voice telephony as a standalone service.<sup>2297</sup> As indicated above, ETCs may use any technology in the provision of voice telephony service. Additionally, consistent with the section 254(b) principle that “[c]onsumers in all regions of the Nation . . . should have access to telecommunications and information services . . . that are available at rates that are reasonably comparable to rates charged for similar services in urban areas,”<sup>2298</sup> ETCs must offer voice telephony service, including voice telephony service offered on a standalone basis, at rates that are reasonably comparable to urban rates.<sup>2299</sup> We find that these requirements are appropriate to help ensure that consumers have access to voice telephony service that best fits their particular needs.<sup>2300</sup>

**(b) Broadband**

1240. Because different technologies, which may provide lower speeds and/or higher latencies, are likely to be used to serve locations in extremely high-cost areas than in other areas, and because it is not reasonably feasible to overcome this difference with the limited resources available through the Connect America Fund, we propose to tailor broadband performance requirements to the economic and technical characteristics of networks likely to exist in those remote areas. We therefore propose to modestly relax the broadband performance obligations for fixed voice and broadband providers to facilitate participation in the Remote Areas Fund by providers of technologies like next-generation satellite broadband and unlicensed localized fixed wireless networks, which may be significantly less costly to deploy in these remote areas. We seek comment on the appropriate performance requirements for broadband service to remote areas.

1241. *Speed Requirement.* We note that satellite broadband providers and WISPs are capable of offering service at speeds of at least 4 Mbps downstream and 1 Mbps upstream or intend to do so in the near future.<sup>2301</sup> We propose that broadband services eligible for CAF support for remote areas must,

<sup>2297</sup> With respect to “standalone service,” we mean that consumers must not be required to purchase any other services (e.g., broadband) in order to purchase voice service. See California PUC Comments at 10; Greenlining Institute Comments at 8; Missouri PSC Comments at 7; NASUCA Comments at 38.

<sup>2298</sup> 47 U.S.C. § 254(b)(3).

<sup>2299</sup> See *Qwest I*, 258 F.3d at 1199-1200.

<sup>2300</sup> See AT&T Comments at 103 (indicating that competition will ensure that customers have multiple options for voice service). But see Frontier Comments at 17-9 (stating that many Americans will have access to broadband but will not use it, so fund recipients must continue to provide standalone voice service).

<sup>2301</sup> See ViaSat, Inc. Comments Exhibit B, Jonathan Orszag and Bryan Keating, An Analysis of the Benefits of Allowing Satellite Broadband Providers to Participate Directly in the Proposed CAF Reverse Auctions (Apr. 18, 2011) at 14 (“ViaSat-1 is designed to provide subscribers with a broadband experience that is very comparable to terrestrial services. It will enable ViaSat to offer a variety of service offerings that meet or exceed the Commission’s proposed 4 Mbps download/1 Mbps upload standard.”) (footnotes omitted); Letter from Stephen D. Baruch, Attorney for Hughes Network Systems, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, attach. at 11 (filed Sept. 17, 2011) (stating that Hughes satellite broadband will be “[c]apable of serving 3 million subscribers at National Broadband Plan (NBP) targeted speeds in next 18 months” and that “[s]peeds will meet or exceed NBP targets (4 Mbps down/1 Mbps up)”; Wireless Internet Service Providers Association, (continued...))

consistent with other CAF requirements, offer actual speeds of at least 4 Mbps downstream and 1 Mbps upstream.<sup>2302</sup> We seek comment on this proposal. Are adjustments to those speeds appropriate given the nature of satellite service, WISP service, or other services? Is the availability of sufficient backhaul capacity a limiting factor that must be taken into account in some circumstances?

1242. *Latency.* Consistent with other CAF requirements, we propose to require ETCs to offer service of sufficiently low latency to enable use of real-time applications, including VoIP.<sup>2303</sup> We recognize that providers that operate satellites in geosynchronous orbits will, as a matter of physics, have higher latency than most terrestrial networks, and seek comment on how to operationalize that requirement. Would it be appropriate to set a latency standard, measured in milliseconds, for satellite services delivered in remote areas? If so, what should that standard be?

1243. *Capacity.* We seek comment on whether services supported by CAF for remote areas should have a minimum capacity requirement, and if so what that requirement should be. We note that both WildBlue and HughesNet currently limit daily or monthly usage by their residential subscribers.<sup>2304</sup> Upon launch of their new satellites, both providers may be able to adjust their usage limits.<sup>2305</sup>

1244. Other elements of CAF require that usage limits for broadband services “must be reasonably comparable to usage limits for comparable residential broadband offerings in urban areas.”<sup>2306</sup> Is this standard appropriate for satellite, WISP, and other broadband services in remote areas? Could the Commission establish a different capacity standard for services supported by CAF in remote areas that still enable consumers to utilize distance learning, remote medical diagnostics, video conferencing, and other critical applications, while allowing network operators the flexibility necessary to manage their networks? How would such a standard be operationalized?

## (ii) Pricing

1245. We seek comment on the pricing obligations of ETCs that receive Remote Areas Fund support.

1246. *Reasonably Comparable Rates.* The fourth performance goal adopted in the CAF Order is to ensure that rates are reasonably comparable for voice as well as broadband service, between urban

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America’s Broadband Heroes: Fixed Wireless Broadband Providers (2011) at 10, attach. to Letter from Elizabeth Bowles, President, and Jack Unger, FCC Chair, Wireless Internet Service Providers Association, to Sharon Gillett, Chief, Wireline Competition Bureau, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 (filed Oct. 20, 2011) (“By 2007, WISP operators were commonly offering 1meg to 4meg speeds to subscribers using the newer platforms.”).

<sup>2302</sup> See *supra* para. 94.

<sup>2303</sup> See *supra* para. 96.

<sup>2304</sup> See HughesNet, Fair Access Policy, <http://web.hughesnet.com/sites/legal/Pages/FairAccessPolicy.aspx> (last visited Oct. 18, 2011); WildBlue, Fair Access Policy Information, <http://www.wildblue.com/fap/> (last visited Oct. 18, 2011).

<sup>2305</sup> See ViaSat Comments at 5 (“ViaSat-1 will feature an innovative spacecraft design yielding capacity that is approximately 50-100 times greater than traditional Ku-band FSS satellites, and approximately 10-15 times greater than the highest capacity Ka-band satellites that serve the United States today.”); Letter from Stephen D. Baruch, Attorney for Hughes Network Systems, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, attach. at 11 (“More than 200 Gbps of capacity coming online in next 18 months.”).

<sup>2306</sup> See *supra* para. 98.

and rural, insular, and high-cost areas.<sup>2307</sup> Rates must be reasonably comparable so that consumers in rural, insular, and high-cost areas have meaningful access to these services.<sup>2308</sup> We propose to utilize the standards discussed in the CAF Order to determine whether rates for voice and broadband service in remote areas are reasonably comparable to those in urban areas.<sup>2309</sup> We seek comment on this proposal.

1247. Specifically, we propose to consider rates for voice service in remote areas to be “reasonably comparable” to urban voice rates under section 254(b)(3) if rates in remote areas fall within a reasonable range of urban rates for reasonably comparable voice service. Consistent with our existing precedent, we propose to presume that a voice rate is within a reasonable range if it falls within two standard deviations above the national average.<sup>2310</sup>

1248. As with voice services, for broadband services, we propose to consider rates in remote areas to be “reasonably comparable” to urban rates under section 254(b)(3) if rates in remote areas fall within a reasonable range of urban rates for reasonably comparable broadband service.<sup>2311</sup> We expect that the specific methodology to define that reasonable range for purposes of section 254(b)(3) the Bureaus have been directed to develop will be of equal use here.

1249. We are committed to achieving our goal of ensuring that voice and broadband are available at reasonably comparable rates for all Americans. It is unlikely, however, that we will be able to ensure that every residence/household in extremely high-cost, remote areas has access to subsidized voice and broadband service given the overall budget for the Connect America Fund. The Remote Areas Fund is, therefore, focused primarily on making voice and broadband affordable for consumers who would not otherwise have the resources to obtain it. Specifically, we seek comment in the following sections on whether to implement a means test to ensure that those residences/households in remote areas that are most in need of support to make voice and broadband affordable are able to obtain it.

1250. We recognize that this approach would be different from the current Commission approach for advancing universal service in high-cost areas, which does not look at the income levels of individual consumers that are served by carriers that receive funding from the high-cost program. These past decisions, however, were made in the context of a high-cost fund that lacked a strict budget. The Commission has now established an annual budget of no more than \$4.5 billion for the high-cost fund. In the context of this budget, the Commission has considered how best to achieve our goals with respect to the relatively small number of extremely costly to serve locations. Supporting robust fixed terrestrial networks in these remote areas would be so expensive that it would impose an excessive burden on contributors to the fund, even recognizing the section 254(b)(3) comparability principle, which the courts and the Commission have held must be balanced against the other principles.<sup>2312</sup> Imposing such a burden

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<sup>2307</sup> See *supra* paras. 55-56.

<sup>2308</sup> See 47 U.S.C. § 254(b)(3); *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4584, para. 80.

<sup>2309</sup> See *supra* para. 113.

<sup>2310</sup> The standard deviation is a measure of dispersion. The sample standard deviation is the square root of the sample variance. The sample variance is calculated as the sum of the squared deviations of the individual observations in the sample of data from the sample average divided by the total number of observations in the sample minus one. In a normal distribution, about 68 percent of the observations lie within one standard deviation above and below the average and about 95 percent of the observations lie within two standard deviations above and below the average.

<sup>2311</sup> See *supra* para. 113.

<sup>2312</sup> *Id.*; see, e.g., *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 434 (5th Cir. 1999); *Qwest Corp. v. FCC*, 258 F.3d 1191, 1199-1200 (10th Cir. 2001) *Qwest Corp. v. FCC*, 398 F.3d 1222 (10th Cir. 2005); *Federal* (continued...)

on consumers that contribute to the universal service fund would undermine our universal service goals by raising the cost of communications services.

1251. We seek to ensure that consumers in extremely high-cost areas have an meaningful opportunity to obtain both voice and broadband connectivity, and have concluded that we should support the provision of some service to those who might otherwise have no service at all. We believe this is a reasonable balancing of the section 254(b) principles in the context of remote areas that would be unreasonably expensive to serve by the means contemplated in the other CAF programs. As discussed above in the Order,<sup>2313</sup> we believe we can achieve this goal for these remote customers for approximately \$100 million per year. It is appropriate to revisit, in this narrow context, the question of whether we should direct the limited available funds to support residences/households with limited means, rather than offering discounted rates to residences/households for which a somewhat higher price is unlikely to be a barrier to adoption.

1252. *Subsidy Pass Through.* To the extent the Remote Areas Fund is structured in a way that support is provided to ETCs on a per-subscriber basis (e.g., as a portable consumer subsidy or as a per-subscribed-location auction), we propose that ETCs be required to pass the subsidy it receives for a subscriber on to that subscriber – in its entirety – in the form of a discount. This requirement is consistent with Lifeline, and will help to ensure that consumers in remote areas have access to services at reasonably comparable rates. We seek comment on this proposal.

1253. *Price Guarantees.* We seek comment on how to ensure that providers do not raise their prices in response to the availability of the Remote Areas Fund subsidy. One proposal would be to require each ETC to establish an “anchor price” for its basic service offering – including installation and equipment charges – as a condition of eligibility to receive Remote Areas Fund support. Such an approach would provide ETCs with pricing flexibility for all but their basic service offerings, while ensuring that low-income consumers have access to at least one product that is affordable. We seek comment on how to establish appropriate anchor prices. Would it be enough to require that the lowest discounted rate be reasonably comparable to rates in urban areas?

1254. *Consumer Flexibility.* We propose that consumers that receive discounts by virtue of Remote Areas Fund support should be permitted to apply that discount to any service package that includes voice telephony service offered by their ETC – not just to a basic package that is available at an anchor price or to other limited service offerings. Consumers in urban areas generally have the ability to purchase multiple service packages with varying levels of service quality at varying prices. It seems reasonable to afford a consumer in a remote area the same opportunity. We seek comment on this proposal.

### **3. Portable Consumer Subsidy Issues**

#### **a. Subscriber Qualifications**

1255. As discussed above, we propose that CAF support for remote areas be used to make available discounted voice and broadband service to qualifying residences/households in remote areas, in a manner similar to our Lifeline program. In this section, we propose to limit CAF support for remote areas to one subsidy per residence/household. We further propose that in order for an ETC to receive a subsidy for a residence/household (which subsidy will be used to provide that service to that residence/household at a discounted rate), the residence/household be located in a remote area, as

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*State Joint Board on Universal Service, High-Cost Universal Service Support*, CC Docket No. 96-45, WC Docket No. 05-337, Notice of Proposed Rulemaking, 20 FCC Rcd 19,731, 19,735-36, para 8 (2005).

<sup>2313</sup> See *supra* para. 534.

identified by the metric discussed in section XVII.K.2.a above. Finally, we seek comment on whether to require that residences/households meet a means test.

1256. *Eligibility Limited to One Per Residence/Household.* We propose to limit support to a single subsidy per residence/household in order to facilitate our statutory universal service obligations while preventing unnecessary expenditures for duplicative connections.<sup>2314</sup> A single fixed broadband connection should be sufficient for a single residence/household. We seek comment on this proposal.

1257. We also seek comment on how to implement this proposal in the context of CAF support for remote areas. First, we propose to adopt the use and definition of “residence” or “household” ultimately adopted by the Commission in connection with the Lifeline and Link Up Reform and Modernization NPRM.<sup>2315</sup> We seek comment on this proposal. We also seek comment on how best to interpret the one per residence/household restriction in light of current service offerings and in the context of situations that may pose unique circumstances.<sup>2316</sup> How should the Commission or Administrator determine that CAF support for remote areas is being provided in a manner consistent with any definitions of “household” or “residence” ultimately adopted? Should providers be able to rely on the representation of the person signing up for the discounted service?

1258. We seek comment on the relationship between CAF support for remote areas and the Lifeline program. Should a consumer’s decision to obtain services supported by the Remote Areas Fund affect or preclude their eligibility for Lifeline, or vice versa? What other issues must the Commission address in order to ensure that these programs are structured in a complementary fashion?

1259. *Remote Area.* We propose that CAF support for remote areas should be available only for service provided to residences/households located in extremely high-cost areas, consistent with the discussion in section XVII.K.2.a above. We seek comment on this proposal.

1260. *Limiting Support to New Subscribers.* It is likely that there are residences/households located in remote areas that are capable of and willing to pay for satellite voice and broadband services at current prices. These residences/households do not, by definition, require assistance in overcoming the barrier to affordability in remote areas. We therefore seek comment on whether it is appropriate to limit Remote Areas Fund support to new subscribers only. If so, how would such a restriction be implemented? Can an ETC determine whether a potential new subscriber is a current or past subscriber to itself or to another ETC? Should residences/households be considered “new customers” some period of time after cancelling service with an ETC? If so, how long a period is appropriate?

1261. *Means Test.* We seek comment on whether to use a means test to identify qualifying locations for which support can be collected in each eligible remote area. It would appear that using a means test for determining qualifying residences/households is particularly appropriate in supporting

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<sup>2314</sup> *Lifeline and Link Up Reform and Modernization NPRM*, 26 FCC Rcd at 2805-10, paras. 106-125.

<sup>2315</sup> *Lifeline and Link Up Reform and Modernization NPRM*, 26 FCC Rcd at 2872-3, Appendix A (proposed 47 C.F.R. § 54.408); *Further Inquiry Into Four Issues in the Universal Service Lifeline/Link Up Reform and Modernization Proceeding*, WC Docket Nos. 03-109, 11-42, CC Docket No. 96-45, Public Notice, 26 FCC Rcd 11,098, 11,100-03 (Wireline Comp. Bureau 2011).

<sup>2316</sup> *Lifeline and Link Up Reform and Modernization NPRM*, 26 FCC Rcd at 2805-6, para. 109. In October 2009, the Wireline Bureau sought comment on how to apply the one-per-household rule to Lifeline support in the context of group living facilities, such as assisted-living centers, Tribal residences, and apartment buildings. *See Comment Sought on TracFone Request for Clarification of Universal Service Lifeline Program “One-Per- Household” Rule As Applied to Group Living Facilities*, WC Docket No. 03-109, Public Notice, 24 FCC Rcd 12788 (Wireline Comp. Bur. 2009); Letter from Mitchell F. Brecher, Counsel for TracFone, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-109 (filed July 17, 2009).

services in extremely high-cost, remote areas that may be most cost-effectively served by satellite technology. This is because such service is readily available over broad areas, but often at higher prices to the end user than common terrestrial broadband services. In addition, by limiting our support to locations that meet a means test we assure that we stretch the available funds as far as possible to support service to those that would not otherwise be able to afford it. We seek comment on whether an approach that provides a portable subsidy to only a subset of consumers in remote areas is consistent with the statutory principle that “[c]onsumers in all regions of the Nation, including low-income consumers . . . should have access to . . . advanced telecommunications and information services . . . at rates that are reasonably comparable to rates charged for similar services in urban areas.”<sup>2317</sup> We seek comment on these proposals, and on any alternatives that commenters may suggest.

1262. We seek comment on what standard we would use for such a means test. For instance, would it be appropriate to set a threshold means test for residences/households of 200 percent of the poverty level as established annually, based on residence/household size?<sup>2318</sup> That would, for example, provide support for a family of four that has income of \$44,700 or lower.<sup>2319</sup> What would be the relative advantages and disadvantages of setting a higher or lower level? Would it be appropriate to also specify other governmental programs that could serve as models or as proxies for a means test, as is done with the Commission’s low-income program?

1263. *Community Anchor Institutions and Small Businesses.* We seek comment on whether small businesses and/or community anchor institutions also should be eligible for the Remote Areas Fund. How would the proposals set forth in this Further Notice need to be modified to administer a Remote Areas Fund that includes small businesses? How should small businesses be defined? Would small businesses receive the same subsidy as residences/households, or a different subsidy? As we observed in the CAF Order, community anchor institutions in rural America often are located near the more densely populated area in a given county – the small town, the county seat, and so forth – which are less likely to be extremely high-cost areas and therefore may not require support.<sup>2320</sup> If we are to provide support to community anchor institutions, how should that term be defined?

#### **b. Setting the Amount of the Subsidy**

1264. We seek comment on how to set the CAF support amount for remote areas for ETCs for voice and broadband services.

##### **(i) Stand-alone Voice Service**

1265. We seek comment on how to set the CAF support amount for remote areas for stand-alone voice service. One proposal would be to adopt rules consistent with those that establish the tiered Lifeline support amounts for voice telephony service.<sup>2321</sup> Would these support amounts be sufficient to

<sup>2317</sup> See 47 U.S.C. §254(b)(3).

<sup>2318</sup> For the Lifeline and Link Up programs, consumers in states without their own low-income programs must comply with eligibility criteria to qualify for low-income support. The Commission’s eligibility criteria include income at or below 135 percent of the federal poverty guidelines, or participation in one of the various income-based public-assistance programs, such as Medicaid, Food Stamps, Supplemental Security Income, Federal Public Housing Assistance, and the National School Lunch Program’s free lunch program. See 54 C.F.R. § 409(b), (c).

<sup>2319</sup> See Annual Update of the HHS Poverty Guidelines, 76 Fed. Reg. 3637-38 (Jan. 20, 2011).

<sup>2320</sup> See *supra* para. 102.

<sup>2321</sup> 47 C.F.R. § 54.403. We note that the Commission has sought comment on whether there is a more appropriate framework for reimbursement than the current four-tier system. See *Lifeline and Link Up Reform and Modernization NPRM*, 26 FCC Rcd at 2845-49, paras. 245-51.

overcome the barrier to affordability for voice service faced by individuals in remote areas? Would a greater or lesser amount be more appropriate? If so, how would such an amount be calculated?

**(ii) Voice and Broadband Service**

1266. We seek comment on how to set the CAF support amount for remote areas for a bundle of voice and broadband (“voice-broadband”) service. We note that current satellite services tend to have significantly higher monthly prices to end-users than many terrestrial fixed broadband services, and frequently include substantial up-front equipment and installation costs.

1267. *Monthly Payments.* We seek comment on the appropriate support amount for monthly satellite voice-broadband service charges. One proposal would be to provide a monthly amount equal to the difference between the retail price of a “basic” satellite voice-broadband service and an appropriate reference price for reasonably comparable service in urban areas. We seek comment on this proposal. How would the appropriate reference price for satellite voice-broadband be calculated? How would the appropriate reference price for a “reasonably comparable” voice-broadband service in urban areas be calculated? What performance criteria should be applied when selecting a service or services from which to derive the price? Should a discount be applied to the price of services which are of lower quality (*e.g.*, have higher latency or stricter capacity limits)? Could the survey of urban broadband rates the Bureaus have been authorized to conduct provide the necessary data?<sup>2322</sup> How should the presence or absence of mandatory contract terms or other terms and conditions that may differ be taken into account? Are there other data sources available that could be relied upon to determine one or both reference prices?

1268. What other methods could be used to establish the appropriate support amount? Proposals should be detailed and specific, and commenters should be mindful of the need to balance the goal of ensuring access to affordable broadband in remote areas with the need to operate within the budget established for CAF for remote areas and minimize opportunities for waste, fraud and abuse.

1269. *Installation and Equipment.* The cost of purchasing or leasing terminal equipment and installation necessary for satellite service to be initiated often are greater than for other services. We seek comment on how and whether Remote Areas Fund support should be allocated to defray these startup costs.

1270. We propose that subscribers be required to pay, or provide a deposit of, a meaningful amount to help ensure that subscribers have the means to pay for the services to which they subscribe and to provide an incentive to comply with any terms of their service agreements regarding use and return of equipment. What would be an appropriate payment or deposit amount?

1271. By extension, we propose that the subsidy for installation services and equipment sale or lease be the difference between the payment or deposit amount described in the preceding paragraph and the ETC’s routine charges for initiating service. We seek comment on whether this would result in an appropriate subsidy level. Should the Commission instead establish a fixed subsidy amount? If so, how should that subsidy amount be calculated? Should the subsidy be paid at the time service is initiated, or should smaller payments be made during the duration of the subscription? What other factors must be taken into account so as to ensure that the costs of installation and equipment do not serve as a barrier to affordable broadband service in remote areas while minimizing incentives for customer churn and opportunities for waste, fraud and abuse?

1272. *Satellite Service Availability.* As discussed above, we recognize that some of the most likely providers of service to remote areas are satellite providers. Are there issues relating to the nature of satellite service that could prevent potential subscribers from obtaining service? For example, WildBlue

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<sup>2322</sup> See *supra* para. 114.



and HughesNet both require that subscribers have a clear view of the southern sky in order to obtain a signal.<sup>2323</sup> How many potential subscribers in remote areas may not be able to obtain a signal due to the nature of their dwelling unit (*e.g.*, a multi-unit dwelling), terrain surrounding their dwelling unit (*e.g.*, proximity to mountains), heavy foliage, or other obstructions? To what extent can such issues be resolved by antenna masts or other solutions? Should the cost of resolving such issues be subsidized by CAF support for remote areas? If so, how would the amount of such subsidy be calculated?

**c. Terms and Conditions of Service**

1273. We note that both WildBlue and HughesNet require subscribers to enter into a 24-month contract as a condition of service, and impose an early termination fee (ETF) if service is terminated prior to the end of the contract term.<sup>2324</sup> Should ETCs be permitted to impose such contract terms when consumers subscribe to services supported by CAF for remote areas? Are there other terms or conditions that should be prohibited or restricted in connection with the provision of supported services? For example, should an ETC be permitted to require subscribers to pay by credit card, or to pass a credit check before service is initiated?

**d. Budget**

1274. We seek comment on how to ensure that we stay within the annual Remote Areas Fund budget under a portable consumer subsidy structure. Should support be available on a “first come, first served” basis, or should some other method be used to identify which applicants receive support? If, in a given funding year, support expenditures begin to approach the budgeted amount, should the Commission tighten the eligibility criteria to reduce demand (*e.g.*, by lowering the threshold established for a means test, if adopted)? If so, how? What other tools or techniques can the Commission use to ensure that demand for CAF for remote areas support does not outstrip the budgeted supply?

1275. We also seek comment on what the Commission should do if requests for reimbursement from the Remote Areas Fund are lower than the budget. If, in a given funding year, support expenditures do not reach the budgeted amount, should the Commission modify its eligibility criteria to allow additional residences/households in remote areas to obtain service supported by the Remote Areas Fund? If so, how?

**4. Auction Approaches**

1276. As alternatives to our proposals above, we could use one of several competitive bidding approaches to target the provision of CAF funding in extremely high-cost areas. Using an auction in which providers compete across areas for support from the Remote Areas Fund could enable us to identify those providers that would offer the services at least cost to the fund, so as to maximize the number of locations that could be served within the budget. More specifically, we seek comment on three auction-related alternatives. In the first, a per-subscribed location auction, bidders would compete for the opportunity to receive payments in exchange for providing services that meet the technical requirements described above, at a set discounted price, to qualifying locations in an area.<sup>2325</sup> In the second, a coverage auction, rather than competing for a per-subscribed location subsidy based on specified performance and

<sup>2323</sup> See WildBlue, Frequently Asked Questions, [http://www.wildblue.com/aboutWildblue/qaa.jsp#4\\_4](http://www.wildblue.com/aboutWildblue/qaa.jsp#4_4) (last visited Oct. 18, 2011); HughesNet, Frequently Asked Questions, Installation, <http://consumer.hughesnet.com/faqs.cfm> (last visited Oct. 18, 2011).

<sup>2324</sup> See WildBlue, Legal – Customer Agreement, [http://www.wildblue.com/legal/customer\\_agreement.jsp](http://www.wildblue.com/legal/customer_agreement.jsp) (last visited Oct. 18, 2011); HughesNet, Plans and Pricing, [http://consumer.hughesnet.com/plans.cfm?WT.mc\\_id=05141PPChncom3](http://consumer.hughesnet.com/plans.cfm?WT.mc_id=05141PPChncom3) (last visited Oct. 18, 2011).

<sup>2325</sup> Such qualifications might include, for example, a means test.

pricing requirements, bidders would compete for support in exchange for making service available at reasonably comparable rates to any requesting location within a geographic area. The third auction alternative, a combined auction, would take place in combination with the competitive bidding process in areas in which the incumbent LEC declines the state-level commitment. We would combine the budgets available for these purposes into a single competitive bidding process, relaxing the performance requirements applicable to supported providers of fixed service in order to increase the number of technologies service providers could use, and thereby increase competition in the auction.<sup>2326</sup> If we use an auction framework, we would have to consider some additional questions regarding how to address aspects of the program that would be different under an auction approach than for our voucher proposal. Below we discuss each auction option in more detail and seek comment on relevant issues. Commenters advocating for auction options should discuss to what extent the choice of a particular auction approach should affect decisions about the general implementation issues discussed above in Section XVII.K.2, including definition of remote areas, provider qualifications, and public interest obligations.

1277. *Per-Subscribed Location Auction.* This competitive bidding alternative would have much in common with the portable consumer subsidy proposal we describe above, in that it would offer a subsidy based on service provided to qualifying locations.<sup>2327</sup> In contrast, however, under an auction approach, the subsidies would not necessarily be available in all the areas identified as extremely high-cost, but only in those areas for which winning bids were accepted. Further, in an auction for per-location support, only the providers submitting the winning bids would be eligible to collect the subsidy payments to serve qualifying locations in the area. And under an auction approach, the subsidy amount would be determined based on bids in the auction, and would not be set by the Commission.

1278. In a per-subscriber location auction, the Commission would establish a benchmark price level for services meeting the performance criteria defined for voice and broadband in extremely high-cost areas. Bidders would then indicate in the auction a subsidy amount at which they would be willing to offer services meeting our specifications while charging consumers no more than the benchmark price, which would represent a discount off the otherwise available price. We seek comment on how we should establish this price, and how to adjust it over time. Many of the same considerations discussed above in Section XVII.K.3.b with respect to the portable consumer subsidy would apply to the per-subscriber-location auction, and we ask commenters to address these issues.

1279. With respect to the choice of areas for competitive bidding under this option, we seek comment on whether we should use a geographic area other than census blocks as a minimum geographic unit for bidding, and how that choice relates to whether and how we might provide for bidding on packages of areas.<sup>2328</sup> In order to evaluate the effect of bids with respect to available funds, we would determine the number of qualifying locations in each eligible census block based on 2010 decennial census data (*e.g.*, those locations meeting a required means test).

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<sup>2326</sup> In the discussion of the competitive bidding process in areas where incumbent LECs have declined a state-level commitment, we seek comment on an approach in which providers could offer different performance characteristics such as download and/or upload speeds, latency, and limits on monthly data usage, and the Commission would score such “quality” differences in evaluating bids. *See supra* para. 1204 and note 2279.

<sup>2327</sup> Our second auction option does not involve per-location support, and so is significantly different from our voucher approach.

<sup>2328</sup> *Compare* WildBlue et al., *Ex Parte* Notice, July 18, 2011 (satellite representatives “urged that support be distributed on the basis of small geographic units, such as census blocks”), *with* Rural Utilities Service, Satellite Awards, Broadband Initiatives Program, Fact Sheet at 2 (illustrating large regions with respect to which BIP satellite funding was granted) (*available at* <http://www.rurdev.usda.gov/supportdocuments/BIPSatelliteFactSheet10-20-10.pdf>).

1280. Under this auction option, we could design the auction to select one or possibly more than one provider that would be eligible to receive a subsidy amount to provide services in a given area, and we seek comment on these possible approaches. Enabling more than one provider to receive support could provide qualifying customers with the benefits of a choice of service providers. Selecting a single provider per area, however, could give the providers more certainty regarding potential customers, which may permit lower bids. We also ask commenters to consider whether picking one provider or two or more would have an effect on auction competition and the auction's ability to drive subsidy prices to efficient levels. In this regard, we ask commenters to indicate the likely impact on subsidy levels of picking one provider or two or more through an auction, as well as the concomitant effect on the number of locations that could be served within the budget.

1281. *Coverage Auction.* This competitive bidding option could be appropriate if we find that we need to spur significant new deployment (e.g., launching a new satellite or directing a dedicated spot beam to a particular area) to make voice and broadband services available in extremely high-cost areas. Thus, a coverage auction would have much in common with our proposals for competitive bidding for Mobility Fund Phase II and price cap areas in which a state-level commitment was not made in that it would offer support to service providers in exchange for making service available at reasonably comparable rates to any requesting location within a particular geographic area. Similar to the other proposed CAF auctions, requesting locations would not be subject to a means test, and support would not be tied to the number of subscribers a provider serves. As a threshold matter, we seek comment on whether a coverage auction would displace private investment, given existing and planned capacity and coverage that may be achieved without support. If adequate capacity and coverage is unlikely to be achieved absent support, we seek input on how to structure a competitive auction, given the nature of competition among satellite broadband providers and the possibility of competition from providers using other technological platforms, such as WISPs.

1282. As with our other competitive bidding proposals we seek comment on the appropriate geographic area to use as a minimum geographic unit for bidding, and how that choice relates to whether and how we might provide for bidding on packages of areas.<sup>2329</sup> In order to evaluate the impact on available funds of bids made for different geographic areas we would determine the number of potential locations in each eligible census block based on 2010 decennial census data. We would anticipate that, in order to maximize the consumer benefits in such an auction, we would generally be supporting a single provider for a given geographic area. As discussed above, we would support more than one provider in an area only if doing so would maximize coverage.

1283. *Combined Auction.* This auction option would combine the budgets available for the post-state-level commitment competitive bidding process and for remote areas, relaxing the performance requirements applicable to providers of fixed services receiving CAF support in order to increase the number of technologies service providers could use. In such an auction, providers could offer different performance characteristics, such as download and/or upload speeds, latency, and limits on monthly data use, and the Commission would score such "quality" differences in evaluating bids. This would give the Commission the ability to make trade-offs between subsidizing a higher quality service to fewer customers versus subsidizing a lower quality for more customers. Additionally, such an approach should result in more competitive bidding and lower prices, by allowing more technologies to compete for funding (both for an area and across areas), thereby permitting the CAF budget to yield greater quality for a given coverage, expanded coverage, or some combination thereof. This could allow the auction to determine a more cost effective distribution of budgets for services that meet potentially different performance obligations, rather than having the Commission decide in advance how to distribute the

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<sup>2329</sup> This approach is similar to what we have done for Mobility Fund Phase I and proposed for other competitive bidding processes in this FNPRM.

budgets across different auctions.

1284. Under this option, as with our other competitive bidding proposals, we seek comment on the appropriate geographic area to use as a minimum geographic unit for bidding, and how that choice relates to whether and how we might provide for bidding on packages of areas.<sup>2330</sup> We also seek comment on how to establish the number of units in eligible geographic areas. For instance, should we apply a means test to determine the number of qualifying locations that must be served? Further, we seek comment on whether and how to score different performance dimensions, and, whether providers should specify as part of their bids the retail prices they would charge consumers and, if so, how to include such prices in evaluating the bids.<sup>2331</sup> We also ask whether we should prioritize areas currently lacking availability of any terrestrial broadband service at any speed by, for example, providing a form of bidding credit that would give an advantage to such areas in across-area bidding.

1285. *Competitive Bidding Procedures.* Should we use any of our competitive bidding alternatives, we would generally structure the procedures as we have done for Mobility Fund Phase I and proposed for Phase II and for the CAF auction for price cap areas. We propose to use the same general auction rules as adopted or proposed for other contexts, including rules on potential auction designs, and rules on governing an auction application phase, a bidding phase, and a post-auction process whereby selected providers would show they are legally, technically and financially qualified to receive the support. As with other adopted and proposed auctions for CAF components, we propose to delegate to the Bureaus authority to establish, consistent with the general rules, detailed auction procedures and take all other actions to implement a competitive bidding process and other program aspects of the subsidies for remote areas to be determined through competitive bidding. We describe the elements of our proposed auction framework briefly below, beginning with an outline of how we would approach the competitive bidding phase.

1286. *Auction Design.* We propose to use the same general rules established for the Mobility Fund Phase I and proposed for the Mobility Fund Phase II, regarding various auction design options and parameters, which would form the basis on which the Bureaus would establish auction procedures to implement a specific design as part of the pre-auction notice and comment proceeding. We contemplate that the specific procedures to be adopted for this auction would be identified in a public notice. Among other issues, we propose to give the Bureaus discretion to consider various procedures for grouping eligible areas to be covered with one bid – package bidding – that could be tailored to the needs of prospective bidders as indicated during the pre-auction notice and comment period. We seek comment on these proposals and invite commenters to identify any alternatives or changes to these general rules that would be appropriate for this competitive bidding process.

1287. *Potential Bidding Preference for Small Businesses.* We also seek comment on whether small businesses should be eligible for a bidding preference if we use any of our competitive bidding alternatives to provide support from the Remote Areas Fund, and whether such a bidding preference would be consistent with the objective of providing such support. The preference would be similar to the small business preference on which we seek comment for auctions of Mobility Fund Phase II support, and would act as a “reverse” bidding credit that would effectively reduce the bid amount of a qualifying small

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<sup>2330</sup> This approach is similar to what we have done for Mobility Fund Phase I and proposed for other competitive bidding processes in this FNPRM.

<sup>2331</sup> In the discussion of the competitive bidding process in areas where incumbent LECs have declined a state-level commitment, we seek comment on an approach that would allow individual providers to propose different prices at which they would be willing to offer services at different performance levels, with selection of the winning bids based on both prices and performance scores. See *supra* para. 1204.

business for the purpose of comparing it to other bids.<sup>2332</sup> We also seek comment on the size of any small business bidding credit, should the Commission adopt one, that would be appropriate to increase the likelihood that the small business would have an opportunity to win support in the auction. We also seek comment on how we should define small businesses if we adopt a small business bidding credit for auctions to award support in remote areas. Specifically, for the reasons provided in our discussion of Mobility Fund Phase II, we seek comment on whether a small business should be defined as an entity with average gross revenues not exceeding \$40 million for the preceding three years.<sup>2333</sup> Alternatively, should we consider a larger size definition for this purpose, such as average gross revenues not exceeding \$125 million for the preceding three years?<sup>2334</sup> In determining an applicant's gross revenues under what circumstances should we attribute the gross revenues of the applicant's affiliates? We seek comment on these definitions and invite input on whether an alternative basis for a size standard should be established.

1288. *Application, Auction and Post-Auction Process.* We propose to use the same two-stage application process described more completely in the Mobility Fund Phase I Order and proposed for Mobility Fund Phase II.<sup>2335</sup> Similarly we propose to use the same rules and procedures regarding permissible communications and public disclosure of auction-related information, and regarding delay, suspension, or cancellation of bidding as adopted in the Mobility Fund Phase I Order and proposed for Mobility Fund Phase II. We also propose to use the same rules regarding the post-auction long-form application process and the same rules regarding auction defaults and performance defaults.

1289. We seek comment on all of these proposals. Specifically, we ask whether there are reasons related to the specific circumstances we seek to address in remote areas that should cause us to deviate from the process established for the Mobility Fund.

## 5. Competitive Evaluation Approach

1290. We seek comment on structuring CAF for remote areas as a competitive proposal evaluation process, or RFP process. With this option we would solicit proposals to provide broadband service in eligible areas, consistent with our technical requirements, and award support for a fixed term to those proposals that offered the best value in terms of meeting our stated criteria. Using such an RFP process, perhaps modeled after the RUS-BIP program,<sup>2336</sup> might permit us more flexibility than an auction in balancing evaluation criteria – for example, with respect to quality standards such as capacity and latency, or quality and price.

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<sup>2332</sup> Similar to the proposal made for Mobility Fund Phase II, the preference would be available with respect to all census blocks on which a qualified small business bids.

<sup>2333</sup> See e.g., In re Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, GN Docket No. 01-74, 17 FCC Rcd 1022, 1087 ¶ 172 (2002).

<sup>2334</sup> The Commission established a size definition for entrepreneurs eligible for broadband PCS C block spectrum licenses based on gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million. In re Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 5532, \*36 ¶ 115 (1994); see also 47 C.F.R. § 24.709(a)(1). Although this definition was used more than a decade ago in the context of spectrum auctions, we seek comment on whether it would be appropriate to use the gross revenues standard of the definition in this universal service context as it would encompass more small businesses.

<sup>2335</sup> See *supra* paras. 416, 417 and 1161.

<sup>2336</sup> See United States Department of Agriculture, About the Recovery Act Broadband Initiatives Program, [http://www.rurdev.usda.gov/utp\\_bip.html](http://www.rurdev.usda.gov/utp_bip.html) (last visited Oct. 17, 2011). We note that the RUS-BIP program is a grant program, not a procurement as contemplated here.

**6. Other Issues****a. Certification and Verification of Eligibility**

1291. Our obligation to minimize waste, fraud and abuse in Commission programs suggests that we should require individuals who are eligible for CAF support for remote areas be required to certify as to their eligibility and periodically verify their continued eligibility.<sup>2337</sup> Given the Commission's experience in administering the Lifeline program, we propose to adopt the Lifeline certification and verification procedures proposed by the Commission in connection with the Lifeline and Link Up Reform and Modernization NPRM. We seek comment on this proposal and on whether any modifications would be necessary to reflect the differences between the Lifeline and Link Up programs and the Remote Areas Fund.<sup>2338</sup> Would other, Remote Areas Fund specific rules be more appropriate? For instance, to the extent that the proposals for Lifeline contemplate that states be permitted to implement additional verification procedures, should we consider permitting similar state-specific procedures here? Should we consider the same uniform sampling methodology proposed for Lifeline? What other modifications to the Lifeline and Link Up rules might be necessary to reflect the differences between the Lifeline program and the proposed CAF support for remote areas?

**b. Accountability and Oversight**

1292. Except for disbursing support, we propose to apply to our program of support for remote areas the same rules for accountability and oversight as we do for CAF. Thus, recipients of this support would be subject generally to the same reporting, audit, and record retention requirements that apply to recipients of CAF support. We propose to disburse support for the remote areas budget on a quarterly, per-location served basis, beginning upon notification that a qualifying location has contracted with the designated support recipient for service consistent with the program technical requirements described above.

1293. We propose that providers notify us quarterly of newly served locations by submitting a certification specifying the number of signed contracts for qualifying locations, along with a certification that each location meets the qualifying criteria (*e.g.*, a means test) established in this proceeding. Signed contracts would be covered by the record retention requirements applicable to all recipients of CAF support.

1294. We propose that payments for newly acquired customers be submitted and paid quarterly. We seek comment on how often support for continuing qualifying customers should be paid out, *e.g.*, in quarterly installments.

1295. In structuring an appropriate payment plan, we are mindful that we must comply with the Anti-Deficiency Act, which prohibits any officer or employee of the U.S. Government from involving the "government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."<sup>2339</sup> Commenters are invited to address how to structure an award of support that provides recipients with the requisite level of funding and certainty, while ensuring that the Commission's Anti-Deficiency Act obligations are met.

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<sup>2337</sup> "Certification" refers to the initial determination of eligibility for the program; "verification" refers to subsequent determinations of ongoing eligibility. *See, e.g., Lifeline and Link Up Reform and Modernization NPRM*, 26 FCC Rcd at 2822-24, paras. 158-66; *see also, e.g., 2010 Recommended Decision*, 25 FCC Rcd at 15,606-11, paras. 23-34.

<sup>2338</sup> *See Lifeline and Link Up Reform and Modernization NPRM*, 26 FCC Rcd at 2822-31, paras. 158-98.

<sup>2339</sup> 31 U.S.C. § 1341(a)(1)(B).

## **L. Introduction to Intercarrier Compensation**

1296. In this portion of the FNPRM, we seek comment on additional topics that will guide the next steps to comprehensive reform of the intercarrier compensation system initiated in the Order. First, we seek comment on the transition to bill-and-keep for rate elements that are not specifically addressed in the Order, including origination and transport. Next, in section N we seek comment on interconnection and related issues that must be addressed to implement bill-and-keep. Then, in section O, we seek comment on the reform of end user charges and the future elimination of the ARC adopted in the Order. In section P we invite comment on IP-to-IP interconnection, including scope, incentives, and statutory issues that will help guide the development of an IP-to-IP policy framework. In section Q, we seek comment on the development of additional call signaling rules for one-way VoIP service providers. Finally, in section R we seek comment on the adequacy of the new and revised rules to reflect the reform adopted in this Order.

## **M. Transitioning All Rate Elements to Bill-and-Keep**

1297. Today, we adopt a bill-and-keep pricing methodology as the default methodology that will apply to all telecommunications traffic at the end of the complete transition period.<sup>2340</sup> As discussed in the Order, we find that a bill-and-keep methodology has numerous consumer benefits, best addresses access charge arbitrage, and will promote the transition from TDM to all-IP networks. Although we specify the implementation of the transition for certain terminating access rates in the Order, we did not do the same for other rate elements, including originating switched access, dedicated transport, tandem switching and tandem transport in some circumstances, and other charges including dedicated transport signaling, and signaling for tandem switching. In this section, we seek further comment to complete our reform effort, and establish the proper transition and recovery mechanism for the remaining elements. Commenters warn that failure to take action promptly on these elements could perpetuate inefficiencies, delay the deployment of IP networks and IP-to-IP interconnection, and maintain opportunities for arbitrage.<sup>2341</sup> We agree, and seek to reach the end state for all rate elements as soon as practicable, but with a sensible transition path that ensures that the industry has sufficient time to adapt to changed circumstances.<sup>2342</sup> As a result, we seek comment on transitioning the remaining rate elements consistent with our bill-and-keep framework, and adopting a new recovery mechanism to provide for a gradual transition away from the current system.

1298. *Origination.* Other than capping interstate originating access rates and bringing dedicated switched access transport to interstate levels, the Order does not fully address the complete transition for originating access charges.<sup>2343</sup> Instead, it provides on an interim basis that interstate originating switched access rates for all carriers are to be capped at current levels as of the effective date of the rules adopted pursuant to this Order.<sup>2344</sup> As we acknowledge in the Order, section 251(b)(5) does not explicitly address originating charges.<sup>2345</sup> We determine, therefore, that such charges should be

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<sup>2340</sup> See *supra* Section XII.A.

<sup>2341</sup> See *supra* Section XII.A.1; see *infra* para. 1307.

<sup>2342</sup> See, e.g., iBasis *August 3 PN Comments* at 2 (“Prepaid Calling Card Providers also emphasize[] the need to establish a uniform rule on a going-forward basis to create certainty in the industry and establish a level playing field among all prepaid card providers.”).

<sup>2343</sup> For price cap carriers, intrastate originating access charges are also capped at current levels as of January 1, 2012. See *supra* para. 805; see also *USF/ICC Transformation NPRM* at para. 554 n.832.

<sup>2344</sup> See *supra* Section XII.C.

<sup>2345</sup> See *supra* paras. 777-778.

eliminated at the conclusion of the ultimate transition to the new intercarrier compensation regime.<sup>2346</sup> Below, we seek comment on that final transition for *all* originating access charges.

1299. Beyond the interim steps set forth in the Order, we seek comment on the need for an additional multi-year transition for originating access as part of the final transition to bill-and-keep. Commenters warn that establishing separate transitions for different intercarrier charges invites opportunities for arbitrage.<sup>2347</sup> Should any final transition of originating access be made to coincide with the final transition for terminating access adopted today? Should a separate transition schedule be established for originating access only after the transition we adopt today for terminating access is complete? If a separate transition schedule is established after the transition above is complete, would a two-year<sup>2348</sup> transition beginning in year 2018 for price cap carriers and 2020 for rate of return carriers be an appropriate time period? If not, what other time period should be considered and when should it commence? Should rate of return carriers be given additional time to transition such rates? If so, how much? How should reductions of originating access rates be structured? Should rates be reduced in equal increments over a period of years? Should the timing of rate reductions vary by type of carrier? We seek comment on an appropriate schedule, and the timing of any necessary interim steps.

1300. In the *August 3 Public Notice* the Wireline Competition Bureau asked whether the Commission should treat originating access revenue differently from terminating access revenues for recovery purposes.<sup>2349</sup> The *August 3 Public Notice* acknowledged that, in many cases, incumbent LECs provide retail long distance through affiliates. For this reason, at least one commenter stated that for many calls, originating access is simply “an imputation, not a real payment,” but that originating access remains problematic for independent long distance carriers and competitive LECs and should be “phased out rapidly.”<sup>2350</sup> The Bureau’s *August 3 Public Notice* also asked about the possibility of flat-rated per-customer charges for the recovery of originating access revenues, though several commenters opposed this approach.<sup>2351</sup>

1301. Although parties commented on the *August 3 Public Notice*’s questions regarding possible recovery for originating access,<sup>2352</sup> the comments do not provide a sufficient basis for us to

<sup>2346</sup> See *id.*; see also *Local Competition First Report and Order*, 11 FCC Rcd at 16016, para. 1042 (“Section 251(b)(5) specifies that LECs and interconnecting carriers shall compensate one another for termination of traffic on a reciprocal basis. This section does not address charges payable to a carrier that originates traffic. We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic.”).

<sup>2347</sup> See Vonage *August 3 PN* Comments at 8; Google *August 3 PN* Comments at 18; iBasis *August 3 PN* Comments at 3.

<sup>2348</sup> We note the Order adopts a similar two-year timeframe to transition intrastate access charges to interstate levels. See *supra* para. 801.

<sup>2349</sup> See *August 3 Public Notice*, 26 FCC Rcd at 11126.

<sup>2350</sup> Compare CRUSIR *August 3 PN* Comments at 11-12; Missouri Commission *August 3 PN* Comments at 13 (“MoPSC supports efforts to limit any recovery mechanism from recovering reduced access revenues of an incumbent’s long distance affiliate.”), with Rural Broadband Alliance *August 3 PN* Comments, Attach. 1 at 32, 36-37 (stating that it would be “inequitable” to deprive recovery where a portion of originating access had been assessed against a carrier’s affiliate).

<sup>2351</sup> See *August 3 Public Notice*, 26 FCC Rcd at 11126; CRUSIR *August 3 PN* Comments at 12-13 (disfavoring a flat-rated approach to recovery); Rural Broadband Alliance *August 3 PN* Comments Attach. 1 at 37 (same); Texas Statewide Tel. Coop. *August 3 PN* Comments at 7 (same); AT&T et al. *August 3 PN* Comments at 27-28 (same).

<sup>2352</sup> See, e.g., COMPTTEL *August 3 PN* Comments at 15 (suggesting that there is no need for the Commission to address originating access charge rate levels); Cincinnati Bell *August 3 PN* Comments at 3 (same); Cox *August 3 PN* (continued...)



proceed at this time. Thus, we seek further comment as to what, if any, recovery would be appropriate for originating access charges and how such recovery should be implemented. For instance, should any recovery be limited to those incumbent LECs that do not provide retail long distance through affiliates? In addition, we ask for comment on the legal basis for the Commission to provide or deny recovery for originating access. We seek comment on how to minimize any additional consumer burden associated with the transition of originated access traffic, and how best to promote IP-to-IP interconnection in this transition.

1302. We also seek the input of the states on how to transition to bill-and-keep for originating access charges. Although the Commission can exercise its authority to implement a transition, as it does in the Order today, the Commission could also defer to the states to create a transition to bill-and-keep for originating access. Since originating intrastate access rates are not capped for rate of return carriers, we ask whether we should initially defer the transition to bill-and-keep for originating access to the states to implement. If so, how much guidance should we provide states? Should we provide the date that the transition must be complete? Should states also be responsible for determining any appropriate recovery mechanism?

1303. Relatedly, we also seek comment on the appropriate treatment of 8YY originated minutes. In the case of 8YY traffic, the role of the originating LEC is more akin to the traditional role of the terminating LEC in that the IXC carrying the 8YY traffic must use the access service of the LEC subscribed to by the calling party. Stated differently, in the case of 8YY traffic, because the calling party chooses the access provider but does not pay for the toll call, it has no incentive to select a provider with lower originating access rates. For this reason, we ask parties to address whether we should distinguish between originating access reform for 8YY traffic and originating access reform more generally.

1304. The Bureau's *August 3 Public Notice* sought data and comment on the relative proportion of 8YY originated minutes to traditional originated minutes.<sup>2353</sup> In its response, the Nebraska Companies estimated that approximately 20-30 percent of originating traffic is to an 8YY number, while Texas Statewide Telephone Cooperative suggested that this figure could be as much as 50 percent.<sup>2354</sup> Are these figures commensurate with the average number of minutes that customers originate to 8YY numbers on other networks? We again invite carriers to provide us with this data to help evaluate originating access reform, and the need for a distinct 8YY resolution.<sup>2355</sup> The Nebraska Companies further contend that a 251(b)(5) regime "in which originating compensation does not exist, is unworkable

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Comments at 16 (same); AT&T et al. *August 3 PN* Comments at 22, 26 (urging the Commission not to undermine support for the ABC Plan by ordering reductions to originating access charges); *compare* Consolidated *August 3 PN* Comments at 20-21 (leaving originating access charges unaddressed could invite arbitrage), *with* CRUSIR *August 3 PN* Comments at 12 (urging action on originating access charges and disfavoring a flat-rated approach to recovery); Nebraska Companies *August 3 PN* Comments at 69-72 (urging that recovery for originating access be made available, but not on a flat rate basis); Rural Broadband Alliance *August 3 PN* Comments, Attach. 1 at 32, 36-37 (stating that it is "essential" that the Commission address originating access); Texas Statewide Tel. Coop. *August 3 PN* Comments at 7-8 (urging the Commission to treat originating and terminating access reform in the same manner); *see also* SureWest *August 3 PN* Comments at 14 (urging the Commission to address originating access in a subsequent proceeding); ITTA *August 3 PN* Comments at 28 (same).

<sup>2353</sup> See *August 3 Public Notice*, 26 FCC Rcd at 11127.

<sup>2354</sup> See Nebraska Companies *August 3 PN* Comments at 71; Texas Statewide Tel. Coop. *August 3 PN* Comments at 8.

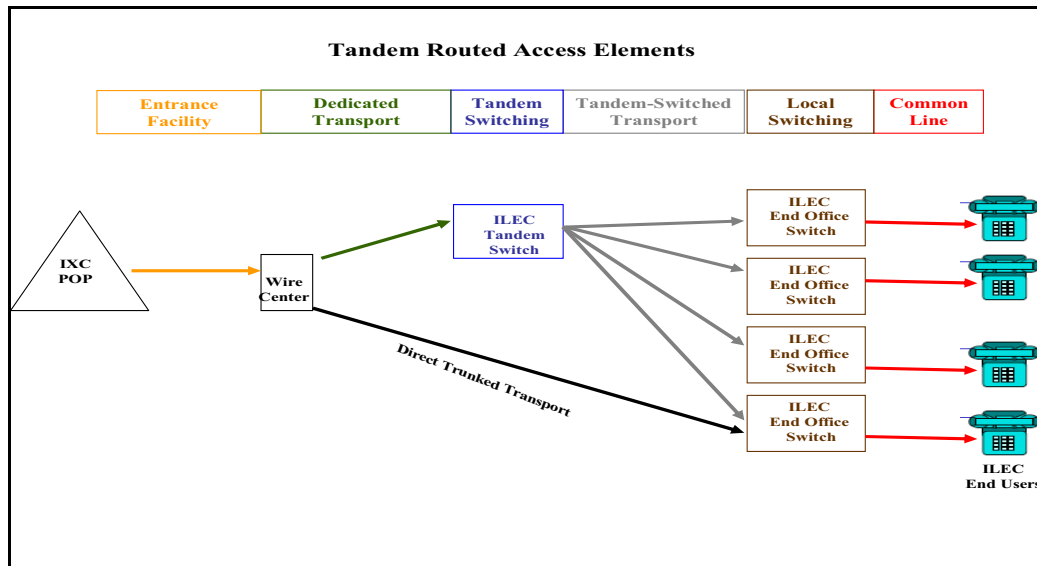
<sup>2355</sup> See *August 3 Public Notice*, 26 FCC Rcd at 11126-27.

in an environment of originating 8YY traffic and equal access obligations.”<sup>2356</sup> We seek comment on this conclusion and any alternatives.

1305. Finally, we seek comment on other possible approaches to originating access reform, including implementation issues and our legal authority to adopt any such reforms.<sup>2357</sup>

1306. *Transport and Termination.* The initial transition described in section XII.C above does not fully address tandem switching and transport charges. For rate-of-return carriers, these charges are capped at interstate levels. For price cap carriers, where the terminating carrier owns the tandem in the serving area, these charges are subject to the transition established in the Order but we do not address the transition for tandem switching and transport charges if the price cap carrier does not own the tandem in the serving area.<sup>2358</sup> The following figure provides an illustration of how these elements may be structured in a carrier’s network:

Figure 13



Because our Order does not address the transition for all transport charges and the relationship between these charges and interconnection obligations more generally, we seek further comment on the proper transition for these charges. We seek comment on the proper scope of our reform and on the transition for these elements.

<sup>2356</sup> Nebraska Companies *August 3 PN* Comments at 71.

<sup>2357</sup> For example, the New York Commission highlighted that one possibility for originating access charge reform would be to modify requirements relating to equal access obligations. See New York Commission *August 3 PN* Comments at 15-16. According to the New York Commission, “[i]t is possible that this action will cause the industry to self-remedy the originating access issue by migrating to exclusively bundled local/toll service for its subscribers, similar to the packages offered by wireless and cable telephony providers.” *Id.* at 15. Meanwhile, Cox argues that precisely because of equal access obligations, there is no need to address originating access. Cox *August 3 PN* Comments at 16. According to Cox, the equal access rules “give customers the ability to choose their long distance carriers, and therefore create opportunities for market pressures to affect originating access rates.” *Id.* at 16.

<sup>2358</sup> With regard to tandem switching and tandem transport, at the end of the transition specified in the Order, rates will be bill-and-keep in the following cases: (1) for transport and termination within the tandem serving area where the terminating carrier owns the tandem serving switch; and (2) for termination at the end office where the terminating carrier does not own the tandem serving switch. See *infra* Section XII.C.

1307. Several commenters express concern about the treatment of transport and tandem services under the ABC Plan and Joint Letter. T-Mobile asserts that as rates are reduced, “ILECs will have powerful incentives to shift costs from end office functions to transport and tandem switching functions, requiring the Commission to devote additional time and effort to its scrutiny of ILEC tariff filings.”<sup>2359</sup> Sprint raises concern that “transport rate elements bear no relationship to the miniscule incremental cost of performing the traffic termination functions” and that these rates serve as a disincentive for efficient interconnection and may have potential to extend arbitrage behavior.<sup>2360</sup> Competitive LECs argue that, even at interstate levels between the years 2013 to 2017, transport rates “create significant opportunities for price cap ILECs to raise rivals’ costs” and, at the end state, “[p]rice-cap ILECs would have the incentive to charge as high a price for [] that transport as possible.”<sup>2361</sup> Commenters further argue that there are definitional ambiguities about the scope of transport that deserve clarification.<sup>2362</sup> We agree that such elements must be transitioned to bill-and-keep at the end state, as required by the Order, and seek comment on the final transition to bill-and-keep for these charges.

1308. We invite comment regarding the appropriate transition for tandem switching and transport charges, and the need for any additional recovery mechanisms. At what point in time should tandem switching and transport charges be transitioned? Some commenters suggest that transport rates be reduced at a pace that coincides with our current transition for end office switching.<sup>2363</sup> Alternatively, tandem switching and transport rates could be reduced after the conclusion of the transition for end office switching. We seek comment on these proposals as well as other possible transition timeframes. Should the transition for these rate elements differ based upon the type of carrier? We ask parties to comment on what, if any, unintended consequences may arise in connection with a longer transition for these charges, and whether any delay would impede the transition to IP-to-IP interconnection.

1309. We also seek comment on possible recovery for tandem switching and transport as part of our recovery mechanism. Should recovery be made available for these charges? If a tandem switching and transport provider renegotiates an agreement for these services in anticipation of reform, should any increased revenue it receives be offset against eligible recovery? Should any recovery for these rate elements differ based upon the type of carrier?

1310. We note that some of these issues are closely related to the discussion in section N of the network edge for purposes of delivering traffic.<sup>2364</sup> In the traditional access charge system, tandem switching and transport charges were typically assessed against interexchange carriers. Meanwhile, in the traditional reciprocal compensation system, the originating carrier was typically responsible for transport to the point of interconnection, which may be located at the end office of the called party’s carrier. As we move to a new intercarrier compensation system governed by a section 251(b)(5) bill-and-keep methodology, we invite parties to comment on the existing and future payment and market structures for dedicated transport, tandem switching, and tandem switched transport. EarthLink has suggested that

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<sup>2359</sup> T-Mobile *August 3 PN* Comments at 8.

<sup>2360</sup> Sprint *August 3 PN* Comments at 11-16.

<sup>2361</sup> CBeyond et al. *August 3 PN* Comments at 15-18.

<sup>2362</sup> *Id.* at 16-17 (“It is... unclear whether, and in what circumstances, the cost-based prices for transport applicable to reciprocal compensation apply and in what circumstances the much higher interstate access prices for transport apply.”); Comptel *August 3 PN* Comments at 17 n. 51 (“The ABC Plan’s recommendations regarding transport are not a model of clarity.”).

<sup>2363</sup> CBeyond et al. *August 3 PN* Comments at 18.

<sup>2364</sup> See *infra* para. 1320.

charges such as tandem switching and transport charges could become “obsolete” in an all-IP world.<sup>2365</sup> Is this correct? If so, how should it impact possible reform?

1311. *Transit.* Currently, transiting occurs when two carriers that are not directly interconnected exchange non-access traffic by routing the traffic through an intermediary carrier’s network.<sup>2366</sup> Thus, although transit is the functional equivalent of tandem switching and transport, today transit refers to non-access traffic, whereas tandem switching and transport apply to access traffic. As all traffic is unified under section 251(b)(5), the tandem switching and transport components of switched access charges will come to resemble transit services in the reciprocal compensation context where the terminating carrier does not own the tandem switch. In the Order, we adopt a bill-and-keep methodology for tandem switched transport in the access context and for transport in the reciprocal compensation context. The Commission has not addressed whether transit services must be provided pursuant to section 251 of the Act; however, some state commissions and courts have addressed this issue.<sup>2367</sup>

1312. Commenters also express concern that, as a result of the reforms adopted in the Order, transit providers will have the ability and incentive to raise transit service rates both during the transition and at the end state of reform.<sup>2368</sup> Specifically, one commenter alleges that without regulation of transit, ILECs would have opportunities to “exploit their termination dominance.”<sup>2369</sup> Commenters also express concern with the end state for tandem switching and transport for price cap carriers when the tandem

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<sup>2365</sup> EarthLink *USF/ICC Transformation NPRM* Comments at 9 (“EarthLink anticipates that IP interconnections will make tandem/end office connections obsolete and carriers may prefer to interconnect at one point per state for the exchange of all traffic, without establishing separate trunk groups for previously distinct categories of traffic such as interstate access and local.”).

<sup>2366</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4776-77, para. 683; see also *Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4737-44, paras. 120-33; *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6650, App. A., para. 347; *id.* at 6849, App. C, para. 344. The term transport is often used interchangeably with transit service. These are two different services. Transport service is a tariffed exchanged access service. See, e.g., 47 C.F.R. § 69.4. Transit service is typically offered via commercially-negotiated interconnection agreements rather than tariffs.

<sup>2367</sup> See, e.g., *Qwest Corp. v. Cox Nebraska Telcom, LLC*, 2008 WL 5273687 (D. Neb. 2008) (finding that an ILEC must provide transit pursuant to its interconnection obligations under section 251); *Brandenburg Tel. Co. v. Windstream Kentucky East, Inc.*, Case No. 2007-0004, Order, 2010 WL 3283776 (Ky PSC Aug. 16, 2010) (cancelling a transit tariff and requiring the parties to negotiate an interconnection agreement for transit pursuant to sections 251 and 252); compare Letter from J.G. Harrington, Counsel to Cox Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, at 1-2, 4 (filed Oct. 19, 2011) (Cox October 19, 2011 *Ex Parte* Letter), and Letter from J.G. Harrington, Counsel to Cox Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, at 1-3 (filed Oct. 21, 2011), with Letter from John R. Harrington, Senior Vice President, Regulatory & Litigation, Neutral Tandem, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket No. 01-92, at 2-3 (filed Oct. 20, 2011) (Neutral Tandem Oct. 20, 2011 *Ex Parte* Letter).

As noted in Section XII.C, our Order does not intend to affect existing agreements not addressed by its reforms, including for transit services. See Letter from Mary McManus, Senior Director FCC and Regulatory Policy, Comcast, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket No. 01-92, 96-45, at 1-2 (filed Sept. 22, 2011).

<sup>2368</sup> See, e.g., Comcast *August 3 PN* Comments at 8-10; Cox *August 3 PN* Comments at 13-15; NCTA *August 3 PN* Comments at 19-20.

<sup>2369</sup> T-Mobile *August 3 PN* Comments at 8.

owner does not own the end office,<sup>2370</sup> which, under section 251 framework is typically considered a transit service. As part of the transition for price cap carriers, the Order provides that bill-and-keep will be the pricing methodology for all traffic and includes the transition for transport and termination within the tandem serving area where the terminating carrier owns the serving tandem switch. However, the Order does not address the transition in situations where the tandem owner does not own the end office. NCTA states that in this regard the “ABC Plan is unclear” and may “attempt[] to significantly undermine competition by suggesting that such services would fall outside of the regulatory regime.”<sup>2371</sup> As a result, commenters suggest that these services are transit services and should be provided pursuant to section 251 at “cost-based and reasonable rates.”<sup>2372</sup>

1313. We seek comment on the need for regulatory involvement and the appropriate end state for transit service.<sup>2373</sup> Given that transit service includes the same functionality as the tandem switching and transport services subject to a default bill-and-keep methodology, should the Commission adopt any different approach for transit traffic given that providers pay for transit for IP services and transit may apply to get traffic to a network “edge” in a bill-and-keep framework? We invite parties to comment on the current market for these services.<sup>2374</sup> Does the transit market demonstrate the hallmarks of a competitive market? If transit services are not being offered competitively, how prevalent is this? How might the market evolve in light of the reforms adopted in the Order? If the Commission were to regulate these charges, what legal framework is appropriate and what pricing methodology would apply during the transition?

1314. *Other Charges.* Our transition to a bill-and-keep framework may implicate other charges. For example, commenters have highlighted that the ABC Plan and Joint Letter fail to specify what transition applies to dedicated transport or to other flat-rated charges.<sup>2375</sup> We invite parties to comment on any rate elements or charges that require additional reform. What transition should apply to these charges?

#### **N. Bill-and-Keep Implementation**

1315. In the *USF/ICC Transformation NPRM* the Commission also sought comment on issues related to the implementation of a bill-and-keep pricing methodology.<sup>2376</sup> Now that the end point to comprehensive intercarrier compensation reform has been determined, we seek comment on any interconnection and related issues that must be addressed to implement bill-and-keep in an efficient and equitable manner. As discussed in the Order, we expect that the reforms adopted today will not upset existing interconnection arrangements or obligations during the transition.

<sup>2370</sup> NCTA August 3 PN Comments at 19-20.

<sup>2371</sup> *Id.* at 20.

<sup>2372</sup> *Id.*; Cox August 3 PN Comments at 15.

<sup>2373</sup> We note that commenters have previously suggested a range of regulatory outcomes. See Charter USF/ICC Transformation NPRM Comments at 13 (proposing a cost-based pricing standard); Level 3 USF/ICC Transformation NPRM Comments at 19 (proposing a just and reasonable pricing standard); MetroPCS August 3 PN Comments at 21-22 (proposing a default rate).

<sup>2374</sup> Compare Cox October 19, 2011 *Ex Parte* Letter at 3-4, with Neutral Tandem October 20, 2011 *Ex Parte* Letter at 1.

<sup>2375</sup> See Level 3 August 3 PN Comments at 11-12; COMPTTEL August 3 PN Comments at 18-20.

<sup>2376</sup> See USF/ICC Transformation NPRM, 26 FCC Rcd at 4774-76, paras. 680-82.

1316. *Points of Interconnection.* Currently, under section 251(c)(2)(B), an incumbent LEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point.<sup>2377</sup> The Commission has interpreted this provision to mean that competitive LECs have the option to interconnect at a single point of interconnection (POI) per LATA.<sup>2378</sup> As a threshold matter, does the Commission need to provide new or revised POI rules at some later stage of the transition to bill-and-keep or provide one set of rules to be effective at the end of the six-year transition for price cap carriers and nine-year transition for rate-of-return carriers described above and maintain the current regime until that time?<sup>2379</sup> For instance, do commenters anticipate potential arbitrage schemes<sup>2380</sup> emerging as a result of maintaining the current POI rules until the transition is complete, or will the defined transition path and accompanying rate reductions we adopt in this Order prevent such practices?

1317. Also, section 251(c) does not currently apply to all rural LECs or non-incumbent LECs.<sup>2381</sup> How do commenters envision POIs functioning for these carriers? We seek to better understand the nature of interconnection arrangements with rural carriers today. For example, is interconnection typically pursuant to negotiated agreements, rules, or another type of framework? Is indirect interconnection the primary means of interconnection with small, rural carriers? If the Commission needs to mandate the use of POIs for rural LECs and non-incumbent LECs, should this requirement begin during or after the transition to the stated end point?

1318. We seek comment on whether the Commission needs to prescribe POIs under a bill-and-keep methodology. One possible approach could be to permit interconnection at “any technically feasible point” on the other providers’ network with a default POI being used for compensation purposes when there is no negotiated agreement between the parties.<sup>2382</sup> What are the pros and cons of such an approach? To what extent does the Commission’s regulatory authority over interconnection allow it to prescribe POIs as described above? Alternatively, CenturyLink proposes the use of traffic volumes to “dictate the number of POI locations for traffic exchanged with an ILEC (including traffic flowing in both

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<sup>2377</sup> 47 U.S.C. § 251(c)(2)(B). IP-to-IP interconnection is addressed later in this FNPRM section. See *infra* Section XVII.P.

<sup>2378</sup> *Application of SBC Communications Inc., Southwestern Bell Tel. Co, and Southwestern Bell Communications Service, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18390, para. 78, n.174 (2000).

<sup>2379</sup> See CenturyLink *USF/ICC Transformation NPRM* Comments at 74 (the Commission “should clarify now the rules for POIs and network edges for purposes of any transitional TDM ICC rate reform”). As discussed in the *USF/ICC Transformation NPRM*, and noted by commenters, flexible proposals to accommodate evolving network architectures and IP networks are the preferred approach. See e.g., *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4775, para. 681.

<sup>2380</sup> “If the Commission fails to adequately address POI and network edge issues in connection with TDM-ICC plans, carriers will be prevented from having adequate cost recovery and new forms of arbitrage will arise. For example, bad actors will no doubt seek to free ride on transport and transit networks.” CenturyLink *USF/ICC Transformation NPRM* Comments at 74.

<sup>2381</sup> See 47 U.S.C. § 251(c) “Additional Obligations of Incumbent Local Exchange Carriers.” Section 251(f)(1) of the Act details the exemption to interconnection obligations for rural telephone companies. See 47 U.S.C. § 251(f)(1).

<sup>2382</sup> See, e.g., *U.S. West v. Jennings*, 304 F.3d 950, 961 (9<sup>th</sup> Cir. 2002); *MCI Telecomm. Corp. v. Bell Atl.-PA*, 271 F.3d 491, 517-18 (3d Cir. 2001).

directions).<sup>2383</sup> We seek comment on this proposal and any other alternatives concerning POI obligations under a bill-and-keep regime.

1319. We seek comment below on how to promote IP-to-IP interconnection and facilitate the transition to all-IP networks.<sup>2384</sup> Some of these questions may affect the POI issues raised here. For instance, if the Commission were to adopt its proposal to require a carrier that desires TDM interconnection to pay the costs of any IP-TDM conversion, how would that affect commenters' opinions or responses to the POI questions herein? How would they be affected if the Commission adopted other IP-to-IP interconnection obligations?

1320. *The Network Edge.* A critical aspect to bill-and-keep is defining the network "edge" for purposes of delivering traffic. The "edge" is the point where bill-and-keep applies, a carrier is responsible for carrying, directly or indirectly by paying another provider, its traffic to that edge. Past "proposals to treat traffic under a bill-and-keep methodology typically assume the existence of a network edge, beyond which terminating carriers cannot charge other carriers to transport and terminate their traffic."<sup>2385</sup> In the *USF/ICC Transformation NPRM* we recognized that there are numerous options for defining an appropriate network edge.<sup>2386</sup> For example, the edge could be "the location of the called party's end office, mobile switching center (MSC), point of presence, media gateway, or trunking media gateway."<sup>2387</sup> We have not received significant comment on the network edge issue up to this point.

1321. As discussed in the Order, we believe states should establish the network edge pursuant to Commission guidance. We seek comment on this and other options for defining the network edge. Assuming that defining the network edge remains a critical aspect of the transition to bill-and-keep, we seek comment on the appropriate network edge and related issues. For instance, should the Commission adopt a "competitively neutral" location for the network edge, such as "where interconnecting carriers have competitive alternatives—other than services or facilities provided by the terminating carrier—to transport traffic to the terminating carrier's network"?<sup>2388</sup> In its comments, CTIA describes a Mutually

<sup>2383</sup> CenturyLink *USF/ICC Transformation NPRM* Comments at 75. CenturyLink includes four additional rule clarifications to facilitate proper traffic exchange. See *id.*

<sup>2384</sup> See *infra* Section XVII.P.

<sup>2385</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4774, para. 680.

<sup>2386</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4775, para. 681. The Commission has previously sought comment on alternative schemes for intercarrier compensation premised on bill-and-keep approaches underpinned by default interconnection rules. See, e.g., *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9620-22, paras. 22-30. First, Patrick DeGraba's "Central Office Bill and Keep" (COBAK) proposal relied on two principal rules: (1) no carrier may recover any costs of its customer's local access facilities from an interconnecting carrier; and (2) the calling party's network is responsible for the cost of transporting the call to the called party's central office. For interexchange calls, the second rule would be modified to make the calling party's LEC responsible for delivering the call to the IXC's point of presence and the IXC responsible for delivering the call to the called party's central office. *Id.* at 9620-21, para. 23 & n. 41 (citing Patrick DeGraba, *Bill and Keep at the Central Office as the Efficient Interconnection Regime* (FCC, OPP Working Paper No. 33, Dec. 2000)). Second, Jay Atkinson and Christopher C. Barnekov's "Bill Access to Subscribers-Interconnection Cost Split" (BASICS) proposal was also premised on two rules: (1) networks should recover all intra-network costs from their end-user customers; and (2) networks should divide equally the costs that result purely from interconnection. See *id.* at 9621, para. 25 (citing Jay M. Atkinson & Christopher Barnekov, *A Competitively Neutral Approach to Network Interconnection* (FCC, OPP Working Paper No. 34, Dec. 2000)).

<sup>2387</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4774, para. 680 (citing *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6619-20, App. A, para. 275; *id.* at 6818-19, App. C, para. 270).

<sup>2388</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4775-76, para. 682.

Efficient Traffic Exchange (“METE”) proposal “pursuant to which carriers would bear their own costs to deliver traffic to each other at specified network ‘edges.’”<sup>2389</sup> Is this an appropriate way to define the network edge under a bill-and-keep approach? Do commenters have alternative suggestions on how best to define carrier obligations under a bill-and-keep approach? We seek comment on these questions and on any alternative proposals regarding the network edge.<sup>2390</sup>

1322. *Role of Tariffs and Interconnection Agreements.* We believe that generally continuing to rely on tariffs while also allowing carriers to negotiate alternatives during the transition is in the public interest<sup>2391</sup> because it provides the certainty of a tariffing option, which historically has been used for access charges, while still allowing carriers to better tailor their arrangements to their particular circumstances and the evolving marketplace than would be accommodated by exclusively relying on “one size fits all” tariffs.<sup>2392</sup> We seek comment on whether the Commission needs to forbear from tariffing requirements in section 203 of the Act and Part 61 of our rules<sup>2393</sup> to enable carriers to negotiate alternative arrangements pursuant to this Order.<sup>2394</sup>

1323. As carriers transition from the existing access charge regime to the section 251(b)(5) framework and bill-and-keep methodology adopted in this Order, we believe they will rely primarily on negotiated interconnection agreements rather than tariffs to set the terms on which traffic is exchanged. Specifically, section 251(b)(5) imposes on all LECs the duty to enter reciprocal compensation arrangements, and section 252 outlines the responsibility of incumbent LECs to negotiate interconnection agreements upon receipt of a request for interconnection pursuant to section 251.<sup>2395</sup> Although we maintain a role for tariffing as part of the transition, we believe the reliance on interconnection agreements is most consistent with this Order’s application of reciprocal compensation duties to all carriers. We seek comment on this view. If so, do commenters believe we need to modify or eliminate any of our interconnection rules?

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<sup>2389</sup> CTIA *USF/ICC Transformation NPRM* Comments at 39. CTIA continues that “[u]nder the METE proposal, the originating carrier would be responsible for assuming the costs of delivering a call, including securing any necessary transport services, to the terminating carrier’s network edge, and could determine how to do so. Each carrier, including wireless carriers, would be required to designate at least one edge to receive traffic in every LATA it serves. For the direct exchange of traffic, originating and transiting carriers could select a delivery point from among the terminating carrier’s designated edges in the LATA, but would be required to use different trunk groups for each of the terminating carrier’s terminating switching facilities in the LATA.” *Id.*

<sup>2390</sup> In Section XV above we establish an interim default rule allocating responsibility for transport costs applicable to non-access traffic exchanged between rural, rate-of-return LECs and CMRS providers. We found that such an interim rule was necessary because we establish bill-and-keep as an immediate default methodology for this category of traffic. We make clear however that with the adoption of this rule we do not intend to prejudice any outcome or otherwise affect the ability of states to define the network edge for intercarrier compensation under bill-and-keep as a general matter. *See supra* Section XV.

<sup>2391</sup> *See* 47 U.S.C. § 160(a)(3).

<sup>2392</sup> *See, e.g.,* paras. 963-967; *see also* para. 1362.

<sup>2393</sup> *See* 47 U.S.C. § 203; 47 C.F.R. §§ 61.31-59.

<sup>2394</sup> *See* Letter from Heather Zachary, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, 04-36, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 8 (filed Oct. 19, 2011) (suggesting that the Commission grant forbearance from tariffing requirements insofar as necessary to allow carriers to negotiate alternatives to a default rate).

<sup>2395</sup> *See* 47 U.S.C. §§ 251(b)(5), 252.



1324. Given the potential primary reliance on interconnection agreements, we seek comment on the possibility of extending our interconnection rules to all telecommunications carriers to ensure a more competitively neutral set of interconnection rights and obligations. As discussed in Section XII.C.5, the *T-Mobile Order* extended to CMRS providers the duty to negotiate interconnection agreements with incumbent LECs under the section 252 framework to address interconnection and mutual compensation for non-access traffic.<sup>2396</sup> We seek comment on whether we should extend the interconnection agreement process adopted in the *T-Mobile Order* to all telecommunications carriers, including competitive LECs or other interconnecting service providers such as interexchange carriers. Competitive LECs have requested that the Commission expand the scope of the *T-Mobile Order* and require CMRS providers to negotiate agreements with competitive LECs under the section 251/252 framework.<sup>2397</sup> In addition, rural incumbent LECs urged the Commission to “extend the T-Mobile Order to give ILECs the right”<sup>2398</sup> to require all carriers to negotiate interconnection agreements under the section 252 framework. These requests stem largely from concerns about payment of intercarrier compensation charges.<sup>2399</sup> Thus, we seek comment on whether, in light of the reforms adopted herein, any further modification to our interconnection rules is still warranted for the end of the transition period, and the legal basis of any such modifications.

1325. *Possible Arbitrage Under a Bill-and-Keep Methodology.* We note that several commenters to the *USF/ICC Transformation NPRM* suggest that a bill-and-keep approach may promote arbitrage opportunities in the industry. For example, some commenters suggest that a bill-and-keep framework may promote traffic dumping on terminating carriers’ networks.<sup>2400</sup> Based on the current record, we disagree with these concerns, which we find speculative.<sup>2401</sup> Nonetheless, to the extent our predictive judgment is incorrect, we take this opportunity to establish a record to ensure that the Commission is prepared to act swiftly to address any potential arbitrage situations. We ask parties to provide more detail on traffic dumping and its negative effects. Have there been incidents of traffic dumping in the wireless industry that operates largely under bill-and-keep today? How should we define traffic dumping for purposes of analyzing its effect on the network. Are there concerns of traffic congestion or other harm to the network?<sup>2402</sup> If so, we note in the Order that carriers may include traffic grooming language in their tariffs to address such concerns.<sup>2403</sup> Are there any additional measures the Commission can and should take to prevent such practices? Other commenters suggest that this practice

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<sup>2396</sup> See *supra* Section XII.C.5.

<sup>2397</sup> See, e.g., Pac-West *USF/ICC Transformation NPRM* Comments at 3; Letter from Michael B. Hazzard, Counsel for Xspedius Communications, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, Attach. at 7 (filed Aug. 10, 2005); *Supra Telecommunications and Information Systems Ex Parte* Comments and Cross-Petition for Limited Clarification, CC Docket No. 01-92 at 10 (filed July 14, 2005).

<sup>2398</sup> Rural Associations Section XV Comments at 29 n.67, 30.

<sup>2399</sup> See *id.* at 30 (“Small carriers often have difficulty convincing other carriers to negotiate interconnection agreements with them, particularly where those other carriers can easily terminate their traffic via a transit or tandem provider and thus have no direct contact with the terminating rural carrier at all. In such circumstances, sending carriers are increasingly arguing that because there is no interconnection agreement, they can pay the terminating rural carrier whatever rate they deem appropriate, if anything at all.”).

<sup>2400</sup> See Verizon *USF/ICC Transformation NPRM* Comments at 13-14; Level 3 *USF/ICC Transformation NPRM* Comments at 9.

<sup>2401</sup> See *supra* Section XII.A.1.

<sup>2402</sup> See Verizon *USF/ICC Transformation NPRM* Comments at 13.

<sup>2403</sup> See *supra* para. 754.

could result in carriers having “every incentive to keep traffic from terminating on their networks.”<sup>2404</sup> Do commenters agree?

**O. Reform of End User Charges and CAF ICC Support**

1326. We seek comment below on a number of questions related both to the recovery mechanism adopted in this Order as well as the pre-existing rules regarding subscriber line charges (SLCs). In particular, with respect to the recovery adopted in this Order, we seek comment on the long-term elimination of that transitional recovery mechanism beyond the provisions for reduction and elimination of elements of that recovery already adopted in the Order. In addition, some commenters question whether existing SLCs—which we do not modify in this Order—are set at appropriate levels under pre-existing Commission rules<sup>2405</sup> or whether they should be reduced, particularly for price cap carriers where the Commission has not evaluated the costs of such carriers in nearly ten years. We therefore seek comment on the appropriate level and, longer-term, the appropriate regulatory approach to such charges, as carriers increasingly transition to broadband networks.

1327. *ARC Phase-Out.* As part of our recovery mechanism, we allow incumbent LECs to impose a limited access replacement charge (ARC).<sup>2406</sup> Because the ARC is, among other constraints, limited to the recovery of Eligible Recovery, and because we define Eligible Recovery to decline over time, the ARC will phase down and approach \$0 under the terms of the Order.<sup>2407</sup> This will take some time, however, under the ten percent annual reductions in Price Cap Eligible Recovery, and smaller annual percentage reductions in Rate-of-Return Eligible Recovery. We note, by contrast, that intercarrier compensation-replacement CAF support for price cap carriers is subject to a defined sunset date.<sup>2408</sup> Should we likewise adopt a defined sunset date for ARC charges? Should those charges sunset at the same time price cap carriers’ intercarrier compensation-replacement CAF support sunsets,<sup>2409</sup> or at some other time? Similarly, as with intercarrier compensation-replacement CAF support for price cap carriers, should the ARC be phased out after the end of intercarrier compensation rate reforms or, given that it already is subject to an independent phase-down, should it simply be eliminated? Would other modifications be appropriate for the ARC charges adopted in this Order, given carriers’ transition to broadband networks and associated business plans relying more heavily on revenues from broadband services?

1328. *CAF ICC Support Phase-Out.* Although the intercarrier compensation-replacement CAF support for price cap carriers is already subject to a defined phase-out under the Order, should we modify the phase-out period based on a price cap carrier’s receipt of state-wide CAF Phase II support?<sup>2410</sup> If so,

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<sup>2404</sup> NASUCA contends that if the Commission adopts bill-and-keep “carriers will have every incentive to dump traffic on to other carriers’ networks, and likewise, carriers will have every incentive to keep traffic from terminating on their networks.” NASUCA *USF/ICC Transformation NPRM* Comments at 101. We note that the Commission has a clear prohibition on call blocking practices. *See generally Call Blocking Declaratory Ruling*, 22 FCC Rcd 11629 (issued to remove any uncertainty surrounding the Commission’s prohibition on call blocking).

<sup>2405</sup> *See, e.g.,* NASUCA *USF/ICC Transformation NPRM* Comments at 98; Free Press *August 3 PN* Comments at 12-13.

<sup>2406</sup> *See supra* XIII.F.1.

<sup>2407</sup> *See supra* XIII.E.

<sup>2408</sup> *See supra* para. 920.

<sup>2409</sup> *Id.*

<sup>2410</sup> *See supra* Section VII.C.2.

how and why? Should intercarrier compensation-replacement CAF support for rate-of-return carriers be subject to a defined phase-out? If so, should it be modeled after the approach used for price cap carriers, or based on a different approach? Would other modifications be appropriate for the intercarrier compensation-replacement CAF support adopted in this Order, given carriers' transition to broadband networks and associated business plans relying more heavily on revenues from broadband services?

1329. *Treatment of Demand in Determining Eligible Recovery for Rate of Return Carriers.* In years one through five, Rate-of-Return Eligible Recovery will decrease at five percent annually, with both ARC and ICC-replacement CAF provided based on a true-up process.<sup>2411</sup> We did so to enable such carriers time to adjust and transition away from the current system. But, we believe that five years is a sufficient time to adjust and, for years six and beyond, we seek comment on how to modify the recovery baseline. We seek comment on decreasing Rate-of-Return Eligible Recovery by an additional percent each year for a maximum of five years, up to a maximum decrease of 10 percent. In addition, we seek comment on an alternative approach to the use of true-ups for determining recovery after five years. For example, in place of annual true-ups, should the Commission use the average MOU loss based on data reported by rate of return carriers in years one through five? If we do so, should it be instead of or in addition to changing the baseline, should the Commission use the same 10 percent decline it uses for price cap carriers, or would commenter recommend another mechanism to replace the true-up process?

1330. *Magnitude and Long-Term Role of SLCs.* Some commenters contend that SLCs are not set appropriately today, particularly for price cap carriers whose costs are no longer evaluated. Moreover, given carriers' transition to business plans relying more heavily on broadband services, it is not clear what the appropriate role is for regulated end-user charges for voice service over the longer term. We thus seek comment on whether SLCs are set at appropriate levels today and whether, longer term, the Commission should retain such regulated charges under existing or modified rules, or if those charges should be eliminated.

1331. When the Commission increased the residential and single-line business SLC cap above \$5.00 it first sought comment on "whether an increase in the SLC cap above \$5.00 is warranted and, if not, whether a decrease in common line charges is warranted."<sup>2412</sup> In light of the evolution of network technology over time and any other marketplace developments raised by commenters,<sup>2413</sup> we seek comment on whether the magnitude of carriers' revenues currently associated with the common line are appropriate, or too high (or low). In particular, as in the past, we seek "forward-looking cost information associated with the provision of retail voice grade access to the public switched telephone network."<sup>2414</sup> in addition to other data or information that commenters wish to provide in this respect. We further seek comment on how the costs of the local loop have been allocated between its use for regulated voice telephone service and its use for other services, such as broadband Internet access, video, or other

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<sup>2411</sup> See *supra* Section XIII.E.

<sup>2412</sup> See *Initiation of Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps*, CC Docket Nos. 96-262, 94-1, Public Notice, 16 FCC Rcd 16705 at 16706 (2001) (quoting *CALLS Order*, 15 FCC Rcd at 12994, para. 83).

<sup>2413</sup> See, e.g., Free Press *August 3 PN* Comments at 12-14; Consumer Federation of America and Consumers Union *August 3 PN* Reply at 3-4; Letter from S. Derek Turner, Research Director, Free Press, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 05-337; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51 at 2 (filed Aug. 2, 2011) (Free Press Aug. 2, 2011 *Ex Parte* Letter).

<sup>2414</sup> See *Initiation of Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps*, CC Docket Nos. 96-262, 94-1, Public Notice, 16 FCC Rcd 16705 (2001) (quoting *CALLS Order*, 15 FCC Rcd at 12994, para. 83).

nonregulated services.<sup>2415</sup> Are carriers' regulated common line recovery bearing an appropriate share of the cost of the local loop, or too much (or too little)?

1332. More broadly, if carriers increasingly are moving to IP networks, to what extent is voice telephone service simply one of many applications on that network, such that regulated charges specific to voice might no longer be appropriate?<sup>2416</sup> In particular, should the Commission eliminate SLCs? If so, when should they be eliminated, and through what process? Should the Commission eliminate SLCs as of a date certain absent a showing by a carrier that such revenue is justified?<sup>2417</sup> If so, should the Commission require a showing comparable to that required under the Total Cost and Earnings Review,<sup>2418</sup> or some other showing? Likewise, to the extent that some carriers continue to receive revenue from a universal service mechanism specifically designed to address common line recovery, such as ICLS, as a supplement to SLC revenues, should that be eliminated or modified, as well? If so, when, and how, should that support be eliminated? If not, how would that continuing support mechanism operate in the absence of SLCs?

1333. Even if the overall magnitude of common line revenues are justified and SLCs are retained, we seek further comment on the operation of the SLCs and the specific levels of the SLC caps, including whether they should be modified in any respect. For example, should the Commission require greater disaggregation or deaveraging of SLCs, either in terms of classes of customers or services or in terms of geographic areas? If so, what is the appropriate scope of customers, services, or geography? Would new cap(s) be appropriate for the new categories of SLCs, and if so, at what level? Conversely, as part of our intercarrier compensation reform, we allow the ARC to be set at the holding-company level. Would that, or another more aggregated or averaged approach be warranted, and if so, what?

1334. *Advertising SLCs.* As described in the Order, although the ARC is distinct from the SLC for regulatory purposes, we expect incumbent LECs to include the new ARC charges as part of the SLC charge for billing purposes.<sup>2419</sup> However, commenters observe that SLC charges frequently are not included in the advertised price for incumbent LECs' services, making it more difficult for customers to evaluate and compare the price of service among different providers.<sup>2420</sup> Thus, we seek comment on requiring incumbent LECs (and other carriers, if they charge a SLC or its equivalent) to include such charges in their advertised price for services subject to SLC charges. Could the Commission require that carriers include SLC charges (including ARCs) in their advertised price for services, or condition their ability to impose SLCs or ARCs or to receive CAF support on their doing so? Are there alternative approaches the Commission should take to ensure greater disclosure of such charges to customers in a way that advances price comparison and evaluation?<sup>2421</sup> Could the Commission adopt such requirements pursuant to its authority under section 201(b) of the Act<sup>2422</sup> or on another basis?

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<sup>2415</sup> See, e.g., NASUCA *USF/ICC Transformation NPRM* Reply at 157-158.

<sup>2416</sup> See, e.g., NASUCA *USF/ICC Transformation NPRM* Comments at 98 n. 281; NASUCA *USF/ICC Transformation NPRM* Reply at 158 (citing AT&T *USF/ICC Transformation NPRM* Comments at 24).

<sup>2417</sup> Cf. NASUCA *August 3 PN* Comments at 57-60; AARP *August 3 PN* Comments at 2.

<sup>2418</sup> See *supra* Section XIII.G.

<sup>2419</sup> See *supra* Section XIII.F.1.

<sup>2420</sup> See, e.g., CRUSIR *August 3 PN* Comments at 17; NASUCA *August 3 PN* Comments at 24 n.54, 72; Illinois AG Oct. 25, 2006 Missoula Plan Comments, CC Docket No. 01-92 at 7.

<sup>2421</sup> See, e.g., *Consumer Information and Disclosure; Truth-in-Billing and Billing Format; IP-Enabled Services*, CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36, Notice of Inquiry, 24 FCC Rcd 11380, 11389- (continued...)

## P. IP-to-IP Interconnection Issues

1335. As recommended by the National Broadband Plan, the Commission has set an express goal of facilitating industry progression to all-IP networks,<sup>2423</sup> and ensuring the transition to IP-to-IP interconnection is an important part of achieving that goal. As stated in recommendation 4.10 of the National Broadband Plan, “[t]he FCC should clarify interconnection rights and obligations and encourage the shift to IP-to-IP interconnection.”<sup>2424</sup> Likewise, in the *USF/ICC Transformation NPRM* the Commission sought comment on “steps we can take to promote IP-to-IP interconnection.”<sup>2425</sup> We received some comment on the issue but hope to develop a more complete record on IP-to-IP interconnection issues, in light of the reforms undertaken in the Order.<sup>2426</sup> As we state in the Order above, the duty to negotiate in good faith has been a longstanding element of interconnection requirements under the Communications Act and does not depend upon the network technology underlying the interconnection, whether TDM, IP, or otherwise.<sup>2427</sup> Commission requirements implementing the duty to negotiate IP-to-IP interconnection in good faith could take their primary guidance from one or more of various provisions of the Communications law—Sections 4, 201, 251(a), or 251(c) of the Communications Act, or 706 of the 1996 Act. We seek comment on which of the available approaches is most consistent with our statutes as a whole and sound policy. We therefore seek comment on the implementation of the good faith negotiation requirement, and also seek comment on any additional actions the Commission should “take to encourage transitions to IP-to-IP interconnection where that is the most efficient approach.”<sup>2428</sup>

### 1. Background and Overview

1336. Interconnection among communications networks is critical given the role of network effects. Network effects arise when the value of a product increases with the number of consumers who

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92, 11395 paras. 25-34, 45 (2009) (seeking comment on information needed by consumers to make purchasing decisions); *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, CG Docket No. 04-208, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 6448, 6476-77, paras. 55-56 (2005) (seeking comment on disclosures at the point of sale and “tentatively conclude that carriers must disclose the full rate, including any non-mandated line items and a reasonable estimate of government mandated surcharges, to the consumer at the point of sale”).

<sup>2422</sup> See, e.g., *NOS Communications, Inc. and Affinity Network Inc.*, File No. EB-00-TC-005, Apparent Liability for Forfeiture, 16 FCC Rcd 8133, 8140, para. 15 (2001) (finding that certain long distance carriers “have apparently engaged in unjust or unreasonable marketing practices in violation of section 201(b) of the Act”).

<sup>2423</sup> National Broadband Plan at 49.

<sup>2424</sup> *Id.*

<sup>2425</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4773, para. 678.

<sup>2426</sup> We note that the Commission’s Technical Advisory Council (TAC) is also evaluating issues relating to the transition of networks to IP, and seeking comment on these issues at this time avoids prejudging the issues they are considering. See, e.g., Technical Advisory Council Chairman’s Report (Apr. 22, 2011) *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-306065A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-306065A1.pdf); Technology Advisory Council, Status of Recommendations, June 29, 2011 *available at* <http://transition.fcc.gov/oet/tac/TACJune2011mtgfullpresentation.pdf>.

<sup>2427</sup> See *supra* Section XIV.

<sup>2428</sup> National Broadband Plan at 49.

purchase it.<sup>2429</sup> For example, telephone service to an individual subscriber becomes more valuable to that subscriber as the number of other people he or she can reach using the telephone increases. Because telecommunications carriers interconnect their individually-owned networks, their subscribers may complete a call to subscribers on all other carriers' networks. This likewise advances the Act's directive to "make available, so far as possible, to all people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communications service."<sup>2430</sup>

1337. In some circumstances, network owners may have incentives to refuse reasonable interconnection to other network operators.<sup>2431</sup> For example, the Commission previously has found "that incumbent LECs have no economic incentive . . . to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services."<sup>2432</sup> Consequently, "[n]egotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires."<sup>2433</sup> In principle, similar incentives can arise between other types of carriers with disparate negotiating leverage.<sup>2434</sup>

1338. Given these considerations, both the Act and Commission rules have required interconnection among carriers under different policy frameworks, which varied both in scope and specificity based on the particular circumstances. For example, all carriers are subject to a general duty to interconnect directly or indirectly,<sup>2435</sup> with LECs also subject to certain rate regulations,<sup>2436</sup> and

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<sup>2429</sup> See, e.g., *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, WT Docket Nos. 04-70, 04-254, 04-323, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21578, para. 143 (2004) (citing Carl Shapiro and Hal Varian, *Information Rules*, Harvard Business School Press, Boston, 1999, at 13).

<sup>2430</sup> 47 U.S.C. §151.

<sup>2431</sup> See, e.g., *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, Second Notice of Proposed Rule Making, 10 FCC Rcd 10666, 10682-83, paras. 31-32 (1995) (*CMRS Interconnection Second NPRM*); see also *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended, et al.*, WC Docket No. 10-143, CC Docket No. 01-92, GN Docket No. 09-51, Declaratory Ruling, 26 FCC Rcd 8259, 8266-67, paras. 13-14 (2011) (*Interconnection Clarification Order*).

<sup>2432</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 15528, para. 55. See also *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14818, para. 238 (1999).

<sup>2433</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 15528, para. 55. See also *id.* ("The inequality of bargaining power between incumbents and new entrants militates in favor of rules that have the effect of equalizing bargaining power in part because many new entrants seek to enter national or regional markets.").

<sup>2434</sup> See, e.g., *CMRS Interconnection Second NPRM*, 10 FCC Rcd at 10682-83, paras. 31-32 (describing CMRS providers' possible incentives to deny reasonable interconnection to competitors under certain circumstances).

<sup>2435</sup> 47 U.S.C. § 251(a)(1) ("[e]ach telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers"). Even prior to the 1996 Act, the Commission required interconnection pursuant to section 201 and, in the context of CMRS providers, section 332. See, e.g., *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9137-38, paras. 59-61 (2004); *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1497-98, para. 230 (1994) (*CMRS Second Report and Order*).

<sup>2436</sup> Compare, e.g., *Investigation of Access and Divestiture Related Tariffs; MTS and WATS Market Structure*, CC Docket No. 83-1145 Phase I, CC Docket No. 78-72 Phase I, Memorandum Opinion and Order, 98 FCC 2d 730 (continued...)

incumbent LECs subject to a more detailed framework.<sup>2437</sup> In other contexts—notably, interconnection among Internet backbone providers—the Commission historically has chosen not to “monitor or exercise authority over” such interconnection on the grounds “that premature regulation ‘might impose structural impediments to the natural evolution and growth process which has made the Internet so successful.’”<sup>2438</sup>

1339. The voice communications marketplace is currently transitioning from traditional circuit-switched telephone service to the use of IP services. There are conflicting views regarding what role interconnection requirements should play in an increasingly IP-centric voice communications market. Some competitive providers seek to ensure that existing interconnection protections continue to apply as voice traffic migrates from TDM to IP.<sup>2439</sup> Other providers see various shortcomings in existing interconnection regimes, and advocate a modified regulatory approach for IP-to-IP interconnection that they believe would result in improvements over the existing regimes.<sup>2440</sup> Similarly, other providers seek to have interconnection requirements imposed more broadly than just for voice services.<sup>2441</sup> Even some smaller incumbent LECs cite concerns about a lack of negotiating leverage relative to other providers in the absence of a right to IP-to-IP interconnection.<sup>2442</sup> At the same time, other incumbent LECs contend that, whatever their historical marketplace position with respect to voice telephone services, their position with respect to IP services does not position them to use interconnection to disadvantage other providers, and does not warrant singling out incumbent LECs for application of legacy interconnection requirements.<sup>2443</sup> They also suggest caution regarding overly-prescriptive approaches based on the

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(1984) (holding that “the Commission is authorized to establish charges for carrier interconnections”) *with, e.g., Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers*, CC Docket No. 94-54, 95-185, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5025, para. 11 (1996) (“In the absence of market power or other distortions, efficient forms of interconnection may develop through private negotiation. For example, small interexchange carriers interconnect with one another, and purchase and resell one another’s services, with little or no outside involvement.”).

<sup>2437</sup> 47 U.S.C. § 251(c)(2) (requiring incumbent LECs to provide for direct, physical interconnection between the incumbent’s network and the competing provider’s network). *See also* 47 U.S.C. § 251(c)(1) (requiring incumbent LECs to negotiate in good faith to implement the requirements of section 251(b) and (c)); 47 U.S.C. § 252 (providing for arbitration of interconnection agreements involving incumbent LECs).

<sup>2438</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2451-52, para. 105 (1999); *see also Applications filed by Global Crossing Limited and Level 3 Communications, Inc. for Consent to Transfer Control*, IB Docket No. 11-78, Memorandum Opinion and Order and Declaratory Ruling, DA 11-1643, paras. 18-19 (WCB, IB rel. Sept. 29, 2011).

<sup>2439</sup> *See, e.g., COMPTTEL USF/ICC Transformation NPRM Comments* at 4-9.

<sup>2440</sup> *See, e.g., Sprint USF/ICC Transformation NPRM Comments* at 16-18.

<sup>2441</sup> *See, e.g., Google USF/ICC Transformation NPRM Comments* at 10-11. *See also AT&T USF/ICC Transformation NPRM Reply* at 9 (“[S]ome commenters ask the Commission to regulate Internet peering and transit relationships: the arrangements that allow *broadband ISPs* to exchange packets containing data from various applications, including voice, between their respective subscribers.”).

<sup>2442</sup> *See, e.g., Nebraska Rural Companies August 3 PN Comments* at 60.

<sup>2443</sup> *See, e.g., CenturyLink USF/ICC Transformation NPRM Comments* at 54-55.

potential for carrier-by-carrier variations in determining the timing of an efficient transition to IP-to-IP interconnection and complexities in the implementation of such requirements.<sup>2444</sup>

1340. The comprehensive reforms we adopt today takes initial steps to eliminate barriers to IP-to-IP interconnection. In this regard, we note that the intercarrier compensation transition we adopt in the Order specifies default rates but leaves carriers free to negotiate alternative arrangements.<sup>2445</sup> We conclude that the preexisting intercarrier compensation regime did not advance technology neutral interconnection policies because it provided LECs a more certain ability to collect intercarrier compensation under TDM-based interconnection, with less certain compensation for IP-to-IP interconnection. Under our new framework, even if a carrier historically has relied on intercarrier compensation revenue streams, it need not wait until intercarrier compensation reform is complete to enter IP-to-IP interconnection arrangements. Rather, to the extent that certainty regarding intercarrier compensation is important to a particular carrier during the transition, it is free to negotiate appropriate compensation as part of an arrangement for IP-to-IP interconnection under our transitional framework.

1341. Some commenters express concern that additional protections are needed to ensure IP-to-IP interconnection, however.<sup>2446</sup> As discussed above, we expect all carriers to negotiate in good faith in response to requests for IP-to-IP interconnection for the exchange of voice traffic, and that such good faith negotiations will result in interconnection arrangements between IP networks,<sup>2447</sup> and we seek comment below on which of the various possible statutory provisions as well as standards and enforcement mechanisms we should adopt to implement our expectation that carriers negotiate in good faith. We also seek comment on actions the Commission could take to, at a minimum, encourage the transition to IP-to-IP interconnection where efficient. In particular, we propose that if a carrier that has deployed an IP network receives a request to interconnect in IP, but instead requires TDM interconnection, the costs of the IP-to-TDM conversion would be borne by the carrier that elected TDM interconnection. We seek comment on this proposal. We also seek comment on other measures that Commission might adopt to encourage efficient IP-to-IP interconnection.

1342. We also seek comment on proposals to require IP-to-IP interconnection in particular circumstances under different policy frameworks. In this regard, we observe that section 251 of the Act is one of the key provisions specifying interconnection requirements, and that its interconnection requirements are technology neutral—they do not vary based on whether one or both of the interconnecting providers is using TDM, IP, or another technology in their underlying networks. The specific application of the interconnection requirements of section 251 depend upon factual circumstances and other considerations, and we seek comment below on the resulting implications in the context of IP-to-IP interconnection, along with other legal authority that might bear on the Commission's ability to adopt any particular IP-to-IP interconnection policy framework. Moreover, we seek comment on how to carefully circumscribe the scope of traffic or services subject to any such framework to leave issues to the marketplace that appropriately can be resolved there.

1343. Finally, we seek comment on proposals that the Commission leave IP-to-IP interconnection to unregulated commercial agreements. Although the Commission has relied on such an approach in some contexts in the past, we seek comment on the factual basis for whether, and when, to adopt such an approach here.

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<sup>2444</sup> See, e.g., Verizon *USF/ICC Transformation NPRM* Reply at 36-37.

<sup>2445</sup> See *supra* Section XII.C.

<sup>2446</sup> See generally *infra* Section XVII.P.4.

<sup>2447</sup> See *supra* Section XVI.



## 2. Scope of Traffic Exchange Covered By an IP-to-IP Interconnection Policy Framework

1344. It is important that any IP-to-IP interconnection policy framework adopted by the Commission be narrowly tailored to avoid intervention in areas where the marketplace will operate efficiently. We thus seek comment on the scope of traffic exchange that should be encompassed by any IP-to-IP interconnection policy framework for purposes of this proceeding. We stated in the Order that we expect carriers to negotiate in good faith in response to requests for IP-to-IP interconnection for the exchange of voice traffic. But, we note that various types of services can be transmitted in IP format, and commenters recognize that many pairs of providers are exchanging both VoIP traffic and other IP traffic with each other.<sup>2448</sup> Further, different commenters appear to envision IP-to-IP interconnection policy frameworks encompassing different categories of services provided using IP transmission. We seek comment on those issues below, along with any other recommendations commenters have for defining the scope of an IP-to-IP interconnection policy framework in this context. For any proposed scope of IP-to-IP interconnection, we also seek comment on whether it is necessary, or appropriate, to address classification issues associated with particular IP services.

1345. Some comments proposed that an IP-to-IP interconnection framework address the exchange of voice traffic. For some commenters, this would broadly encompass all VoIP traffic, whether referred to as “packetized voice” traffic, “IP voice” traffic, or simply “VoIP.”<sup>2449</sup> Is it technologically possible to adopt such an approach? Does it make sense as a policy matter to adopt an IP-to-IP interconnection framework focused specifically on voice service, and how would such an approach be implemented? For example, would this approach have the result of compelling providers to exchange VoIP traffic under a different technological or legal arrangement from what those providers use to exchange other IP traffic? Could the interconnection framework be structured to provide certain interconnection rights with respect to the exchange of VoIP traffic, while giving those providers the freedom to exchange other IP traffic in a consistent manner? What impact, if any, would such an approach have on any preexisting arrangements for the exchange of non-voice IP traffic?

1346. Other comments propose IP-to-IP interconnection frameworks that would encompass narrower categories of VoIP services, such as “managed” or “facilities-based” VoIP, as distinct from “over the top” VoIP.<sup>2450</sup> Are there advantages or disadvantages to focusing on this narrower universe of voice traffic as a technological, policy, or legal matter? For example, are there different costs or service quality requirements associated with such services such that those services would warrant distinct treatment? How would such traffic or services be defined? Would interconnection for other VoIP services be left unaddressed at this time? Or would they be subject to a different policy framework, and if so, what framework would be appropriate?

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<sup>2448</sup> See, e.g., *id.* at 24; AT&T *USF/ICC Transformation NPRM* Reply at 15.

<sup>2449</sup> See, e.g., Sprint *USF/ICC Transformation NPRM* Comments at 16-28; T-Mobile *USF/ICC Transformation NPRM* Comments at 17, 20-21; XO *USF/ICC Transformation NPRM* Comments at 17; Cablevision *USF/ICC Transformation NPRM* Reply at 3; Cox *USF/ICC Transformation NPRM* Reply at 2-3; Letter from Tamar E. Finn, Counsel for PAETEC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92; WC Docket Nos. 05-337, 07-135, 10-90; GN Docket No. 09-51 at 1 (filed July 19, 2011).

<sup>2450</sup> See, e.g., Cbeyond et al. Section XV Comments at 10 & n.28; Cbeyond et al. *USF/ICC Transformation NPRM* Reply at 7-8 & nn.12, 13; COMPTTEL Aug. 11, 2011 *Ex Parte* Letter, Attach. at 2-3 & n.2.

1347. Alternatively, other comments seem to anticipate that IP interconnection policies could encompass IP traffic other than voice.<sup>2451</sup> Would it be appropriate to encompass any non-voice IP traffic or services in such a framework, and how would they be defined? We note, for example, that the Commission historically has not regulated interconnection among Internet backbone providers. If a different interconnection policy framework were adopted in this context, how would it be distinguishable? To what extent would an IP-to-IP interconnection policy framework address interconnection rights for both voice and non-voice traffic, or to what extent would providers simply have the freedom to use otherwise-available interconnection arrangements to exchange particular IP traffic or services?

### 3. Good Faith Negotiations for IP-to-IP Interconnection

#### a. Standards and Enforcement for Good Faith Negotiations

1348. Building upon our statement in the Order that the duty to negotiate in good faith under the Act does not depend upon the network technology underlying the interconnection, whether TDM, IP, or otherwise, we seek comment below on the particular statutory authority that provides the strongest basis for the right to good faith negotiations for IP-to-IP interconnection. As a threshold matter, however, we seek comment on the appropriate scope and nature of requirements for good faith negotiations generally that should apply, as well as the associated implementation and enforcement.<sup>2452</sup> For example, should the Commission focus on all carriers generally, or adopt differing standards for particular subsets of carriers such as terminating carriers, incumbent LECs, or carriers that may have market power in the provision of voice services, or should we focus on some other scope of providers? Should the right to good faith negotiations for IP-to-IP interconnection be limited to traffic associated with particular types of services?<sup>2453</sup> How would the Commission determine whether or not a particular provider negotiated in good faith under such an approach? For example, should such claims be evaluated in the same manner as claims that a carrier failed to negotiate in good faith as required by section 251(c)(1) of the Act,<sup>2454</sup> or regulatory frameworks from other contexts?<sup>2455</sup> Are there other criteria that commenters believe the

<sup>2451</sup> See, e.g., Google *USF/ICC Transformation NPRM* Comments at 10-11 (“As part of its reform, the FCC also should affirm that broadband service providers have a duty pursuant to Section 251(a)(1) of the Communications Act to interconnect with other network providers for the exchange of telecommunications traffic, including local traffic encoded in IP.”); AT&T *USF/ICC Transformation NPRM* Reply at 9 (“[S]ome commenters ask the Commission to regulate Internet peering and transit relationships: the arrangements that allow *broadband ISPs* to exchange packets containing data from various applications, including voice, between their respective subscribers.”); Google June 16, 2011 *Ex Parte* Letter at 3 (“While many IP-based services (including VoIP) may be properly classified as information services, telecommunications carriers remain subject to the requirements of § 251(a) insofar as they are engaging in transport of telecommunications.”). Cf. Cox *USF/ICC Transformation NPRM* Reply at 4 (“Cox encourages the Commission to recognize that there should be continuing review of the regulatory framework for IP-based interconnection of voice and other interconnected services.”).

<sup>2452</sup> See, e.g., Sprint July 29, 2011 *Ex Parte* Letter at 10-11 (advocating a requirement to negotiate in good faith); Letter from Ad Hoc *et al.* to Hon. Julius Genachowski, Chairman, FCC, *et al.*, WC Docket Nos. 10-90, 07-135, 06-122, 05-337, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51 at 10 (filed Aug. 18, 2011) (Ad Hoc Aug. 18, 2011 *Ex Parte* Letter) (same).

<sup>2453</sup> See *supra* Section XVII.P.2.

<sup>2454</sup> See, e.g., 47 C.F.R. § 51.301(c) (setting forth a non-exhaustive list of eight specific actions that, if proven, would violate the duty to negotiate in good faith under section 251(c)(1)).

<sup>2455</sup> See, e.g., *Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, ET Docket Nos. 00-258, 95-18, RM-9498, RM-10024, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, 15076-15077, para. 201 & n.524 (2004) (requiring good faith in rebidding negotiations); *CMRS Interconnection Second NPRM*, 10 FCC Rcd at 10682-83, paras. 31-32. See also, e.g., 2011 (continued...)

Commission should address with respect to the standards and enforcement for good faith negotiations? For example, should enforcement occur at the Commission, state commissions, courts, or other forums?

1349. Would the Commission need to address or provide guidance regarding the contours of a range of reasonableness for IP-to-IP interconnection rates, terms, and conditions themselves to assess whether a party's negotiating positions are reasonable and in good faith? For example, would the Commission need to specify whether direct physical interconnection is required, or whether indirect interconnection could be sufficient in order to judge whether particular negotiations are in good faith? Are there other criteria or guidance regarding the substance of the underlying IP-to-IP interconnection that the Commission would need to specify to make enforcement of a good faith negotiation requirement more administrable?

1350. We observe that certain statutory provisions may give the Commission either broader or narrower leeway to define the scope of entities covered by the requirement, the standards for evaluating whether negotiations are in good faith, and the associated enforcement mechanisms. Thus, in addition to seeking comment on the particular statutory authority we should adopt for good faith negotiation requirements below, commenters should discuss any limitations on the substance and enforcement of the good faith negotiation requirements arising from the particular statutory provision at issue, or what particular approaches to defining and enforcing good faith negotiations are appropriate in the context of the Commission's exercise of particular legal authority. In addition, we seek comment not only on any rules the Commission would need to adopt or revise, but also any forbearance from statutory requirements that would be needed to implement a particular framework for good faith negotiations for IP-to-IP interconnection.<sup>2456</sup>

#### **b. Statutory Authority To Require Good Faith Negotiations**

1351. In this section, we note that there are various sections of the Act upon which the right to good faith negotiations for IP-to-IP interconnection could be grounded, and seek comment on the policy implications of selecting particular provisions of the Act. In the subsequent section, we seek comment on the possible legal authority commenters have cited in support of substantive IP-to-IP interconnection obligations, including sections 251(a)(1), 251(c)(2), and other provisions of the Act; section 706 of the 1996 Act; as well as the Commission's ancillary authority under Title I. We thus likewise seek comment on those and other provisions as a basis for the right to good faith negotiations regarding IP-to-IP interconnection, as well as resulting implications for the scope and enforcement of that right.

1352. We seek comment on whether we should utilize section 251(a)(1) as the basis for the requirement that all carriers must negotiate in good faith in response to a request for IP-to-IP interconnection. Section 251(a)(1) requires all telecommunications carriers to interconnect directly or indirectly.<sup>2457</sup> The requirements of this provision thus extend broadly to all telecommunications carriers, and are technology neutral on their face with respect to the transmission protocol used for purposes of interconnection. We thus seek comment on whether the Commission should rely upon section 251(a)(1) as the primary source of a right to good faith negotiations for IP-to-IP interconnection. Should the Commission create a specific enforcement mechanism and, if so, should the remedy be at the state level (Continued from previous page) \_\_\_\_\_

*Pole Attachment Order*, 26 FCC Rcd at 5286, para. 100 (revising the Commission's rules to require executive-level negotiations for pole attachments to demonstrate good faith); 47 C.F.R. § 1.721(a)(8) (requiring that complaints include "certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement"); 47 C.F.R. § 76.65 (requiring good faith in retransmission consent negotiations).

<sup>2456</sup> 47 U.S.C. § 160.

<sup>2457</sup> 47 U.S.C. § 251(a)(1). *See also infra* paras. 1381-1383.

or with the Commission? We note that section 251(c)(1) of the Act expressly adopts a requirement for incumbent LECs, and requesting carriers seeking interconnection with them, to “negotiate in good faith in accordance with section 252” to implement the requirements of sections 251(b) and (c).<sup>2458</sup> Although the requirements of section 251(a)(1), standing alone, are not encompassed by that provision, we do not believe that would preclude the Commission from concluding that a separate good faith negotiation requirement is required under section 251(a)(1). What is the appropriate mechanism for enforcing a right to good faith negotiations for IP-to-IP interconnection under 251(a)(1)? Similarly, to the extent that the good faith negotiation requirement adopted for section 251(a)(1) interconnection must be distinct from that imposed by section 251(c)(1), would the Commission need to adopt a different approach to evaluating claimed breaches of good faith from the framework used under section 251(c)(1)?<sup>2459</sup> If so, what framework for evaluating such claims should the Commission adopt?

1353. We also seek comment on whether the requirement of good faith negotiations for IP-to-IP interconnection should be based on section 251(c)(2). Section 251(c)(2) requires incumbent LECs to provide direct physical interconnection to requesting carriers when the criteria of sections 251(c)(2)(A)-(D) are met.<sup>2460</sup> As noted above, when section 251(c)(2) applies, it is subject to a statutory requirement of good faith negotiations under section 251(c)(1), with enforcement available through state arbitrations under section 252.<sup>2461</sup> Further, the Commission already has adopted guidance for evaluating claimed breaches of good faith negotiations under section 251(c)(1). Would that guidance remain appropriate for evaluating alleged failure to negotiate IP-to-IP interconnection in good faith under this provision? Under the terms of section 251(c), we believe that the obligations of section 251(c)(2) apply only to incumbent LECs, and thus under the terms of the statute the associated duty to negotiate interconnection in good faith under section 251(c)(1) only would extend to incumbent LECs and requesting carriers seeking interconnection with them. We note, however, that good faith negotiations under the Order are expected of all carriers, not just incumbent LECs. As a result, would the Commission need to rely on additional statutory provisions for the basis of good faith negotiation requirements for IP-to-IP interconnection among other types of carriers?

1354. Alternatively, we seek comment on whether the obligation to negotiate in good faith for IP-to-IP interconnection arrangements should be grounded in section 201, particularly in conjunction with other provisions of the Act and the Clayton Act.<sup>2462</sup> The Commission previously interpreted section 2(a), 201 and 202 collectively “as requiring common carriers to negotiate the provision of their services in good faith” and thus requiring LECs to negotiate interconnection in good faith with CMRS providers.<sup>2463</sup> It found it appropriate to extend the requirement of good faith negotiations not only to interconnection for the exchange of interstate services, but for intrastate services as well, reasoning that “departures from our good faith requirement [in the context of intrastate services] could severely affect interstate communications by preventing cellular carriers from obtaining interconnection agreements and consequently excluding them from the nationwide public telephone network.”<sup>2464</sup> The Commission

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<sup>2458</sup> 47 U.S.C. § 251(c)(1).

<sup>2459</sup> See 47 C.F.R. § 51.301(c).

<sup>2460</sup> 47 U.S.C. § 251(c)(2)(A)-(D). See also *infra* paras. 1384-1393.

<sup>2461</sup> 47 U.S.C. §§ 251(c)(1); 252.

<sup>2462</sup> See *infra* para. 1393.

<sup>2463</sup> *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Declaratory Ruling, 2 FCC Rcd 2910, 2912-13, para. 21 (1987) (*CMRS Interconnection Declaratory Ruling*).

<sup>2464</sup> *Id.*

further concluded that its “authority to mandate good faith negotiations is also derived from Sections 309(a) and 314 of the Act and Section 11 of the Clayton Act, which require the Commission to remedy anticompetitive conduct,” given that delays in the negotiating process could place a carrier at a competitive disadvantage.<sup>2465</sup> We seek comment on whether we should adopt these provisions as the legal basis for a requirement of good faith negotiations among carriers regarding IP-to-IP interconnection. Would the considerations cited by the Commission in the context of LEC-CMRS interconnection likewise justify a right to good faith negotiations in this context? If so, what standards and processes should apply in evaluating and enforcing good faith negotiations under this provision? We note that interconnection with LECs for access traffic historically—and as preserved by 251(g)—was addressed through exchange access and related interconnection regulations, including through the purchase of tariffed access services. How should any right to good faith negotiation of IP-to-IP interconnection for the exchange of access traffic be reconciled with those historical regulatory frameworks? Does the Commission’s action in the accompanying Order to supersede the preexisting access charge regime and adopt a transition to a new regulatory framework affect this evaluation?

1355. In addition, we seek comment on the relative merits of section 706 of the 1996 Act as the statutory basis for carriers’ duty to negotiate IP-to-IP interconnection in good faith. As discussed below, some commenters suggest that section 706 would provide the Commission authority to regulate IP-to-IP interconnection.<sup>2466</sup> Would the statutory mandate in section 706 justify a requirement that carriers negotiate in good faith regarding IP-to-IP interconnection? If so, what standards and enforcement processes would be appropriate? If the Commission were to rely on section 706 of the 1996 Act to impose a good faith negotiation requirement, would it also need to adopt associated complaint procedures, or could the existing informal and formal complaint processes, which derive from section 208, nonetheless be interpreted to extend more broadly than alleged violations of Title II duties? Could the Commission, relying on section 706, extend the obligation to negotiate in good faith beyond carriers to include all providers of telecommunications? If so, should the Commission do so?

1356. We also seek comment on whether section 256 provides a basis for the good faith negotiation requirement for IP-to-IP interconnection. Although section 256(a)(2) says that the purpose of the section is “to ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks,”<sup>2467</sup> section 256(c) provides that “[n]othing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before February 8, 1996.”<sup>2468</sup> Particularly in light of section 256(c), is it reasonable to interpret section 256 as a basis for the good faith negotiation requirement? If so, what are the appropriate details and enforcement mechanism? Even if it is not a direct source of authority in that regard, should it inform the Commission’s interpretation and application of other statutory provisions to require carriers to negotiate IP-to-IP interconnection in good faith?

1357. Alternatively, should the Commission rely upon ancillary authority as a basis for requiring that carriers negotiate in good faith in response to requests for IP-to-IP interconnection? Because it is “communications by wire or radio,” the Commission clearly has subject matter jurisdiction

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<sup>2465</sup> *Id.* at 2913, para. 22.

<sup>2466</sup> *See infra* para. 1394.

<sup>2467</sup> 47 U.S.C. § 256(a)(2).

<sup>2468</sup> 47 U.S.C. § 256(c); *see also Comcast*, 600 F.3d at 659 (acknowledging section 256’s objective, while adding that section 256 does not “‘expand[] . . . any authority that the Commission’ otherwise has under law”) (quoting 47 U.S.C. § 256(c)).

over IP traffic such as packetized voice traffic.<sup>2469</sup> Is the requirement that carriers negotiate in good faith in response to requests for IP-to-IP interconnection reasonably ancillary to the Commission's exercise of its authority under a statutory provision, such as the provisions identified above?<sup>2470</sup> If so, what standards and enforcement mechanisms should apply? If the Commission were to rely on ancillary authority to impose a good faith negotiation requirement, would it also need to adopt associated complaint procedures, or could the existing informal and formal complaint processes, which derive from section 208, nonetheless be interpreted to extend more broadly than alleged violations of Title II duties? Similarly, if the Commission relies on ancillary authority, could it extend the obligation to negotiate in good faith beyond carriers to include all providers of telecommunications? If so, should the Commission do so?

1358. Finally, we seek comment on whether the obligation for carriers to negotiate IP-to-IP interconnection in good faith should be grounded in other statutory provisions identified by commenters. If so, what statutory provisions, and what are the appropriate standards and enforcement mechanisms? Alternatively, should the Commission rely on multiple statutory provisions? If so, which provisions, and how would they operate in conjunction?

#### **4. IP-to-IP Interconnection Policy Frameworks**

##### **a. Alternative Policy Frameworks**

1359. We seek comment on the appropriate role for the Commission regarding IP-to-IP interconnection. In particular, we seek specific comment on certain proposed policy frameworks described below. With respect to each such framework, we seek comment not only on the policy merits of the approach, but also the associated implementation issues. These include not only any rules the Commission would need to adopt or revise, but also any forbearance from statutory requirements that would be needed to implement the particular framework for IP-to-IP interconnection.<sup>2471</sup>

##### **(i) Measures To Encourage Efficient IP-to-IP Interconnection**

1360. At a minimum, we believe that any action the Commission adopts in response to this FNPRM should affirmatively encourage the transition to IP-to-IP interconnection where it increases overall efficiency for providers to interconnect in this manner. We seek comment below on possible elements of such a framework, as well as alternative approaches for encouraging efficient IP-to-IP interconnection.

1361. *Responsibility for the Costs of IP-to-TDM Conversions.* Some commenters have proposed that carriers electing TDM interconnection be responsible for the costs associated with the IP-TDM conversion.<sup>2472</sup> In particular, these commenters contend that carriers that require such conversion,

<sup>2469</sup> 47 U.S.C. § 152(a).

<sup>2470</sup> As discussed below, Sprint asserts that the Commission has authority under Title I to adopt requirements for IP-to-IP interconnection as ancillary to its execution of sections 251 and 252, and consistent with the policies specified in various other provisions of the Act. See *infra* para. 1396.

<sup>2471</sup> 47 U.S.C. § 160.

<sup>2472</sup> See, e.g., Charter *USF/ICC Transformation NPRM* Reply at 5-6 & n.14; NCTA *August 3 PN* Comments at 18 n.42. See also Letter from Karen Reidy, Vice President of Regulatory Affairs for COMPTTEL, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 11-119, 10-90, 07-135, 06-122, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51 at 2 (filed Aug. 11, 2011) (COMPTTEL Aug. 11, 2011 *Ex Parte* Letter) (asserting that competitive LECs currently incur unnecessary costs “associated with converting IP calls to TDM format, including the costs of purchasing, operating, and maintaining numerous gateways”).

sometimes despite the fact that they have deployed IP networks themselves, effectively raise the costs of their competitors that have migrated to IP networks.<sup>2473</sup> If a carrier that has deployed an IP network receives a request to interconnect in IP, but, chooses to require TDM interconnection, we propose to require that the costs of the conversion from IP to TDM be borne by the carrier that elected TDM interconnection (whether direct or indirect).<sup>2474</sup> We seek comment on how to define the scope of carriers with IP networks that should be subject to such a requirement. We further seek comment on what specific functions the carrier electing TDM interconnection should be financially responsible for under such a requirement. Should the financial responsibility be limited to the electronics or equipment required to perform the conversion? Or should the financial responsibility extend to other costs, such as any potentially increased costs from interconnecting in many locations with smaller-capacity connections rather than (potentially) less expensive interconnection in a smaller number of locations with higher-capacity connections? If there are disputes regarding payments, should the losing party bear the cost of those disputes?

1362. Would the Commission need to take steps to ensure the rates associated with those functionalities remain reasonable, and under what regulatory framework? For example, would *ex ante* rules or *ex post* adjudication in the case of disputes be preferable? Would the costs of the relevant functions need to be measured, and if so how? In the case of rates for such functionalities charged by incumbent LECs, should the otherwise-applicable rate regulations apply to such offerings? In the case of carriers other than incumbent LECs, how, if at all, would such rates be regulated? Would the ability of the carrier electing TDM interconnection to self-deploy the IP-to-TDM conversion technology or purchase it from a third party<sup>2475</sup> rather than paying the other provider constrain the rate the other provider could charge for such functionality? Would the Commission also need to regulate the terms and conditions of such services? If so, what is the appropriate regulatory approach?

1363. Would some pairs of carriers with IP networks that interconnect directly or indirectly in TDM today both choose to continue interconnecting in TDM? If so, how would the commission ensure that any requirements it adopted addressing financial responsibility for IP-to-TDM conversions did not alter the *status quo* in such circumstances? For example, could the obligation to pay these charges be triggered through a formal process by which one interconnected carrier requests IP-to-IP interconnection and, if the second interconnected carrier refuses (or fails to respond), the second carrier then would be required to bear financial responsibility for the IP-to-TDM conversion? Would the Commission need to specify a timeline for the process, including the time by which a carrier receiving a request for IP-to-IP interconnection either must respond or be deemed to have refused the request (and thus become subject to the financial responsibility for the IP-to-TDM conversion)? If so, what time periods are reasonable?

1364. What mechanism would be used to implement any such charges? Should carriers rely solely on agreements? Or should carriers tariff these rates, perhaps as default rates that apply in the absence of an agreement to the contrary? Should the carrier seeking to retain TDM interconnection be permitted to choose to purchase the conversion service from any available third party providers of IP-to-TDM conversions, rather than from the carrier seeking IP-to-IP interconnection? If so, how would that be implemented as part of the implementation framework?

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<sup>2473</sup> See, e.g., Cablevision *USF/ICC Transformation NPRM* Comments at 3-5; COMPTTEL *USF/ICC Transformation NPRM* Comments at 35; Google *USF/ICC Transformation NPRM* Comments at 5.

<sup>2474</sup> See *supra* para. 1340.

<sup>2475</sup> See, e.g., Letter from Edward Kirsch, counsel for Hypercube, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 01-92; WC Docket Nos. 03-109, 05-337, 07-135, 10-90; GN Docket No. 09-51, Attach. at 2 (filed Sept. 1, 2011) (describing “commercial network bridge providers . . . facilitat[ing] indirect IP interconnection wherever direct IP interconnection is not available or is less efficient”).

(ii) **Specific Mechanisms To Require IP-to-IP Interconnection**

1365. We seek comment on certain other approaches for requiring IP-to-IP interconnection raised in the record.

1366. *Scope of Issues To Address Under Different Policy Frameworks Requiring IP-to-IP Interconnection.* We seek comment on the general scope of the Commission's appropriate role concerning IP-to-IP interconnection, subject to certain baseline requirements. For example, if the baseline only extended to certain terms and conditions,<sup>2476</sup> would providers have adequate incentives to negotiate reasonable IP-to-IP interconnection rates? What specific terms and conditions would need to be subject to the policy framework, and which could be left entirely to marketplace negotiations?<sup>2477</sup> Should any oversight of terms and conditions take the form of general guidelines, perhaps subject to case-by-case enforcement, rather than more detailed *ex ante* rules? Where in a provider's network would IP need to be deployed for it to be subject to such requirements? To inform our analysis of these issues, we seek comment on the physical location of IP POIs, with concrete examples of traffic and revenue flows, as well as who bears the underlying costs of any facilities used, whether in the original installation, or in maintenance and network management. What are the implementation costs of the provision of Session Initiation Protocol (SIP) at the point of interconnection, and the extent to which voice quality would be compromised without such provision?<sup>2478</sup> How would current policies, if maintained, provide efficient or inefficient incentives for point-of-interconnection consolidation, and/or the provision of efficient interconnection protocols, such as SIP? Would adopting a timetable for all-IP interconnection be necessary or appropriate, or would carriers have incentives to elect IP-to-IP (rather than TDM) interconnection whenever it is efficient to do so?

1367. In addition, would it be necessary or appropriate to address providers' physical POIs in the context of IP-to-IP interconnection? What factors should the Commission consider in evaluating possible policy frameworks for physical POIs, such as the appropriate burden each provider bears regarding the cost of transporting traffic? If the Commission were to address POIs, would we need to mandate the number and/or location of physical POIs, or would general encouragement to transition to one POI per geographic area larger than a LATA be appropriate?<sup>2479</sup> If so, what should that larger area

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<sup>2476</sup> See, e.g., Ad Hoc Aug. 18, 2011 *Ex Parte* Letter at 9 ("as an initial matter, the FCC could leave to the market IP-to-IP rates between carriers, including taking a hands-off approach to whether rates should be capacity-based or based on another measure").

<sup>2477</sup> See, e.g., COMPTel Aug. 11, 2011 *Ex Parte* Letter, Attach. at 2 ("the basic elements of interconnection – i.e., the physical link, interface, signaling and database access – will be just as important to Managed Packet networks as they have been to traditional circuit-switched facilities").

<sup>2478</sup> See, e.g., *id.* at 4-5 (discussing SIP and other protocols used to establish and manage IP voice calls); *id.* at 6 (discussing the capability for voice QoS in the exchange of traffic).

<sup>2479</sup> See Level 3 *USF/ICC Transformation NPRM* Comments at 12-13; COMPTel Aug. 11, 2011 *Ex Parte* Letter, Attach. at 9.



be?<sup>2480</sup> How, if at all, would any regulations of physical POIs impact the relative financial responsibilities of the interconnected carriers for transporting the traffic?<sup>2481</sup>

1368. We also seek comment on providers' incentives under a policy framework that involves some Commission oversight of IP-to-IP interconnection rates, as well as terms and conditions. If an IP-to-IP interconnection policy framework addresses interconnection rates, how should it do so? For example, would it be sufficient to require that all VoIP traffic be treated identically, including in terms of price? Would it be appropriate to require that interconnection for the exchange of VoIP traffic be priced the same as interconnection for the exchange of all other IP traffic? If the price for the interconnection arrangement itself is distinct from the compensation for the exchange of traffic, how should each be regulated? Would a differential between the costs/revenues in the pricing of IP-to-IP interconnection and traffic exchange relative to TDM interconnection and traffic exchange create inefficient incentives to elect one form of interconnection rather than the other? If so, should any charges for both the interconnection arrangement and traffic exchange under an IP-to-IP interconnection framework mirror those that apply when carriers interconnect in TDM? Or should the Commission adopt an alternative approach? For example, should the Commission provide for different rate levels or rate structures than otherwise apply in the TDM context? What is the appropriate mechanism for implementing any such framework? Should the regulated rates, terms, and conditions be defaults that allow providers to negotiate alternatives?

1369. *Specific Proposals For IP-to-IP Interconnection.* Some commenters contend that the Commission should require incumbent LECs to directly interconnect on an IP-to-IP basis under section 251(c)(2) of the Act.<sup>2482</sup> In addition to the section 251(c)(2) legal analysis upon which we seek comment below, we seek comment on the policy merits of such an approach.<sup>2483</sup> What requirements would the Commission need to specify under such an approach? In addition, by its terms, section 251(c)(2) only imposes obligations on incumbent LECs. Is that focus appropriate, or would the Commission need to address the requirements applicable to other carriers, as well?<sup>2484</sup> If so, how could that be done under such an approach?

1370. Alternatively, should we adopt a case-by-case adjudicatory framework somewhat analogous to the approach of section 251(c)(2) and 252, where we require IP-to-IP interconnection as a

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<sup>2480</sup> See, e.g., EarthLink *USF/ICC Transformation NPRM* Comments at 9 (suggesting one POI per state); XO *USF/ICC Transformation NPRM* Comments at 31 (suggesting a default of no more than one POI per state but the Commission should encourage regional POIs). But see, e.g., CenturyLink *USF/ICC Transformation NPRM* Comments at 73 ("the Commission is a long way from being in a position to dictate the details of the ideal POI rules for such networks - even if [it] determined that it had the authority to do so").

<sup>2481</sup> We seek comment above on the possible need for rules governing the "edge" that defines the scope of functions encompassed by bill-and-keep under the reforms adopted in this Order. See *supra* Section XVII.N.

<sup>2482</sup> See, e.g., Cablevision *USF/ICC Transformation NPRM* Comments at 8-9; COMPTTEL *USF/ICC Transformation NPRM* Comments at 8; EarthLink *USF/ICC Transformation NPRM* Comments at 4-6; PAETEC *et al.* *USF/ICC Transformation NPRM* Comments at 5-8; Cbeyond *et al.* *USF/ICC Transformation NPRM* Reply at 5-12. Cf. NCTA *August 3 PN* Comments at 18 n.43 ("As set out in our comments filed in response to tw telecom's petition for declaratory ruling, section 251(c)(2) of the Act requires incumbent LECs to provide direct IP-to-IP interconnection for the transmission and routing of facilities-based VoIP services. . . . Although it is important for the Commission quickly to address the refusal of incumbent LECs to directly interconnect in IP format for the provision of VoIP services, the Commission need not address those issues in this proceeding.").

<sup>2483</sup> See *supra* Section XVII.P.3.b.

<sup>2484</sup> Cf. Nebraska Rural Companies *August 3 PN* Comments at 60 (expressing concern that small incumbent LECs might be at a negotiating disadvantage relative to larger providers).

matter of principle, but leave particular disputes for case-by-case arbitration or adjudication? Under such an approach, would the Commission need to establish some general principles or guidelines regarding how arbitrations or adjudications will be resolved, and if so, with respect to what issues? Which providers should be subject to any such obligations—incumbent LECs, all carriers that terminate traffic, or a broader scope of providers? Should the states and/or the Commission provide arbitration or dispute resolution when providers fail to reach agreement, and what processes should apply? Does the Commission have legal authority to adopt such an approach?

1371. Other commenters propose that we require IP-to-IP interconnection under section 251(a)(1).<sup>2485</sup> We seek comment below on the possibility of designating one of the carriers as entitled to insist upon direct (rather than indirect) interconnection under section 251(a)(1).<sup>2486</sup> However, if the Commission required IP-to-IP interconnection under 251(a)(1) but permitted either carrier to insist upon indirect interconnection, could the Commission require the carrier making that election bear certain costs associated with indirect interconnection, such as payment to the third party for the indirect interconnection arrangement, bearing the cost of transporting the traffic back to its own network and customers from the point where the carriers are indirectly interconnected, or other costs?

1372. As another alternative, T-Mobile and Sprint proposed that each service provider establish no more than one POI in each state using Session Initiation Protocol (SIP) to receive incoming packetized voice traffic and be required to provide at its own cost any necessary packet-to-TDM conversion for a short-term transition period.<sup>2487</sup> Then, in the longer term, the parties suggest that the Commission use the Technical Advisory Committee (TAC) “to develop recommendations for the protocol for receiving packet-based traffic and to propose efficient regional packet-based interconnection points.”<sup>2488</sup> T-Mobile and Sprint suggest acting on the TAC’s recommendations after public notice and the opportunity for comment.<sup>2489</sup> We seek comment on T-Mobile and Sprint’s proposal. If the Commission moves forward with an approach like T-Mobile/Sprint’s, how much time should the Commission allow for each of the two time periods proposed?<sup>2490</sup> Based on the transition periods adopted in this Order, how would this two-step approach work?

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<sup>2485</sup> See, e.g., Letter from Teresa K. Gaugler, Federal Regulatory Counsel, XO, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 11-119, 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, Attach. at 5 (filed Sept. 6, 2011); Letter from Helen E. Disenhaus, counsel for Hypercube, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, at 1-2 & Attach. at 2-3 (filed Sept. 30, 2011).

<sup>2486</sup> See *infra* paras. 1381-1383.

<sup>2487</sup> See Letter from Kathleen O’Brien Ham, VP – Federal Regulatory Affairs, T-Mobile, and Charles W. McKee, VP – Government Affairs, Sprint, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 2 (filed Jan. 21, 2011) (T-Mobile/Sprint Jan. 21, 2011 *Ex Parte* Letter). In its comments Level 3 suggests that the Commission allow for a market-determined number of POIs rather than mandating a specific number of POIs, i.e. one per state. See Level 3 *USF/ICC Transformation NPRM* Comments at 12.

<sup>2488</sup> T-Mobile/Sprint Jan. 21, 2011 *Ex Parte* Letter at 3. Specifically, Sprint suggests that the Commission refer to the TAC as soon as possible “(1) the locations where packetized voice traffic should be exchanged; and (2) a set of minimum (and default only) technical requirements pertaining to the transport of voice traffic that all IP networks would support.” Sprint Nextel *USF/ICC Transformation NPRM* Comments at 22.

<sup>2489</sup> See T-Mobile/Sprint Jan. 21, 2011 *Ex Parte* Letter at 3.

<sup>2490</sup> For example, in its comments Level 3 suggests a nine-year transition plan for comprehensive intercarrier compensation reform and suggests that Commission involvement in the transition to IP-to-IP interconnection also follow the nine-year timeframe. See Level 3 *USF/ICC Transformation NPRM* Comments at 3, 13.

1373. We also seek comment on XO's proposal to facilitate the move to IP-to-IP interconnection.<sup>2491</sup> XO recommends that the Commission "require every telecommunications carrier to provide IP-based carrier-to-carrier interconnection (directly or indirectly) within [five] years, regardless of the technology the carrier uses to provide services to its end users."<sup>2492</sup> During the transition period parties could continue to negotiate an agreement with a third party to fulfill its interconnection obligations.<sup>2493</sup> XO suggests that "[i]f a carrier chose to continue delivering traffic to the TDM POI, it would continue to pay higher intercarrier compensation rates"<sup>2494</sup> while the IP termination rate would be set lower to incentivize carriers to deliver traffic in an IP format and therefore deploy IP networks to avoid the costs of converting from TDM to IP.<sup>2495</sup> After the proposed five-year transition, XO recommends that terminating carriers would be able "to refuse to accept traffic via TDM interconnection where IP interconnection is available."<sup>2496</sup> We note that the Commission has adopted a different approach to intercarrier compensation for VoIP traffic in this Order than that recommended by XO. What impact would that have on XO's IP-to-IP interconnection proposal?<sup>2497</sup> In addition, is a five-year transition period to IP interconnection sufficient? Should the Commission allow providers to refuse TDM traffic as XO proposes? Are there any potential negative consequences for having different pricing for TDM and IP interconnection?

1374. We also observe that many providers interconnect indirectly today, and some commenters anticipate that indirect interconnection will remain important in an IP environment, as well.<sup>2498</sup> If an IP-to-IP interconnection policy framework granted providers the right to direct IP-to-IP interconnection, would this reduce or eliminate providers' incentives to interconnect indirectly? Alternatively, if the policy framework gave providers flexibility to interconnect either directly or indirectly, would this result in demand for indirect IP-to-IP interconnection that gives some providers incentives to offer services that enable third parties to interconnect on an IP-to-IP basis?

**(iii) Commercial Agreements Not Regulated by the Commission**

1375. We also seek comment on proposals to adopt a policy framework that would leave IP-to-IP interconnection largely unregulated by the Commission.

1376. *Incentives Under Unregulated Commercial Agreements.* Has the Commission, through its actions in this Order, sufficiently eliminated disincentives to IP-to-IP interconnection arising from

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<sup>2491</sup> See XO *USF/ICC Transformation NPRM* Comments at 31. See also Letter from Tiki Gaugler, Senior Manager & Counsel, XO to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, at Attach. (filed Sept. 10, 2010) (Sept. 10, 2010 XO *Ex Parte* Letter).

<sup>2492</sup> XO *USF/ICC Transformation NPRM* Comments at 31. XO also suggests that the Commission eliminate LATA and other jurisdictional boundaries for traffic exchanged in IP. See *id.*

<sup>2493</sup> See *id.*

<sup>2494</sup> *Id.* at 32.

<sup>2495</sup> See *id.*

<sup>2496</sup> *Id.* at 33.

<sup>2497</sup> See, e.g., COMPTTEL *USF/ICC Transformation NPRM* Comments at 5 ("Individual carriers' business plans will dictate the timing of network upgrades").

<sup>2498</sup> See, e.g., Sprint July 29, 2011 *Ex Parte* Letter at 9 ("It is not realistic to believe that all 1,800 to 2,000 networks will connect directly with each other. Rather, as is the case today with PSTN interconnection, in many circumstances it will be more efficient for two networks to interconnect indirectly with each other, using an IP network operated by a third party.").

intercarrier compensation rules?<sup>2499</sup> Even if there were no disincentive arising from the intercarrier compensation rules, would some competitors seek to deny IP-to-IP interconnection on reasonable rates, terms, and conditions to raise their rivals' costs?<sup>2500</sup> Are there circumstances where a refusal to interconnect on an IP-to-IP basis would result in service disruptions?<sup>2501</sup>

1377. *Specific Proposals for Unregulated Commercial Agreements.* Verizon contends that “[t]he efficient way to allow IP interconnection arrangements to develop would be to follow . . . the tremendously successful example of the Internet, which relies upon voluntarily negotiated commercial agreements developed over time and fueled by providers’ strong incentives to interconnect their networks.”<sup>2502</sup> As AT&T argues, “the interdependence of IP networks, along with the multiplicity of indirect paths into any broadband ISP’s network—for the transmission of a VoIP call or any other type of IP application—deprive any such ISP of any conceivable terminating access ‘monopoly’ over traffic bound for its subscribers.”<sup>2503</sup> Thus, commenters contend that the “government should avoid prescribing the terms that will govern complex and evolving relationships among private sector actors.”<sup>2504</sup> In other contexts, the Commission has recognized that a provider might not always voluntarily grant another provider access to its network on just and reasonable rates, terms, and conditions and that, in certain circumstances, some regulatory protections might be warranted.<sup>2505</sup> Is interconnection in this context distinguishable, and if so, how? If not, how could the Commission identify the circumstances where a less regulated (or unregulated) approach might be warranted from those where some regulation is needed?

#### (iv) Other Proposals and Related Issues

1378. In addition to the specific proposals described above, we seek comment on any alternative approaches that commenters would suggest. In addition to the policy merits of the approach, we seek comment on the Commission’s legal authority to adopt the approach, and how that approach would be implemented, including any new rules or rule changes.

1379. We also observe that there is a growing problem of calls to rural customers that are being delayed or that fail to connect.<sup>2506</sup> We seek comment on whether any issues related to those concerns are

<sup>2499</sup> We note that the Order does not fully reform all intercarrier compensation elements, and we seek comment in the FNPRM regarding how to complete the reform of those elements. *See supra* Section XVII.M.

<sup>2500</sup> *See, e.g.,* COMPTTEL Aug. 11, 2011 *Ex Parte* Letter, Attach. at 8 n.15 (“Early in the adoption of [Managed Packet transport] arrangements, however, incumbents have the incentive to impose additional costs on rivals that have deployed more efficient Managed Packet technology by requiring that competitive entrants interconnect through the incumbent’s obsolete circuit-switched technology, even where a more efficient Managed Packet transport facility is available.”).

<sup>2501</sup> *See, e.g.,* COMPTTEL Nov. 1, 2010 *Ex Parte* Letter, Attach. at 5-6 (describing a position taken by AT&T).

<sup>2502</sup> Verizon *USF/ICC Transformation NPRM* Comments at 16.

<sup>2503</sup> AT&T *USF/ICC Transformation NPRM* Reply at 11.

<sup>2504</sup> Verizon *USF/ICC Transformation NPRM* Comments at 16-17. *See also* CenturyLink *USF/ICC Transformation NPRM* Comments at 71; AT&T *USF/ICC Transformation NPRM* Reply at 13-14.

<sup>2505</sup> *CMRS Interconnection Second NPRM*, 10 FCC Rcd at 10682-83, paras. 31-32. *See also, e.g.,* 2011 *Pole Attachment Order*, 26 FCC Rcd at 5327, para. 199 (discussing incumbent LEC concerns about the ability to negotiate access to electric utilities’ pole networks on just and reasonable rates, terms, and conditions, notwithstanding the fact that the incumbent LEC itself owns a pole network).

<sup>2506</sup> *See, e.g., FCC Launches Rural Call Completion Task Force to Address Call Routing and Termination Problems In Rural America*, News Release, (rel. Sept. 26, 2011). The task force recently held a workshop “to identify specific (continued...) ”

affected by carriers' interconnection on an IP-to-IP basis, or to any interconnection policy framework the Commission might adopt in that context. Are there components of, or modifications to, any such framework that the Commission should consider in light of concerns about calls being delayed or failing to connect?

**b. Statutory Interconnection Frameworks**

1380. We anticipate that the Commission may need to take some steps to enable the efficient transition to IP-to-IP interconnection, and we seek comment on the contours of our statutory authority in this regard. Just as there are varied positions regarding the appropriate policy framework for IP-to-IP interconnection, so too are there varied positions on the application of various statutory provisions in this regard. We therefore seek comment on the appropriate interpretation of statutory interconnection requirements and other possible regulatory authority for the Commission to adopt a policy framework governing IP-to-IP interconnection. In addition, insofar as the Commission addresses IP-to-IP interconnection through a statutory framework historically applied to TDM traffic, we seek comment on whether any resulting changes will be required to the application of those historical TDM interconnection requirements, either through rule changes or forbearance.

1381. *Section 251.* We agree with commenters that “nothing in the language of [s]ection 251 limits the applicability of a carrier’s statutory interconnection obligations to circuit-switched voice traffic”<sup>2507</sup> and that the language is in fact technology neutral.<sup>2508</sup> In addition, we seek comment on whether the provisions of section 251 interconnection are also service neutral, or do they vary with the particular services (e.g., voice vs. data, telecommunications services vs. information services) being exchanged? If so, on what basis, and in what ways, do they vary? A number of commenters go on to contend that the Commission can regulate IP-to-IP interconnection pursuant to section 251 of the Act.<sup>2509</sup> If the Commission were to adopt IP-to-IP interconnection regulations under the section 251 framework, would those regulations serve as a default in the absence of a negotiated IP-to-IP interconnection agreement between parties?<sup>2510</sup> In addition to those overarching considerations regarding the application of section 251 generally, we recognize that the scope of the interconnection requirements of sections

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causes of the problem and to discuss potential solutions with key stakeholders.” *See FCC Announces Agenda for October 18 Rural Call Completion Workshop*, Public Notice, DA 11-1715 (rel. Oct. 14, 2011).

<sup>2507</sup> COMPTTEL *USF/ICC Transformation NPRM* Comments at 5. “The Commission has already determined that Section 251 entitles telecommunications carriers to interconnect for the purpose of exchanging VoIP traffic with incumbent LECs and that a contrary decision would impede the development of VoIP competition and broadband deployment.” *Id.* at 6 (citing *Time-Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, As Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd 3513, 3517, 3519-20, paras. 8, 13 (2007) (*Time Warner Cable Order*)).

<sup>2508</sup> *See, e.g.,* XO *USF/ICC Transformation NPRM* Reply at 5-6 (“Despite protestations of the ILECs, the interconnection obligations of sections 251 and 252 are technology neutral and not targeted to apply only to legacy TDM networks that existed at the time the Telecommunications Act was passed.”).

<sup>2509</sup> *See, e.g.,* COMPTTEL *USF/ICC Transformation NPRM* Comments at 4-9; XO *USF/ICC Transformation NPRM* Section XV Comments at 15-17; Cablevision *USF/ICC Transformation NPRM* Reply at 2-11; Letter from Donna N. Lampert, Counsel to Google Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 05-337; GN Docket No. 09-51; CC Docket Nos. 01-92, 96-45 at 2-3 (filed June 16, 2011) (Google June 16, 2011 *Ex Parte* Letter).

<sup>2510</sup> *See* XO *USF/ICC Transformation NPRM* Comments at 31.

251(a)(1) and 251(c)(2) are tied to factual circumstances or otherwise circumscribed in various ways, and we seek comment below on the resulting implications in the context of IP-to-IP interconnection.

1382. *Section 251(a)(1)*. Section 251(a)(1) of the Act requires each telecommunications carrier “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.”<sup>2511</sup> The Commission previously has recognized that this provision gives carriers the right to interconnect for purposes of exchanging VoIP traffic.<sup>2512</sup> However, could a carrier satisfy its obligation under section 251(a)(1) by agreeing to interconnect directly or indirectly only in TDM, or could the Commission require IP-to-IP interconnection in some circumstances?

1383. Section 251(a)(1) does not expressly specify how a particular pair of interconnecting carriers will decide whether to interconnect directly or indirectly.<sup>2513</sup> How should the Commission interpret section 251(a)(1) in this regard? If the Commission were to require IP-to-IP interconnection under section 251(a)(1), would this effectively require direct interconnection in situations where there was no third party that could facilitate indirect IP-to-IP interconnection? Would this be consistent with the Commission’s prior interpretation of section 251(a)(1) that “telecommunications carriers should be permitted to provide interconnection pursuant to section 251(a) either directly or indirectly, based upon their most efficient technical and economic choices”?<sup>2514</sup> Should the Commission interpret section 251(a)(1) to allow the carrier requesting interconnection to decide whether interconnection will be direct or indirect or should we otherwise formally designate one of the carriers as entitled to insist upon direct (rather than indirect) interconnection? If so, which carrier should be entitled to make that choice, and how would such a framework be implemented?

1384. In general, how would IP-to-IP interconnection be implemented under section 251(a)(1)?<sup>2515</sup> To what extent should the Commission specify *ex ante* rules governing the rates, terms, and conditions of IP-to-IP interconnection under section 251(a)(1), or could those issues be left to case-by-case evaluation in state arbitrations or disputes brought before the Commission? If the Commission did not address these issues through *ex ante* rules, what standards or guidelines would apply in resolving disputes?

1385. *Section 251(c)(2)*. Section 251(c)(2) requires incumbent LECs to “provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier’s network,” subject to certain conditions and criteria.<sup>2516</sup> Such interconnection is “for the transmission and routing of telephone exchange service and exchange access.”<sup>2517</sup> Interconnection must be direct, and at any “technically feasible point within the carrier’s network”<sup>2518</sup> that is “at least

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<sup>2511</sup> 47 U.S.C. § 251(a)(1).

<sup>2512</sup> *Interconnection Clarification Order*, 26 FCC Rcd at 8273-74 paras. 26-27.

<sup>2513</sup> See, e.g., PAETEC *USF/ICC Transformation NPRM* Reply at 11, 12 (“Although section 251(a)(1) requires all telecommunications carriers to interconnect, it permits direct or indirect interconnection.”).

<sup>2514</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 15991, para. 997 (finding further that “indirect connection (e.g., two non-incumbent LECs interconnecting with an incumbent LEC’s network) satisfies a telecommunications carrier’s duty to interconnect pursuant to section 251(a)”).

<sup>2515</sup> See, e.g., PAETEC *USF/ICC Transformation NPRM* Reply at 13 (“[S]ection 251(a)(1) lacks the detail and standards necessary to establish the framework for IP-IP interconnection.”).

<sup>2516</sup> 47 U.S.C. § 251(c)(2).

<sup>2517</sup> 47 U.S.C. § 251(c)(2)(A).

<sup>2518</sup> 47 U.S.C. § 251(c)(2)(B).

equal in quality to that provided by the [incumbent LEC] to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection.”<sup>2519</sup> Finally, incumbent LECs must provide interconnection under section 251(c)(2) “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.”<sup>2520</sup> We seek comment on whether the Commission should set a policy framework for IP-to-IP interconnection under section 251(c)(2), including on the specific issues below.

1386. We seek comment on the scope of an “incumbent local exchange carrier” for purposes of section 251(c)(2).<sup>2521</sup> The Commission has recognized that an entity that meets the definition of “incumbent local exchange carrier” in section 251(h) is treated as an incumbent LEC for purposes of the obligations imposed by section 251 even if it also provides services other than pure “telephone exchange service” and “exchange access.”<sup>2522</sup> Thus, under the statute, an incumbent LEC retains its status as an incumbent LEC<sup>2523</sup> as long as it remains a “local exchange carrier.”<sup>2524</sup>

1387. To the extent that, at some point in the future, an entity that historically was classified as an incumbent LEC ceased offering circuit-switched voice telephone service,<sup>2525</sup> and instead offered only VoIP service, we seek comment on whether that entity would remain a “local exchange carrier” (to the extent that it did not otherwise offer services that were “telephone exchange service” or “exchange access”).<sup>2526</sup> We note that the Commission has not broadly determined whether VoIP services are

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<sup>2519</sup> 47 U.S.C. § 251(c)(2)(C).

<sup>2520</sup> 47 U.S.C. § 251(c)(2)(D).

<sup>2521</sup> 47 U.S.C. § 251(c)(2).

<sup>2522</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, Order on Remand, 15 FCC Rcd 385, 388-91, paras. 7-14 (1999), *aff’d in pertinent part WorldCom v. FCC.*, 246 F.3d 690 (D.C. Cir. 2001).

<sup>2523</sup> It is nonetheless possible that an incumbent LEC’s marketplace status could change such that forbearance from certain incumbent LEC regulations might be warranted. *See, e.g., Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Resale, Unbundling and Other Incumbent Local Exchange Requirements Contained in Sections 251 and 271 of the Telecommunications Act of 1996 in the Terry, Montana Exchange*, WC Docket No. 07-9, Memorandum Opinion and Order, 23 FCC Rcd 7257 (2008).

<sup>2524</sup> The definition of “incumbent local exchange carrier” in section 251(h) requires that the entity be a “local exchange carrier.” 47 U.S.C. § 251(h)(1) (“For purposes of this section, the term ‘incumbent local exchange carrier’ means, with respect to an area, *the local exchange carrier* that” meets certain criteria) (emphasis added). *See also* 47 U.S.C. § 251(h)(2) (allowing the treatment of other local exchange carriers as incumbent LECs if certain conditions are met); *WorldCom v. FCC*, 246 F.3d at 694 (citing the Commission’s brief and statements at oral argument “acknowledging that a carrier must still be a ‘live LEC’ to be an incumbent LEC”). A “local exchange carrier” is defined as “any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of this title, except to the extent that the Commission finds that such service should be included in the definition of such term.” 47 U.S.C. § 153(26).

<sup>2525</sup> We note that an existing incumbent LEC’s ability to discontinue such services would be contingent upon Commission approval based on, among other things, a “[s]tatement of the factors showing that neither present nor future public convenience and necessity would be adversely affected by the granting of the application.” 47 C.F.R. § 63.505(i).

<sup>2526</sup> The provider might continue to offer special access services, for example, and thus remain a local exchange carrier (and thus an incumbent LEC) on that basis. *See, e.g., Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14860-61, para. 9 & n.15 (2005) (*Wireline Broadband Order*) (noting various high capacity access services, including Frame Relay and ATM, being offered on a common carrier basis).

“telecommunications services” or “information services,” or whether such VoIP services constitute “telephone exchange service” or “exchange access.” To what extent would the Commission need to classify VoIP services as “telecommunications services” or “information services” to resolve whether the provider remained a LEC?<sup>2527</sup> Under the reasoning of prior Commission decisions, we do not believe that a retail service must be classified as a “telecommunications service” for the provider carrying that traffic (whether the provider of the retail service or a third party) to be offering “telephone exchange service” or “exchange access.”<sup>2528</sup> With specific respect to VoIP, we note that some providers contend that the classification of their retail VoIP service is irrelevant to determining whether “telephone exchange service” and/or “exchange access” is being provided as an input to that service.<sup>2529</sup> We seek comment on these issues.

1388. In addition, the record reveals that today, some incumbent LECs are offering IP services through affiliates. Some commenters contend that incumbent LECs are doing so simply in an effort to evade the application of incumbent LEC-specific legal requirements on those facilities and services,<sup>2530</sup> and we would be concerned if that were the case. We note that the D.C. Circuit has held that “the Commission may not permit an ILEC to avoid § 251(c) obligations as applied to advanced services by setting up a wholly owned affiliate to offer those services.”<sup>2531</sup> In reaching that conclusion, the court relied on the fact that the affiliate at issue was providing “services with equipment originally owned by its ILEC parent, to customers previously served by its ILEC parent, marketed under the name of its ILEC parent.”<sup>2532</sup> That holding remains applicable here, but we also seek comment more broadly on when an

<sup>2527</sup> Some commenters suggest that the Commission classified exchange access as a telecommunications service in the *Time Warner Cable Order* and/or *Universal Service First Report and Order*. See Cablevision-Charter Section XV Comments at 8 n.10 (citing *Time Warner Cable Order*, 22 FCC Rcd at 3517-19, paras. 9-12; *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9177-78, para. 785 (1997) (*Universal Service First Report and Order*)). Although those decisions recognize that exchange access can be offered on a common carrier basis, they do not address the question whether a service must be offered on a common carrier basis to constitute “exchange access.”

<sup>2528</sup> See, e.g., *ESP Exemption Order*, 3 FCC Rcd at 2631, 2635, para. 2 n.8; *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, 13 FCC Rcd 22466, 22469-70, para. 7 (1998) (*GTE DSL Order*). See also *supra* Section XIV.C.1.

<sup>2529</sup> See, e.g., Cablevision-Charter Section XV Comments at 8-9 & n.14; Time Warner Cable Section XV Comments at 6-7; Bright House Section XV Reply at 3-4 n.6 See also, e.g., COMPTTEL Aug. 11, 2011 *Ex Parte* Letter, Attach. at 4 (“the continuing need for a regulatory backstop to negotiations for *wholesale* voice traffic exchange has no bearing on whether or how *retail* voice services offered to end users are regulated”) (emphasis in original).

<sup>2530</sup> See, e.g., COMPTTEL *USF/ICC Transformation NPRM* Comments at 7 (“In an apparent effort to shield their IP networks and SIP termination services from negotiated or arbitrated interconnection agreements with other carriers, AT&T, Verizon and CenturyLink/Qwest offer their Internet/IP services through various affiliates (AT&T Internet Services, Verizon Business, Qwest Long Distance) rather than through their regulated local exchange carrier operating companies that provide service predominantly over the public switched telephone network (‘PSTN’).”); PAETEC, *et al.* *USF/ICC Transformation NPRM* Reply at 4 (“AT&T has deployed soft switches in its unregulated affiliates, instead of its ILECs, and used this corporate shell game in an attempt to avoid any obligation to offer IP interconnection to requesting carriers.”). See also Amicus Brief of tw telecom of texas *et al.*, PUC Docket No. 26381 at 3-5 in Letter from Mary C. Albert, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, WC Docket No. 10-143 (filed Nov. 1, 2010) (COMPTTEL Nov. 1, 2010 *Ex Parte* Letter).

<sup>2531</sup> *Ass’n of Commc’ns Enterprises v. FCC*, 235 F.3d 662, 668 (D.C. Cir. 2001), *amended by Ass’n of Commc’ns Enterprises v. FCC* (D.C. Cir. Jan. 18, 2001) (*ASCENT*).

<sup>2532</sup> *Id.* In the *ASCENT* decision, the D.C. Circuit concluded that the Commission’s interpretation of the Act, in seeking to allow SBC to avoid section 251(c) obligations through the use of an affiliate, was unreasonable “[w]hether one concludes that the Commission has actually forborne” from obligations imposed on the incumbent (continued...)



affiliate should be treated as an incumbent LEC under circumstances beyond those squarely addressed in that decision. What factors or considerations should be weighed in making that evaluation?

Alternatively, to what extent would those same, or similar, considerations be necessary to a finding that the affiliate is a “successor or assign” of the incumbent LEC within the meaning of section 251(h)(1)?<sup>2533</sup> Could the affiliate be a “successor or assign” if it satisfies only a subset of those considerations or different considerations? As another alternative, even if an affiliate is not a “successor or assign” of the incumbent LEC under section 251(h)(1), would the Commission nevertheless be warranted to treat it as an incumbent LEC under section 251(h)(2)?<sup>2534</sup> To treat the affiliate as an incumbent LEC would require finding that it is a LEC, potentially implicating many of the same issues raised above regarding the classification of a retail VoIP provider or its carrier partner as a LEC.<sup>2535</sup> Would such affiliates be classified as LECs under the considerations raised above or based on other factors? If an affiliate is treated as an incumbent LEC in its own right under section 251(h)(1) or (h)(2), what are the implications for how section 251(c) applies? For example, if a requesting carrier were entitled to IP-to-IP interconnection with that affiliate under section 251(c)(2), could it use that interconnection arrangement to exchange traffic only with the customers of the affiliate, or could it use that arrangement to exchange traffic with the original incumbent LEC?

1389. Section 251(c)(2)(A) requires that interconnection obtained under 251(c)(2) be “for the transmission and routing of telephone exchange service and exchange access.”<sup>2536</sup> We seek comment on whether traffic exchanged via IP-to-IP interconnection would meet those criteria. We note in this regard that some providers of facilities-based retail VoIP services state that they are providing those services on a common carrier basis,<sup>2537</sup> and expect that those services would include the provision of “telephone exchange service” and/or “exchange access” to the same extent as comparable services provided using TDM or other transmission protocols. Other providers of retail VoIP services assert that, regardless of the classification of the retail VoIP service, their carrier partners are providing “telephone exchange service” (Continued from previous page) \_\_\_\_\_

LEC (suggesting that the affiliate potentially could, in some sense, be viewed as part of the incumbent LEC, “or whether [the Commission’s] interpretation of ‘successor or assign’ is unreasonable.” *Id.* We seek comment on each of these scenarios (among others) below.

<sup>2533</sup> See, e.g., Letter from Howard J. Symons, counsel for Cablevision, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket No. 01-92, 96-45, GN Docket No. 09-51, at 3-5 (filed Oct. 20, 2011) (Cablevision Oct. 20, 2011 *Ex Parte* Letter) (discussing the “successor or assign” analysis under Commission and court precedent).

<sup>2534</sup> 47 U.S.C. § 251(h)(2) provides that “The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.”

<sup>2535</sup> See *supra* para. 1386.

<sup>2536</sup> 47 U.S.C. § 251(c)(2)(A).

<sup>2537</sup> See, e.g., Petition for Declaratory Ruling That tw telecom inc. Has the Right to Direct IP-to-IP Interconnection Pursuant to Section 251(c)(2) of the Communications Act, as Amended, for the Transmission and Routing of tw telecom’s Facilities-Based VoIP Services and IP-in-the-Middle Voice Services, WC Docket No. 11-119 (filed June 30, 2011).

and/or “exchange access.”<sup>2538</sup> Although the record reveals that these carriers typically provide these services at least in part in TDM today,<sup>2539</sup> we do not believe that their regulatory status should change if they simply performed the same or comparable functions using a different protocol, such as IP. We seek comment on these views, as well as on the need to address this question given our holdings that carriers that otherwise have section 251(c)(2) interconnection arrangements for the exchange of telephone exchange service and/or exchange access traffic are free to use those arrangements to exchange other traffic—including toll traffic and/or information services traffic—with the incumbent LEC, as well.<sup>2540</sup>

1390. In the *Local Competition First Report and Order*, the Commission held “that an IXC that requests interconnection solely for the purpose of originating or terminating its interexchange traffic, not for the provision of telephone exchange service and exchange access to others” is not entitled to interconnection under the language of section 251(c)(2)(A) because the IXC “is not seeking interconnection for the purpose of providing telephone exchange service,” nor is it “offering access, but rather is only obtaining access for its own traffic.”<sup>2541</sup> By contrast, some commenters assert that, in applying section 251(c)(2)(A), it is sufficient for the incumbent LEC to be providing “telephone exchange service” or “exchange access,” regardless of whether the requesting carrier is doing so.<sup>2542</sup> We seek comment on this view. Under this interpretation, are there any circumstances when a requesting carrier would not be entitled to interconnection under section 251(c)(2) because the incumbent LEC is not providing telephone exchange service or exchange access? For example, might Congress have anticipated that incumbent LECs eventually would offer interexchange services on an integrated basis?<sup>2543</sup> To what extent was the Commission’s prior interpretation the *Local Competition First Report and Order* motivated by commenters’ concerns that an alternative outcome would permit IXCs to evade the pre-1996 Act exchange access rules, including the payment of access charges, which were preserved under section 251(g)?<sup>2544</sup> Would those concerns be mitigated insofar as the Commission is superseding the pre-existing access charge regime in the Order above? Are there other reasons why the new interpretation of section 251(c)(2)(A) is warranted?

1391. Section 251(c)(2)(B) requires interconnection at any “technically feasible point within the carrier’s network.”<sup>2545</sup> We observe that IP-to-IP interconnection arrangements exist in the marketplace today, and seek comment on whether they demonstrate that IP-to-IP interconnection is

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<sup>2538</sup> See, e.g., Time Warner Cable Section XV Comments at 7; Cablevision-Charter Section XV Reply at 12; ; Bright House Section XV Reply at 3-4 n.6.

<sup>2539</sup> See, e.g., Cablevision-Charter Section XV Comments at 4; Cbeyond *et al.* Section XV Comments at 12 n.35; TCA Section XV Comments at 2.

<sup>2540</sup> See *supra* Section XIV.C.2.d(i). As described above with respect to the broader use of section 251(c)(2) interconnection arrangements, it will be necessary for the interconnection agreement to specifically address such usage to, for example, address the associated compensation. See *supra id.*

<sup>2541</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 15598-99, para. 191.

<sup>2542</sup> See, e.g., Cablevision Oct. 20, 2011 *Ex Parte* Letter at 6-7.

<sup>2543</sup> See, e.g., 47 U.S.C. § 272(f)(1) (providing for the sunset of, among other things, separate affiliate requirements for the BOCs’ provision of in-region interLATA telecommunications services).

<sup>2544</sup> See, e.g., *Local Competition First Report and Order*, 11 FCC Rcd at 15595-96, para. 188 & n.385 (summarizing commenters expressing concern that permitting the use of section 251(c)(2) interconnection purely for the provision of interexchange service would allow evasion of the access charge regime, which was preserved under section 251(g)). But see *id.* at 15598-99, para. 191 (interpreting section 251(c)(2)(A) without expressly referencing those concerns).

<sup>2545</sup> 47 U.S.C. § 251(c)(2)(B).

technically feasible at particular points within a carrier's network.<sup>2546</sup> To what extent does the requirement that incumbent LECs modify their "facilities to the extent necessary to accommodate interconnection or access to network elements"<sup>2547</sup> inform the evaluation whether IP-to-IP interconnection is technically feasible at particular points in the network?

1392. Section 251(c)(2)(C) requires that the interconnection provided by an incumbent LEC be "at least equal in quality to that provided by the [incumbent LEC] to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection."<sup>2548</sup> To what extent are incumbent LECs interconnecting on an IP-to-IP basis with a "subsidiary, affiliate, or any other party" today, and at what quality? The Commission previously has interpreted this language to "require[] incumbent LECs to design interconnection facilities to meet the same technical criteria and service standards, such as probability of blocking in peak hours and transmission standards, that are used within their own networks."<sup>2549</sup> Consistent with this interpretation, to what extent must an incumbent LEC be using IP transmission in its own network before it could be required to provide IP-to-IP interconnection pursuant to this language, and to what extent is that occurring today?<sup>2550</sup> If the incumbent LEC is not otherwise interconnecting on an IP-to-IP basis with a "subsidiary, affiliate, or any other party," could the Commission require it to provide IP-to-IP interconnection as long as the other criteria of section 251(c)(2) are met? Should such interconnection be understood to be equal in quality to what the incumbent LEC provides others—albeit in a different protocol<sup>2551</sup>—or should it be understood to be requiring a "superior network"?<sup>2552</sup>

<sup>2546</sup> See, e.g., Neutral Tandem *USF/ICC Transformation NPRM* Comments at 1-2; PAETEC *August 3 PN* Comments at 22-24. See also COMPTTEL Aug. 11, 2011 *Ex Parte* Letter, Attach. at 11-12 ("In comparing networks [for evaluating technical feasibility], the substantial similarity of network facilities may evidenced, for example, by their adherence to the same interface or protocol standards.") (quoting *Local Competition First Report and Order*, 11 FCC Rcd at 15606, para. 204 (emphasis added)). Under Commission rules, the burden is on the "incumbent LEC that denies a request for a particular method of interconnection . . . [to] prove to the state commission that the requested method of interconnection . . . is not technically feasible." 47 C.F.R. § 51.323(d). Nonetheless, the Commission previously has elected to clarify certain methods of interconnection as technically feasible, and also to identify other categories as presumptively technically feasible. 47 C.F.R. §§ 51.323(b), (c).

<sup>2547</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 15602, para. 198. As the Commission further concluded, "the 1996 Act bars consideration of costs in determining 'technically feasible' points of interconnection or access," although "a requesting carrier that wishes a 'technically feasible' but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit." *Id.* at 15603, para. 199. But see, e.g., COMPTTEL Aug. 11, 2011 *Ex Parte* Letter, Attach. at 7 n.13 ("Obviously, this paper does not suggest that an incumbent should be required to deploy a Managed Packet transport network to accommodate competitive entrants where it has not done so.").

<sup>2548</sup> 47 U.S.C. § 251(c)(2)(C).

<sup>2549</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 15614-15, para. 224.

<sup>2550</sup> See, e.g., COMPTTEL Aug. 11, 2011 *Ex Parte* Letter, Attach. at 1 (contending that incumbent LECs "are actively deploying Managed Packet transport networks themselves").

<sup>2551</sup> In the *Non-Accounting Safeguards Order*, the Commission distinguished the requirements of section 272(c)(1) from those in section 251(c)(2) because the "equal in quality" language in section 251(c)(2) permitted "requesting entities [to] require [an incumbent LEC] to provide goods, facilities, services, or information that are different from those that the [incumbent LEC] provides to itself or to its affiliates." *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act Of 1934, As Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22001, paras. 203-04 (1998) *remanded Bell Atlantic Telephone Companies v. FCC*, 1997 WL 307161 (D.C. Cir. Mar 31, 1997). But see, e.g., *Verizon MD, DC, WV Section 271 Order*, 18 FCC Rcd 5212 at 5275-76, para. 107 (2003) (holding that Verizon's failure to pass ANI through MF signaling did not violate the "equal in quality" requirement because, "[a]lthough (continued...)").

1393. Section 251(c)(2)(D) requires that incumbent LECs provide interconnection “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.”<sup>2553</sup> In the *Local Competition First Report and Order*, the Commission found that “minimum national standards for just, reasonable, and nondiscriminatory terms and conditions of interconnection will be in the public interest and will provide guidance to the parties and the states in the arbitration process and thereafter.”<sup>2554</sup> If the Commission concludes that IP-to-IP interconnection is required under section 251(c)(2), should it follow a similar approach and adopt minimum national standards? If so, what should those standards be? If not, what standards would be used to resolve arbitrations regarding the implementation of section 251(c)(2)?

1394. *Sections 201 and 332.* Historically, the Commission has imposed interconnection obligations pursuant to section 201 of the Act.<sup>2555</sup> Section 201 applies to interstate services, as well as to interconnection involving CMRS providers under section 332(c)(1)(B).<sup>2556</sup> Do sections 201 (and 332 in the case of CMRS providers) provide the Commission authority to mandate IP-to-IP interconnection, including for intrastate traffic either alone, or in conjunction with other provisions of the Act and the Clayton Act?<sup>2557</sup> If so, what standards or requirements would be appropriate, and how would those obligations be implemented? How should any IP-to-IP interconnection requirements regarding the exchange of access traffic be reconciled with the historical regulatory framework governing the exchange of such traffic with LECs, as well as with the Commission’s action in the accompanying Order to supersede the preexisting access charge regime and adopt a transition to a new regulatory framework for intercarrier compensation for access traffic?

1395. *Section 706 of the 1996 Act.* Some commenters suggest that section 706 would provide the Commission authority to regulate IP-to-IP interconnection.<sup>2558</sup> We seek comment on the relationship between the Commission’s statutory mandate in section 706 and regulation of IP-to-IP interconnection. If section 706 provides Commission authority to regulate IP-to-IP interconnection, what standards or requirements would be appropriate, and how would those obligations be implemented? If the Commission were to rely on section 706 of the 1996 Act to require IP-to-IP interconnection, would it also need to adopt associated complaint procedures, or could the existing informal and formal complaint processes, which derive from section 208, nonetheless be interpreted to extend more broadly than alleged violations of Title II duties?

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Verizon does pass the ANI to interexchange carriers for long distance calls, it does not pass the ANI to any carriers for *local calls*.”).

<sup>2552</sup> See, e.g., *Iowa Utilities Board v. FCC*, 219 F.3d 744, 757-58 (2000) (“Subsection 251(c)(2)(C) requires the ILECs to provide interconnection ‘that is at least equal in quality to that provided by the local exchange carrier to itself....’ Nothing in the statute requires the ILECs to provide superior quality interconnection to its competitors.”).

<sup>2553</sup> 47 U.S.C. § 251(c)(2)(D).

<sup>2554</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 15611, para. 216.

<sup>2555</sup> See, e.g., *Eighth Report and Order*, 19 FCC Rcd at 9137-38, paras. 60-61; 47 U.S.C. § 201(a).

<sup>2556</sup> See, e.g., *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1497-98, para. 230 (1994) (CMRS *Second Report and Order*); 47 U.S.C. § 332(c)(1)(B).

<sup>2557</sup> See *supra* para. 1352.

<sup>2558</sup> See, e.g., *Sprint USF/ICC Transformation NPRM Reply*, App. D at 9-12; COMPTel Aug. 11, 2011 *Ex Parte* Letter, Attach. at 13.

1396. *Section 256.* There also is some record support for imposing IP-to-IP interconnection requirements under section 256 of the Act.<sup>2559</sup> Section 256(a)(2) says that the purpose of the section is “to ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks.”<sup>2560</sup> Do commenters agree that section 256 authorizes Commission regulation of IP-to-IP interconnection? In particular, to what extent could section 256 provide a source of authority for such regulation given the statement in section 256(c) that “[n]othing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before February 8, 1996”?<sup>2561</sup> Even if it is not a direct source of authority in that regard, should it inform the Commission’s interpretation and application of other statutory provisions to require IP-to-IP interconnection?

1397. *Title I Authority over IP-to-IP Interconnection.* Does the Commission have ancillary authority to regulate IP-to-IP interconnection? For example, Sprint notes that the Commission has subject matter jurisdiction over traffic such as packetized voice traffic,<sup>2562</sup> and asserts that regulation of IP-to-IP interconnection is reasonably ancillary to the Commission’s authority under the Act.<sup>2563</sup> Sprint also asserts that its IP-to-IP interconnection proposals for the exchange of packetized voice traffic “are incidental to, and would affirmatively promote, specifically delegated powers under §§ 251-52” regarding network interconnection, intercarrier compensation, and dispute resolution.<sup>2564</sup> Sprint further argues that its proposed rules would advance other statutory policies regarding the promotion of competition, and the promotion of communications services, including advanced telecommunications services and the Internet, among other things.<sup>2565</sup> Thus, Sprint contends that “[even] if packetized voice services are . . . classified as information services, the Commission still possesses the authority to adopt these rule proposals under its Title I ‘ancillary’ authority.”<sup>2566</sup> We seek comment on Sprint’s analysis and other evaluations of whether the Commission has ancillary authority to regulate IP-to-IP interconnection in particular ways.<sup>2567</sup>

1398. *Other Sources of Authority.* We also seek comment on any other sources of Commission authority for adopting a policy framework for IP-to-IP interconnection. What is the scope and substance of the Commission’s authority to address IP-to-IP interconnection under that authority?

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<sup>2559</sup> See Google June 16, 2011 *Ex Parte* Letter at 2-3.

<sup>2560</sup> 47 U.S.C. § 256(a)(2).

<sup>2561</sup> 47 U.S.C. § 256(c); see also *Comcast*, 600 F.3d at 659 (acknowledging section 256’s objective, while adding that section 256 does not “‘expand[] . . . any authority that the Commission’ otherwise has under law”) (quoting 47 U.S.C. § 256(c)).

<sup>2562</sup> Sprint *USF/ICC Transformation NPRM* Reply, App. D at 3-4.

<sup>2563</sup> Sprint *USF/ICC Transformation NPRM* Reply, App. D at 4-9. See also, e.g., T-Mobile *USF/ICC Transformation NPRM* Comments at 21-22 (arguing that the Commission has ancillary authority to regulate IP-to-IP interconnection).

<sup>2564</sup> Sprint *USF/ICC Transformation NPRM* Reply, App. D at 5-7.

<sup>2565</sup> Sprint *USF/ICC Transformation NPRM* Reply, App. D at 7-9.

<sup>2566</sup> Sprint *USF/ICC Transformation NPRM* Reply, App. D at 1.

<sup>2567</sup> See, e.g., AT&T *USF/ICC Transformation NPRM* Reply at 20-21 (arguing that the Commission could not rely on ancillary authority to regulate IP-to-IP interconnection).

**Q. Further Call Signaling Rules for VoIP**

1399. In the Order accompanying this FNPRM, we adopt revised call signaling rules to address intercarrier compensation arbitrage practices that led to unbillable or “phantom” traffic. These rules apply to providers of interconnected VoIP service as that term is defined in the Commission’s rules.<sup>2568</sup> We also adopt a framework of intercarrier compensation obligations that applies to all VoIP-PSTN traffic, which is defined as “traffic exchanged over PSTN facilities that originates and/or terminates in IP format”<sup>2569</sup> 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 (referred to herein as “one-way VoIP service”).<sup>2570</sup>

1400. We recognize that the scope of the intercarrier compensation obligations for VoIP providers adopted in the Order is broader than the definition of interconnected VoIP in our rules to which the call signaling obligations will apply. And, as with any instance where similar entities are treated differently under our rules, we are concerned about creating additional arbitrage opportunities. But, we also recognize that there may be technical difficulties associated with applying our revised call signaling rules to one-way VoIP service providers.<sup>2571</sup> The *August 3 Public Notice* sought comment on the application of call signaling rules to one-way VoIP service providers.<sup>2572</sup> There was relatively little comment on this issue, with some commenters suggesting that the Commission should not delay adoption of other intercarrier compensation reforms pending resolution of this issue.<sup>2573</sup> Now that the rules applicable to VoIP service providers adopted in the Order provide additional context, we seek comment again on the need for signaling rules for one-way VoIP service providers.<sup>2574</sup>

1401. If call signaling rules apply to one-way VoIP service providers, how could these requirements be implemented? Would one-way VoIP service providers have to obtain and use numbering resources? If call signaling rules were to apply signaling obligations to one-way VoIP service providers, at what point in a call path should the required signaling originate, i.e. at the gateway or elsewhere? Are there alternative approaches for how signaling rules could operate for originating callers that do not have a telephone number? In addition, would signaling rules be needed for all one-way VoIP service providers? Or, given the terminating carrier’s need for the information provided under our signaling rules, is it sufficient to focus only on providers of one-way VoIP service services that allow users to terminate voice calls to the PSTN (but not those that only allow users to receive calls from the PSTN)?

1402. If one-way VoIP service providers were permitted to use a number other than an actual North American Numbering Plan (NANP) telephone number associated with an originating caller in

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<sup>2568</sup> See 47 C.F.R. § 9.3. Interconnected VoIP providers as defined in our rules include, for example, a service similar to the service offered by Vonage, where customers are able to make calls to the PSTN and are able to receive calls from it.

<sup>2569</sup> See *supra* para. 940.

<sup>2570</sup> An example of a one-way interconnected VoIP service is Skype’s “Call Phones or Mobile” service which allows users to make VoIP call from a computer to a PSTN telephone number. See <http://www.skype.com/intl/en-us/features/allfeatures/call-phones-and-mobiles/>.

<sup>2571</sup> See, e.g., Level 3 Section XV Comments at 10-11 (seeking clarification that compliance would not require one-way interconnected VoIP providers to obtain numbering resources).

<sup>2572</sup> See *August 3 Public Notice*, 26 FCC Rcd at 11128-29.

<sup>2573</sup> NECA *et al.* *August 3 PN* Comments at 50-51.

<sup>2574</sup> We initially sought comment on several of these questions in a public notice released August 3, 2001. See generally *August 3 Public Notice*.

required signaling, would such use lead to unintended or undesirable consequences? If so, should other types of carriers or entities also be entitled to use alternate numbering? Would there need to be numbering resources specifically assigned in the context of one-way VoIP services? Are there other signaling issues that we should consider with regard to one-way VoIP calls?

#### **R. New Intercarrier Compensation Rules**

1403. Finally, we seek comment on whether the new rules adopted in the Order may result in any conflicts or inconsistencies.<sup>2575</sup> This could include conflicts or inconsistencies within the newly adopted rules or conflicts or inconsistencies between the new rules and the Commission's existing rules. If commenters believe conflicts or inconsistencies are present, we ask that they identify the specific rule or rules that may be affected, explain the perceived conflict or inconsistency, and propose language to address the conflict or inconsistency. Also, we seek comment on whether the new and revised rules we adopt today reflect all of the modifications to the intercarrier compensation regimes made in the Order. If not, we ask that parties identify in their comments the potential problem areas and propose specific language to address the possible oversight.

### **XVIII. DELEGATION TO REVISE RULES**

1404. Given the complexities associated with modifying existing rules as well as other reforms adopted in this Order, we delegate authority to the Wireline Competition Bureau and Wireless Telecommunications Bureau, as appropriate, to make any further rule revisions as necessary to ensure that the reforms adopted in this Order are properly reflected in the rules. This includes correcting any conflicts between the new or revised rules and existing rules as well as addressing any omissions or oversights. If any such rule changes are warranted, the Wireline Competition Bureau or Wireless Telecommunications Bureau, as appropriate, shall be responsible for such changes. We note that any entity that disagrees with a rule change made on delegated authority will have the opportunity to file an Application for Review by the full Commission.<sup>2576</sup>

### **XIX. SEVERABILITY**

1405. All of the universal service and intercarrier compensation rules that are adopted in this Order are designed to work in unison to ensure the ubiquitous deployment of voice and broadband-capable networks to all Americans. However, each of the separate universal service and intercarrier compensation reforms we undertake in this Order serve a particular function toward the goal of ubiquitous voice and broadband service. Therefore, it is our intent that each of the rules adopted herein shall be severable. If any of the rules is declared invalid or unenforceable for any reason, it is our intent that the remaining rules shall remain in full force and effect.

### **XX. PROCEDURAL MATTERS**

#### **A. Filing Requirements**

1406. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

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<sup>2575</sup> See *infra* Appendix A.

<sup>2576</sup> See 47 U.S.C. § 155(c)(1).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12<sup>th</sup> St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

## B. Paperwork Reduction Act Analysis

1407. The Report and Order contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law No. 104-13. It has been or will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. We note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."<sup>2577</sup> We describe impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the FRFA in Appendix O, *infra*.

1408. The Further Notice of Proposed Rulemaking (FNPRM) contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collection requirements contained in this document, as required by PRA. In addition, pursuant to the Small Business Paperwork Relief Act of 2002,<sup>2578</sup> we seek specific comment on how we might "further reduce

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<sup>2577</sup> *Connect America Fund, Developing a Unified Inter-carrier Compensation*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; GN Docket No. 09-51; CC Docket Nos. 01-92, 96-45; FCC 11-13, Proposed Rule, 76 FR 11632, 11633 (Mar. 2, 2011).

<sup>2578</sup> Pub. L. No. 107-198.



the information collection burden for small business concerns with fewer than 25 employees.”<sup>2579</sup>

### C. Congressional Review Act

1409. The Commission will send a copy of this Report & Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

### D. Final Regulatory Flexibility Analysis

1410. The Regulatory Flexibility Act (RFA)<sup>2580</sup> requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”<sup>2581</sup> Accordingly, we have prepared a Final Regulatory Flexibility Analysis concerning the possible impact of the rule changes contained in the *Report and Order* on small entities. The Final Regulatory Flexibility Analysis is set forth in Appendix O.

### E. Initial Regulatory Flexibility Analysis

1411. As required by the Regulatory Flexibility Act of 1980 (RFA),<sup>2582</sup> the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in the *Further Notice of Proposed Rulemaking*. The analysis is found in Appendix P. We request written public comment on the analysis. Comments must be filed in accordance with the same deadlines as comments filed in response to the FNPRM and must have a separate and distinct heading designating them as responses to the IRFA. The Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this Report and Order and Further Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

## XXI. ORDERING CLAUSES

1412. ACCORDINGLY, IT IS ORDERED, that pursuant to the authority contained in sections 1, 2, 4(i), 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, 403 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151, 152, 154(i), 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, 403, and 1302, and sections 1.1 and 1.1421 of the Commission’s rules, 47 C.F.R. §§ 1.1, 1.421, this Report and Order and Further Notice of Proposed Rulemaking ARE ADOPTED, effective thirty (30) days after publication of the text or summary thereof in the Federal Register, except for those rules and requirements involving Paperwork Reduction Act burdens, which shall become effective immediately upon announcement in the Federal Register of OMB approval. It is our intention in adopting these rules that, if any of the rules that we retain, modify or adopt today, or the application thereof to any person or circumstance, are held to be unlawful, the remaining portions of the rules not deemed unlawful, and the application of such rules to other persons or circumstances, shall remain in effect to the fullest extent permitted by law.

1413. IT IS FURTHER ORDERED, that pursuant to the authority contained in sections 1, 2, 4(i), 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, 403 of the Communications Act of 1934, as

<sup>2579</sup> 44 U.S.C. § 3506(c)(4).

<sup>2580</sup> *See* 5 U.S.C. § 601–612. The RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2581</sup> 5 U.S.C. § 605(b).

<sup>2582</sup> *See* 5 U.S.C. § 603.

amended, and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151, 152, 154(i), 201-206, 214, 218-220, 251, 252, 254, 256 303(r), 332, 403, and 1302, and sections 1.1 and 1.1421 of the Commission's rules, 47 C.F.R. §§ 1.1, 1.421, this *Further Notice of Proposed Rulemaking* IS hereby ADOPTED.

1414. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on Sections XVII.A-K of the *Further Notice of Proposed Rulemaking* on or before January 18, 2012, and reply comments on or before February 17, 2012, and comments on section XVII.L-R of this *Further Notice of Proposed Rulemaking* on or before February 24, 2012, and reply comments on or before March 30, 2012.

1415. IT IS FURTHER ORDERED, that the Petition of All American Telephone Co., Inc., e.Pinnacle Communications, Inc., and ChaseCom Regarding Agreements between Local Exchange Carriers and Service Providers filed on May 20, 2009 is DISMISSED.

1416. IT IS FURTHER ORDERED, that the Petition of AT&T For Interim Declaratory Ruling and Limited Waivers filed on July 17, 2008 is DENIED in part and DISMISSED as moot and WC Docket No. 08-152 is terminated.

1417. IT IS FURTHER ORDERED, that the Petition of Embarq Local Operating Companies for Waiver of Sections 61.3 and 61.44-61.48 of the Commission's Rules, and any Associated Rules Necessary to Permit it to Unify Switched Access Charges Between Interstate and Intrastate Jurisdictions filed on August 1, 2008 is DISMISSED as moot and WC Docket No. 08-160 is terminated.

1418. IT IS FURTHER ORDERED, that the Joint Michigan CLEC Petition for Declaratory Ruling that the State of Michigan's Statute 2009 PA 182 is Preempted Under Sections 253 and 254 of the Communications Act and Motion for Temporary Relief filed on February 12, 2010, is DISMISSED as moot and WC Docket No. 10-45 is terminated.

1419. IT IS FURTHER ORDERED, that the Petition of Global NAPS for Declaratory Ruling and for Preemption of the PA, NH and MD State Commissions filed on March 5, 2010 is GRANTED in part and DENIED in part and WC Docket No. 10-60 is terminated.

1420. IT IS FURTHER ORDERED, that the Petition of Vaya Telecom, Inc. Regarding LEC-to-LEC VoIP Traffic Exchanges filed on August 26, 2011 is GRANTED in part and DENIED in part.

1421. IT IS FURTHER ORDERED, that the Petition of Grande for Declaratory Ruling Regarding Compensation for IP-Originated Calls filed on October 3, 2005 is DENIED and WC Docket No. 05-283 is terminated.

1422. IT IS FURTHER ORDERED, that the Petition for Reconsideration of the American Association of Paging Carriers filed on April 29, 2005 is DENIED.

1423. IT IS FURTHER ORDERED, that the Rural Cellular Association Petition for Clarification or in the Alternative, Petition for Reconsideration, filed on April 29, 2005 is DENIED.

1424. IT IS FURTHER ORDERED, that pursuant to sections 201 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201, 254, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, the Petition for Waiver of Sections 54.309 and 54.313(d)(vi) of the Commission's Rules of Hawaiian Telcom, Inc. filed on December 31, 2007 is DENIED.

1425. IT IS FURTHER ORDERED that pursuant to sections 201 and 254 of the

Communications Act of 1934, as amended, 47 U.S.C. §§ 201, 254, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration of Verizon Wireless filed on May 2, 2011 is DENIED

1426. IT IS FURTHER ORDERED that pursuant to sections 201 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201, 254, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration of Allied Wireless Communications Corp., et al., filed on October 4, 2010 is DENIED.

1427. IT IS FURTHER ORDERED that pursuant to sections 201 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201, 254, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Partial Reconsideration of SouthernLINC Wireless and the Universal Service for America Coalition filed on September 29, 2010 is DENIED.

1428. IT IS FURTHER ORDERED, that Parts 0, 1, 36, 51, 54, 61, 64, and 69 of the Commission's rules, 47 C.F.R. Parts 0, 1, 36, 51, 54, 61, 64 and 69, are AMENDED as set forth in Appendix A, and such rule amendments shall be effective 30 days after the date of publication of the rule amendments in the Federal Register, except to the extent they contain information collections subject to PRA review. The rules that contain information collections subject to PRA review WILL BECOME EFFECTIVE immediately upon announcement in the Federal Register of OMB approval.

1429. IT IS FURTHER ORDERED, that the Commission SHALL SEND a copy of this Report and Order and Further Notice of Proposed Rulemaking to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

1430. IT IS FURTHER ORDERED, that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order and Further Notice of Proposed Rulemaking, including the Final Regulatory Flexibility Analysis and the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**APPENDIX A****Final Rules**

For the reasons discussed in the preamble, the Federal Communications Commission amends 47

CFR parts 0, 1, 20, 36, 51, 54, 61, 64, 69 to read as follows:

**PART 0 – COMMISSION ORGANIZATION**

1. The authority citation for part 0 continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended, 47 U.S.C. 155, 225, unless otherwise noted.

2. Amend § 0.91 by adding paragraph (p) as follows:

**§ 0.91 Functions of the Bureau.**

\* \* \* \* \*

(p) In coordination with the Wireless Telecommunications Bureau, serves as the Commission's principal policy and administrative staff resource with respect to the use of market-based mechanisms, including competitive bidding, to distribute universal service support. Develops, recommends and administers policies, programs, rules and procedures concerning the use of market-based mechanisms, including competitive bidding, to distribute universal service support.

3. Amend § 0.131 by adding paragraph (r) to read as follows:

**§ 0.131 Functions of the Bureau.**

\* \* \* \* \*

(r) In coordination with the Wireline Competition Bureau, serves as the Commission's principal policy and administrative staff resource with respect to the use of market-based mechanisms, including competitive bidding, to distribute universal service support. Develops, recommends and administers policies, programs, rules and procedures concerning the use of market-based mechanisms, including competitive bidding, to distribute universal service support.

**PART 1 – PRACTICE AND PROCEDURE**

4. The authority citation for part 1 continues to read as follows:

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 160, 201, 225, 254, 303, and 309.

5. Add new subpart AA to part 1 to read as follows:

**Subpart AA – Competitive Bidding for Universal Service Support**

**Sec.**

1.21000 Purpose.

1.21001 Participation in Competitive Bidding for Support.

1.21002 Communications Prohibited During the Competitive Bidding Process.

1.21003 Competitive Bidding Process.

1.21004 Winning Bidder's Obligation to Apply for Support.

**§ 1.21000 Purpose.**

This subpart sets forth procedures for competitive bidding to determine the recipients of universal service support pursuant to part 54 and the amount(s) of support that each recipient respectively may receive, subject to post-auction procedures, when the Commission directs that such support shall be determined through competitive bidding.

**§ 1.21001 Participation in Competitive Bidding for Support.**

(a) Public Notice of the Application Process. The dates and procedures for submitting applications to participate in competitive bidding pursuant to this subpart shall be announced by public notice.

(b) Application Contents. An applicant to participate in competitive bidding pursuant to this subpart shall provide the following information in an acceptable form:

- (1) The identity of the applicant, i.e., the party that seeks support, including any required information regarding parties that have an ownership or other interest in the applicant;
- (2) The identities of up to three individuals authorized to make or withdraw a bid on behalf of the applicant;
- (3) The identities of all real parties in interest to any agreements relating to the participation of the applicant in the competitive bidding;
- (4) Certification that the application discloses all real parties in interest to any agreements involving the applicant's participation in the competitive bidding;
- (5) Certification that the applicant and all applicable parties have complied with and will continue to comply with § 1.21002;
- (6) Certification that the applicant is in compliance with all statutory and regulatory requirements for receiving the universal service support that the applicant seeks;
- (7) Certification that the applicant will make any payment that may be required pursuant to § 1.21004;
- (8) Certification that the individual submitting the application is authorized to do so on behalf of the applicant; and
- (9) Such additional information as may be required.

(c) Financial Requirements for Participation. As a prerequisite to participating in competitive bidding, an applicant may be required to post a bond or place funds on deposit with the Commission in an amount based on the default payment that may be required pursuant to § 1.21004. The details of and deadline for posting such a bond or making such a deposit will be announced by public notice. No interest will be paid on any funds placed on deposit.

(d) Application Processing. (1) Any timely submitted application will be reviewed by Commission staff for completeness and compliance with the Commission's rules. No untimely applications shall be reviewed or considered.

(2) An applicant will not be permitted to participate in competitive bidding if the application does not identify the applicant as required by the public notice announcing application procedures or does not include all required certifications, as of the deadline for submitting applications.

(3) An applicant will not be permitted to participate in competitive bidding if the applicant has not provided any bond or deposit of funds required pursuant to § 1.21001(c), as of the applicable deadline.

(4) An applicant may not make major modifications to its application after the deadline for submitting the application. An applicant will not be permitted to participate in competitive bidding if Commission staff determines that the application requires major modifications to be made after that deadline. Major modifications include, but are not limited to, any changes in the ownership of the applicant that constitute an assignment or transfer of control, or any changes in the identity of the applicant, or any changes in the required certifications.

(5) An applicant may be permitted to make minor modifications to its application after the deadline for submitting applications. Minor modifications may be subject to a deadline specified by public notice. Minor modifications include correcting typographical errors and supplying non-material information that was inadvertently omitted or was not available at the time the application was submitted.

(6) After receipt and review of the applications, an applicant that will be permitted participate in competitive bidding shall be identified in a public notice.

#### **§ 1.21002 Prohibition of Certain Communications During the Competitive Bidding Process.**

(a) Definition of Applicant. For purposes of this paragraph, the term "applicant" shall include any applicant, each party capable of controlling the applicant, and each party that may be controlled by the applicant or by a party capable of controlling the applicant.

(b) Certain Communications Prohibited. After the deadline for submitting applications to participate, an applicant is prohibited from cooperating or collaborating with any other applicant with respect to its own, or one another's, or any other competing applicant's bids or bidding strategies, and is prohibited from communicating with any other applicant in any manner the substance of its own, or one another's, or any other competing applicant's bids or bidding strategies, until after the post-auction deadline for winning bidders to submit applications for support, unless such applicants are members of a joint bidding arrangement identified on the application pursuant to § 1.21001(b)(4).

(c) Duty To Report Potentially Prohibited Communications. An applicant that makes or receives communications that may be prohibited pursuant to this paragraph shall report such communications to

the Commission staff immediately, and in any case no later than 5 business days after the communication occurs. An applicant's obligation to make such a report continues until the report has been made.

(d) Procedures for Reporting Potentially Prohibited Communications. Particular procedures for parties to report communications that may be prohibited under this rule may be established by public notice. If no such procedures are established by public notice, the party making the report shall do so in writing to the Chief of the Auctions and Spectrum Access Division by the most expeditious means available, including electronic transmission such as email.

**§ 1.21003 Competitive Bidding Process.**

(a) Public Notice of Competitive Bidding Procedures. Detailed competitive bidding procedures shall be established by public notice prior to the commencement of competitive bidding any time competitive bidding is conducted pursuant to this subpart.

(b) Competitive Bidding Procedures. The public notice detailing competitive bidding procedures may establish any of the following:

- (1) Limits on the public availability of information regarding applicants, applications, and bids during a period of time covering the competitive bidding process, as well as procedures for parties to report the receipt of such non-public information during such periods;
- (2) The way in which support may be made available for multiple identified areas by competitive bidding, *e.g.*, simultaneously or sequentially, and if the latter, in what grouping, if any, and order;
- (3) The acceptable form for bids, including whether and how bids will be accepted on individual items and/or for combinations or packages of items;
- (4) Reserve prices, either for discrete items or combinations or packages of items, as well as whether the reserve prices will be public or non-public during the competitive bidding process;
- (5) The methods and times for submission of bids, whether remotely, by telephonic or electronic transmission, or in person;
- (6) The number of rounds during which bids may be submitted, *e.g.*, one or more, and procedures for ending the bidding;
- (7) Measurements of bidding activity in the aggregate or by individual applicants, together with requirements for minimum levels of bidding activity;
- (8) Acceptable bid amounts at the opening of and over the course of bidding;
- (9) Consistent with the public interest objectives of the competitive bidding, the process for reviewing bids and determining the winning bidders and the amount(s) of universal service support that each winning bidder may apply for, pursuant to applicable post-auction procedures;
- (10) Procedures, if any, by which bidders may withdraw bids; and
- (11) Procedures by which bidding may be delayed, suspended, or canceled before or after bidding begins for any reason that affects the fair and efficient conduct of the bidding, including natural disasters, technical failures, administrative necessity, or any other reason.

(c) Apportioning Package Bids. If the public notice establishing detailed competitive bidding procedures adopts procedures for bidding for support on combinations or packages of geographic areas, the public notice also shall establish a methodology for apportioning such bids among the geographic areas within the combination or package for purposes of implementing any Commission rule or procedure that that requires a discrete bid for support in relation to a specific geographic area.

(d) Public Notice of Competitive Bidding Results. After the conclusion of competitive bidding, a public notice shall identify the winning bidders that may apply for the offered universal service support and the amount(s) of support for which they may apply, and shall detail the application procedures.

#### **§ 1.21004 Winning Bidder's Obligation To Apply for Support**

(a) Timely and Sufficient Application. A winning bidder has a binding obligation to apply for support by the applicable deadline. A winning bidder that fails to file an application by the applicable deadline or that for any reason is not subsequently authorized to receive support has defaulted on its bid.

(b) Liability for Default Payment. A winning bidder that defaults is liable for a default payment, which will be calculated by a method that will be established as provided in a public notice prior to competitive bidding. If the default payment is determined as a percentage of the defaulted bid amount, the default payment will not exceed twenty percent of the amount of the defaulted bid amount.

(c) Additional Liabilities. A winning bidder that defaults, in addition to being liable for a default payment, shall be subject to such measures as the Commission may provide, including but not limited to disqualification from future competitive bidding pursuant to this subpart AA, competitive bidding for universal service support.

#### **PART 20-Commercial Mobile Radio Services**

6. The authority citation for Part 20 continues to read as follows:

Authority: 47 U.S.C. 154, 160, 201, 251–254, 301, 303, 316, and 332 unless otherwise noted. Section 20.12 is also issued under 47 U.S.C. 1302.

7. Section 20.11 is amended by revising paragraph (b) to read as follows:

§20.11 Interconnection to facilities of local exchange carriers.

\* \* \* \* \*

(b) Local exchange carriers and commercial mobile radio service providers shall exchange Non-Access Telecommunications Traffic, as defined in § 51.701 of this chapter, under a bill-and-keep arrangement, as defined in § 51.713 of this chapter, unless they mutually agree otherwise.

\* \* \* \* \*

#### **PART 36—JURISDICTIONAL SEPARATIONS PROCEDURES; STANDARD PROCEDURES FOR SEPARATING TELECOMMUNICATIONS PROPERTY COSTS, REVENUES, EXPENSES, TAXES AND RESERVES FOR TELECOMMUNICATIONS COMPANIES**

8. The authority citation for part 36 is revised to read as follows:



Authority: 47 U.S.C. 151, 154(i) and (j), 205, 221(c), 254, 303(r), 403, 410, and 1302 unless otherwise noted.

### **Subpart A—General**

9. Add § 36.4 to subpart A to read as follows:

#### **§ 36.4 Streamlining procedures for processing petitions for waiver of study area boundaries.**

Effective January 1, 2012, local exchange carriers seeking a change in study area boundaries shall be subject to the following procedure:

(a) Public Notice and Review Period. Upon determination by the Wireline Competition Bureau that a petitioner has filed a complete petition for study area waiver and that the petition is appropriate for streamlined treatment, the Wireline Competition Bureau will issue a public notice seeking comment on the petition. Unless otherwise notified by the Wireline Competition Bureau, the petitioner is permitted to alter its study area boundaries on the 60th day after the reply comment due date, but only in accordance with the boundary changes proposed in its application.

(b) Comment Cycle. Comments on petitions for waiver may be filed during the first 30 days following public notice, and reply comments may be filed during the first 45 days following public notice, unless the public notice specifies a different pleading cycle. All comments on petitions for waiver shall be filed electronically, and shall satisfy such other filing requirements as may be specified in the public notice.

10. Revise subpart F heading to read as follows:

### **Subpart F—High-Cost Loop Support**

11. Amend § 36.601 by adding the following two sentences at the end of paragraph (a) and removing paragraph (c) to read as follows:

#### **§ 36.601 General**

(a) \*\*\*Effective January 1, 2012, this subpart will only apply to incumbent local exchange carriers that are rate-of-return carriers not affiliated, as “affiliated companies” are defined in § 32.9000 of this chapter, with price cap local exchange carriers. Rate-of-return carriers and price cap local exchange carriers are defined pursuant to § 54.5 and § 61.3(aa) of this chapter, respectively.

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#### **§ 36.602 [Removed]**

12. Section 36.602 is removed.

13. Section 36.603 is amended by revising the section heading, and paragraph (a) to read as follows:

#### **§ 36.603 Calculation of incumbent local exchange carrier portion of nationwide loop cost expense adjustment for rate-of-return carriers.**

(a) Beginning January 1, 2003, the annual amount of the rural incumbent local exchange carrier portion of the nationwide loop cost expense adjustment calculated pursuant to this subpart F shall not exceed the amount of the total rural incumbent local exchange carrier loop cost expense adjustment for the

immediately preceding calendar year, multiplied times one plus the Rural Growth Factor calculated pursuant to §36.604. Beginning January 1, 2012, the total annual amount of the incumbent local exchange carrier portion of the nationwide loop cost expense adjustment shall not exceed the expense adjustment calculated for rate-of-return regulated carriers pursuant to this paragraph. Beginning January 1, 2012, rate-of-return local exchange carriers shall not include rate-of-return carriers affiliated with price cap local exchange carriers as set forth in § 36.601(a) of this subpart. Beginning January 1, 2013, and each calendar year thereafter, the total annual amount of the incumbent local exchange carrier portion of the nationwide loop cost expense adjustment shall not exceed the amount for the immediately preceding calendar year, multiplied times one plus the Rural Growth Factor calculated pursuant to § 36.604.

\*\*\*\*\*

14. Revise § 36.604 to read as follows:

**§ 36.604 Calculation of the rural growth factor.**

(a) Until July 30, 2012, the Rural Growth Factor (RGF) is equal to the sum of the annual percentage change in the United States Department of Commerce's Gross Domestic Product—Chained Price Index (GPD-CPI) plus the percentage change in the total number of rural incumbent local exchange carrier working loops during the calendar year preceding the July 31st filing submitted pursuant to § 36.611. The percentage change in total rural incumbent local exchange carrier working loops shall be based upon the difference between the total number of rural incumbent local exchange carrier working loops on December 31 of the calendar year preceding the July 31st filing and the total number of rural incumbent local exchange carrier working loops on December 31 of the second calendar year preceding that filing, both determined by the company's submissions pursuant to §36.611. Loops acquired by rural incumbent local exchange carriers shall not be included in the RGF calculation.

(b) Effective July 31, 2012, pursuant to §36.601(a) of this subpart, the calculation of the Rural Growth Factor shall not include price cap carrier working loops and rate-of-return local exchange carrier working loops of companies that were affiliated with price cap carriers during the calendar year preceding the July 31<sup>st</sup> filing submitted pursuant to § 36.611.

15. Amend §36.605 by revising paragraphs (a), (b) and (c) and (c)(1) as follows:

**§ 36.605 Calculation of safety net additive.**

(a) "Safety net additive support." Beginning January 1, 2012, only those local exchange carriers that qualified in 2010 or earlier, based on 2009 or prior year costs, shall be eligible to receive safety net additive pursuant to paragraph (c) of this section. Local exchange carriers shall not receive safety net additive for growth of Telecommunications Plant in Service in 2011, as compared to 2010. A local exchange carrier qualifying for safety net additive shall no longer receive safety net additive after January 1, 2012 unless the carrier's realized total growth in Telecommunications Plant in Service was more than 14 percent during the qualifying period, defined as 2010 or earlier, pursuant to paragraph (c) of this section. A local exchange carrier qualifying for safety net additive that fails to meet the requirements set forth in the preceding sentence will receive 50 percent of the safety net additive that it otherwise would have received pursuant to this rule in 2012 and will cease to receive safety net additive in 2013 and thereafter.

(b) Calculation of safety net additive support for companies that qualified prior to 2011: Safety net additive support is equal to the amount of capped support calculated pursuant to this subpart F in the qualifying year minus the amount of support in the year prior to qualifying for support subtracted from

the difference between the uncapped expense adjustment for the study area in the qualifying year minus the uncapped expense adjustment in the year prior to qualifying for support as shown in the following equation: Safety net additive support = (Uncapped support in the qualifying year – Uncapped support in the base year) – (Capped support in the qualifying year – Amount of support received in the base year).

(c) Operation of safety net additive support for companies that qualified prior to 2011: (1) In any year in which the total carrier loop cost expense adjustment is limited by the provisions of § 36.603 a rate-of-return incumbent local exchange carrier, as set forth in §36.601(a) of this subpart, shall receive safety net additive support as calculated in paragraph (b) of this section, if in any study area, the rural incumbent local exchange carrier realizes growth in end of period Telecommunications Plant in Service (TPIS), as prescribed in § 32.2001 of this chapter, on a per loop basis, of at least 14 percent more than the study area's TPIS per loop investment at the end of the prior period.

\*\*\*\*\*

16. Amend § 36.611 by revising the first sentence of paragraph (h) to read as follows:

**§ 36.611 Submission of information to the National Exchange Carrier Association (NECA).**

\*\*\*\*\*

(h) For incumbent local exchange carriers subject to § 36.601(a) this subpart, the number of working loops for each study area. \*\*\*

17. Amend §36.612 by revising the first sentence of paragraph (a) to read as follows:

**§ 36.612 Updating information submitted to the National Exchange Carrier Association.**

(a) Any incumbent local exchange carrier subject to §36.601(a) of this subpart may update the information submitted to the National Exchange Carrier Association (NECA) on July 31st pursuant to §36.611 one or more times annually on a rolling year basis according to the schedule. \*\*\*

\*\*\*\*\*

18. Amend §36.621 by revising paragraph (a)(4) and adding paragraphs (a)(4)(iii), and (a)(5) to read as follows:

**§ 36.621 Study area total unseparated loop cost.**

(a) \*\*\*

(4) Corporate Operations Expenses, Operating Taxes and the benefits and rent portions of operating expenses, as reported in §36.611(e) attributable to investment in C&WF Category 1.3 and COE Category 4.13. This amount is calculated by multiplying the total amount of these expenses and taxes by the ratio of the unseparated gross exchange plant investment in C&WF Category 1.3 and COE Category 4.13, as reported in §36.611(a), to the unseparated gross telecommunications plant investment, as reported in §36.611(f). Total Corporate Operations Expense, for purposes of calculating universal service support payments beginning July 1, 2001 and ending December 31, 2011, shall be limited to the lesser of § 36.621(a)(4)(i) or (ii). Total Corporate Operations Expense for purposes of calculating universal service support payments beginning January 1, 2012 shall be limited to the lesser of § 36.621(a)(4)(i) or (iii).

\* \* \* \* \*

(iii) A monthly per-loop amount computed according to paragraphs (a)(4)(iii)(A), (a)(4)(iii)(B), (a)(4)(iii)(C), and (a)(4)(iii)(D) of this section. To the extent that some carriers' corporate operations expenses are disallowed pursuant to these limitations, the national average unseparated cost per loop shall be adjusted accordingly.

(A) For study areas with 6,000 or fewer total working loops the amount monthly per working loop shall be  $\$42.337 - (.00328 \times \text{the number of total working loops})$ , or,  $\$63,000 / \text{the number of total working loops}$ , whichever is greater;

(B) For study areas with more than 6,000 but fewer than 17,887 total working loops, the monthly amount per working loop shall be  $\$3.007 + (117,990 / \text{the number of total working loops})$ ; and

(C) For study areas with 17,887 or more total working loops, the monthly amount per working loop shall be \$9.562.

(D) Beginning January 1, 2013, the monthly per-loop amount computed according to paragraphs (a)(4)(iii)(A), (a)(4)(iii)(B), and (a)(4)(iii)(C) of this section shall be adjusted each year to reflect the annual percentage change in the United States Department of Commerce's Gross Domestic Product-Chained Price Index (GDP-CPI).

(5) Study area unseparated loop cost may be limited annually pursuant to a schedule announced by the Wireline Competition Bureau.

19. Amend §36.631 by revising the introductory text of paragraphs (c) and (d) to read as follows:

**§ 36.631 Expense adjustment.**

\*\*\*\*\*

(c) Beginning January 1, 1988, for study areas reporting 200,000 or fewer working loops pursuant to §36.611(h), the expense adjustment (additional interstate expense allocation) is equal to the sum of paragraphs (c)(1) through (2) of this section.

\* \* \* \* \*

(d) Beginning January 1, 1998, for study areas reporting more than 200,000 working loops pursuant to §36.611(h), the expense adjustment (additional interstate expense allocation) is equal to the sum of paragraphs (d)(1) through (4) of this section.

\*\*\*\*\*

**PART 51-INTERCONNECTION**

20. The authority citation for part 51 is amended to read as follows:

Authority: Sections 1–5, 7, 201–05, 207–09, 218, 220, 225–27, 251–54, 256, 271, 303(r), and 332, of the Communications Act of 1934, as amended, and section 706 of the Telecommunication Act of 1996, as amended; 47 U.S.C. 151–55, 157, 201–05, 207–09, 218, 220, 225–227, 251–254, 256, 271, 303(r), 332, 1302, 47 U.S.C. 157 note, unless otherwise noted.

**Subpart H-Reciprocal Compensation for Transport and Termination of Telecommunications Traffic**

21. Add § 51.700 to subpart H to read as follows:

**§ 51.700 Purpose of this subpart.**

The purpose of this subpart, as revised in 2011 by FCC 11-161 is to establish rules governing the transition of intercarrier compensation from a calling-party's-network pays system to a default bill-and-keep methodology. Following the transition, the exchange of telecommunications traffic between and among service providers will, by default, be governed by bill-and-keep arrangements.

Note to 51.700 See FCC 11-161, figure 9 (chart identifying steps in the transition).

22. Revise § 51.701 paragraphs (a) and (b) introductory text, add paragraph (b)(3) and revised paragraphs (c), (d), and (e) to read as follows:

**§ 51.701 Scope of transport and termination pricing rules.**

(a) Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], compensation for telecommunications traffic exchanged between two telecommunications carriers that is interstate or intrastate exchange access, information access, or exchange services for such access, other than special access, is specified in subpart J of this part. The provisions of this subpart apply to Non-Access Reciprocal Compensation for transport and termination of Non-Access Telecommunications Traffic between LECs and other telecommunications carriers.

(b) Non-Access Telecommunications Traffic. For purposes of this subpart, Non-Access Telecommunications Traffic means:

\* \* \* \* \*

(3) This definition includes telecommunications traffic exchanged between a LEC and another telecommunications carrier in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format and that otherwise meets the definitions in paragraphs (b)(1) or (b)(2) of this section. Telecommunications traffic originates and/or terminates in IP format if it originates from and/or terminates to an end-user customer of a service that requires Internet protocol-compatible customer premises equipment.

(c) Transport. For purposes of this subpart, transport is the transmission and any necessary tandem switching of Non-Access Telecommunications Traffic subject to section 251(b)(5) of the Communications Act of 1934, as amended, 47 U.S.C. 251(b)(5), from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

(d) Termination. For purposes of this subpart, termination is the switching of Non-Access Telecommunications Traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

(e) Non-Access Reciprocal Compensation. For purposes of this subpart, a Non-Access Reciprocal Compensation arrangement between two carriers is either a bill-and-keep arrangement, per §51.713, or an

arrangement in which each carrier receives intercarrier compensation for the transport and termination of Non-Access Telecommunications Traffic.

23. Revise § 51.703 to read as follows:

**§ 51.703 Non-Access reciprocal compensation obligation of LECs.**

(a) Each LEC shall establish Non-Access Reciprocal Compensation arrangements for transport and termination of Non-Access Telecommunications Traffic with any requesting telecommunications carrier.

(b) A LEC may not assess charges on any other telecommunications carrier for Non-Access Telecommunications Traffic that originates on the LEC's network.

(c) Notwithstanding any other provision of the Commission's rules, a LEC shall be entitled to assess and collect the full charges for the transport and termination of Non-Access Telecommunications Traffic, regardless of whether the local exchange carrier assessing the applicable charges itself delivers such traffic to the called party's premises or delivers the call to the called party's premises via contractual or other arrangements with an affiliated or unaffiliated provider of interconnected VoIP service, as defined in 47 U.S.C. § 153(25), or a non-interconnected VoIP service, as defined in 47 U.S.C. § 153(36), that does not itself seek to collect Non-Access Reciprocal Compensation charges for the transport and termination of that Non-Access Telecommunications Traffic. In no event may the total charges that a LEC may assess for such service to the called location exceed the applicable transport and termination rate. For purposes of this section, the facilities used by the LEC and affiliated or unaffiliated provider of interconnected VoIP service or a non-interconnected VoIP service for the transport and termination of such traffic shall be deemed an equivalent facility under §51.701.

24. Revise §51.705 to read as follows:

**§ 51.705 LECs' rates for transport and termination.**

(a) Notwithstanding any other provision of the Commission's rules, by default, transport and termination for Non-Access Telecommunications Traffic exchanged between a local exchange carrier and a CMRS provider within the scope of §51.701(b)(2) shall be pursuant to a bill-and-keep arrangement, as provided in §51.713.

(b) Establishment of incumbent LECs' rates for transport and termination

(1) This provision applies when, in the absence of a negotiated agreement between parties, state commissions establish Non-Access Reciprocal Compensation rates for the exchange of Non-Access Telecommunications Traffic between a local exchange carrier and a telecommunications carrier other than a CMRS provider where the incumbent local exchange carriers did not have any such rates as of [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Any rates established pursuant to this provision apply between [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] and the date at which they are superseded by the transition specified in paragraphs (c)(2) through (c)(5) of this section.

(2) An incumbent LEC's rates for transport and termination of telecommunications traffic shall be established, at the election of the state commission, on the basis of:

(i) The forward-looking economic costs of such offerings, using a cost study pursuant to §§51.505 and 51.511; or

(ii) A bill-and-keep arrangement, as provided in §51.713.

(3) In cases where both carriers in a Non-Access Reciprocal Compensation arrangement are incumbent LECs, state commissions shall establish the rates of the smaller carrier on the basis of the larger carrier's forward-looking costs, pursuant to §51.711.

(c) Except as provided by paragraph (a) of this section, and notwithstanding any other provision of the Commission's rules, default transitional Non-Access Reciprocal Compensation rates shall be determined as follows:

(1) Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], no telecommunications carrier may increase a Non-Access Reciprocal Compensation for transport or termination above the level in effect on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. All Bill-and-Keep Arrangements in effect on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] shall remain in place unless both parties mutually agree to an alternative arrangement.

(2) Effective July 1, 2012, if any telecommunications carrier's Non-Access Reciprocal Compensation rates in effect on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] or established pursuant paragraph (b) of this section subsequent to [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], exceed that carrier's interstate access rates for functionally equivalent services in effect in the same state on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], that carrier shall reduce its reciprocal compensation rate by one half of the difference between the Non-Access Reciprocal Compensation rate and the corresponding functionally equivalent interstate access rate.

(3) Effective 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 July 1 of that same year, for equivalent functionality

(4) After July 1, 2018, all Price-Cap Local Exchange Carrier's Non-Access Reciprocal Compensation rates and all non-incumbent LECs that benchmark access rates to Price Cap Carrier shall be set pursuant to Bill-and-Keep arrangements for Non-Access Reciprocal Compensation as defined in this subpart.

(5) After July 1, 2020, all Rate-of-Return Local Exchange Carrier's Non-Access Reciprocal Compensation rates and all non-incumbent LECs that benchmark access rates to Rate-of-Return Carriers shall be set pursuant to Bill-and-Keep arrangements for Non-Access Reciprocal Compensation as defined in this subpart.

#### **§ 51.707 [Removed and Reserved]**

25. Remove and reserve §51.707.

26. Revise §51.709 to read as follows:

**§ 51.709 Rate structure for transport and termination.**

(a) In state proceedings, where a rate for Non-Access Reciprocal Compensation does not exist of as of [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], a state commission shall establish initial rates for the transport and termination of Non-Access Telecommunications Traffic that are structured consistently with the manner that carriers incur those costs, and consistently with the principles in this section.

(b) The rate of a carrier providing transmission facilities dedicated to the transmission of non-access traffic between two carriers' networks 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. Such proportions may be measured during peak periods.

(c) For Non-Access Telecommunications Traffic exchanged between a rate-of-return regulated rural telephone company as defined in §51.5 and a CMRS provider, the rural rate-of-return incumbent local exchange carrier will be responsible for transport to the CMRS provider's interconnection point when it is located within the rural rate-of-return incumbent local exchange carrier's service area. When the CMRS provider's interconnection point is located outside the rural rate-of-return incumbent local exchange carrier's service area, the rural rate-of-return incumbent local exchange carrier's transport and provisioning obligation stops at its meet point and the CMRS provider is responsible for the remaining transport to its interconnection point. This paragraph (c) is a default provision and applicable in the absence of an existing agreement or arrangement otherwise.

27. Revise §51.711(d) paragraphs (a) introductory text, (a)(1) and (b) to read as follows:

**§ 51.711 Symmetrical non-access reciprocal compensation.**

(a) Rates for transport and termination of Non-Access Telecommunications Traffic shall be symmetrical, unless carriers mutually agree otherwise, except as provided in paragraphs (b) and (c) of this section.

(1) For purposes of this subpart, symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of Non-Access Telecommunications Traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services.

\* \* \* \* \*

(b) Except as provided in § 51.705, a state commission may establish asymmetrical rates for transport and termination of Non-Access Telecommunications Traffic only if the carrier other than the incumbent LEC (or the smaller of two incumbent LECs) proves to the state commission on the basis of a cost study using the forward-looking economic cost based pricing methodology described in §§51.505 and 51.511, that the forward-looking costs for a network efficiently configured and operated by the carrier other than the incumbent LEC (or the smaller of two incumbent LECs), exceed the costs incurred by the incumbent LEC (or the larger incumbent LEC), and, consequently, that such that a higher rate is justified.

\* \* \* \* \*

28. Revise §51.713 to read as follows:

**§ 51.713 Bill-and-keep arrangements.**



Bill-and-keep arrangements are those in which carriers exchanging telecommunications traffic do not charge each other for specific transport and/or termination functions or services.

29. Revise §51.715 paragraphs (a) introductory text, (a)(1), (b) introductory text, (b)(2), and revise the first sentence in paragraph (d) to read as follows:

**§ 51.715 Interim transport and termination pricing.**

(a) Upon request from a telecommunications carrier without an existing interconnection arrangement with an incumbent LEC, the incumbent LEC shall provide transport and termination of Non-Access Telecommunications Traffic immediately under an interim arrangement, pending resolution of negotiation or arbitration regarding transport and termination rates and approval of such rates by a state commission under sections 251 and 252 of the Act.

(1) This requirement shall not apply when the requesting carrier has an existing interconnection arrangement that provides for the transport and termination of Non-Access Telecommunications Traffic by the incumbent LEC.

\* \* \* \* \*

(b) Upon receipt of a request as described in paragraph (a) of this section, an incumbent LEC must, without unreasonable delay, establish an interim arrangement for transport and termination of Non-Access Telecommunications Traffic at symmetrical rates.

\* \* \* \* \*

(2) In a state in which the state commission has not established transport and termination rates based on forward-looking economic cost studies, an incumbent LEC shall set interim transport and termination rates either at the default ceilings specified in §51.705(c) or in accordance with a bill-and-keep methodology as defined in §51.713.

\* \* \* \* \*

(d) If the rates for transport and termination of Non-Access Telecommunications Traffic in an interim arrangement differ from the rates established by a state commission pursuant to §51.705, the state commission shall require carriers to make adjustments to past compensation.

\* \* \*

**§51.717 [Removed and Reserved]**

30. Remove and reserve §51.717.

31. Add new subpart J to part 51 to read as follows:

**Subpart J—Transitional Access Service Pricing**

Sec.

51.901 Purpose and Scope of transitional access service pricing rules.

51.903 Definitions.

- 51.905 Implementation.
- 51.907 Transition of Price Cap Carrier access charges.
- 51.909 Transition of Rate-of-Return carrier access charges.
- 51.911 Reciprocal compensation rates for CLECs.
- 51.913 Transition for VoIP-PSTN traffic.
- 51.915 Revenue recovery for Price Cap carriers
- 51.917 Revenue recovery for Rate of Return carriers
- 51.919 Reporting and Monitoring

**§ 51.901 Purpose and scope of transitional access service pricing rules.**

(a) The purpose of this section is to establish rules governing the transition of intercarrier compensation from a calling-party's-network pays system to a default bill-and-keep methodology. Following the transition, the exchange of traffic between and among service providers will, by default, be governed by bill-and-keep arrangements.

(b) Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] , the provisions of this subpart apply to reciprocal compensation for telecommunications traffic exchanged between telecommunications providers that is interstate or intrastate exchange access, information access, or exchange services for such access, other than special access.

Note to § 51.901 See FCC 11-161, figure 9 (chart identifying steps in the transition).

**§ 51.903 Definitions.**

(a) Competitive Local Exchange Carrier. A Competitive Local Exchange Carrier is any local exchange carrier, as defined in §51.5, that is not an incumbent local exchange carrier .

(b) Composite Terminating End Office Access Rate. Composite Terminating End Office Access Rate means terminating End Office Access Service revenue, calculated using demand for a given time period, divided by end office switching minutes for the same time period.

(c) Dedicated Transport Access Service. Dedicated Transport Access Service means originating and terminating transport on circuits dedicated to the use of a single carrier or other customer provided by an incumbent local exchange carrier or any functional equivalent of the incumbent local exchange carrier access service provided by a non-incumbent local exchange carrier. Dedicated Transport Access Service rate elements for an incumbent local exchange carrier include the entrance facility rate elements specified in §69.110 of this chapter, the dedicated transport rate elements specified in §69.111 of this chapter, the direct-trunked transport rate elements specified in §69.112 of this chapter, and the intrastate rate elements for functionally equivalent access services. Dedicated Transport Access Service rate elements for a non-incumbent local exchange carrier include any functionally equivalent access services.

- (d) End Office Access Service. End Office Access Service means: (1) The switching of access traffic at the carrier's end office switch and the delivery to or from of such traffic to the called party's premises;
- (2) The routing of interexchange telecommunications traffic to or from the called party's premises, either directly or via contractual or other arrangements with an affiliated or unaffiliated entity, regardless of the specific functions provided or facilities used; or
- (3) Any functional equivalent of the incumbent local exchange carrier access service provided by a non-incumbent local exchange carrier. End Office Access Service rate elements for an incumbent local exchange carrier include the local switching rate elements specified in §69.106 of this chapter, the carrier common line rate elements specified in §69.154 of this chapter, and the intrastate rate elements for functionally equivalent access services. End Office Access Service rate elements for an incumbent local exchange carrier also include any rate elements assessed on local switching access minutes, including the information surcharge and residual rate elements. End office Access Service rate elements for a non-incumbent local exchange carrier include any functionally equivalent access service.

Note to paragraph (d): For incumbent local exchange carriers, residual rate elements may include, for example, state Transport Interconnection Charges, Residual Interconnection Charges, and PICCs. For non-incumbent local exchange carriers, residual rate elements may include any functionally equivalent access service.

- (e) Fiscal Year 2011. Fiscal Year 2011 means October 1, 2010 through September 30, 2011.
- (f) Price Cap Carrier. Price Cap Carrier has the same meaning as that term is defined in §61.3(aa) of this chapter.
- (g) Rate-of-Return Carrier. A Rate-of-Return Carrier is any incumbent local exchange carrier not subject to price cap regulation as that term is defined in §61.3(aa) of this chapter, but only with respect to the territory in which it operates as an incumbent local exchange carrier.
- (h) Access Reciprocal Compensation. For the purposes of this subpart, Access Reciprocal Compensation means telecommunications traffic exchanged between telecommunications service providers that is interstate or intrastate exchange access, information access, or exchange services for such access, other than special access.
- (i) Tandem-Switched Transport Access Service. Tandem-Switched Transport Access Service means:
- (1) Tandem switching and common transport between the tandem switch and end office; or
- (2) Any functional equivalent of the incumbent local exchange carrier access service provided by a non-incumbent local exchange carrier via other facilities. Tandem-Switched Transport rate elements for an incumbent local exchange carrier include the rate elements specified in §69.111 of this chapter, except for the dedicated transport rate elements specified in that section, and intrastate rate elements for functionally equivalent service. Tandem Switched Transport Access Service rate elements for a non-incumbent local exchange carrier include any functionally equivalent access service.
- (j) Transitional Intrastate Access Service. A Transitional Intrastate Access Service means terminating End Office Access Service that was subject to intrastate access rates as of December 31, 2011; terminating Tandem-Switched Transport Access Service that was subject to intrastate access rates as of December 31, 2011; and originating and terminating Dedicated Transport Access Service that was subject to intrastate access rates as of December 31, 2011.

**§ 51.905 Implementation.**

- (a) The rates set forth in this section are default rates. Notwithstanding any other provision of the Commission's rules, telecommunications carriers may agree to rates different from the default rates.
- (b) LECs who are otherwise required to file tariffs are required to tariff rates no higher than the default transitional rates specified by this subpart.
- (1) With respect to interstate switched access services governed by this subpart, LECs shall tariff rates for those services in their federal tariffs. Except as expressly superseded below, LECs shall follow the procedures specified in part 61 of this chapter when filing such tariffs.
- (2) With respect to Transitional Intrastate Access Services governed by this subpart, LECs shall follow the procedures specified by relevant state law when filing such tariffs, price lists or other instrument (referred to collectively as "tariffs").
- (c) Nothing in this section shall be construed to require a carrier to file or maintain a tariff or to amend an existing tariff if it is not otherwise required to do so under applicable law.

**§ 51.907 Transition of price cap carrier access charges.**

- (a) Notwithstanding any other provision of the Commission's rules, on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], a Price Cap Carrier shall cap the rates for all interstate and intrastate rate elements for services contained in the definitions of Interstate End Office Access Services, Tandem Switched Transport Access Services, and Dedicated Transport Access Services. In addition, a Price Cap Carrier shall also cap the rates for any interstate and intrastate rate elements in the "traffic sensitive basket" and the "trunking basket" as described in 47 CFR 61.42(d)(2) and (3) to the extent that such rate elements are not contained in the definitions of Interstate End Office Access Services, Tandem Switched Transport Access Services, and Dedicated Transport Access Services. Carriers will remove these services from price cap regulation in their July 1, 2012 annual tariff filing.
- (b) Step 1. Effective July 1, 2012, notwithstanding any other provision of the Commission's rules:
- (1) Each Price Cap Carrier shall file tariffs, in accordance with §51.905(b)(2), with the appropriate state regulatory authority, that set forth the rates applicable to Transitional Intrastate Access Service in each state in which it provides Transitional Intrastate Access Service.
- (2) Each Price Cap Carrier shall establish the rates for Transitional Intrastate Access Service using the following methodology:
- (i) Calculate total revenue from Transitional Intrastate Access Service at the carrier's interstate access rates in effect on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], using Fiscal Year 2011 intrastate switched access demand for each rate element.
- (ii) Calculate total revenue from Transitional Intrastate Access Service at the carrier's intrastate access rates in effect on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], using Fiscal Year 2011 intrastate switched access demand for each rate element.

(iii) Calculate the Step 1 Access Revenue Reduction. The Step 1 Access Revenue Reduction is equal to one-half of the difference between the amount calculated in paragraph (b)(2)(i) of this section and the amount calculated in paragraph (b)(2)(ii) of this section.

(iv) A Price Cap Carrier may elect to establish rates for Transitional Intrastate Access Service using its intrastate access rate structure. Carriers using this option shall establish rates for Transitional Intrastate Access Service such that Transitional Intrastate Access Service revenue at the proposed rates is no greater than Transitional Intrastate Access Service revenue at the intrastate rates in effect as of [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] less the Step 1 Access Revenue Reduction, using Fiscal Year 2011 demand. Carriers electing to establish rates for Transitional Intrastate Access Service in this manner shall notify the appropriate state regulatory authority of their election in the filing required by §51.907(b)(1).

(v) In the alternative, a Price Cap Carrier may elect to apply its interstate access rate structure and interstate rates to Transitional Intrastate Access Service. In addition to applicable interstate access rates, the carrier may, between July 1, 2012 and July 1, 2013, assess a transitional per-minute charge on Transitional Intrastate Access Service end office switching minutes (previously billed as intrastate access). The transitional per-minute charge shall be no greater than the Step 1 Access Revenue Reduction divided by Fiscal Year 2011 Transitional Intrastate Access Service end office switching minutes. Carriers electing to establish rates for Transitional Intrastate Access Service in this manner shall notify the appropriate state regulatory authority of their election in the filing required by §51.907(b)(1).

(vi) Nothing in this section obligates or allows a Price Cap Carrier that has intrastate rates lower than its functionally equivalent interstate rates to make any intrastate tariff filing or intrastate tariff revisions to increase such rates.

(c) Step 2. Effective July 1, 2013, notwithstanding any other provision of the Commission's rules:

(1) Transitional Intrastate Access Service rates shall be no higher than the Price Cap Carrier's interstate access rates. Once the Price Cap Carrier's Transitional Intrastate Access Service rates are equal to its functionally equivalent interstate access rates, they shall be subject to the same rate structure and all subsequent rate and rate structure modifications. Nothing in this section obligates or allows a Price Cap Carrier that has intrastate rates lower than its functionally equivalent interstate rates to make any intrastate tariff filing or intrastate tariff revisions to increase such rates.

(2) In cases where a Price Cap Carrier does not have intrastate rates that permit it to determine composite intrastate End Office Access Service rates, the carrier shall establish End Office Access Service rates such that the ratio between its composite intrastate End Office Access Service revenues and its total intrastate switched access revenues may not exceed the ratio between its composite interstate End Office Access Service revenues and its total interstate switched access revenues.

(3) Nothing in this section obligates or allows a Price Cap Carrier that has intrastate rates lower than its functionally equivalent interstate rates to make any intrastate tariff filing or intrastate tariff revisions to increase such rates.

(d) Step 3. Effective July 1, 2014, notwithstanding any other provision of the Commission's rules:

(1) A Price Cap Carrier shall establish separate originating and terminating rate elements for all per-minute components within interstate and intrastate End Office Access Service. For fixed charges, the Price Cap Carrier shall divide the rate between originating and terminating rate elements based on relative originating and terminating end office switching minutes. If sufficient originating and terminating end office switching minute data is not available, the carrier shall divide such charges equally between originating and terminating elements.

(2) Each Price Cap Carrier shall establish rates for interstate or intrastate terminating End Office Access Service using the following methodology:

(i) Each Price Cap Carrier shall calculate the 2011 Baseline Composite Terminating End Office Access Rate. The 2011 Baseline Composite Terminating End Office Access Rate means the Composite Terminating End Office Access Rate calculated using Fiscal Year 2011 demand and the End Office Access Service rates at the levels in effect on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

(ii) Each Price Cap Carrier shall calculate its 2014 Target Composite Terminating End Office Access Rate. The 2014 Target Composite Terminating End Office Access Rate means \$0.0007 per minute plus two-thirds of any difference between the 2011 Baseline Composite Terminating End Office Access Rate and \$0.0007 per minute.

(iii) Effective July 1, 2014, no Price Cap Carrier's interstate or intrastate Composite Terminating End Office Access Rate shall exceed its 2014 Target Composite Terminating End Office Access Rate. In the alternative, any Price Cap Carrier may elect to implement a single per minute rate element for terminating End Office Access Service no greater than the 2014 Target Composite Terminating End Office Access Rate.

(iv) Nothing in this section obligates or allows a Price Cap Carrier that has intrastate rates lower than its functionally equivalent interstate rates to make any intrastate tariff filing or intrastate tariff revisions increasing such rates.

(e) Step 4. Effective July 1, 2015, notwithstanding any other provision of the Commission's rules:

(1) Each Price Cap Carrier shall establish interstate or intrastate rates for terminating End Office Access Service using the following methodology:

(i) Each Price Cap Carrier shall calculate its 2015 Target Composite Terminating End Office Access Rate. The 2015 Target Composite Terminating End Office Access Rate means \$0.0007 per minute plus one-third of any difference between the 2011 Composite Terminating End Office Access Rate and \$0.0007 per minute.

(ii) Effective July 1, 2015, no Price Cap Carrier's interstate or intrastate Composite Terminating End Office Access Rate shall exceed its 2015 Target Composite Terminating End Office Access Rate. In the alternative, any Price Cap Carrier may elect

to implement a single per minute rate element for terminating End Office Access Service no greater than the 2015 Target Composite Terminating End Office Access Rate.

(2) Nothing in this section obligates or allows a Price Cap Carrier that has intrastate rates lower than its functionally equivalent interstate rates to make any intrastate tariff filing or intrastate tariff revisions raising such rates.

(f) Step 5. Effective July 1, 2016, notwithstanding any other provision of the Commission's rules, each Price Cap Carrier shall establish interstate and intrastate per minute terminating End Office Access Service rates such that its Composite Terminating End Office Access Service rate does not exceed \$0.0007 per minute. Nothing in this section obligates or allows a Price Cap Carrier that has intrastate rates lower than its functionally equivalent interstate rates to make any intrastate tariff filing or intrastate tariff revisions raising such rates.

(g) Step 6. Effective July 1, 2017, notwithstanding any other provision of the Commission's rules:

(1) Each Price Cap Carrier shall, in accordance with a bill-and-keep methodology, refile its interstate access tariffs and any state tariffs, in accordance with § 51.905(b)(2), removing any intercarrier charges for terminating End Office Access Service.

(2) Each Price Cap Carrier shall establish, for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier or its affiliates owns, Tandem-Switched Transport Access Service rates no greater than \$0.0007 per minute.

(3) Nothing in this section obligates or allows a Price Cap Carrier that has intrastate rates lower than its functionally equivalent interstate rates to make any intrastate tariff filing or intrastate tariff revisions raising such rates.

(h) Step 7. Effective July 1, 2018, notwithstanding any other provision of the Commission's rules, each Price Cap carrier shall, in accordance with bill-and-keep, as defined in §51.713, revise and refile its interstate switched access tariffs and any state tariffs to remove any intercarrier charges applicable to terminating tandem-switched access service traversing a tandem switch that the terminating carrier or its affiliate owns.

**§ 51.909 Transition of rate-of-return carrier access charges.**

(a) Notwithstanding any other provision of the Commission's rules, on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], a Rate-of-Return Carrier shall:

(1) Cap the rates for all rate elements for services contained in the definitions of End Office Access Service, Tandem Switched Transport Access Service, and Dedicated Transport Access Service, as well as all other interstate switched access rate elements, in its interstate switched access tariffs at the rate that was in effect on the [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]; and

(2) Cap, in accordance with §51.505(b)(2), the rates for rate all elements in its intrastate switched access tariffs associated with the provision of terminating End Office Access Service and terminating Tandem-Switched Transport Access Service at the rates that were in effect on the [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER],

- (i.) Using the terminating rates if specifically identified; or
  - (ii.) Using the rate for the applicable rate element if the tariff does not distinguish between originating and terminating.
- (3) Nothing in this section obligates or allows a Rate-of-Return Carrier that has intrastate rates lower than its functionally equivalent interstate rates to make any intrastate tariff filing or intrastate tariff revisions raising such rates.
- (b) Step 1. Effective July 1, 2012, notwithstanding any other provision of the Commission's rules:
- (1) Each Rate-of-Return Carrier shall file intrastate access tariff provisions, in accordance with §51.505(b)(2), that set forth the rates applicable to Transitional Intrastate Access Service in each state in which it provides Transitional Intrastate Access Service.
  - (2) Each Rate-of-Return Carrier shall establish the rates for Transitional Intrastate Access Service using the following methodology:
    - (i) Calculate total revenue from Transitional Intrastate Access Service at the carrier's interstate access rates in effect on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], using Fiscal Year 2011 intrastate switched access demand for each rate element.
    - (ii) Calculate total revenue from Transitional Intrastate Access Service at the carrier's intrastate access rates in effect on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], using Fiscal Year 2011 intrastate switched access demand for each rate element.
    - (iii) Calculate the Step 1 Access Revenue Reduction. The Step 1 Access Revenue Reduction is equal to one-half of the difference between the amount calculated in (b)(2)(i) of this section and the amount calculated in (b)(2)(ii) of this section.
    - (iv) A Rate-of-Return Carrier may elect to establish rates for Transitional Intrastate Access Service using its intrastate access rate structure. Carriers using this option shall establish rates for Transitional Intrastate Access Service such that Transitional Intrastate Access Service revenue at the proposed rates is no greater than Transitional Intrastate Access Service revenue at the intrastate rates in effect as of [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] less the Step 1 Access Revenue Reduction, using Fiscal Year 2011 intrastate switched access demand. Carriers electing to establish rates for Transitional Intrastate Access Service in this manner shall notify the appropriate state regulatory authority of their election in the filing required by §51.907(b)(1).
    - (v) In the alternative, a Rate-of-Return Carrier may elect to apply its interstate access rate structure and interstate rates to Transitional Intrastate Access Service. In addition to applicable interstate access rates, the carrier may, between July 1, 2012 and July 1, 2013, assess a transitional per-minute charge on Transitional Intrastate Access Service end office switching minutes (previously billed as intrastate access). The transitional per-minute charge shall be no greater than the Step 1 Access Revenue Reduction divided by Fiscal Year 2011 Transitional Intrastate Access Service end office switching minutes. Carriers electing to establish rates for Transitional Intrastate Access Service in this



manner shall notify the appropriate state regulatory authority of their election in the filing required by §51.907(b)(1).

(3) Nothing in this section obligates or allows a Rate-of-Return carrier that has intrastate rates lower than its functionally equivalent interstate rates to make any intrastate tariff filing or intrastate tariff revisions raising such rates.

(c) Step 2. Effective July 1, 2013, notwithstanding any other provision of the Commission's rules, Transitional Intrastate Access Service rates shall be no higher than the Rate-of-Return Carrier's interstate Terminating End Office Access Service and Terminating Tandem-Switched Transport Access Service rates and subject to the same rate structure and all subsequent rate and rate structure modifications.

(d) Step 3. Effective July 1, 2014, notwithstanding any other provision of the Commission's rules:

(1) Notwithstanding the rate structure rules set forth in §69.106 of this chapter or anything else in the Commission's rules, a Rate-of-Return Carrier shall establish separate originating and terminating interstate and intrastate rate elements for all components within interstate End Office Access Service. For fixed charges, the Rate-of-Return Carrier shall divide the amount based on relative originating and terminating end office switching minutes. If sufficient originating and terminating end office switching minute data is not available, the carrier shall divide such charges equally between originating and terminating elements.

(2) Nothing in this Step shall affect Tandem-Switched Transport Access Service or Dedicated Transport Access Service.

(3) Each Rate-of-Return Carrier shall establish rates for interstate and intrastate terminating End Office Access Service using the following methodology:

(i) Each Rate-of-Return Carrier shall calculate the 2011 Baseline Composite Terminating End Office Access Rate. The 2011 Baseline Composite Terminating End Office Access Rate means the Composite Terminating End Office Access Rate calculated using Fiscal Year 2011 interstate demand and the interstate End Office Access Service rates at the levels in effect on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

(ii) Each Rate-of-Return Carrier shall calculate its 2014 interstate Target Composite Terminating End Office Access Rate. The 2014 interstate Target Composite Terminating End Office Access Rate means \$0.005 per minute plus two-thirds of any difference between the 2011 Baseline Composite Terminating End Office Access Rate, and \$0.005 per minute.

(iii) Effective July 1, 2014, no Rate-of-Return Carrier's interstate or intrastate Composite Terminating End Office Access Rate shall exceed its 2014 interstate Target Composite Terminating End Office Access Rate. In the alternative, any Rate-of-Return Carrier may elect to implement a single per minute rate element for terminating End Office Access Service no greater than the 2014 interstate Target Composite Terminating End Office Access Rate.

(4) Nothing in this section obligates or allows a Rate-of-Return Carrier that has intrastate rates lower than its functionally equivalent interstate rates to make any intrastate tariff filing or intrastate tariff revisions raising such rates.

(e) Step 4. Effective July 1, 2015, notwithstanding any other provision of the Commission's rules:

(1) Each Rate-of-Return Carrier shall establish rates for interstate and intrastate terminating End Office Access Service using the following methodology:

(i) Each Rate-of-Return Carrier shall calculate its 2015 interstate Target Composite Terminating End Office Access Rate. The 2015 interstate Target Composite Terminating End Office Access Rate means \$0.005 per minute plus one-third of any difference between the 2011 Baseline Composite Terminating End Office Access Rate and \$0.005 per minute.

(ii) Effective July 1, 2015, no Rate-of-Return Carrier's interstate or intrastate Composite Terminating End Office Access Rate shall exceed its 2015 Target Composite Terminating End Office Access Rate. In the alternative, any Rate-of-Return Carrier may elect to implement a single per minute rate element for terminating End Office Access Service no greater than the 2015 interstate Target Composite Terminating End Office Access Rate.

(2) Reserved.

(f) Step 5. Effective July 1, 2016, notwithstanding any other provision of the Commission's rules, each Rate-of-Return Carrier shall establish interstate and intrastate per minute terminating End Office Access Service rates such that its Composite Terminating End Office Access Service rate does not exceed \$0.005 per minute. Nothing in this section obligates or allows a Rate-of-Return Carrier that has intrastate rates lower than its functionally equivalent interstate rates to make any intrastate tariff filing or intrastate tariff revisions raising such rates.

(g) Step 6. Effective July 1, 2017, notwithstanding any other provision of the Commission's rules:

(1) Each Rate-of-Return Carrier shall establish rates for terminating End Office Access Service using the following methodology:

(i) Each Rate-of-Return Carrier shall calculate its 2017 interstate Target Composite Terminating End Office Access Rate. The 2017 interstate Target Composite Terminating End Office Access Rate means \$0.0007 per minute plus two-thirds of any difference between that carrier's Terminating End Office Access Service Rate as of July 1, 2016 and \$0.0007 per minute.

(ii) Effective July 1, 2017, no Rate-of-Return Carrier's interstate or intrastate Composite Terminating End Office Access Rate shall exceed its 2017 interstate Target Composite Terminating End Office Access Rate. In the alternative, any Rate-of-Return Carrier may elect to implement a single per minute rate element for terminating End Office Access Service no greater than the 2017 interstate Target Composite Terminating End Office Access Rate.

(2) Reserved.

(h) Step 7. Effective July 1, 2018, notwithstanding any other provision of the Commission's rules:

(1) Each Rate-of-Return Carrier shall establish rates for terminating End Office Access Service using the following methodology:

(i) Each Rate-of-Return Carrier shall calculate its 2018 interstate Target Composite Terminating End Office Access Rate. The 2018 interstate Target Composite Terminating End Office Access Rate means \$0.0007 per minute plus one-third of any difference between that carrier's Terminating End Office Access Service Rate as of July 1, 2016 and \$0.0007 per minute.

(ii) Effective July 1, 2018, no Rate-of-Return Carrier's interstate or intrastate Composite Terminating End Office Access Rate shall exceed its 2018 interstate Target Composite Terminating End Office Access Rate. In the alternative, any Rate-of-Return Carrier may elect to implement a single per minute rate element for terminating End Office Access Service no greater than the 2018 interstate Target Composite Terminating End Office Access Rate.

(2) Reserved.

(i) Step 8. Effective July 1, 2019, notwithstanding any other provision of the Commission's rules, each Rate-of-Return Carrier shall establish interstate and intrastate rates for terminating End Office Access Service that do not exceed \$0.0007 per minute.

(j) Step 9. Effective July 1, 2020, notwithstanding any other provision of the Commission's rules, each Rate-of-Return Carrier shall, in accordance with a bill-and-keep methodology, revise and refile its federal access tariffs and any state tariffs to remove any intercarrier charges for terminating End Office Access Service.

(k) As set forth in FCC 11-161, states will facilitate implementation of changes to intrastate access rates to ensure compliance with the Order. Nothing in this section shall alter the authority of a state to monitor and oversee filing of intrastate tariffs.

**§51.911 Access reciprocal compensation rates for competitive LECs.**

(a) Caps on Access Reciprocal Compensation and switched access rates. Notwithstanding any other provision of the Commission's rules:

(1) In the case of Competitive LECs operating in an area served by a Price Cap Carrier, no such Competitive LEC may increase the rate for any originating or terminating intrastate switched access service above the rate for such service in effect on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

(2) In the case of Competitive LEC operating in an area served by an incumbent local exchange carrier that is a Rate-of-Return Carrier or Competitive LECs that are subject to the rural exemption in §61.26(e) of this chapter, no such Competitive LEC may increase the rate for any originating or terminating intrastate switched access service above the rate for such service in effect on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], with the exception of intrastate originating access service. For such Competitive LECs, intrastate originating access service subject to this subpart shall remain subject to the same state rate regulation in effect December 31, 2011, as may be modified by the state thereafter.

(b) Effective July 1, 2012, notwithstanding any other provision of the Commission's rules, each Competitive LEC that has tariffs on file with state regulatory authorities shall file intrastate access tariff provisions, in accordance with §51.505(b)(2), that set forth the rates applicable to Transitional Intrastate Access Service in each state in which it provides Transitional Intrastate Access Service. Each Competitive Local Exchange Carrier shall establish the rates for Transitional Intrastate Access Service using the following methodology:

- (1) Calculate total revenue from Transitional Intrastate Access Service at the carrier's interstate access rates in effect on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], using Fiscal Year 2011 intrastate switched access demand for each rate element.
- (2) Calculate total revenue from Transitional Intrastate Access Service at the carrier's intrastate access rates in effect on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], using Fiscal Year 2011 intrastate switched access demand for each rate element.
- (3) Calculate the Step 1 Access Revenue Reduction. The Step 1 Access Revenue Reduction is equal to one-half of the difference between the amount calculated in (b) (1) of this section and the amount calculated in (b)(2) of this section.
- (4) A Competitive Local Exchange Carrier may elect to establish rates for Transitional Intrastate Access Service using its intrastate access rate structure. Carriers using this option shall establish rates for Transitional Intrastate Access Service such that Transitional Intrastate Access Service revenue at the proposed rates is no greater than Transitional Intrastate Access Service revenue at the intrastate rates in effect as of [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] less the Step 1 Access Revenue Reduction, using Fiscal year 2011 intrastate switched access demand.
- (5) In the alternative, a Competitive Local Exchange Carrier may elect to apply its interstate access rate structure and interstate rates to Transitional Intrastate Access Service. In addition to applicable interstate access rates, the carrier may assess a transitional per-minute charge on Transitional Intrastate Access Service end office switching minutes (previously billed as intrastate access). The transitional charge shall be no greater than the Step 1 Access Revenue Reduction divided by Fiscal year 2011 intrastate switched access demand
- (6) Nothing in this subsection obligates or allows a Competitive LEC that has intrastate rates lower than its functionally equivalent interstate rates to make any intrastate tariff filing or intrastate tariff revisions raising such rates.

(c) Effective July 1, 2013, notwithstanding any other provision of the Commission's rules, all Competitive Local Exchange Carrier Access Reciprocal Compensation rates for switched exchange access services subject to this subpart shall be no higher than the Access Reciprocal Compensation rates charged by the competing incumbent local exchange carrier, in accordance with the same procedures specified in §61.26 of this chapter.

**§ 51.913 Transition for VoIP-PSTN traffic.**

(a) Access Reciprocal Compensation subject to this subpart exchanged between a local exchange carrier and another telecommunications carrier in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format shall be subject to a rate equal to the relevant interstate access charges

specified by this subpart. Telecommunications traffic originates and/or terminates in IP format if it originates from and/or terminates to an end-user customer of a service that requires Internet protocol-compatible customer premises equipment.

(b) Notwithstanding any other provision of the Commission's rules, a local exchange carrier shall be entitled to assess and collect the full Access Reciprocal Compensation charges prescribed by this subpart that are set forth in a local exchange carrier's interstate or intrastate tariff for the access services defined in § 51.903 regardless of whether the local exchange carrier itself delivers such traffic to the called party's premises or delivers the call to the called party's premises via contractual or other arrangements with an affiliated or unaffiliated provider of interconnected VoIP service, as defined in 47 U.S.C. 153(25), or a non-interconnected VoIP service, as defined in 47 U.S.C. 153(36), that does not itself seek to collect Access Reciprocal Compensation charges prescribed by this subpart for that traffic. This rule does not permit a local exchange carrier to charge for functions not performed by the local exchange carrier itself or the affiliated or unaffiliated provider of interconnected VoIP service or non-interconnected VoIP service. For purposes of this provision, functions provided by a LEC as part of transmitting telecommunications between designated points using, in whole or in part, technology other than TDM transmission in a manner that is comparable to a service offered by a local exchange carrier constitutes the functional equivalent of the incumbent local exchange carrier access service.

#### **§ 51.915 Recovery Mechanism For Price Cap Carriers.**

- (a) Scope. This section sets forth the extent to which Price Cap Carriers may recover certain revenues, through the recovery mechanism outlined below, to implement reforms adopted in FCC 11-161 and as required by § 20.11(b) of this chapter, and §§51.705 and 51.907.
- (b) Definitions. As used in this section and § 51.917, the following terms mean:
- (1) CALLS Study Area. A CALLS Study Area means a Price Cap Carrier study area that participated in the CALLS plan at its inception. See Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long-Distance Users, Federal-State Joint Board on Universal Service, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000).
  - (2) CALLS Study Area Base Factor. The CALLS Study Area Base Factor is equal to ninety (90) percent.
  - (3) CMRS Net Reciprocal Compensation Revenues. CMRS Net Reciprocal Compensation Revenues means the reduction in net reciprocal compensation revenues required by § 20.11 of this chapter associated with CMRS traffic as described in § 51.701(b)(2), which is equal to its Fiscal Year 2011 net reciprocal compensation revenues from CMRS carriers.
  - (4) Expected Revenues for Access Recovery Charges. Expected Revenues for Access Recovery Charges are calculated using the tariffed Access Recovery Charge rate for each class of service and the forecast demand for each class of service.
  - (5) Initial Composite Terminating End Office Access Rate. Initial Composite Terminating End Office Access Rate means Fiscal Year 2011 terminating interstate End Office Access Service revenue divided by Fiscal Year 2011 terminating interstate end office switching minutes.

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- (6) Lifeline Customer. A Lifeline Customer is a residential lifeline subscriber as defined by § 54.400(a) of this chapter that does not pay a Residential and/or Single-Line Business End User Common Line Charge.
- (7) Net Reciprocal Compensation. Net Reciprocal Compensation means the difference between a carrier's reciprocal compensation revenues from non-access traffic less its reciprocal compensation payments for non-access traffic during a stated period of time. For purposes of the calculations made under §§ 51.915 and 51.917, the term does not include reciprocal compensation revenues for non-access traffic exchanged between Local Exchange Carriers and CMRS providers; recovery for such traffic is addressed separately in these sections.
- (8) Non-CALLS Study Area. Non-CALLS Study Area means a Price Cap Carrier study area that did not participate in the CALLS plan at its inception.
- (9) Non-CALLS Study Area Base Factor. The Non-CALLS Study Area Base Factor is equal to one hundred (100) percent for five (5) years beginning July 1, 2012. Beginning July 1, 2017, the Non-CALLS Price Cap Carrier Base Factor will be equal to ninety (90) percent.
- (10) Price Cap Carrier Traffic Demand Factor. The Price Cap Carrier Traffic Demand Factor, as used in calculating eligible recovery, is equal to ninety (90) percent for the one-year period beginning July 1, 2012. It is reduced by ten (10) percent of its previous value in each subsequent annual tariff filing.
- (11) Rate Ceiling Component Charges. The Rate Ceiling Component Charges consists of the federal end user common line charge and the Access Recovery Charge; the flat rate for residential local service (sometimes know as the "1FR" or "R1" rate), mandatory extended area service charges, and state subscriber line charges; per-line state high cost and/or state access replacement universal service contributions, state E911 charges, and state TRS charges.
- (12) Residential Rate Ceiling. The Residential Rate Ceiling, which consists of the total of the Rate Ceiling Component Charges, is set at \$30 per month. The Residential Rate Ceiling will be the higher of the rate in effect on January 1, 2012, or the rate in effect on January 1 in any subsequent year.
- (13) True-up Revenues for Access Recovery Charge. True-up revenues for Access Recovery Charge are equal to Expected Access Recovery Charge Revenues minus ((projected demand minus actual realized demand for Access Recovery Charges) times the tariffed Access Recovery Charge). This calculation shall be made separately for each class of service and shall be adjusted to reflect any changes in tariffed rates for the Access Recovery Charge. Realized demand is the demand for which payment has been received, or has been made, as appropriate, by the time the true-up is made.
- (c) 2011 Price Cap Carrier Base Period Revenue. 2011 Price Cap Carrier Base Period Revenue is equal to the sum of the following three components:
- (1) Terminating interstate end office switched access revenues and interstate Tandem-Switched Transport Access Service revenues for Fiscal Year 2011 received by March 31, 2012;
  - (2) Fiscal Year 2011 revenues from Transitional Intrastate Access Service received by March 31, 2012; and

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- (3) Fiscal Year 2011 reciprocal compensation revenues received by March 31, 2012, less fiscal year 2011 reciprocal compensation payments made by March 31, 2012.
- (d) Eligible recovery for Price Cap Carriers.
- (1) Notwithstanding any other provision of the Commission's rules, a Price Cap Carrier may recover the amounts specified in this paragraph through the mechanisms described in paragraphs (e) and (f) of this section.
- (i) Beginning July 1, 2012, a Price Cap Carrier's eligible recovery will be equal to the CALLS Study Area Base Factor and/or the Non-CALLS Study Area Base Factor, as applicable, multiplied by the sum of the following three components:
- A. The amount of the reduction in Transitional Intrastate Access Service revenues determined pursuant to § 51.907(b)(2) multiplied by the Price Cap Carrier Traffic Demand Factor;
  - B. CMRS Net Reciprocal Compensation Revenues multiplied by the Price Cap Carrier Traffic Demand Factor; and
  - C. A Price Cap Carrier's reductions in Fiscal Year 2011 net reciprocal compensation revenues resulting from rate reductions required by § 51.705, other than those associated with CMRS traffic as described in § 51.701(b)(2), which may be calculated in one of the following ways:
    - 1. Calculate the reduction in Fiscal Year 2011 net reciprocal compensation revenue as a result of rate reductions required by § 51.705 using Fiscal Year 2011 reciprocal compensation demand, and then multiply by the Price Cap Carrier Traffic Demand Factor;
    - 2. By using a composite reciprocal compensation rate as follows:
      - (i) Establish a composite reciprocal compensation rate for its Fiscal Year 2011 reciprocal compensation receipts and its Fiscal Year 2011 reciprocal compensation payments by dividing its Fiscal Year 2011 reciprocal compensation receipts and payments by their respective Fiscal Year 2011 demand;
      - (ii) Calculate the difference between each of the composite reciprocal compensation rates and the target reciprocal compensation rate set forth in § 51.705 for the year beginning July 1, 2012 multiply by the appropriate Fiscal Year 2011 demand, and then multiply by the Price Cap Carrier Traffic Demand Factor; or
    - 3. For the purpose of establishing its recovery for net reciprocal compensation, a Price Cap Carrier may elect to forgo this step and receive no recovery for reductions in net reciprocal compensation. If a carrier elects this option, it may not change its election at a later date.
- (ii) Beginning July 1, 2013, a Price Cap Carrier's eligible recovery will be equal to the CALLS Study Area Base Factor and/or the Non-CALLS Study Area Base Factor, as applicable, multiplied by the sum of the following three components:

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- A. The cumulative amount of the reduction in Transitional Intrastate Access Service revenues determined pursuant to § 51.907(b)(2) and (c) multiplied by the Price Cap Carrier Traffic Demand Factor; and
- B. CMRS Net Reciprocal Compensation Revenues multiplied by the Price Cap Carrier Traffic Demand Factor; and
- C. A Price Cap Carrier's cumulative reductions in Fiscal Year 2011 net reciprocal compensation revenues other than those associated with CMRS traffic as described in § 51.701(b)(2) resulting from rate reductions required by § 51.705 may be calculated in one of the following ways:
1. Calculate the cumulative reduction in Fiscal Year 2011 net reciprocal compensation revenue as a result of rate reductions required by § 51.705 using Fiscal Year 2011 reciprocal compensation demand and then multiply by the Price Cap Carrier Traffic Demand Factor;
  2. By using a composite reciprocal compensation rate as follows:
    - (i) Establish a composite reciprocal compensation rate for its Fiscal Year 2011 reciprocal compensation receipts and its Fiscal Year 2011 reciprocal compensation payments by dividing its Fiscal Year 2011 reciprocal compensation receipts and payments by their respective Fiscal Year 2011 demand;
    - (ii) Calculate the difference between each of the composite reciprocal compensation rates and the target reciprocal compensation rate set forth in § 51.705 for the year beginning July 1, 2013, using the appropriate Fiscal Year 2011 demand, and then multiply by the Price Cap Carrier Traffic Demand Factor; or
  3. For the purpose of establishing its recovery for net reciprocal compensation, a Price Cap Carrier may elect to forgo this step and receive no recovery for reductions in net reciprocal compensation. If a carrier elects this option, it may not change its election at a later date.
- (iii) Beginning July 1, 2014, a Price Cap Carrier's eligible recovery will be equal to the CALLS Study Area Base Factor and/or the Non-CALLS Study Area Base Factor, as applicable, multiplied by the sum of the amounts in paragraphs (d)(1)(iii)A-(d)(1)(iii)E, and then adding the amount in paragraph(d)(1)(iii)F to that amount:
- A. The amount of the reduction in Transitional Intrastate Access Service revenues determined pursuant to § 51.907(b)(2) and (c) multiplied by the Price Cap Carrier Traffic Demand Factor; and
  - B. The reduction in interstate switched access revenues equal to the difference between the Initial Composite Terminating End Office Access Rate and the 2014 Target Composite Terminating End Office Access Rate determined pursuant to § 51.907(d) using 2011 terminating interstate end office switching minutes, and then multiply by the Price Cap Carrier Traffic Demand Factor;



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- C. If the 2014 Intrastate Composite Terminating End Office Access Rate is higher than the 2014 Target Composite Terminating End Office Access Rate, the reduction in revenues equal to the difference between the intrastate 2014 Composite Terminating End Office Access Rate and the intrastate 2014 Target Composite Terminating End Office Access Rate determined pursuant to § 51.907(d) using Fiscal Year 2011 terminating intrastate end office switching minutes, and then multiply by the Price Cap Carrier Traffic Demand Factor;
- D. CMRS Net Reciprocal Compensation Revenues multiplied by the Price Cap Carrier Traffic Demand Factor; and
- E. A Price Cap Carrier's cumulative reductions in Fiscal Year 2011 net reciprocal compensation revenues other than those associated with CMRS traffic as described in § 51.701(b)(2) resulting from rate reductions required by § 51.705 may be calculated in one of the following ways:
1. Calculate the cumulative reduction in Fiscal Year 2011 net reciprocal compensation revenue as a result of rate reductions required by § 51.705 using Fiscal Year 2011 reciprocal compensation demand, and then multiply by the Price Cap Carrier Traffic Demand Factor;
  2. By using a composite reciprocal compensation rate as follows:
    - (i) Establish a composite reciprocal compensation rate for its Fiscal Year 2011 reciprocal compensation receipts and its Fiscal Year 2011 reciprocal compensation payments by dividing its Fiscal Year 2011 reciprocal compensation receipts and payments by their respective Fiscal Year 2011 demand;
    - (ii) Calculate the difference between each of the composite reciprocal compensation rates and the target reciprocal compensation rate set forth in § 51.705 for the year beginning July 1, 2014, using the appropriate Fiscal Year 2011 demand, and then multiply by the Price Cap Carrier Traffic Demand Factor; or
  3. For the purpose of establishing its recovery for net reciprocal compensation, a Price Cap Carrier may elect to forgo this step and receive no recovery for reductions in net reciprocal compensation. If a carrier elects this option, it may not change its election at a later date.
- F. An amount equal to True-up Revenues for Access Recovery Charges less Expected Revenues for Access Recovery Charges for the year beginning July 1, 2012.
- (iv) Beginning July 1, 2015, a Price Cap Carrier's eligible recovery will be equal to the CALLS Study Area Base Factor and/or the Non-CALLS Study Area Base Factor, as applicable, multiplied by the sum of the amounts in paragraphs (d)(1)(iv)A-(d)(1)(iv)E, and then adding the amount in paragraph(d)(1)(iv)F to that amount:
- A. The amount of the reduction in Transitional Intrastate Access Service revenues determined pursuant to § 51.907(b)(2) and (c) multiplied by the Price Cap Carrier Traffic Demand Factor;

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- B. The reduction in interstate switched access revenues equal to the difference between the Initial Composite Terminating End Office Access Rate and the 2015 Target Composite Terminating End Office Access Rate determined pursuant to § 51.907(e) using Fiscal Year 2011 terminating interstate end office switching minutes, and then multiply by the Price Cap Carrier Traffic Demand Factor;
- C. If the 2014 Intrastate Composite Terminating End Office Access Rate is higher than the 2015 Target Composite Terminating End Office Access Rate, the reduction in intrastate switched access revenues equal to the difference between the intrastate 2014 Composite Terminating End Office Access Rate and the 2015 Target Composite Terminating End Office Access Rate determined pursuant to § 51.907(e) using Fiscal Year 2011 terminating intrastate end office switching minutes, and then multiply by the Price Cap Carrier Traffic Demand Factor; and
- D. CMRS Net Reciprocal Compensation Revenues multiplied by the Price Cap Carrier Traffic Demand Factor;
- E. A Price Cap Carrier's cumulative reductions in Fiscal Year 2011 net reciprocal compensation revenues other than those associated with CMRS traffic as described in § 51.701(b)(2) resulting from rate reductions required by § 51.705 may be calculated in one of the following ways:
1. Calculate the cumulative reduction in Fiscal Year 2011 net reciprocal compensation revenue as a result of rate reductions required by § 51.705 using Fiscal Year 2011 reciprocal compensation demand, and then multiply by the Price Cap Carrier Traffic Demand Factor;
  2. By using a composite reciprocal compensation rate as follows:
    - (i) Establish a composite reciprocal compensation rate for its Fiscal Year 2011 reciprocal compensation receipts and its Fiscal Year 2011 reciprocal compensation payments by dividing its Fiscal Year 2011 reciprocal compensation receipts and payments by their respective Fiscal Year 2011 demand;
    - (ii) Calculate the difference between each of the composite reciprocal compensation rates and the target reciprocal compensation rate set forth in § 51.705 for the year beginning July 1, 2015, using the appropriate Fiscal Year 2011 demand, and then multiply by the Price Cap Carrier Traffic Demand Factor; or
  3. For the purpose of establishing its recovery for net reciprocal compensation, a Price Cap Carrier may elect to forgo this step and receive no recovery for reductions in net reciprocal compensation. If a carrier elects this option, it may not change its election at a later date.
- F. An amount equal to True-up Revenues for Access Recovery Charges less Expected Revenues for Access Recovery Charges for the year beginning July 1, 2013.
- (v) Beginning July 1, 2016, a Price Cap Carrier's eligible recovery will be equal to the CALLS Study Area Base Factor and/or the Non-CALLS Study Area Base Factor, as applicable,

multiplied by the sum of the amounts in paragraphs (d)(1)(v)A-(d)(1)(v)E, and then adding the amount in paragraph (d)(1)(v)F to that amount:

- A. The amount of the reduction in Transitional Intrastate Access Service revenues determined pursuant to § 51.907(b)(2) and (c) multiplied by the Price Cap Carrier Traffic Demand Factor;
- B. The reduction in interstate switched access revenues equal to the difference between the Initial Composite Terminating End Office Access Rate and \$0.0007 determined pursuant to § 51.907(f) using Fiscal Year 2011 terminating interstate end office switching minutes, and then multiply by the Price Cap Carrier Traffic Demand Factor;
- C. If the 2014 Intrastate Composite Terminating End Office Access Rate is higher than \$0.0007, the reduction in revenues equal to the difference between the intrastate 2014 Composite Terminating End Office Access Rate and \$0.0007 determined pursuant to § 51.907(f) using Fiscal Year 2011 terminating intrastate end office minutes, and then multiply by the Price Cap Carrier Traffic Demand Factor;
- D. CMRS Net Reciprocal Compensation Revenues multiplied by the Price Cap Carrier Traffic Demand Factor;
- E. A Price Cap Carrier's cumulative reductions in Fiscal Year 2011 net reciprocal compensation revenues other than those associated with CMRS traffic as described in § 51.701(b)(2) resulting from rate reductions required by § 51.705 may be calculated in one of the following ways:
  - 1. Calculate the cumulative reduction in Fiscal Year 2011 net reciprocal compensation revenue as a result of rate reductions required by § 51.705 using Fiscal Year 2011 reciprocal compensation demand, and then multiply by the Price Cap Carrier Traffic Demand Factor;
  - 2. By using a composite reciprocal compensation rate as follows:
    - (i) Establish a composite reciprocal compensation rate for its Fiscal Year 2011 reciprocal compensation receipts and its Fiscal Year 2011 reciprocal compensation payments by dividing its Fiscal Year 2011 reciprocal compensation receipts and payments by their respective Fiscal Year 2011 demand;
    - (ii) Calculate the difference between each of the composite reciprocal compensation rates and the target reciprocal compensation rate set forth in § 51.705 for the year beginning July 1, 2016, using the appropriate Fiscal Year 2011 demand, and then multiply by the Price Cap Carrier Traffic Demand Factor; or
  - 3. For the purpose of establishing its recovery for net reciprocal compensation, a Price Cap Carrier may elect to forgo this step and receive no recovery for reductions in net reciprocal compensation. If a carrier elects this option, it may not change its election at a later date.
- F. An amount equal to True-up Revenues for Access Recovery Charges less Expected Revenues for Access Recovery Charges for the year beginning July 1, 2014.

- (vi) Beginning July 1, 2017, a Price Cap Carrier's eligible recovery will be equal to ninety (90) percent of the sum of the amounts in paragraphs (d)(1)(vi)A-(d)(1)(vi)F, and then adding the amount in paragraph(d)(1)(vi)G to that amount:
- A. The amount of the reduction in Transitional Intrastate Access Service revenues determined pursuant to § 51.907(b)(2) and (c) multiplied by the Price Cap Carrier Traffic Demand Factor; and
  - B. The reduction in interstate switched access revenues equal to the Initial Composite terminating End Office Access Rate using Fiscal Year 2011 terminating interstate end office switching minutes, and then multiply by the Price Cap Carrier Traffic Demand Factor;
  - C. The reduction in revenues equal to the intrastate 2014 Composite terminating End Office Access Rate using Fiscal Year 2011 terminating intrastate end office switching minutes, and then multiply by the Price Cap Carrier Traffic Demand Factor;
  - D. The reduction in revenues resulting from reducing the terminating Tandem-Switched Transport Access Service rate to \$0.0007 pursuant to § 51.907(g)(2) using Fiscal Year 2011 terminating tandem-switched minutes, and then multiply by the Price Cap Carrier Traffic Demand Factor;
  - E. CMRS Net Reciprocal Compensation Revenues multiplied by the Price Cap Carrier Traffic Demand Factor; and
  - F. A Price Cap Carrier's cumulative reductions in Fiscal Year 2011 net reciprocal compensation revenues other than those associated with CMRS traffic as described in § 51.701(b)(2) resulting from rate reductions required by § 51.705 may be calculated in one of the following ways:
    - 1. Calculate the cumulative reduction in Fiscal Year 2011 net reciprocal compensation revenue as a result of rate reductions required by § 51.705 using Fiscal Year 2011 reciprocal compensation demand, and then multiply by the Price Cap Carrier Traffic Demand Factor;
    - 2. By using a composite reciprocal compensation rate as follows:
      - (i) Establish a composite reciprocal compensation rate for its Fiscal Year 2011 reciprocal compensation receipts and its Fiscal Year 2011 reciprocal compensation payments by dividing its Fiscal Year 2011 reciprocal compensation receipts and payments by their respective Fiscal Year 2011 demand;
      - (ii) Calculate the difference between each of the composite reciprocal compensation rates and the target reciprocal compensation rate set forth in § 51.705 for the year beginning July 1, 2017, using the appropriate Fiscal Year 2011 demand, and then multiply by the Price Cap Carrier Traffic Demand Factor; or
    - 3. For the purpose of establishing its recovery for net reciprocal compensation, a Price Cap Carrier may elect to forgo this step and receive no recovery for reductions in net

reciprocal compensation. If a carrier elects this option, it may not change its election at a later date.

- G. An amount equal to True-up Revenues for Access Recovery Charges less Expected Revenues for Access Recovery Charges for the year beginning July 1, 2015.
- (vii) Beginning July 1, 2018, a Price Cap Carrier's eligible recovery will be equal to ninety (90) percent of the sum of the amounts in paragraphs (d)(1)(vii)A-(d)(1)(vii)G, and then adding the amount in paragraph(d)(1)(vii)H to that amount:
- A. The amount of the reduction in Transitional Intrastate Access Service revenues determined pursuant to § 51.907(b)(2) and (c) multiplied by the Price Cap Carrier Traffic Demand Factor; and:
  - B. The reduction in interstate switched access revenues equal to the Initial Composite terminating End Office Access Rate using Fiscal Year 2011 terminating interstate end office switching minutes, and then multiply by the Price Cap Carrier Traffic Demand Factor;
  - C. The reduction in revenues equal to the intrastate 2014 Composite terminating End Office Access Rate using Fiscal Year 2011 terminating intrastate end office switching minutes, and then multiply by the Price Cap Carrier Traffic Demand Factor;
  - D. The reduction in revenues resulting from reducing the terminating Tandem-Switched Transport Access Service rate to \$0.0007 pursuant to § 51.907(g)(2) using Fiscal Year 2011 terminating tandem-switched minutes, and then multiply by the Price Cap Carrier Traffic Demand Factor;
  - E. The reduction in revenues resulting from moving from a terminating Tandem-Switched Transport Access Service rate tariffed at a maximum of \$0.0007 to removal of intercarrier charges pursuant to § 51.907(h), if applicable, using Fiscal Year 2011 terminating tandem-switched minutes, and then multiply by the Price Cap Carrier Traffic Demand Factor;
  - F. CMRS Net Reciprocal Compensation Revenues multiplied by the Price Cap Carrier Traffic Demand Factor; and
  - G. A Price Cap Carrier's cumulative reductions in Fiscal Year 2011 net reciprocal compensation revenues other than those associated with CMRS traffic as described in § 51.701(b)(2) resulting from rate reductions required by § 51.705 may be calculated in one of the following ways:
    - 1. Calculate the cumulative reduction in Fiscal Year 2011 net reciprocal compensation revenue as a result of rate reductions required by § 51.705 using Fiscal Year 2011 reciprocal compensation demand, and then multiply by the Price Cap Carrier Traffic Demand Factor;
    - 2. By using a composite reciprocal compensation rate as follows:
      - (i) Establish a composite reciprocal compensation rate for its Fiscal Year 2011 reciprocal compensation receipts and its Fiscal Year 2011 reciprocal

compensation payments by dividing its Fiscal Year 2011 reciprocal compensation receipts and payments by their respective Fiscal Year 2011 demand;

- (ii) Calculate the difference between each of the composite reciprocal compensation rates and the target reciprocal compensation rate set forth in § 51.705 for the year beginning July 1, 2018, using the appropriate Fiscal Year 2011 demand, and then multiply by the Price Cap Carrier Traffic Demand Factor; or

- 3. For the purpose of establishing its recovery for net reciprocal compensation, a Price Cap Carrier may elect to forgo this step and receive no recovery for reductions in net reciprocal compensation. If a carrier elects this option, it may not change its election at a later date.

H. An amount equal to True-up Revenues for Access Recovery Charges less Expected Revenues for Access Recovery Charges for the year beginning July 1, 2016.

- (viii) Beginning July 1, 2019, and in subsequent years, a Price Cap Carrier's eligible recovery will be equal to the amount calculated in paragraph (d)(1)(vii)A-(d)(1)(vii)H before the application of the Price Cap Carrier Traffic Demand Factor applicable in 2018 multiplied by the appropriate Price Cap Carrier Traffic Demand Factor for the year in question, and then adding an amount equal to True-up Revenues for Access Recovery Charges less Expected Revenues for Access Recovery Charges for the year beginning July 1 two years earlier

- (2) If a Price Cap Carrier recovers any costs or revenues that are already being recovered as Eligible Recovery through Access Recovery Charges or the Connect America Fund from another source, that carrier's ability to recover reduced switched access revenue from Access Recovery Charges or the Connect America Fund shall be reduced to the extent it receives duplicative recovery.

- (3) A Price Cap Carrier seeking revenue recovery must annually certify as part of its tariff filings to the Commission and to the relevant state commission that the carrier is not seeking duplicative recovery in the state jurisdiction for any Eligible Recovery subject to the recovery mechanism.

- (e) Access Recovery Charge. (1) A charge that is expressed in dollars and cents per line per month may be assessed upon end users that may be assessed an end user common line charge pursuant to § 69.152 of this chapter, to the extent necessary to allow the Price Cap Carrier to recover some or all of its eligible recovery determined pursuant to paragraph (d), subject to the caps described in paragraph (e)(5) below. A Price Cap Carrier may elect to forgo charging some or all of the Access Recovery Charge.

- (2) Total Access Recovery Charges calculated by multiplying the tariffed Access Recovery Charge by the projected demand for the year in question may not recover more than the amount of eligible recovery calculated pursuant to paragraph (d) for the year beginning on July 1.

- (3) For the purposes of this section, a Price Cap Carrier holding company includes all of its wholly-owned operating companies that are price cap incumbent local exchange carriers. A Price Cap Carrier Holding Company may recover the eligible recovery attributable to any price cap study areas operated by its wholly-owned operating companies through assessments of the Access Recovery Charge on end users in any price cap study areas operated by its wholly owned operating companies that are price cap incumbent local exchange carriers.

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- (4) Distribution of Access Recovery Charges among lines of different types. (i) A Price Cap Carrier holding company that does not receive ICC-replacement CAF support (whether because it elects not to or because it does not have sufficient eligible recovery after the Access Recovery Charge is assessed or imputed) may not recover a higher fraction of its total revenue recovery from Access Recovery Charges assessed on Residential and Single Line Business lines than:
- A. The number of Residential and Single-Line Business lines divided by
  - B. The sum of the number of Residential and Single-Line Business lines and two (2) times the number of End User Common Line charges assessed on Multi-Line Business customers.
- (ii) For purposes of this rule, Residential and Single Line Business lines are lines (other than lines of Lifeline Customers) assessed the residential and single line business end user common line charge and lines assessed the non-primary residential end user common line charge.
- (iii) For purposes of this rule, Multi-Line Business Lines are lines assessed the multi-line business end user common line charge.
- (5) Per-line caps and other limitations on Access Recovery Charges
- (i) For each line other than lines of Lifeline Customers assessed a primary residential or single-line business end user common line charge or a non-primary residential end user common line charge pursuant to § 69.152 of this Chapter, a Price Cap Carrier may assess an Access Recovery Charge as follows:
- A. Beginning July 1, 2012, a maximum of \$0.50 per month for each line;
  - B. Beginning July 1, 2013, a maximum of \$1.00 per month for each line;
  - C. Beginning July 1, 2014, a maximum of \$1.50 per month for each line;
  - D. Beginning July 1, 2015, a maximum of \$2.00 per month for each line; and
  - E. Beginning July 1, 2016, a maximum of \$2.50 per month for each line.
- (ii) For each line assessed a multi-line business end user common line charge pursuant to § 69.152 of this Chapter, a Price Cap Carrier may assess an Access Recovery Charge as follows:
- A. Beginning July 1, 2012, a maximum of \$1.00 per month for each multi-line business end user common line charge assessed;
  - B. Beginning July 1, 2013, a maximum of \$2.00 per month for each multi-line business end user common line charge assessed;
  - C. Beginning July 1, 2014, a maximum of \$3.00 per month for each multi-line business end user common line charge assessed;
  - D. Beginning July 1, 2015, a maximum of \$4.00 per month for each multi-line business end user common line charge assessed; and

- E. Beginning July 1, 2016, a maximum of \$5.00 per month for each multi-line business end user common line charge assessed.
- (iii) The Access Recovery Charge allowed by paragraph (e)(5)(i) may not be assessed to the extent that its assessment would bring the total of the Rate Ceiling Component Charges above the Residential Rate Ceiling on January 1 of that year. This limitation applies only to the first residential line obtained by a residential end user and does not apply to single-line business customers.
- (iv) The Access Recovery Charge allowed by paragraph (e)(5)(ii) may not be assessed to the extent that its assessment would bring the total of the multi-line business end user common line charge and the Access Recovery Charge above \$12.20 per line.
- (v) The Access Recovery Charge assessed on lines assessed the non-primary residential line end user common line charge in a study area may not exceed the Access Recovery Charge assessed on residential end-users' first residential line in that study area.
- (vi) The Access Recovery Charge may not be assessed on lines of any Lifeline Customers.
- (vii) If in any year, the Price Cap Carrier's Access Recovery Charge is not at its maximum, the succeeding year's Access Recovery Charge may not increase more than \$.050 per line per month for charges assessed under paragraph (e)(5)(i) or \$1.00 per line per month for charges assessed under paragraph (e)(5)(ii).
- (f) Price Cap Carrier eligibility for CAF ICC Support.
- (2) A Price Cap Carrier shall elect in its July 1, 2012 access tariff filing whether it will receive CAF ICC Support under this paragraph. A Price Cap Carrier eligible to receive CAF ICC Support subsequently may elect at any time not to receive such funding. Once it makes the election not to receive CAF ICC Support, it may not elect to receive such funding at a later date.
- (3) Beginning July 1, 2012, a Price Cap Carrier may recover any eligible recovery allowed by paragraph (d) that it could not have recovered through charges assessed pursuant to paragraph (e) from CAF ICC Support pursuant to § 54.304. For this purpose, the Price Cap Carrier must impute the maximum charges it could have assessed under paragraph (e).
- (4) Beginning July 1, 2017, a Price Cap Carrier may recover two-thirds (2/3) of the amount it otherwise would have been eligible to recover under subparagraph (2) from CAF ICC Support.
- (5) Beginning July 1, 2018, a Price Cap Carrier may recover one-third (1/3) of the amount it otherwise would have been eligible to recover under subparagraph (2) from CAF ICC Support.
- (6) Beginning July 1, 2019, a Price Cap Carrier may no longer recover any amount related to revenue recovery under this paragraph from CAF ICC Support.
- (7) A Price Cap Carrier that elects to receive CAF ICC support must certify with its 2012 annual access tariff filing and on April 1<sup>st</sup> of each subsequent year that it has complied with paragraphs (d) and (e), and, after doing so, is eligible to receive the CAF ICC support requested pursuant to paragraph (f).



**§ 51.917 Revenue recovery for Rate-of-Return Carriers.**

- (a) Scope. This section sets forth the extent to which Rate-of-Return Carriers may recover, through the recovery mechanism outlined below, a portion of revenues lost due to rate reductions required by §§ 20.11(b), 51.705 and 51.909 of this chapter.
- (b) Definitions. 2011 Interstate Switched Access Revenue Requirement. 2011 Interstate Switched Access Revenue Requirement means: (a) for a Rate-of-Return Carrier that participated in the NECA 2011 annual switched access tariff filing, its projected interstate switched access revenue requirement associated with the NECA 2011 annual interstate switched access tariff filing; (b) for a Rate-of-Return Carrier subject to section 61.38 of this chapter that filed its own annual access tariff in 2010 and did not participate in the NECA 2011 annual switched access tariff filing, its projected interstate switched access revenue requirement in its 2010 annual interstate switched access tariff filing; and (3) for a Rate-of-Return Carrier subject to section 61.39 of this chapter that filed its own annual switched access tariff in 2011, its historically-determined annual interstate switched access revenue requirement filed with its 2011 annual interstate switched access tariff filing.
- (1) Expected Revenues. Expected Revenues from an access service are calculated using the default transition rate for that service specified by § 51.909 of this part and forecast demand for that service. Expected Revenues from a non-access service are calculated using the default transition rate for that service specified by § 20.11 or § 51.705 of this chapter and forecast net demand for that service.
- (2) Rate-of-Return Carrier Baseline Adjustment Factor. The Rate-of-Return Carrier Baseline Adjustment Factor, as used in calculating eligible recovery for Rate-of-Return Carriers, is equal to ninety-five (95) percent for the period beginning July 1, 2012. It is reduced by five (5) percent of its previous value in each subsequent annual tariff filing.
- (3) Revenue Requirement. Revenue Requirement is equal to a carrier's regulated operating costs plus an 11.25 percent return on a carrier's net rate base calculated in compliance with the provisions of parts 36, 65 and 69 of this chapter. For an average schedule carrier, its Revenue Requirement shall be equal to the average schedule settlements it received from the pool, adjusted to reflect an 11.25 percent rate of return, or what it would have received if it had been a participant in the pool. If the reference is to an operating segment, these references are to the Revenue Requirement associated with that segment.
- (4) True-up Adjustment. The True-up Adjustment is equal to the Expected Revenues less the True-up Revenues for any particular service for the period in question.
- (5) True-up Revenues. True-up Revenues from an access service are equal to Expected Revenues minus ((projected demand minus actual realized demand for that service) times the default transition rate for that service specified by 51.909). True-up Revenues from a non-access service are equal to Expected Revenues minus ((projected demand minus actual realized net demand for that service) times the default transition rate for that service specified by 20.11(b) or 51.705). Realized demand is the demand for which payment has been received, or has been made, as appropriate, by the time the true-up is made.
- (c) 2011 Rate-of-Return Carrier Base Period Revenue. (1) 2011 Rate-of-Return Carrier Base Period Revenue is the sum of:
- (i) 2011 Interstate Switched Access Revenue Requirement;

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- (ii) Fiscal Year 2011 revenues from Transitional Intrastate Access Service received by March 31, 2012; and
  - (iii) Fiscal Year 2011 reciprocal compensation revenues received by March 31, 2012, less Fiscal Year 2011 reciprocal compensation payments paid and/or payable by March 31, 2012
- (2) 2011 Rate-of-Return Carrier Base Period Revenue shall be adjusted to reflect the removal of any increases in revenue requirement or revenues resulting from access stimulation activity the Rate-of-Return Carrier engaged in during the relevant measuring period. A Rate-of-Return Carrier should make this adjustment for its initial July 1, 2012, tariff filing, but the adjustment may result from a subsequent Commission or court ruling.
- (d) Eligible Recovery for Rate-of-Return Carriers. (1) Notwithstanding any other provision of the Commission's rules, a Rate-of-Return Carrier may recover the amounts specified in this paragraph through the mechanisms described in paragraphs (e) and (f).
- (i) Beginning July 1, 2012, a Rate-of-Return Carrier's eligible recovery will be equal to the Rate-of-Return Carrier Baseline Adjustment Factor multiplied by the sum of:
    - 1. The Fiscal Year 2011 revenues from Transitional Intrastate Access Service less the Expected Revenues from Transitional Intrastate Access Service for the year beginning July 1, 2012, reflecting the rate transition contained in § 51.909;
    - 2. 2011 Base Period Revenue Requirement less the Expected Revenues from interstate switched access for the year beginning July 1, 2012, reflecting the rate transition contained in § 51.909;
    - 3. CMRS Net Reciprocal Compensation Revenues; and
    - 4. A Rate-of-Return Carrier's reductions in Fiscal Year 2011 net reciprocal compensation revenues other than those associated with CMRS traffic as described in § 51.701(b)(2) of this part resulting from rate reductions required by § 51.705, which may be calculated in one of the following ways:
      - i. Fiscal Year 2011 net reciprocal compensation revenue less the Expected Revenues from net reciprocal compensation for the year beginning July 1, 2012, reflecting the rate reductions required by § 51.705;
      - ii. By using a composite reciprocal compensation rate as follows:
        - 1. Establish a composite reciprocal compensation rate for its Fiscal Year 2011 reciprocal compensation receipts and its Fiscal Year 2011 reciprocal compensation payments by dividing its Fiscal Year 2011 reciprocal compensation receipts and payments by their respective Fiscal Year 2011 demand;
        - 2. Estimate the expected reduction in net reciprocal compensation for the year beginning July 1, 2012, by calculating the expected difference between the Fiscal Year 2011 composite reciprocal compensation rates and the target reciprocal compensation rate set forth in § 51.705 for the year beginning July 1, 2012 using projected 2012 demand; or

- iii. For the purpose of establishing its recovery for net reciprocal compensation, a Rate-of-Return Carrier may elect to forgo this step and receive no recovery for reductions in net reciprocal compensation. If a carrier elects this option, it may not change its election at a later date.
- (ii) Beginning July 1, 2013, a Rate-of-Return Carrier's eligible recovery will be equal to the Rate-of-Return Carrier Baseline Adjustment Factor multiplied by the sum of:
- 1. The Fiscal Year 2011 revenues from Transitional Intrastate Access Service less the Expected Revenues from Transitional Intrastate Access Service for the year beginning July 1, 2013, reflecting the rate transition contained in § 51.909;
  - 2. 2011 Rate-of-Return Carrier Base Period Revenue Requirement less the Expected Revenues from interstate switched access for the year beginning July 1, 2013
  - 3. CMRS Net Reciprocal Compensation Revenues;
  - 4. A Rate-of-Return Carrier's reductions in Fiscal Year 2011 net reciprocal compensation revenues other than those associated with CMRS traffic as described in § 51.701(b)(2) resulting from rate reductions required by § 51.705 may be calculated in one of the following ways:
    - i. Fiscal Year 2011 net reciprocal compensation revenue less the Expected Revenues from net reciprocal compensation for the year beginning July 1, 2013, reflecting the rate reductions required by 51.705;
    - ii. By using a composite reciprocal compensation rate as follows:
      - 1. Establish a composite reciprocal compensation rate for its Fiscal Year 2011 reciprocal compensation receipts and its Fiscal Year 2011 reciprocal compensation payments by dividing its Fiscal Year 2011 reciprocal compensation receipts and payments by their respective Fiscal Year 2011 demand;
      - 2. Estimate the expected reduction in net reciprocal compensation for the year beginning July 1, 2013, by calculating the expected difference between the Fiscal Year 2011 composite reciprocal compensation rates and the target reciprocal compensation rate set forth in § 51.705 for the year beginning July 1, 2013 using projected 2013 demand; or
- iii. For the purpose of establishing its recovery for net reciprocal compensation, a Rate-of-Return Carrier may elect to forgo this step and receive no recovery for reductions in net reciprocal compensation. If a carrier elects this option, it may not change its election at a later date.
- (iii) Beginning July 1, 2014, a Rate-of-Return Carrier's eligible recovery will be equal to the Rate-of-Return Carrier Baseline Adjustment Factor multiplied by the sum of the amounts in paragraphs (d)(1)(iii)(1)-(d)(1)(iii)(4), and by adding the amount in paragraph (d)(1)(iii)5 to that amount:

1. The Fiscal Year 2011 revenues from Transitional Intrastate Access Service less the Expected Revenues from Transitional Intrastate Access Service for the year beginning July 1, 2014, reflecting the rate transitions contained in § 51.909 (including the reduction in intrastate End Office Switched Access Service rates), adjusted to reflect the True-Up Adjustment for Transitional Intrastate Access Service for the year beginning July 1, 2012;
  2. 2011 Base Period Revenue Requirement less the Expected Revenues from interstate switched access for the year beginning July 1, 2014, adjusted to reflect the True-Up Adjustment for Interstate switched Access for the year beginning July 1, 2012;
  3. CMRS Net Reciprocal Compensation Revenues; and
  4. A Rate-of-Return Carrier's reductions in Fiscal Year 2011 net reciprocal compensation revenues other than those associated with CMRS traffic as described in § 51.701(b)(2) resulting from rate reductions required by § 51.705 may be calculated in one of the following ways:
    - i. Fiscal Year 2011 net reciprocal compensation revenue less the Expected Revenues from net reciprocal compensation for the year beginning July 1, 2014, reflecting the rate reductions required by 51.705 adjusted to reflect the True-Up Adjustment for reciprocal compensation for the year beginning July 1, 2012;
    - ii. By using a composite reciprocal compensation rate as follows:
      1. Establish a composite reciprocal compensation rate for its Fiscal Year 2011 reciprocal compensation receipts and its Fiscal Year 2011 reciprocal compensation payments by dividing its Fiscal Year 2011 reciprocal compensation receipts and payments by their respective Fiscal Year 2011 demand;
      2. Estimate the expected reduction in net reciprocal compensation for the year beginning July 1, 2014, by calculating the expected difference between the Fiscal Year 2011 composite reciprocal compensation rates and the target reciprocal compensation rate set forth in § 51.705 for the year beginning July 1, 2014, adjusted to reflect the True-Up Adjustment for reciprocal compensation for the year beginning July 1, 2012; or
    - iii. For the purpose of establishing its recovery for net reciprocal compensation, a Rate-of-Return Carrier may elect to forgo this step and receive no recovery for reductions in net reciprocal compensation. If a carrier elects this option, it may not change its election at a later date.
  5. An amount equal to True-up Revenues for Access Recovery Charges less Expected Revenues for Access Recovery Charges for the year beginning July 1, 2012.
- (iv) Beginning July 1, 2015, and for all subsequent years, a Rate-of-Return Carrier's eligible recovery will be calculated by updating the procedures set forth in paragraph (d)(1)(iii) for the period beginning July 1, 2014, to reflect the passage of an additional year in each subsequent year.

- (v) If a Rate-of-Return Carrier receives payments for intrastate or interstate switched access services or for Access Recovery Charges after the period used to measure the adjustments to reflect the differences between estimated and actual revenues, it shall treat such payments as actual revenue in the year the payment is received and shall reflect this as an additional adjustment for that year.
  - (vi) If a Rate-of-Return Carrier receives or makes reciprocal compensation payments after the period used to measure the adjustments to reflect the differences between estimated and actual net reciprocal compensation revenues, it shall treat such amounts as actual revenues or payments in the year the payment is received or made and shall reflect this as an additional adjustment for that year.
  - (vii) If a Rate-of-Return Carrier recovers any costs or revenues that are already being recovered as Eligible Recovery through Access Recovery Charges or the Connect America Fund from another source, that carrier's ability to recover reduced switched access revenue from Access Recovery Charges or the Connect America Fund shall be reduced to the extent it receives duplicative recovery. A Rate-of-Return Carrier seeking revenue recovery must annually certify as part of its tariff filings to the Commission and to the relevant state commission that the carrier is not seeking duplicative recovery in the state jurisdiction for any Eligible Recovery subject to the recovery mechanism.
- (e) Access Recovery Charge. (1) A charge that is expressed in dollars and cents per line per month may be assessed upon end users that may be assessed a subscriber line charge pursuant to § 69.104 of this chapter, to the extent necessary to allow the Rate-of-Return Carrier to recover some or all of its Eligible Recovery determined pursuant to paragraph (d), subject to the caps described in paragraph (e)(6) below. A Rate-of-Return Carrier may elect to forgo charging some or all of the Access Recovery Charge.
- (2) Total Access Recovery Charges calculated by multiplying the tariffed Access Recovery Charge by the projected demand for the year may not recover more than the amount of eligible recovery calculated pursuant to paragraph (d) for the year beginning on July 1.
  - (3) For the purposes of this section, a Rate-of-Return Carrier holding company includes all of its wholly-owned operating companies. A Rate-of-Return Carrier Holding Company may recover the eligible recovery attributable to any Rate-of-Return study areas operated by its wholly-owned operating companies that are Rate-of-Return incumbent local exchange carriers through assessments of the Access Recovery Charge on end users in any Rate-of-Return study areas operated by its wholly owned operating companies that are Rate-of-Return incumbent local exchange carriers.
  - (4) Distribution of Access Recovery Charges among lines of different types
    - (i) A Rate-of-Return Carrier that does not receive ICC-replacement CAF support (whether because they elect not to or because they do not have sufficient eligible recovery after the Access Recovery Charge is assessed or imputed) may not recover a higher ratio of its total revenue recovery from Access Recovery Charges assessed on Residential and Single Line Business lines than the following ratio (using holding company lines):
      - 1. The number of Residential and Single-Line Business lines assessed an End User Common Line charge (excluding Lifeline Customers), divided by

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2. The sum of the number of Residential and Single-Line Business lines assessed an End User Common Line charge (excluding Lifeline Customers), and two (2) times the number of End User Common Line charges assessed on Multi-Line Business customers.
- (5) For purposes of this rule, Residential and Single Line Business lines are lines (other than lines of Lifeline Customers) assessed the residential and single line business end user common line charge.
- (i) For purposes of this rule, Multi-Line Business Lines are lines assessed the multi-line business end user common line charge.
- (6) Per-line caps and other limitations on Access Recovery Charges. (i) For each line other than lines of Lifeline Customers assessed a primary residential or single-line business end user common line charge pursuant to § 69.104 of this Chapter, a Rate-of-Return Carrier may assess an Access Recovery Charge as follows:
1. Beginning July 1, 2012, a maximum of \$0.50 per month for each line;
  2. Beginning July 1, 2013, a maximum of \$1.00 per month for each line;
  3. Beginning July 1, 2014, a maximum of \$1.50 per month for each line;
  4. Beginning July 1, 2015, a maximum of \$2.00 per month for each line;
  5. Beginning July 1, 2016, a maximum of \$2.50 per month for each line; and
  6. Beginning July 1, 2017, a maximum of \$3.00 per month for each line.
- (ii) For each line assessed a multi-line business end user common line charge pursuant to § 69.104 of this Chapter, a Rate-of-Return Carrier may assess an Access Recovery Charge as follows:
1. Beginning July 1, 2012, a maximum of \$1.00 per month for each multi-line business end user common line charge assessed;
  2. Beginning July 1, 2013, a maximum of \$2.00 per month for each multi-line business end user common line charge assessed;
  3. Beginning July 1, 2014, a maximum of \$3.00 per month for each multi-line business end user common line charge assessed;
  4. Beginning July 1, 2015, a maximum of \$4.00 per month for each multi-line business end user common line charge assessed;
  5. Beginning July 1, 2016, a maximum of \$5.00 per month for each multi-line business end user common line charge assessed; and
  6. Beginning July 1, 2017, a maximum of \$6.00 per month for each multi-line business end user common line charge assessed.
- (iii) The Access Recovery Charge allowed by subparagraph (e)(6)(i) may not be assessed to the extent that its assessment would bring the total of the Rate Ceiling Component Charges above

the Residential Rate Ceiling. This limitation does not apply to single-line business customers.

- (iv) The Access Recovery Charge allowed by subparagraph (e)(6)(ii) may not be assessed to the extent that its assessment would bring the total of the multi-line business end user common line charge and the Access Recovery Charge above \$12.20 per line.
  - (v) The Access Recovery Charge may not be assessed on lines of Lifeline Customers.
  - (vi) If in any year, the Rate of return carriers' Access Recovery Charge is not at its maximum, the succeeding year's Access Recovery Charge may not increase more than \$0.50 per line for charges under subparagraph (e)(6)(i) or \$1.00 per line for charges assessed under subparagraph (e)(6)(ii).
  - (vii) A Price Cap Carrier with study areas that are subject to rate-of-return regulation shall recover its eligible recovery for such study areas through the recovery procedures specified in this section. For that purpose, the provisions of paragraph (e)(3) shall apply to the rate-of-return study areas if the applicable conditions in paragraph (e)(3) are met.
- (f) Rate-of-Return Carrier eligibility for CAF ICC Recovery. (1) A Rate-of-Return Carrier shall elect in its July 1, 2012 access tariff filing whether it will receive CAF ICC Support under this paragraph. A Rate-of-Return Carrier eligible to receive CAF ICC Support subsequently may elect at any time not to receive such funding. Once it makes the election not to receive CAF ICC Support, it may not elect to receive such funding at a later date.
- (2) Beginning July 1, 2012, a Rate-of-Return Carrier may recover any eligible recovery allowed by paragraph (d) that it could not have recovered through charges assessed pursuant to paragraph (e) from CAF ICC Support pursuant to § 54.304. For this purpose, the Rate-of-Return Carrier must impute the maximum charges it could have assessed under paragraph (e).
- (3) A Rate-of-Return Carrier that elects to receive CAF ICC support must certify with its 2012 annual access tariff filing and on April 1<sup>st</sup> of each subsequent year that it has complied with paragraphs (d) and (e), and, after doing so, is eligible to receive the CAF ICC support requested pursuant to paragraph (f).

#### **§ 51.919 Reporting and monitoring**

- (a) A Price Cap Carrier that elects to participate in the recovery mechanism outlined in § 51.915 shall, beginning in 2012, file with the Commission the data consistent with Section XIII (f)(3) of FCC 11-161 with its annual access tariff filing.
- (b) A Rate-of-Return Carrier that elects to participate in the recovery mechanism outlined in § 51.917 shall file with the Commission the data consistent with Section XIII (f)(3) of FCC 11-161 with its annual interstate access tariff filing, or on the date such a filing would have been required if it had been required to file in that year.

#### **PART 54—UNIVERSAL SERVICE**

32. The authority citation for part 54 is revised to read as follows:

Authority: 47 U.S.C. 151, 154(i), 201, 205, 214, 219, 220, 254, 303(r), 403, and 1302 unless otherwise noted.

### Subpart A—General Information

33. Amend §54.5 by adding definitions of “community anchor institutions,” “high-cost support,” “Tribal lands” and “unsubsidized competitor,” and by revising the definition of “rate-of-return carrier” to read as follows:

#### **§ 54.5 Terms and Definitions.**

\* \* \* \* \*

Community anchor institutions. For the purpose of high-cost support, “community anchor institutions” refers to schools, libraries, health care providers, community colleges, other institutions of higher education, and other community support organizations and entities.

\*\*\*\*\*

High-cost support. “High-cost support” refers to those support mechanisms in existence as of October 1, 2011, specifically, high-cost loop support, safety net additive and safety valve provided pursuant to subpart F of part 36, local switching support pursuant to § 54.301, forward-looking support pursuant to § 54.309, interstate access support pursuant to §§ 54.800 through 54.809, and interstate common line support pursuant to §§ 54.901 through 54.904, support provided pursuant to §§ 51.915, 51.917, and 54.304, support provided to competitive eligible telecommunications carriers as set forth in §54.307(e), Connect America Fund support provided pursuant to § 54.312, and Mobility Fund support provided pursuant to subpart L of this part.

\* \* \* \* \*

Rate-of-return carrier. “Rate-of-return carrier” shall refer to any incumbent local exchange carrier not subject to price cap regulation as that term is defined in § 61.3(aa) of this chapter.

\* \* \* \* \*

Tribal lands. For the purposes of high-cost support, “Tribal lands” include any federally recognized Indian tribe’s reservation, pueblo or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlements Act (85 Stat. 688) and Indian Allotments, see § 54.400(e), as well as Hawaiian Home Lands – areas held in trust for native Hawaiians by the state of Hawaii, pursuant to the Hawaiian Homes Commission Act, 1920, July 9, 1921, 42 Stat. 108, et seq., as amended.

Unsubsidized competitor. An “unsubsidized competitor” is a facilities-based provider of residential terrestrial fixed voice and broadband service that does not receive high-cost support.

\* \* \* \* \*

14. Revise § 54.7 to read as follows:

#### **§ 54.7 Intended use of federal universal service support.**



(a) A carrier that receives federal universal service support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.

(b) The use of federal universal service support that is authorized by paragraph (a) shall include investments in plant that can, either as built or with the addition of plant elements, when available, provide access to advanced telecommunications and information services.

#### **Subpart B—Services Designated for Support**

34. Revise §54.101 to read as follows:

##### **§ 54.101 Supported services for rural, insular and high cost areas.**

(a) Services designated for support. Voice telephony service shall be supported by federal universal service support mechanisms. The functionalities of eligible voice telephony services include voice grade access to the public switched network or its functional equivalent; minutes of use for local service provided at no additional charge to end users; access to the emergency services provided by local government or other public safety organizations, such as 911 and enhanced 911, to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems; and toll limitation for qualifying low-income consumers (as described in subpart E of this part).

(b) An eligible telecommunications carrier must offer voice telephony service as set forth in paragraph (a) of this section in order to receive federal universal service support.

#### **Subpart C—Carriers Eligible for Universal Service Support**

35. Revise §54.202 to read as follows:

##### **§ 54.202 Additional requirements for Commission designation of eligible telecommunications carriers.**

(a) In order to be designated an eligible telecommunications carrier under section 214(e)(6), any common carrier in its application must:

(1) (i) Certify that it will comply with the service requirements applicable to the support that it receives.

(ii) Submit a five-year plan that describes with specificity proposed improvements or upgrades to the applicant's network throughout its proposed service area. Each applicant shall estimate the area and population that will be served as a result of the improvements.

(2) Demonstrate its ability to remain functional in emergency situations, including a demonstration that it has a reasonable amount of back-up power to ensure functionality without an external power source, is able to reroute traffic around damaged facilities, and is capable of managing traffic spikes resulting from emergency situations.

(3) Demonstrate that it will satisfy applicable consumer protection and service quality standards. A commitment by wireless applicants to comply with the Cellular Telecommunications and Internet Association's Consumer Code for Wireless Service will satisfy this requirement. Other commitments will be considered on a case-by-case basis.

(b) Public Interest Standard. Prior to designating an eligible telecommunications carrier pursuant to section 214(e)(6), the Commission determines that such designation is in the public interest.

(c) A common carrier seeking designation as an eligible telecommunications carrier under section 214(e)(6) for any part of Tribal lands shall provide a copy of its petition to the affected tribal government and tribal regulatory authority, as applicable, at the time it files its petition with the Federal Communications Commission. In addition, the Commission shall send any public notice seeking comment on any petition for designation as an eligible telecommunications carrier on Tribal lands, at the time it is released, to the affected tribal government and tribal regulatory authority, as applicable, by the most expeditious means available.

#### **Subpart D—Universal Service Support for High-Cost Areas**

36. Amend §54.301 by revising paragraph (a)(1), revising the first sentence of paragraph (b), and by revising the first sentence of paragraph (e)(1) to read as follows:

##### **§ 54.301 Local switching support.**

(a) \*\*\*

(1) Beginning January 1, 1998 and ending December 31, 2011, an incumbent local exchange carrier that has been designated an eligible telecommunications carrier and that serves a study area with 50,000 or fewer access lines shall receive support for local switching costs using the following formula: the carrier's projected annual unseparated local switching revenue requirement, calculated pursuant to paragraph (d) of this section, shall be multiplied by the local switching support factor. Beginning January 1, 2012 and ending June 30, 2012, a rate-of-return carrier, as that term is defined in § 54.5 of this chapter, that is an incumbent local exchange carrier that has been designated an eligible telecommunications carrier and that serves a study area with 50,000 or fewer access lines and is not affiliated with a price cap carrier, as that term is defined in § 61.3(aa) of this chapter, shall receive support for local switching costs frozen at the same support level received for calendar year 2011, subject to true-up. For purposes of this section, local switching costs shall be defined as Category 3 local switching costs under part 36 of this chapter. Beginning January 1, 2012, no carrier that is a price cap carrier, as that term is defined in § 61.3(aa) of this chapter, or a rate-of-return carrier, as that term is defined in § 54.5 of this chapter, that is affiliated with a price cap carrier, shall receive local switching support. Beginning July 1, 2012, no carrier shall receive local switching support.

\*\*\*\*\*

(b) Submission of data to the Administrator. Until October 1, 2011, each incumbent local exchange carrier that has been designated an eligible telecommunications carrier and that serves a study area with 50,000 or fewer access lines shall, for each study area, provide the Administrator with the projected total unseparated dollar amount assigned to each account listed below for the calendar year following each filing.\*\*\*

\*\*\*\*\*

(e) True-up adjustment—(1) Submission of true-up data. Until December 31, 2012, each incumbent local exchange carrier that has been designated an eligible telecommunications carrier and that serves a study area with 50,000 or fewer access lines shall, for each study area, provide the Administrator with the historical total unseparated dollar amount assigned to each account listed in paragraph (b) of this section for each calendar year no later than 12 months after the end of such calendar year.\*\*\*

\*\*\*\*\*

37. Add §54.302 to subpart D to read as follows:

**§ 54.302 Monthly per-line limit on universal service support.**

(a) Beginning July 1, 2012 and until June 30, 2013, each study area's universal service monthly support (not including Connect America Fund support provided pursuant to § 54.304) on a per-line basis shall not exceed \$250 per-line plus two-thirds of the difference between its uncapped per-line monthly support and \$250. Beginning July 1, 2013 and until June 30, 2014, each study area's universal service monthly support on a per-line basis shall not exceed \$250 per-line plus one third of the difference between its uncapped per-line monthly support and \$250. Beginning July 1, 2014, each study area's universal service monthly per-line support shall not exceed \$250.

(b) For purposes of this section, universal service support is defined as the sum of the amounts calculated pursuant to §§ 36.605, 36.631, 54.301, 54.305, and 54.901-.904 of this chapter. Line counts for purposes of this section shall be as of the most recent line counts reported pursuant to § 36.611(h) of this chapter.

(c) The Administrator, in order to limit support to \$250 for affected carriers, shall reduce safety net additive support, high-cost loop support, safety valve support, and interstate common line support in proportion to the relative amounts of each support the study area would receive absent such limitation.

**§54.303 [Removed]**

38. Section 54.303 is removed.

39. Add §54.304 to subpart D to read as follows:

**§54.304 – Administration of Connect America Fund Intercarrier Compensation Replacement.**

(a) The Administrator shall administer CAF ICC support pursuant to § 51.915 and § 51.917 of this chapter.

(b) The funding period is the period beginning July 1 through June 30 of the following year.

(c) For price cap carriers that are eligible and elect, pursuant to § 51.915(f) of this chapter, to receive CAF ICC support, the following provisions govern the filing of data with the Administrator, the Commission, and the relevant state commissions and the payment by the Administrator to those carriers of CAF ICC support amounts that the carrier is eligible to receive pursuant to § 51.915 of this chapter.

(1) A price cap carrier seeking CAF ICC support pursuant to § 51.915 of this chapter shall file data with the Administrator, the Commission, and the relevant state commissions no later than June 30, 2012, for the first year, and no later than March 31, in subsequent years, establishing the amount of the price cap carrier's eligible CAF ICC funding during the upcoming funding period pursuant to § 51.915 of this chapter. The amount shall include any true-ups, pursuant to § 51.915 of this chapter, associated with an earlier funding period.

(2) The Administrator shall monthly pay each price cap carrier one-twelfth (1/12) of the amount the carrier is eligible to receive during that funding period.

- (d) For rate-of-return carriers that are eligible and elect, pursuant to § 51.917(f) of this chapter, to receive CAF ICC support, the following provisions govern the filing of data with the Administrator, the Commission, and the relevant state commissions and the payment by the Administrator to those carriers of CAF ICC support amounts that the rate-of-return carrier is eligible to receive pursuant to § 51.917 of this chapter.

(1) A rate-of-return carrier seeking CAF ICC support shall file data with the Administrator, the Commission, and the relevant state commissions no later than June 30, 2012, for the first year, and no later than March 31, in subsequent years, establishing the rate-of-return carrier's projected eligibility for CAF ICC funding during the upcoming funding period pursuant to § 51.917 of this chapter. The projected amount shall include any true-ups, pursuant to § 51.917 of this chapter, associated with an earlier funding period.

(2) The Administrator shall monthly pay each rate-of-return carrier one-twelfth (1/12) of the amount the carrier is to be eligible to receive during that funding period.

40. Amend §54.305 by adding a sentence at the end of paragraph (a) and by adding a sentence at the beginning of paragraph (b) to read as follows:

**§ 54.305 Sale or transfer of exchanges.**

(a) \*\*\* After December 31, 2011, the provisions of this section shall not be used to determine support for any price cap incumbent local exchange carrier or a rate-of-return carrier, as that term is defined in § 54.5 of this chapter, that is affiliated with a price cap incumbent local exchange carrier.

(b) Beginning January 1, 2012, any carrier subject to the provisions of this paragraph shall receive support pursuant to this paragraph or support based on the actual costs of the acquired exchanges, whichever is less. \*\*\*

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41. Amend §54.307 by adding paragraph (e) to read as follows:

**§ 54.307 Support to a competitive eligible telecommunications carrier.**

\*\*\*\*\*

(e) Support Beginning January 1, 2012. Competitive eligible telecommunications carriers will, beginning January 1, 2012, receive support based on the methodology described in this paragraph and not based on paragraph (a) of this section.

(1) Baseline Support Amount. Each competitive eligible telecommunication carrier will have a "baseline support amount" equal to its total 2011 support in a given study area, or an amount equal to \$3,000 times the number of reported lines for 2011, whichever is lower. Each competitive eligible telecommunications carrier will have a "monthly baseline support amount" equal to its baseline support amount divided by twelve.

(i) "Total 2011 support" is the amount of support disbursed to a competitive eligible telecommunication carrier for 2011, without regard to prior period adjustments related to years other than 2011 and as determined by the Administrator on January 31, 2012.

(ii) For the purpose of calculating the \$3,000 per line limit, the average of lines reported by a competitive eligible telecommunication carrier pursuant to line count filings required for December 31, 2010, and December 31, 2011 shall be used.

(2) Monthly Support Amounts. Competitive eligible telecommunications carriers shall receive the following support amounts, except as provided in paragraphs (e)(3) through (e)(6) of this section.

(i) From January 1, 2012, to June 30, 2012, each competitive eligible telecommunications carrier shall receive its monthly baseline support amount each month.

(ii) From July 1, 2012 to June 30, 2013, each competitive eligible telecommunications carrier shall receive 80 percent of its monthly baseline support amount each month.

(iii) From July 1, 2013, to June 30, 2014, each competitive eligible telecommunications carrier shall receive 60 percent of its monthly baseline support amount each month.

(iv) From July 1, 2014, to June 30, 2015, each competitive eligible telecommunications carrier shall receive 40 percent of its monthly baseline support amount each month.

(v) From July 1, 2015, to June 30, 2016, each competitive eligible telecommunications carrier shall receive 20 percent of its monthly baseline support amount each month.

(vi) Beginning July 1, 2016, no competitive eligible telecommunications carrier shall receive universal service support pursuant to this section.

(3) Delayed Phase Down for Remote Areas in Alaska. Certain competitive eligible telecommunications carriers serving remote areas in Alaska shall have their support phased down on a later schedule than that described in paragraph (e)(2) of this section.

(i) Remote Areas in Alaska. For the purpose of this paragraph, “remote areas in Alaska” includes all of Alaska except;

(A) The ACS-Anchorage incumbent study area; (2) the ACS-Juneau incumbent study area;

(B) The fairbankszone1 disaggregation zone in the ACS-Fairbanks incumbent study area; and

(C) The Chugiak 1 and 2 and Eagle River 1 and 2 disaggregation zones of the Matanuska Telephone Association incumbent study area.

(ii) Carriers Subject to Delayed Phase Down. A competitive eligible telecommunications carrier shall be subject to the delayed phase down described in paragraph (e)(3) of this section to the extent that it serves remote areas in Alaska, and it certified that it served covered locations in its September 30, 2011, filing of line counts with the Administrator. To the extent a competitive eligible telecommunications carrier serving Alaska is not subject to the delayed phase down, it will be subject to the phase down of support on the schedule described in paragraph (e)(2) of this section.

(iii) Baseline for Delayed Phase Down. For purpose of the delayed phase down for remote areas in Alaska, the baseline amount shall be calculated in the same manner as described in paragraph (e)(1) of this section, except that support amounts from 2013 shall be used.

(iv) Monthly Support Amounts. Competitive eligible telecommunications carriers subject to the delayed phase down for remote areas in Alaska shall receive the following support amounts, except as provided in paragraphs (e)(4) through (e)(6) of this section.

(A) From January 1, 2014, to June 30, 2014, each competitive eligible telecommunications carrier shall receive its monthly baseline support amount each month.

(B) From July 1, 2014 to June 30, 2015, each competitive eligible telecommunications carrier shall receive 80 percent of its monthly baseline support amount each month.

(C) From July 1, 2015, to June 30, 2016, each competitive eligible telecommunications carrier shall receive 60 percent of its monthly baseline support amount each month.

(D) From July 1, 2016, to June 30, 2017, each competitive eligible telecommunications carrier shall receive 40 percent of its monthly baseline support amount each month.

(E) From July 1, 2017, to June 30, 2018, each competitive eligible telecommunications carrier shall receive 20 percent of its monthly baseline support amount each month.

(F) Beginning July 1, 2018, no competitive eligible telecommunications carrier serving remote areas in Alaska shall receive universal service support pursuant to this section.

(v) Interim Support for Remote Areas in Alaska. From January 1, 2012, until December 31, 2013, competitive eligible telecommunications carriers subject to the delayed phase down for remote areas in Alaska shall receive the support, as calculated by the Administrator, each competitive eligible telecommunications carrier would have received under the frozen per-line support amount as of December 31, 2011 capped at \$3,000 per year, provided that the total amount of support for all such competitive eligible telecommunications carriers shall be capped pursuant to subparagraph (A).

(A) Cap Amount. The total amount of support available on an annual basis for competitive eligible telecommunications carriers subject to the delayed phase down for remote areas in Alaska shall be equal to the sum of “total 2011 support,” as defined in paragraph (e)(1)(i) of this section, received by all competitive eligible telecommunications carriers subject to the delayed phase down for serving remote areas in Alaska.

(B) Reduction Factor. To effectuate the cap, the Administrator shall apply a reduction factor as necessary to the support that would otherwise be received by all competitive eligible telecommunications carriers serving remote areas in Alaska subject to the delayed phase down. The reduction factor will be calculated by dividing the total amount of support available amount by the total support amount calculated for those carriers in the absence of the cap.

(4) Further reductions. If a competitive eligible telecommunications carrier ceases to provide services to high-cost areas it had previously served, the Commission may reduce its baseline support amount.

(5) Implementation of Mobility Fund Phase II Required. In the event that the implementation of Mobility Fund Phase II has not occurred by June 30, 2014, competitive eligible telecommunications carriers will continue to receive support at the level described in paragraph (e)(2)(iv) of this section until Mobility Fund Phase II is implemented. In the event that Mobility Fund Phase II for Tribal lands is not implemented by June 30, 2014, competitive eligible telecommunications carriers serving Tribal lands shall continue to receive support at the level described in paragraph (e)(2)(iii) of this section until Mobility Fund Phase II for Tribal lands is implemented, except that competitive eligible

telecommunications carriers serving remote areas in Alaska and subject to paragraph (e)(3) of this section shall continue to receive support at the level described in paragraph (e)(3)(iv)(A) of this section.

(6) Eligibility after Implementation of Mobility Fund Phase II. If a competitive eligible telecommunications carrier becomes eligible to receive high-cost support pursuant to the Mobility Fund Phase II, it will cease to be eligible for phase-down support in the first month for which it receives Mobility Fund Phase II support.

(7) Line Count Filings. Competitive eligible telecommunications carriers, except those subject to the delayed phase down described in paragraph (e)(3) of this section, shall no longer be required to file line counts beginning January 1, 2012. Competitive eligible telecommunications carriers subject to the delayed phase down described in paragraph (e)(3) of this section shall no longer be required to file line counts beginning January 1, 2014.

42. Amend §54.309 by adding paragraph (d) to read as follows:

**§ 54.309 Calculation and distribution of forward-looking support for non-rural carriers.**

\*\*\*\*\*

(d) Support After December 31, 2011. Beginning January 1, 2012, no carrier shall receive support under this rule.

**§54.311 [Removed]**

43. Section 54.311 is removed.

44. Section 54.312 is added to read as follows:

**§ 54.312 Connect America Fund for Price Cap Territories – Phase I**

(a) Frozen High-Cost Support. Beginning January 1, 2012, each price cap local exchange carrier and rate-of-return carrier affiliated with a price cap local exchange carrier will have a “baseline support amount” equal to its total 2011 support in a given study area, or an amount equal to \$3,000 times the number of reported lines for 2011, whichever is lower. For purposes of this section, price cap carriers are defined pursuant to §61.3(aa) of this chapter and affiliated companies are determined by §32.9000 of this chapter. Each price cap local exchange carrier and rate-of-return carrier affiliated with a price cap local exchange carrier will have a “monthly baseline support amount” equal to its baseline support amount divided by twelve. Beginning January 1, 2012, on a monthly basis, eligible carriers will receive their monthly baseline support amount.

(1) “Total 2011 support” is the amount of support disbursed to a price cap local exchange carrier or rate-of-return carrier affiliated with a price cap local exchange carrier for 2011, without regard to prior period adjustments related to years other than 2011 and as determined by USAC on January 31, 2012.

(2) For the purpose of calculating the \$3,000 per line limit, the average of lines reported by a price cap local exchange carrier or rate-of-return carrier affiliated with a price cap local exchange carrier pursuant to line count filings required for December 31, 2010, and December 31, 2011 shall be used.

(3) A carrier receiving frozen high cost support under this rule shall be deemed to be receiving Interstate Access Support and Interstate Common Line Support equal to the amount of support the carrier to which the carrier was eligible under those mechanisms in 2011.

(b) Incremental Support. Beginning January 1, 2012, support in addition to baseline support defined in paragraph (a) of this section will be available for certain price cap local exchange carriers and rate-of-return carriers affiliated with price cap local exchange carriers as follows.

(1) For each carrier for which the Wireline Competition Bureau determines that it has appropriate data or for which it determines that it can make reasonable estimates, the Bureau will determine an average per-location cost for each wire center using a simplified cost-estimation function derived from the Commission's cost model. Incremental support will be based on the wire centers for which the estimated per-location cost exceeds the funding threshold. The funding threshold will be determined by calculating which funding threshold would allocate all available incremental support, if each carrier that would be offered incremental support were to accept it.

(2) An eligible telecommunications carrier accepting incremental support must deploy broadband to a number of unserved locations, as shown as unserved by fixed broadband on the then-current version of the National Broadband Map, equal to the amount of incremental support it accepts divided by \$775.

(3) A carrier may elect to accept or decline incremental support. A holding company may do so on a holding-company basis on behalf of its operating companies that are eligible telecommunications carriers, whose eligibility for incremental support, for these purposes, shall be considered on an aggregated basis. A carrier must provide notice to the Commission, the Administrator, relevant state commissions, and any affected Tribal government, stating the amount of incremental support it wishes to accept and identifying the areas by wire center and census block in which the designated eligible telecommunications carrier will deploy broadband to meet its deployment obligation, or stating that it declines incremental support. Such notification must be made within 90 days of being notified of any incremental support for which it would be eligible. Along with its notification, a carrier accepting incremental support must also submit a certification that the locations to be served to satisfy the deployment obligation are shown as unserved by fixed broadband on the then-current version of the National Broadband Map; that, to the best of the carrier's knowledge, the locations are, in fact, unserved by fixed broadband; that the carrier's current capital improvement plan did not already include plans to complete broadband deployment within the next three years to the locations to be counted to satisfy the deployment obligation; and that incremental support will not be used to satisfy any merger commitment or similar regulatory obligation.

(4) An eligible telecommunications carrier must complete deployment of broadband to two-thirds of the required number of locations within two years of providing notification of acceptance of funding, and must complete deployment to all required locations within three years. To satisfy its deployment obligation, the eligible telecommunications carrier must offer broadband service to such locations of at least 4 Mbps downstream and 1 Mbps upstream, with latency sufficiently low to enable the use of real-time communications, including Voice over Internet Protocol, and with usage caps, if any, that are reasonably comparable to comparable offerings in urban areas.

45. Revise §54.313 to read as follows:

**§ 54.313 Annual reporting requirements for high-cost recipients.**

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



(1) A progress report on its five-year service quality improvement plan pursuant to § 54.202(a), including maps detailing its progress towards meeting its plan targets, an explanation of how much universal service support was received and how it was used to improve service quality, coverage, or capacity, and an explanation regarding any network improvement targets that have not been fulfilled in the prior calendar year. The information shall be submitted at the wire center level or census block as appropriate;

(2) Detailed information on any outage in the prior calendar year, as that term is defined in 47 CFR 4.5, of at least 30 minutes in duration for each service area in which an eligible telecommunications carrier is designated for any facilities it owns, operates, leases, or otherwise utilizes that potentially affect

(i) At least ten percent of the end users served in a designated service area; or

(ii) A 911 special facility, as defined in 47 CFR 4.5(e).

(iii) Specifically, the eligible telecommunications carrier's annual report must include information detailing:

(A) The date and time of onset of the outage;

(B) A brief description of the outage and its resolution;

(C) The particular services affected;

(D) The geographic areas affected by the outage;

(E) Steps taken to prevent a similar situation in the future; and

(F) The number of customers affected.

(3) The number of requests for service from potential customers within the recipient's service areas that were unfulfilled during the prior calendar year. The carrier shall also detail how it attempted to provide service to those potential customers;

(4) The number of complaints per 1,000 connections (fixed or mobile) in the prior calendar year;

(5) Certification that it is complying with applicable service quality standards and consumer protection rules;

(6) Certification that the carrier is able to function in emergency situations as set forth in §54.202(a)(2);

(7) The company's price offerings in a format as specified by the Wireline Competition Bureau;

(8) The recipient's holding company, operating companies, affiliates, and any branding (a "dba," or "doing-business-as company" or brand designation), as well as universal service identifiers for each such entity by Study Area Codes, as that term is used by the Administrator. For purposes of this paragraph, "affiliates" has the meaning set forth in section 3(2) of the Communications Act of 1934, as amended;

(9) To the extent the recipient serves Tribal lands, documents or information demonstrating that the ETC had discussions with Tribal governments that, at a minimum, included:

(i) A needs assessment and deployment planning with a focus on Tribal community anchor institutions;

(ii) Feasibility and sustainability planning;

(iii) Marketing services in a culturally sensitive manner;

(iv) Rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and

(v) Compliance with Tribal business and licensing requirements. Tribal business and licensing requirements include business practice licenses that Tribal and non-Tribal business entities, whether located on or off Tribal lands, must obtain upon application to the relevant Tribal government office or division to conduct any business or trade, or deliver any goods or services to the Tribes, Tribal members, or Tribal lands. These include certificates of public convenience and necessity, Tribal business licenses, master licenses, and other related forms of Tribal government licensure.

(10) Beginning April 1, 2013. A letter certifying that the pricing of the company's voice services is no more than two standard deviations above the applicable national average urban rate for voice service, as specified in the most recent public notice issued by the Wireline Competition Bureau and Wireless Telecommunications Bureau; and

(11) Beginning April 1, 2013. The results of network performance tests pursuant to the methodology and in the format determined by the Wireline Competition Bureau, Wireless Telecommunications Bureau, and Office of Engineering and Technology and the information and data required by this paragraphs (a)(1) through (7) of this section separately broken out for both voice and broadband service.

(b) In addition to the information and certifications in paragraph (a) of this section, any recipient of incremental CAF Phase I support pursuant to § 54.312(b) shall provide:

(1) In its next annual report due after two years after filing a notice of acceptance of funding pursuant to § 54.312(b), a certification that the company has deployed to no fewer than two-thirds of the required number of locations; and

(2) In its next annual report due after three years after filing a notice of acceptance of funding pursuant to § 54.312(b), a certification that the company has deployed to all required locations and that it is offering broadband service of at least 4 Mbps downstream and 1 Mbps upstream, with latency sufficiently low to enable the use of real-time communications, including Voice over Internet Protocol, and with usage caps, if any, that are reasonably comparable to those in urban areas.

(c) In addition to the information and certifications in paragraph (a) of this section, price cap carriers that receive frozen high-cost support pursuant to § 54.312(a) shall provide:

(1) By April 1, 2013. A certification that frozen high-cost support the company received in 2012 was used consistent with the goal of achieving universal availability of voice and broadband;

(2) By April 1, 2014. A certification that at least one-third of the frozen-high cost support the company received in 2013 was used 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;

(3) By April 1, 2015. A certification that at least two-thirds of the frozen-high cost support the company received in 2014 was used 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; and

(4) By April 1, 2016 and in subsequent years. A certification that all frozen-high cost support the company received in the previous year was used 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.

(d) In addition to the information and certifications in paragraph (a) of this section, beginning April 1, 2013, price cap carriers receiving high-cost support to offset reductions in access charges shall provide a certification that the support received pursuant to § 54.304 in the prior calendar year was used to build and operate broadband-capable networks used to offer provider's own retail service in areas substantially unserved by an unsubsidized competitor.

(e) In addition to the information and certifications in paragraph (a) of this section, any recipient of CAF Phase II support shall provide:

(1) In the calendar year no later than three years after implementation of CAF Phase II. A certification that the company is providing broadband service to 85% of its supported locations at actual speeds of at least 4 Mbps downstream/1 Mbps upstream, with latency suitable for real-time applications, including Voice over Internet Protocol, and usage capacity that is reasonably comparable to comparable offerings in urban areas as determined in an annual survey.

(2) In the calendar year no later than five years after implementation of CAF Phase II. A certification that the company is providing broadband service to 100% of its supported locations at actual speeds of at least 4 Mbps downstream/1 Mbps upstream, and a percentage of supported locations, to be specified by the Wireline Competition Bureau, at actual speeds of at least 6 Mbps downstream/1.5 Mbps upstream, with latency suitable for real-time applications, including Voice over Internet Protocol, and usage capacity that is reasonably comparable to comparable offerings in urban areas as determined in an annual survey.

(3) Beginning April 1, 2014. A progress report on the company's five-year service quality plan pursuant to § 54.202(a), including the following information:

(i) A letter certifying that it is meeting the interim deployment milestones as set forth, and that it is taking reasonable steps to meet increased speed obligations that will exist for all supported locations at the expiration of the five-year term for CAF Phase II funding; and

(ii) The number, names, and addresses of community anchor institutions to which the ETC newly began providing access to broadband service in the preceding calendar year.

(f) In addition to the information and certifications in paragraph (a) of this section, any rate-of-return carrier shall provide:

(1) Beginning April 1, 2014. A progress report on its five-year service quality plan pursuant to §54.202(a) that includes the following information:

(i) A letter certifying that it is taking reasonable steps to provide upon reasonable request broadband service at actual speeds of at least 4 Mbps downstream/1 Mbps upstream, with latency suitable for real-time applications, including Voice over Internet Protocol, and usage capacity that is reasonably comparable to comparable offerings in urban areas as determined in an annual survey, and that requests for such service are met within a reasonable amount of time; and

(ii) The number, names, and addresses of community anchor institutions to which the ETC newly began providing access to broadband service in the preceding calendar year.

(2) Privately held rate-of-return carriers only. A full and complete annual report of the company's financial condition and operations as of the end of the preceding fiscal year, which is audited and certified by an independent certified public accountant in a form satisfactory to the Commission, and accompanied by a report of such audit. The annual report shall include balance sheets, income statements, and cash flow statements along with necessary notes to clarify the financial statements. The income statements shall itemize revenue, including non-regulated revenue, by its sources.

(g) Areas with No Terrestrial Backhaul. Carriers without access to terrestrial backhaul that are compelled to rely exclusively on satellite backhaul in their study area must certify annually that no terrestrial backhaul options exist. Any such funding recipients must certify they offer broadband service at actual speeds of at least 1 Mbps downstream and 256 kbps upstream within the supported area served by satellite middle-mile facilities. To the extent that new terrestrial backhaul facilities are constructed, or existing facilities improve sufficiently to meet the relevant speed, latency and capacity requirements then in effect for broadband service supported by the CAF, within twelve months of the new backhaul facilities becoming commercially available, funding recipients must provide the certifications required in paragraphs (e) or (f) of this section in full. Carriers subject to this paragraph must comply with all other requirements set forth in the remaining paragraphs of this section.

(h) Additional voice rate data. All incumbent local exchange carrier recipients of high-cost support must report all of their flat rates for residential local service, as well as state fees as defined pursuant to § 54.318(e) of this subpart. Carriers must also report all rates that are below the local urban rate floor as defined in § 54.318 of this subpart, and the number of lines for each rate specified. Carriers shall report lines and rates in effect as of January 1.

(i) All reports pursuant to this section shall be filed with the Office of the Secretary of the Commission clearly referencing WC Docket No. 10-90, and with the Administrator, and the relevant state commissions, relevant authority in a U.S. Territory, or Tribal governments, as appropriate.

(j) Filing deadlines. In order for a recipient of high-cost support to continue to receive support for the following calendar year, or retain its eligible telecommunications carrier designation, it must submit the annual reporting information required by this section no later than April 1, 2012, except as otherwise specified in this section to begin in a subsequent year, and thereafter annually by April 1 of each year. Eligible telecommunications carriers that file their reports after the April 1 deadline shall receive support pursuant to the following schedule:

(1) Eligible telecommunication carriers that file no later than July 1 shall receive support for the second, third and fourth quarters of the subsequent year.

(2) Eligible telecommunication carriers that file no later than October 1 shall receive support for the third and fourth quarters of the subsequent year.

(3) Eligible telecommunication carriers that file no later than January 1 of the subsequent year shall receive support for the fourth quarter of the subsequent year.

(k) This section does not apply to recipients that solely receive support from the Phase I Mobility Fund.

46. Revise §54.314 to read as follows:

**§ 54.314 Certification of support for eligible telecommunications carriers.**

(a) Certification. States that desire eligible telecommunications carriers to receive support pursuant to the high-cost program must file an annual certification with the Administrator and the Commission stating that all federal high-cost support provided to such carriers within that State was used in the preceding calendar year and will be used in the coming calendar year only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. High-cost support shall only be provided to the extent that the State has filed the requisite certification pursuant to this section.

(b) Carriers not subject to State jurisdiction. An eligible telecommunications carrier not subject to the jurisdiction of a State that desires to receive support pursuant to the high-cost program must file an annual certification with the Administrator and the Commission stating that all federal high-cost support provided to such carrier was used in the preceding calendar year and will be used in the coming calendar year only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Support provided pursuant to the high-cost program shall only be provided to the extent that the carrier has filed the requisite certification pursuant to this section.

(c) Certification format. (1) A certification pursuant to this section may be filed in the form of a letter from the appropriate regulatory authority for the State, and must be filed with both the Office of the Secretary of the Commission clearly referencing WC Docket No. 10-90, and with the Administrator of the high-cost support mechanism, on or before the deadlines set forth in paragraph (d) of this section. If provided by the appropriate regulatory authority for the State, the annual certification must identify which carriers in the State are eligible to receive federal support during the applicable 12-month period, and must certify that those carriers only used support during the preceding calendar year and will only use support in the coming calendar year for the provision, maintenance, and upgrading of facilities and services for which support is intended. A State may file a supplemental certification for carriers not subject to the State's annual certification. All certificates filed by a State pursuant to this section shall become part of the public record maintained by the Commission.

(2) An eligible telecommunications carrier not subject to the jurisdiction of a State shall file a sworn affidavit executed by a corporate officer attesting that the carrier only used support during the preceding calendar year and will only use support in the coming calendar year for the provision, maintenance, and upgrading of facilities and services for which support is intended. The affidavit must be filed with both the Office of the Secretary of the Commission clearly referencing WC Docket No. 10-90, and with the Administrator of the high-cost universal service support mechanism, on or before the deadlines set forth in paragraph (d) of this section. All affidavits filed pursuant to this section shall become part of the public record maintained by the Commission.

(d) Filing deadlines. In order for an eligible telecommunications carrier to receive federal high-cost support, the State or the carrier, if not subject to the jurisdiction of a State, must file an annual

certification, as described in paragraph (c) of this section, with both the Administrator and the Commission. Upon the filing of the certification described in this section, support shall be provided in accordance with the following schedule:

- (1) Certifications filed on or before October 1. Carriers subject to certifications filed on or before October 1 shall receive support in the first, second, third, and fourth quarters of the succeeding year.
- (2) Certifications filed on or before January 1. Carriers subject to certifications filed on or before January 1 shall receive support in the second, third, and fourth quarters of that year. Such carriers shall not receive support in the first quarter of that year.
- (3) Certifications filed on or before April 1. Carriers subject to certifications filed on or before April 1 shall receive support in the third and fourth quarters of that year. Such carriers shall not receive support in the first or second quarters of that year.
- (4) Certifications filed on or before July 1. Carriers subject to certifications filed on or before July 1 shall receive support beginning in the fourth quarter of that year. Such carriers shall not receive support in the first, second, or third quarters of that year.
- (5) Certifications filed after July 1. Carriers subject to certifications filed after July 1 shall not receive support in that year.
- (6) Newly designated eligible telecommunications carriers. Notwithstanding the deadlines in paragraph (d) of this section, a carrier shall be eligible to receive support as of the effective date of its designation as an eligible telecommunications carrier under section 214(e)(2) or (e)(6) of the Act, provided that it files the certification described in paragraph (b) of this section or the state commission files the certification described in paragraph (a) of this section within 60 days of the effective date of the carrier's designation as an eligible telecommunications carrier. Thereafter, the certification required by paragraphs (a) or (b) of this section must be submitted pursuant to the schedule in paragraph (d) of this section.

#### **§54.316 [Removed]**

47. Section 54.316 is removed.

48. Add §54.318 to subpart D to read as follows:

#### **§ 54.318 High-cost support; limitations on high-cost support.**

(a) Beginning July 1, 2012, each carrier receiving high-cost support in a study area under this subpart will receive the full amount of high-cost support it otherwise would be entitled to receive if its flat rate for residential local service plus state regulated fees as defined in paragraph (e) of this section exceeds a local urban rate floor representing the national average of local urban rates plus state regulated fees under the schedule specified in paragraph (f) of this section..

(b) Carriers whose flat rate for residential local service plus state regulated fees offered for voice service are below the specified local urban rate floor under the schedule below plus state regulated fees shall have high-cost support reduced by an amount equal to the extent to which its flat rate for residential local service plus state regulated fees are below the local urban rate floor, multiplied by the number of lines for which it is receiving support.

(c) This rule will apply to rate-of-return carriers as defined in §54.5 and carriers subject to price cap regulation as that term is defined in §61.3 of this chapter.

(d) For purposes of this section, high-cost support is defined as the support available pursuant to § 36.631 of this chapter and support provided to carriers that formerly received support pursuant to § 54.309.

(e) State regulated fees. (1) Beginning on July 1, 2012, for purposes of calculating limitations on high-cost support under this section, state regulated fees shall be limited to state subscriber line charges, state universal service fees and mandatory extended area service charges, which shall be determined as part of a local rate survey, the results of which shall be published annually.

(2) Federal subscriber line charges shall not be included in calculating limitations on high-cost support under this section.

(f) Schedule. High-cost support will be limited where the flat rate for residential local service plus state regulated fees are below the local urban rate floor representing the national average of local urban rates plus state regulated fees under the schedule specified in this paragraph. To the extent end user rates plus state regulated fees are below local urban rate floors plus state regulated fees, appropriate reductions in high-cost support will be made by the Universal Service Administrative Company.

(1) Beginning on July 1, 2012, and ending June 30, 2013, the local urban rate floor shall be \$10.

(2) Beginning on July 1, 2013, and ending June 30, 2014, the local urban rate floor shall be \$14.

(3) Beginning July 1, 2014, and thereafter, the local urban rate floor will be announced annually by the Wireline Competition Bureau.

(h) Any reductions in high-cost support under this section will not be redistributed to other carriers that receive support pursuant to § 36.631 of this chapter.

49. Add §54.320 to subpart D to read as follows:

**§ 54.320 Compliance and recordkeeping for the high-cost program.**

- (a) Eligible telecommunications carriers authorized to receive universal service high-cost support are subject to random compliance audits and other investigations to ensure compliance with program rules and orders.
- (b) All eligible telecommunications carriers shall retain all records required to demonstrate to auditors that the support received was consistent with the universal service high-cost program rules. This documentation must be maintained for at least ten years from the receipt of funding. All such documents shall be made available upon request to the Commission and any of its Bureaus or Offices, the Administrator, and their respective auditors.
- (c) Eligible telecommunications carriers authorized to receive high-cost support that fail to comply with public interest obligations or any other terms and conditions may be subject to further action, including the Commission's existing enforcement procedures and penalties, reductions in support amounts, potential revocation of ETC designation, and suspension or debarment pursuant to § 54.8.

**Subpart H—Administration**

50. Amend §54.702 by revising paragraphs (a), (b), (c), and (h) to read as follows:

**§ 54.702 Administrator's functions and responsibilities.**

(a) The Administrator, and the divisions therein, shall be responsible for administering the schools and libraries support mechanism, the rural health care support mechanism, the high-cost support mechanism, and the low income support mechanism.

(b) The Administrator shall be responsible for billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds.

(c) The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.

\* \* \* \* \*

(h) The Administrator shall report quarterly to the Commission on the disbursement of universal service support program funds. The Administrator shall keep separate accounts for the amounts of money collected and disbursed for eligible schools and libraries, rural health care providers, low-income consumers, and high-cost and insular areas.

\* \* \* \* \*

51. Amend § 54.709 by adding three sentences to the end of paragraph (b) to read as follows:

**§ 54.709 Computations of required contributions to universal service support mechanisms.**

\*\*\*\*\*

(b)\* \* \* The Commission may instruct the Administrator to treat excess contributions in a manner other than as prescribed in this paragraph (b). Such instructions may be made in the form of a Commission Order or a public notice released by the Wireline Competition Bureau. Any such public notice will become effective fourteen days after release of the public notice, absent further Commission action.

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52. Amend §54.715 by revising paragraph (c) to read as follows:

**§ 54.715 Administrative expenses of the Administrator.**

\* \* \* \* \*

(c) The Administrator shall submit to the Commission projected quarterly budgets at least sixty (60) days prior to the start of every quarter. The Commission must approve the projected quarterly budgets before the Administrator disburses funds under the federal universal service support mechanisms. The administrative expenses incurred by the Administrator in connection with the schools and libraries support mechanism, the rural health care support mechanism, the high-cost support mechanism, and the low income support mechanism shall be deducted from the annual funding of each respective support mechanism. The expenses deducted from the annual funding for each support mechanism also shall include the Administrator's joint and common



costs allocated to each support mechanism pursuant to the cost allocation manual filed by the Administrator under § 64.903 of this chapter.

**Subpart J— Interstate Access Universal Service Support Mechanism**

53. Amend §54.801 by adding paragraph (f) to read as follows:

**§ 54.801 General**

\*\*\*\*\*

(f) Beginning January 1, 2012, no incumbent or competitive eligible telecommunications carrier shall receive support pursuant to this subpart, nor shall any incumbent or competitive eligible telecommunications carrier be required to complete any filings pursuant to this subpart after March 31, 2012.

**Subpart K— Interstate Common Line Support Mechanism for Rate-of-Return Carriers**

54. Amend §54.901 by adding a paragraphs (b)(4), (c) and (d) to read as follows:

**§ 54.901 Calculation of Interstate Common Line Support.**

\*\*\*\*\*

(b) \*\*\*

(4) Beginning January 1, 2012, competitive eligible telecommunications carriers shall not receive Interstate Common Line Support pursuant to this subpart and will instead receive support consistent with § 54.307(e).

(c) Beginning January 1, 2012, for purposes of calculating Interstate Common Line Support, corporate operations expense allocated to the Common Line Revenue Requirement, pursuant to § 69.409 of this chapter, shall be limited to the lesser of:

(1) The actual average monthly per-loop corporate operations expense; or

(2) A monthly per-loop amount computed pursuant to 36.621(a)(4)(iii) of this chapter.

(d) Support After December 31, 2011. Notwithstanding paragraph (a) of this section, beginning January 1, 2012, no carrier that is a rate-of-return carrier, as that term is defined in §54.5 affiliated with a price cap local exchange carrier, as that term is defined in § 61.3(aa) of this chapter, shall receive support under this subpart.

55. Add subpart L to part 54 as follows:

**Subpart L – Mobility Fund**

**Sec.**

54.1001 Mobility Fund – Phase I

54.1002 Geographic Areas Eligible for Support

54.1003 Provider Eligibility

54.1004 Service to Tribal Lands

54.1005 Application Process

54.1006 Public Interest Obligations

54.1007 Letter of Credit

54.1008 Mobility Fund Phase I Disbursements

54.1009 Annual Reports

54.1010 Record Retention for Mobility Fund Phase I

**§ 54.1001 Mobility Fund – Phase I.**

The Commission will use competitive bidding, as provided in part 1, subpart AA, to determine the recipients of support available through Phase I of the Mobility Fund and the amount(s) of support that they may receive for specific geographic areas, subject to applicable post-auction procedures.

**§ 54.1002 Geographic Areas Eligible for Support**

(a) Mobility Fund Phase I support may be made available for census blocks identified as eligible by public notice.

(b) Except as provided in § 54.1004, coverage units for purposes of conducting competitive bidding and disbursing support based on designated road miles will be identified by public notice for each census block eligible for support.

**§ 54.1003 Provider Eligibility**

(a) Except as provided in § 54.1004, an applicant shall be an Eligible Telecommunications Carrier in an area in order to receive Mobility Fund Phase I support for that area. The applicant's designation as an Eligible Telecommunications Carrier may be conditional subject to the receipt of Mobility Fund support.

(b) An applicant shall have access to spectrum in an area that enables it to satisfy the applicable performance requirements in order to receive Mobility Fund Phase I support for that area. The applicant shall certify, in a form acceptable to the Commission, that it has such access at the time it applies to participate in competitive bidding and at the time that it applies for support and that it will retain such access for five (5) years after the date on which it is authorized to receive support.

(c) An applicant shall certify that it is financially and technically qualified to provide the services supported by Mobility Fund Phase I in order to receive such support.

**§ 54.1004 Service to Tribal Lands**

(a) A Tribally-owned or –controlled entity that has pending an application to be designated an Eligible Telecommunications Carrier may participate in any Mobility Fund Phase I auction, including any auction for support solely in Tribal lands, by bidding for support in areas located within the boundaries of the Tribal land associated with the Tribe that owns or controls the entity. To bid on this basis, an entity shall

certify that it is a Tribally-owned or –controlled entity and identify the applicable Tribe and Tribal lands in its application to participate in the competitive bidding. A Tribally-owned or -controlled entity shall receive Mobility Fund Phase I support only after it has become an Eligible Telecommunications Carrier.

(b) In any auction for support solely in Tribal lands, coverage units for purposes of conducting competitive bidding and disbursing support based on designated population will be identified by public notice for each census block eligible for support.

(c) Tribally-owned or –controlled entities may receive a bidding credit with respect to bids for support within the boundaries of associated Tribal lands. To qualify for a bidding credit, an applicant shall certify that it is a Tribally-owned or –controlled entity and identify the applicable Tribe and Tribal lands in its application to participate in the competitive bidding. An applicant that qualifies shall have its bid(s) for support in areas within the boundaries of Tribal land associated with the Tribe that owns or controls the applicant reduced by twenty-five (25) percent for purposes of determining winning bidders without any reduction in the amount of support available.

(d) A winning bidder for support in Tribal lands shall notify and engage the Tribal governments responsible for the areas supported.

(1) A winning bidder’s engagement with the applicable Tribal government shall consist, at a minimum, of discussion regarding:

- (i) A needs assessment and deployment planning with a focus on Tribal community anchor institutions;
- (ii) Feasibility and sustainability planning;
- (iii) Marketing services in a culturally sensitive manner;
- (iv) Rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and
- (v) Compliance with Tribal business and licensing requirements

(2) A winning bidder shall notify the appropriate Tribal government of its winning bid no later than five (5) business days after being identified by public notice as a winning bidder.

(3) A winning bidder shall certify in its application for support that it has substantively engaged appropriate Tribal officials regarding the issues specified in § 54.1004(d)(1), at a minimum, as well as any other issues specified by the Commission, and provide a summary of the results of such engagement. A copy of the certification and summary shall be sent to the appropriate Tribal officials when it is sent to the Commission.

(4) A winning bidder for support in Tribal lands shall certify in its annual report, pursuant to § 54.1009(a)(5), and prior to disbursement of support, pursuant to § 54.1008(c), that it has substantively engaged appropriate Tribal officials regarding the issues specified in § 54.1004(d)(1), at a minimum, as well as any other issues specified by the Commission, and provide a summary of the results of such engagement. A copy of the certification and summary shall be sent to the appropriate Tribal officials when it is sent to the Commission.

**§ 54.1005 Application Process**

(a) Application to Participate in Competitive Bidding for Mobility Fund Phase I Support. In addition to providing information specified in § 1.21001(b) of this chapter and any other information required by the Commission, an applicant to participate in competitive bidding for Mobility Fund Phase I support also shall:

- (1) Provide ownership information as set forth in § 1.2112(a) of this chapter;
- (2) Certify that the applicant is financially and technically capable of meeting the public interest obligations of § 54.1006 in each area for which it seeks support;
- (3) Disclose its status as an Eligible Telecommunications Carrier in any area for which it will seek support or as a Tribal entity with a pending application to become an Eligible Telecommunications Carrier in any such area, and certify that the disclosure is accurate;
- (4) Describe the spectrum access that the applicant plans to use to meet obligations in areas for which it will bid for support, including whether the applicant currently holds a license for or leases the spectrum, and certify that the description is accurate and that the applicant will retain such access for at least five (5) years after the date on which it is authorized to receive support;
- (5) Certify that it will not bid on any areas in which it has made a public commitment to deploy 3G or better wireless service by December 31, 2012; and
- (6) Make any applicable certifications required in § 54.1004 .

(b) Application by Winning Bidders for Mobility Fund Phase I Support.

(1) Deadline. Unless otherwise provided by public notice, winning bidders for Mobility Fund Phase I support shall file an application for Mobility Fund Phase I support no later than 10 business days after the public notice identifying them as winning bidders.

(2) Application Contents.

- (i) Identification of the party seeking the support, including ownership information as set forth in § 1.2112(a) of this chapter.
- (ii) Certification that the applicant is financially and technically capable of meeting the public interest obligations of § 54.1006 in the geographic areas for which it seeks support.
- (iii) Proof of the applicant's status as an Eligible Telecommunications Carrier or as a Tribal entity with a pending application to become an Eligible Telecommunications Carrier in any area for which it seeks support and certification that the proof is accurate.
- (iv) A description of the spectrum access that the applicant plans to use to meet obligations in areas for which it is the winning bidder for support, including whether the applicant currently holds a license for or leases the spectrum, and a certification that the description is accurate and that the applicant will retain such access for at least five (5) years after the date on which it is authorized to receive support.

(v) A detailed project description that describes the network, identifies the proposed technology, demonstrates that the project is technically feasible, discloses the budget and describes each specific phase of the project, e.g., network design, construction, deployment, and maintenance. The applicant shall indicate whether the supported network will provide third generation (3G) mobile service within the period prescribed by § 54.1006(a) or fourth generation (4G) mobile service within the period prescribed by § 54.1006(b).

(vi) Certifications that the applicant has available funds for all project costs that exceed the amount of support to be received from Mobility Fund Phase I and that the applicant will comply with all program requirements.

(vii) Any guarantee of performance that the Commission may require by public notice or other proceedings, including but not limited to the letters of credit required in §54.1007, or a written commitment from an acceptable bank, as defined in §54.1007(a)(1), to issue such a letter of credit.

(viii) Certification that the applicant will offer service in supported areas at rates that are within a reasonable range of rates for similar service plans offered by mobile wireless providers in urban areas for a period extending until five (5) years after the date on which it is authorized to receive support.

(ix) Any applicable certifications and showings required in §54.1004.

(x) Certification that the party submitting the application is authorized to do so on behalf of the applicant.

(xi) Such additional information as the Commission may require.

(3) Application Processing. (i) No application will be considered unless it has been submitted in an acceptable form during the period specified by public notice. No applications submitted or demonstrations made at any other time shall be accepted or considered.

(ii) Any application that, as of the submission deadline, either does not identify the applicant seeking support as specified in the public notice announcing application procedures or does not include required certifications shall be denied.

(iii) An applicant may be afforded an opportunity to make minor modifications to amend its application or correct defects noted by the applicant, the Commission, the Administrator, or other parties. Minor modifications include correcting typographical errors in the application and supplying non-material information that was inadvertently omitted or was not available at the time the application was submitted.

(iv) Applications to which major modifications are made after the deadline for submitting applications shall be denied. Major modifications include, but are not limited to, any changes in the ownership of the applicant that constitute an assignment or change of control, or the identity of the applicant, or the certifications required in the application.

(v) After receipt and review of the applications, a public notice shall identify each winning bidder that may be authorized to receive Mobility Fund Phase I support after the winning bidder submits a Letter of Credit and an accompanying opinion letter as required

by § 54.1007, in a form acceptable to the Commission, and any final designation as an Eligible Telecommunications Carrier that any Tribally-owned or –controlled applicant may still require. Each such winning bidder shall submit a Letter of Credit and an accompanying opinion letter as required by §54.1007, in a form acceptable to the Commission, and any required final designation as an Eligible Telecommunications Carrier no later than 10 business days following the release of the public notice.

(vi) After receipt of all necessary information, a public notice will identify each winning bidder that is authorized to receive Mobility Fund Phase I support.

**§ 54.1006 Public Interest Obligations.**

(a) Deadline for Construction – 3G networks. A winning bidder authorized to receive Mobility Fund Phase I support that indicated in its application that it would provide third generation (3G) service on the supported network shall, no later than two (2) years after the date on which it was authorized to receive support, submit data from drive tests covering the area for which support was received demonstrating mobile transmissions supporting voice and data to and from the network covering 75% of the designated coverage units in the area deemed uncovered, or a higher percentage established by public notice prior to the competitive bidding, and meeting or exceeding the following:

(1) Outdoor minimum data transmission rates of 50 kbps uplink and 200 kbps downlink at vehicle speeds appropriate for the roads covered;

(2) Transmission latency low enough to enable the use of real time applications, such as VoIP.

(b) Deadline for Construction – 4G networks. A winning bidder authorized to receive Mobility Fund Phase I support that indicated in its application that it would provide fourth generation (4G) service on the supported network shall, no later than three (3) years after the date on which it was authorized to receive support, submit data from drive tests covering the area for which support was received demonstrating mobile transmissions supporting voice and data to and from the network covering 75% of the designated coverage units in the area deemed uncovered, or an applicable higher percentage established by public notice prior to the competitive bidding, and meeting or exceeding the following:

(1) Outdoor minimum data transmission rates of 200 kbps uplink and 768 kbps downlink at vehicle speeds appropriate for the roads covered;

(2) Transmission latency low enough to enable the use of real time applications, such as VoIP.

(c) Coverage Test Data. Drive tests submitted in compliance with a recipient's public interest obligations shall cover roads designated in the public notice detailing the procedures for the competitive bidding that is the basis of the recipient's support. Scattered site tests submitted in compliance with a recipient's public interest obligations shall be in compliance with standards set forth in the public notice detailing the procedures for the competitive bidding that is the basis of the recipient's authorized support.

(d) Collocation Obligations. During the period when a recipient shall file annual reports pursuant to § 54.1009, the recipient shall allow for reasonable collocation by other providers of services that would meet the technological requirements of Mobility Fund Phase I on newly constructed towers that the recipient owns or manages in the area for which it receives support. In addition, during this period, the recipient may not enter into facilities access arrangements that restrict any party to the arrangement from allowing others to collocate on the facilities.

(e) Voice and Data Roaming Obligations. During the period when a recipient shall file annual reports pursuant to § 54.1009, the recipient shall comply with the Commission's voice and data roaming requirements that were in effect as of October 27, 2011, on networks that are built through Mobility Fund Phase I support.

(f) Liability for Failing To Satisfy Public Interest Obligations. A winning bidder authorized to receive Mobility Fund Phase I support that fails to comply with the public interest obligations in this paragraph or any other terms and conditions of the Mobility Fund Phase I support will be subject to repayment of the support disbursed together with an additional performance default payment. Such a winning bidder may be disqualified from receiving Mobility Fund Phase I support or other USF support. The additional performance default amount will be a percentage of the Mobility Fund Phase I support that the winning bidder has been and is eligible to request be disbursed to it pursuant to § 54.1008. The percentage will be determined as specified in the public notice detailing competitive bidding procedures prior to the commencement of competitive bidding. The percentage will not exceed twenty percent.

**§ 54.1007 Letter of Credit.**

(a) Before being authorized to receive Mobility Fund Phase I support, a winning bidder shall obtain an irrevocable standby letter of credit which shall be acceptable in all respects to the Commission. Each winning bidder authorized to receive Mobility Fund Phase I support shall maintain its standby letter of credit or multiple standby letters of credit in an amount equal to the amount of Mobility Fund Phase I support that the winning bidder has been and is eligible to request be disbursed to it pursuant to § 54.1008 plus the additional performance default amount described in § 54.1006(f), until at least 120 days after the winning bidder receives its final distribution of support pursuant to § 54.1008(b)(3).

(1) The bank issuing the letter of credit shall be acceptable to the Commission. A bank that is acceptable to the Commission is

(i) Any United States Bank that

(A) Is among the 50 largest United States banks, determined on the basis of total assets as of the end of the calendar year immediately preceding the issuance of the letter of credit,

(B) Whose deposits are insured by the Federal Deposit Insurance Corporation, and

(C) Who has a long-term unsecured credit rating issued by Standard & Poor's of A- or better (or an equivalent rating from another nationally recognized credit rating agency); or

(ii) Any non-U.S. bank that

(A) Is among the 50 largest non-U.S. banks in the world, determined on the basis of total assets as of the end of the calendar year immediately preceding the issuance of the letter of credit (determined on a U.S. dollar equivalent basis as of such date),

(B) Has a branch office in the District of Columbia or such other branch office agreed to by the Commission,

(C) Has a long-term unsecured credit rating issued by a widely-recognized credit rating agency that is equivalent to an A- or better rating by Standard & Poor's, and

(D) Issues the letter of credit payable in United States dollars.

(2) Reserved.

(b) A winning bidder for Mobility Fund Phase I support shall provide with its Letter of Credit an opinion letter from its legal counsel clearly stating, subject only to customary assumptions, limitations, and qualifications, that in a proceeding under Title 11 of the United States Code, 11 U.S.C. 101 et seq. (the “Bankruptcy Code”), the bankruptcy court would not treat the letter of credit or proceeds of the letter of credit as property of the winning bidder’s bankruptcy estate under section 541 of the Bankruptcy Code.

(c) Authorization to receive Mobility Fund Phase I support is conditioned upon full and timely performance of all of the requirements set forth in § 54.1006 and any additional terms and conditions upon which the support was granted.

(1) Failure by a winning bidder authorized to receive Mobility Fund Phase I support to comply with any of the requirements set forth in § 54.1006 or any other term or conditions upon which support was granted, or its loss of eligibility for any reason for Mobility Fund Phase I support, will be deemed an automatic performance default, will entitle the Commission to draw the entire amount of the letter of credit, and may disqualify the winning bidder from the receipt of Mobility Fund Phase I support or additional USF support.

(2) A performance default will be evidenced by a letter issued by the Chief of either the Wireless Bureau or Wireline Bureau or their respective designees, which letter, attached to a standby letter of credit draw certificate, shall be sufficient for a draw on the standby letter of credit for the entire amount of the standby letter of credit.

#### **§ 54.1008 Mobility Fund Phase I Disbursements.**

(a) A winning bidder for Mobility Fund Phase I support will be advised by public notice whether it has been authorized to receive support. The public notice will detail how disbursement will be made available.

(b) Mobility Fund Phase I support will be available for disbursement to authorized winning bidders in three stages.

(1) One-third of the total possible support, if coverage were to be extended to 100 percent of the units deemed unserved in the geographic area, when the winning bidder is authorized to receive support.

(2) One-third of the total possible support with respect to a specific geographic area when the recipient demonstrates coverage of 50 percent of the coverage requirements of § 54.1006(a) or (b), as applicable.

(3) The remainder of the total support, based on the final total units covered, when the recipient demonstrates coverage meeting the requirements of §54.1006(a) or (b) , as applicable.

(c) A recipient accepting a final disbursement for a specific geographic area based on coverage of less than 100 percent of the units in the area previously deemed unserved waives any claim for the remainder of potential Mobility Fund Phase I support with respect to that area.

(d) Prior to each disbursement request, a winning bidder for support in a Tribal land will be required to certify that it has substantively engaged appropriate Tribal officials regarding the issues specified in § 54.1004(d)(1), at a minimum, as well as any other issues specified by the Commission and to provide a summary of the results of such engagement.



(e) Prior to each disbursement request, a winning bidder will be required to certify that it is in compliance with all requirements for receipt of Mobility Fund Phase I support at the time that it requests the disbursement.

**§ 54.1009 Annual Reports.**

(a) A winning bidder authorized to receive Mobility Fund Phase I support shall submit an annual report no later than April 1 in each year for the five years after it was so authorized. Each annual report shall include the following, or reference the inclusion of the following in other reports filed with the Commission for the applicable year:

- (1) Electronic Shapefiles site coverage plots illustrating the area newly reached by mobile services at a minimum scale of 1:240,000;
- (2) A list of relevant census blocks previously deemed unserved, with road miles and total resident population and resident population residing in areas newly reached by mobile services (based on Census Bureau data and estimates);
- (3) If any such testing has been conducted, data received or used from drive tests, or scattered site testing in areas where drive tests are not feasible, analyzing network coverage for mobile services in the area for which support was received;
- (4) Certification that the applicant offers service in supported areas at rates that are within a reasonable range of rates for similar service plans offered by mobile wireless providers in urban areas;
- (5) Any applicable certifications and showings required in § 54.1004; and
- (6) Updates to the information provided in § 54.1005(b)(2)(v).

(b) The party submitting the annual report must certify that it has been authorized to do so by the winning bidder.

(c) Each annual report shall be submitted to the Office of the Secretary of the Commission, clearly referencing WT Docket No. 10-208; the Administrator; and the relevant state commissions, relevant authority in a U.S. Territory, or Tribal governments, as appropriate.

**§ 54.1010 Record Retention for Mobility Fund Phase I.**

A winning bidder authorized to receive Mobility Fund Phase I support and its agents are required to retain any documentation prepared for, or in connection with, the award of Mobility Fund Phase I support for a period of not less than ten (10) years after the date on which the winning bidder receives its final disbursement of Mobility Fund Phase I support.

**PART 61—TARIFFS**

56. The authority citation for part 61 continues to read as follows:

Authority: Secs. 1, 4(i), 4(j), 201–205 and 403 of the Communications Act of 1934, as amended; 47 U.S.C. 151, 154(i), 154(j), 201–205 and 403, unless otherwise noted.

57. Add §61.3 (aaa) to read as follows:

**§ 61.3 Definitions**

\* \* \* \* \*

(aaa) Access stimulation.

(1) A rate-of-return local exchange carrier or a Competitive Local Exchange Carrier engages in access stimulation when it satisfies the following two conditions:

(i) 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 local exchange carrier or Competitive Local Exchange Carrier 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 of form, provided by the rate-of-return local exchange carrier or Competitive Local Exchange Carrier to the other party to the agreement shall be taken into account; and

(ii) Has either an interstate terminating-to-originating traffic ratio of at least 3:1 in a calendar month, or has had more than a 100 percent growth in interstate originating and/or terminating switched access minutes of use in a month compared to the same month in the preceding year.

(2) The local exchange carrier will continue to be engaging in access stimulation until it terminates all revenue sharing arrangements covered in paragraph (a)(1)(i) of this section. A local exchange carrier engaging in access stimulation is subject to revised interstate switched access charge rules under §61.38 and § 69.3(e)(12) of this chapter.

58. Revise §61.26 to read as follows:

**§ 61.26 Tariffing of competitive interstate switched exchange access services.**

(a) Definitions. For purposes of this section, the following definitions shall apply:

(1) CLEC shall mean a local exchange carrier that provides some or all of the interstate exchange access services used to send traffic to or from an end user and does not fall within the definition of “incumbent local exchange carrier” in 47 U.S.C. 251(h).

(2) Competing ILEC shall mean the incumbent local exchange carrier, as defined in 47 U.S.C. 251(h), that would provide interstate exchange access services, in whole or in part, to the extent those services were not provided by the CLEC.

(3) Switched exchange access services shall include:

(i) The functional equivalent of the ILEC interstate exchange access services typically associated with following rate elements: carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching;

(ii) The termination of interexchange telecommunications traffic to any end user, either directly or via contractual or other arrangements with an affiliated or unaffiliated provider

of interconnected VoIP service, as defined in 47 U.S.C. § 153(25), or a non-interconnected VoIP service, as defined in 47 U.S.C. § 153(36), that does not itself seek to collect reciprocal compensation charges prescribed by this subpart for that traffic, regardless of the specific functions provided or facilities used.

(4) Non-rural ILEC shall mean an incumbent local exchange carrier that is not a rural telephone company under 47 U.S.C. 153(44).

(5) The rate for interstate switched exchange access services shall mean the composite, per-minute rate for these services, including all applicable fixed and traffic-sensitive charges.

(6) Rural CLEC shall mean a CLEC that does not serve (i.e., terminate traffic to or originate traffic from) any end users located within either:

(i) Any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or

(ii) An urbanized area, as defined by the Census Bureau.

(b) Except as provided in paragraphs (c), (e), and (g) of this section, a CLEC shall not file a tariff for its interstate switched exchange access services that prices those services above the higher of:

(1) The rate charged for such services by the competing ILEC or

(2) The lower of:

(i) The benchmark rate described in paragraph (c) of this section or

(ii) In the case of interstate switched exchange access service, the lowest rate that the CLEC has tariffed for its interstate exchange access services, within the six months preceding June 20, 2001.

(c) The benchmark rate for a CLEC's switched exchange access services will be the rate charged for similar services by the competing ILEC. If an ILEC to which a CLEC benchmarks its rates, pursuant to this section, lowers the rate to which a CLEC benchmarks, the CLEC must revise its rates to the lower level within 15 days of the effective date of the lowered ILEC rate.

(d) Except as provided in paragraph (g) of this section, and notwithstanding paragraphs (b) and (c) of this section, in the event that, after June 20, 2001, a CLEC begins serving end users in a metropolitan statistical area (MSA) where it has not previously served end users, the CLEC shall not file a tariff for its exchange access services in that MSA that prices those services above the rate charged for such services by the competing ILEC.

(e) Rural exemption. Except as provided in paragraph (g) of this section, and notwithstanding paragraphs (b) through (d) of this section, a rural CLEC competing with a non-rural ILEC shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the NECA access tariff, assuming the highest rate band for local switching. In addition to that NECA rate, the rural CLEC may assess a presubscribed interexchange carrier charge if, and only to the extent that, the competing ILEC assesses this charge. Effective July 1, 2013, all CLEC reciprocal compensation rates for intrastate switched exchange access services subject to this subpart also shall be no higher than that NECA rate.

(f) If a CLEC provides some portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services, except if the CLEC is listed in the database of the Number Portability Administration Center as providing the calling party or dialed number, the CLEC may assess a rate equal to the rate that would be charged by the competing ILEC for all exchange access services required to deliver interstate traffic to the called number.

(g) Notwithstanding paragraphs (b) through (e) of this section:

(1) a CLEC engaging in access stimulation, as that term is defined in §61.3(aaa) , shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the access tariff of the price cap LEC with the lowest switched access rates in the state.

(2) A CLEC engaging in access stimulation, as that term is defined in §61.3(aaa), shall file revised interstate switched access tariffs within forty-five (45) days of commencing access stimulation, as that term is defined in § 61.3(aaa) , or within forty-five (45) days of [date] if the CLEC on that date is engaged in access stimulation, as that term is defined in § 61.3(aaa) .

59. Revise §61.39(a) paragraph (a) and add paragraph (g) to read as follows:

**§61.39 Optional supporting information to be submitted with letters of transmittal for Access Tariff filings by incumbent local exchange carriers serving 50,000 or fewer access lines in a given study area that are described as subset 3 carriers in §69.602.**

(a) Scope. Except as provided in paragraph (g) of this section, This section provides for an optional method of filing for any local exchange carrier that is described as a subset 3 carrier in §69.602 of this chapter, which elects to issue its own Access Tariff for a period commencing on or after April 1, 1989, and which serves 50,000 or fewer access lines in a study area as determined under §36.611(a)(8) of this chapter. However, the Commission may require any carrier to submit such information as may be necessary for review of a tariff filing. This section (other than the preceding sentence of this paragraph) shall not apply to tariff filings of local exchange carriers subject to price cap regulation.

\* \* \* \* \*

(g) A local exchange carrier otherwise eligible to file a tariff pursuant to this section may not do so if it is engaging in access stimulation, as that term is defined in §61.3(aaa) of this part, and has not terminated its access revenue sharing agreement(s). A carrier so engaged must file interstate access tariffs in accordance with §61.38, and §69.3(e)(12)(1) of this chapter.

\* \* \* \* \*

**PART 64-MISCELLANEOUS RULES RELATING TO COMMON CARRIERS**

60. The authority citation for part 64 is amended to read as follows:

Authority: 47 U.S.C. 151, 152, 154, 254(k), 227; secs. 403(b)(2)(B), (c), 1302, Pub. L. 104–104, 100 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 207, 228, and 254(k) unless otherwise noted.

61. In §64.1600, redesignate paragraphs (f) through (i) as paragraphs (h) through (j) respectively and add new paragraph (f) to read as follows:

**§64.1600 Definitions.**

\* \* \* \* \*

(f) Intermediate Provider. The term Intermediate Provider means any entity that carries or processes traffic that traverses or will traverse the PSTN at any point insofar as that entity neither originates nor terminates that traffic.

\* \* \* \* \*

62. Revise §64.1601 (a) to read as follows:

**§ 64.1601 Delivery requirements and privacy restrictions.**

(a) Delivery. Except as provided in paragraphs (d) and (e) of this section:

(1) Telecommunications carriers and providers of interconnected Voice over Internet Protocol (VoIP) services, in originating interstate or intrastate traffic on the public switched telephone network (PSTN) or originating interstate or intrastate traffic that is destined for the PSTN (collectively “PSTN Traffic”), are required to transmit for all PSTN Traffic the telephone number received from or assigned to or otherwise associated with the calling party to the next provider in the path from the originating provider to the terminating provider. This provision applies regardless of the voice call signaling and transmission technology used by the carrier or VoIP provider. Entities subject to this provision that use Signaling System 7 (SS7) are required to transmit the calling party number (CPN) associated with all PSTN Traffic in the SS7 ISUP (ISDN User Part) CPN field to interconnecting providers, and are required to transmit the calling party’s charge number (CN) in the SS7 ISUP CN field to interconnecting providers for any PSTN Traffic where CN differs from CPN. Entities subject to this provision who use multi-frequency (MF) signaling are required to transmit CPN, or CN if it differs from CPN, associated with all PSTN Traffic in the MF signaling automatic numbering information (ANI) field.

(2) Intermediate providers within an interstate or intrastate call path that originates and/or terminates on the PSTN must pass unaltered to subsequent providers in the call path signaling information identifying the telephone number, or billing number, if different, of the calling party that is received with a call. This requirement applies to SS7 information including but not limited to CPN and CN, and also applies to MF signaling information or other signaling information intermediate providers receive with a call. This requirement also applies to VoIP signaling messages, such as calling party and charge information identifiers contained in Session Initiation Protocol (SIP) header fields, and to equivalent identifying information as used in other VoIP signaling technologies, regardless of the voice call signaling and transmission technology used by the carrier or VoIP provider.

\* \* \* \* \*

**PART 69—ACCESS CHARGES**

63. The authority citation for part 69 continues to read as follows:

Authority: 47 U.S.C. 154, 201, 202, 203, 205, 218, 220, 254, 403.

47 U.S.C. 154, 201, 202, 203, 205, 218, 220, 254, 403.

64. Add paragraph (d) to §69.1 to read as follows:

**§69.1 Application of access charges.**

\* \* \* \* \*

(d) To the extent any provision contained in part 51 subparts H and J conflict with any provision of this part, the part 51 provision supersedes the provision of this part.

\* \* \* \* \*

65. Revise §69.3 paragraphs (e)(6) and (e)(9) and add paragraph (e)(12) to read as follows:

**§69.3 Filing of access service tariffs.**

\* \* \* \* \*

(e) \* \* \*

(6) Except as provided in paragraph (e)(12) of this section, a telephone company or companies that elect to file such a tariff shall notify the association not later than March 1 of the year the tariff becomes effective, if such company or companies did not file such a tariff in the preceding biennial period or cross-reference association charges in such preceding period that will be cross-referenced in the new tariff. A telephone company or companies that elect to file such a tariff not in the biennial period shall file its tariff to become effective July 1 for a period of one year. Thereafter, such telephone company or companies must file its tariff pursuant to paragraphs (f)(1) or (f)(2) of this section.

\* \* \* \* \*

(9) Except as provided in paragraph (e)(12) of this section, a telephone company or group of affiliated telephone companies that elects to file its own Carrier Common Line tariff pursuant to paragraph (a) of this section shall notify the association not later than March 1 of the year the tariff becomes effective that it will no longer participate in the association tariff. A telephone company or group of affiliated telephone companies that elects to file its own Carrier Common Line tariff for one of its study areas shall file its own Carrier Common Line tariff(s) for all of its study areas.

\* \* \* \* \*

(12)(i) A local exchange carrier, or a group of affiliated carriers in which at least one carrier is engaging in access stimulation, as that term is defined in §61.3(aaa) of this chapter, shall file its own access tariffs within forty-five (45) days of commencing access stimulation, as that term is defined in §61.3(aaa) of this chapter, or within forty-five (45) days of [date] if the local exchange carrier on that date is engaged in access stimulation, as that term is defined in §61.3(aaa) of this chapter.

(ii) Notwithstanding paragraphs (e)(6) and (e)(9) of this section, a local exchange carrier, or a group of affiliated carriers in which at least one carrier is engaging in access stimulation, as that

term is defined in §61.3(aaa) of this chapter, must withdraw from all interstate access tariffs issued by the association within forty-five (45) days of engaging in access stimulation, as that term is defined in §61.3(aaa) of this chapter, or within forty-five (45) days of [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] if the local exchange carrier on that date is engaged in access stimulation, as that term is defined in §61.3(aaa) of this chapter.

(iii) Any such carrier(s) shall notify the association when it begins access stimulation, or on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] if it is engaged in access stimulation, as that term is defined in §61.3(aaa) of this chapter, on that date, of its intent to leave the association tariffs within forty-five (45) days.

**APPENDIX B****Proposed Rules**

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 54 to read as follows:

**PART 54 – UNIVERSAL SERVICE**

1. The authority citation for part 54 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 201, 205, 214, 219, 220, 254, 303(r), 403, and 1302 unless otherwise noted.

2. Revise subpart L to part 54 to read as follows:

**Subpart L – Mobility Fund****Sec.**

54.1011 Mobility Fund – Phase II

54.1012 Geographic Areas Eligible for Support

54.1013 Provider Eligibility

54.1014 Service to Tribal Lands

54.1015 Application Process

54.1016 Public Interest Obligations

54.1017 Letter of Credit

54.1018 Mobility Fund Phase II Disbursements

54.1019 Annual Reports

54.1020 Record Retention for Mobility Fund Phase II

**§ 54.1011 Mobility Fund – Phase II.**

The Commission will use competitive bidding, as provided in part 1, subpart AA, to determine the recipients of support available through Phase II of the Mobility Fund and the amount(s) of support that they may receive for specific geographic areas, subject to applicable post-auction procedures.

**§ 54.1012 Geographic Areas Eligible for Support**

(a) Mobility Fund Phase II support may be made available for census blocks or other areas identified as eligible by public notice.



(b) Except as provided in § 54.1014, coverage units for purposes of conducting competitive bidding and disbursing support based on designated road miles will be identified by public notice for each area eligible for support.

**§ 54.1013 Provider Eligibility.**

(a) Except as provided in § 54.1014, an applicant shall be an Eligible Telecommunications Carrier in an area in order to receive Mobility Fund Phase II support for that area. The applicant's designation as an Eligible Telecommunications Carrier may be conditional subject to the receipt of Mobility Fund support.

(b) An applicant shall have access to spectrum in an area that enables it to satisfy the applicable performance requirements in order to receive Mobility Fund Phase II support for that area. The applicant shall certify, in a form acceptable to the Commission, that it has such access at the time it applies to participate in competitive bidding and at the time that it applies for support and that it will retain such access for ten (10) years after the date on which it is authorized to receive support.

(c) An applicant shall certify that it is financially and technically qualified to provide the services supported by Mobility Fund Phase II in order to receive such support.

**§ 54.1014 Service to Tribal Lands.**

(a) A Tribally-owned or –controlled entity that has pending an application to be designated an Eligible Telecommunications Carrier may participate in an auction by bidding for support in areas located within the boundaries of the Tribal land associated with the Tribe that owns or controls the entity. To bid on this basis, an entity shall certify that it is a Tribally-owned or –controlled entity and identify the applicable Tribe and Tribal lands in its application to participate in the competitive bidding. A Tribally-owned or -controlled entity shall receive any Mobility Fund Phase II support only after it has become an Eligible Telecommunications Carrier.

(b) In any auction for support solely in Tribal lands, coverage units for purposes of conducting competitive bidding and disbursing support based on designated population will be identified by public notice for each census block eligible for support.

(c) Tribally-owned or –controlled entities may receive a bidding credit with respect to bids for support within the boundaries of associated Tribal lands. To qualify for a bidding credit, an applicant shall certify that it is a Tribally-owned or –controlled entity and identify the applicable Tribe and Tribal lands in its application to participate in the competitive bidding. An applicant that qualifies shall have its bid(s) for support in areas within the boundaries of Tribal land associated with the Tribe that owns or controls the applicant reduced by twenty-five (25) percent or purposes of determining winning bidders without any reduction in the amount of support available.

(d) A winning bidder for support in Tribal lands shall notify and engage the Tribal governments responsible for the areas supported.

(1) A winning bidder's engagement with the applicable Tribal government shall consist, at a minimum, of discussion regarding:

(i) A needs assessment and deployment planning with a focus on Tribal community anchor institutions;

(ii) Feasibility and sustainability planning;

(iii) Marketing services in a culturally sensitive manner;

(iv) Rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and

(v) Compliance with Tribal business and licensing requirements

(2) A winning bidder shall notify the appropriate Tribal government of its winning bid no later than five (5) business days after being identified by public notice as a winning bidder.

(3) A winning bidder shall certify in its application for support that it has substantively engaged appropriate Tribal officials regarding the issues specified in § 54.1014(d)(1), at a minimum, as well as any other issues specified by the Commission, and provide a summary of the results of such engagement. A copy of the certification and summary shall be sent to the appropriate Tribal officials when it is sent to the Commission.

(4) A winning bidder for support in Tribal lands shall certify in its annual report, pursuant to § 54.1019(a)(5), and prior to disbursement of support, pursuant to § 54.1018, that it has substantively engaged appropriate Tribal officials regarding the issues specified in § 54.1014(d)(1), at a minimum, as well as any other issues specified by the Commission, and provide a summary of the results of such engagement. A copy of the certification and summary shall be sent to the appropriate Tribal officials when it is sent to the Commission.

**§ 54.1015 Application Process.**

(a) Application to Participate in Competitive Bidding for Mobility Fund Phase II Support. In addition to providing information specified in § 1.21001(b) of this chapter and any other information required by the Commission, an applicant to participate in competitive bidding for Mobility Fund Phase II support shall:

- (1) Provide ownership information as set forth in § 1.2112(a) of this chapter;
- (2) Certify that the applicant is financially and technically capable of meeting the public interest obligations of § 54.1016 in each area for which it seeks support;
- (3) Disclose its status as an Eligible Telecommunications Carrier in any area for which it will seek support or as a Tribal entity with a pending application to become an Eligible Telecommunications Carrier in any such area, and certify that the disclosure is accurate;
- (4) Describe the spectrum access that the applicant plans to use to meet obligations in areas for which it will bid for support, including whether the applicant currently holds a license for or leases the spectrum, and certify that the description is accurate and that the applicant will retain such access for at least ten (10) years after the date on which it is authorized to receive support;.
- (5) Make any applicable certifications required in § 54.1014.

(b) Application by Winning Bidders for Mobility Fund Phase II Support.

(1) Deadline. Unless otherwise provided by public notice, winning bidders for Mobility Fund Phase II support shall file an application for Mobility Fund Phase II support no later than 10 business days after the public notice identifying them as winning bidders.

(2) Application Contents. (i) Identification of the party seeking the support, including ownership information as set forth in § 1.2112(a) of this chapter.

(ii) Certification that the applicant is financially and technically capable of meeting the public interest obligations of § 54.1016 in the geographic areas for which it seeks support.

(iii) Proof of the applicant's status as an Eligible Telecommunications or as a Tribal entity with a pending application to become an Eligible Telecommunications Carrier in any area for which it seeks support and certification that the proof is accurate.

(iv) A description of the spectrum access that the applicant plans to use to meet obligations in areas for which it is winning bidder for support, including whether the applicant currently holds a license for or leases the spectrum, and certification that the description is accurate and that the applicant will retain such access for at least ten (10) years after the date on which it is authorized to receive support.

(v) A detailed project description that describes the network, identifies the proposed technology, demonstrates that the project is technically feasible, discloses the budget and describes each specific phase of the project, e.g., network design, construction, deployment and maintenance.

(vi) Certifications that the applicant has available funds for all project costs that exceed the amount of support to be received from Mobility Fund Phase II and that the applicant will comply with all program requirements.

(vii) Any guarantee of performance that the Commission may require by public notice or other proceedings, including but not limited to the letters of credit required in §54.1017, or a written commitment from an acceptable bank, as defined in §54.1017(a)(1), to issue such a letter of credit.

(viii) Certification that the applicant will offer service in supported areas at rates that are within a reasonable range of rates for similar service plans offered by mobile wireless providers in urban areas for a period during the term of the support the applicant seeks.

(ix) Any applicable certifications and showings required in §54.1014.

(x) Certification that the party submitting the application is authorized to do so on behalf of the applicant.

(xi) Such additional information as the Commission may require.

(3) Application Processing. (i) No application will be considered unless it has been submitted in an acceptable form during the period specified by public notice. No applications submitted or demonstrations made at any other time shall be accepted or considered.

(ii) Any application that, as of the submission deadline, either does not identify the applicant seeking support as specified in the public notice announcing application procedures or does not include required certifications shall be denied.

(iii) An applicant may be afforded an opportunity to make minor modifications to amend its application or correct defects noted by the applicant, the Commission, the Administrator, or other parties. Minor modifications include correcting typographical errors in the application and supplying non-material information that was inadvertently omitted or was not available at the time the application was submitted.

(iv) Applications to which major modifications are made after the deadline for submitting applications shall be denied. Major modifications include, but are not limited to, any changes in the ownership of the applicant that constitute an assignment or change of control, or the identity of the applicant, or the certifications required in the application.

(v) After receipt and review of the applications, a public notice shall identify each winning bidder that may be authorized to receive Mobility Fund Phase II support, after the winning bidder submits a Letter of Credit and an accompanying opinion letter as required by § 54.1016, in a form acceptable to the Commission, and any final designation as an Eligible Telecommunications Carrier that any Tribally-owned or –controlled applicant may still require. Each such winning bidder shall submit a Letter of Credit and an accompanying opinion letter as required by § 54.1016, in a form acceptable to the Commission, and any required final designation as an Eligible Telecommunications Carrier no later than 10 business days following the release of the public notice.

(v) After receipt of all necessary information, a public notice will identify each winning bidder that is authorized to receive Mobility Fund Phase II support.

**§ 54.1016 Public Interest Obligations.**

(a) Deadline for Construction. A winning bidder authorized to receive Mobility Fund Phase II support shall, no later than three (3) years after the date on which it was authorized to receive support, submit data from drive tests covering the area for which support was received demonstrating mobile transmissions supporting voice and data to and from the network covering 75% of the designated coverage units in the area deemed uncovered, or an applicable higher percentage established by public notice prior to the competitive bidding, and meeting or exceeding the following:

(1) Outdoor minimum data transmission rates of 200 kbps uplink and 768 kbps downlink at vehicle speeds appropriate for the roads covered;

(2) Transmission latency low enough to enable the use of real time applications, such as VoIP.

(b) Coverage Test Data. Drive tests submitted in compliance with a recipient's public interest obligations shall cover roads designated in the public notice detailing the procedures for the competitive bidding that is the basis of the recipient's support. Scattered site tests submitted in compliance with a recipient's public interest obligations shall be in compliance with standards set forth in the public notice detailing the procedures for the competitive bidding that is the basis of the recipient's authorized support.

(c) Collocation Obligations. During the period when a recipient shall file annual reports pursuant to § 54.1019, the recipient shall allow for reasonable collocation by other providers of services that would meet the technological requirements of Mobility Fund Phase II on newly constructed towers that the recipient owns or manages in the area for which it receives support. In addition, during this period, the recipient may not enter into facilities access arrangements that restrict any party to the arrangement from allowing others to collocate on the facilities.

(d) Voice and Data Roaming Obligations. During the period when a recipient shall file annual reports pursuant to § 54.1019, the recipient shall comply with the Commission's voice and data roaming requirements that were in effect as of October 27, 2011, on networks that are built through Mobility Fund Phase II support.

(e) Liability for Failing To Satisfy Public Interest Obligations. A winning bidder authorized to receive Mobility Fund Phase II support that fails to comply with the public interest obligations in this paragraph or any other terms and conditions of the Mobility Fund Phase II support will be subject to repayment of the support disbursed together with an additional performance default payment. Such a winning bidder may be disqualified from receiving Mobility Fund Phase II support or other USF support. The additional performance default amount will be a percentage of the Mobility Fund Phase II support that the applicant has been and is eligible to request be disbursed to it pursuant to § 54.1018. The percentage will be determined as specified in the public notice detailing competitive bidding procedures prior to the commencement of competitive bidding. The percentage will not exceed twenty percent.

**§ 54.1017 Letter of Credit.**

(a) Before being authorized to receive Mobility Fund Phase II support, a winning bidder shall obtain an irrevocable standby letter of credit which shall be acceptable in all respects to the Commission. Each winning bidder authorized to receive Mobility Fund Phase II support shall maintain the standby letter of credit or multiple standby letters of credit in an amount equal to the amount of Mobility Fund Phase II support that the winning bidder has been and is eligible to request be disbursed to it pursuant to § 54.1018 plus the additional performance default amount described in § 54.1016(e), until at least 120 days after the winning bidder receives its final distribution of support pursuant to § 54.1017.

(1) The bank issuing the letter of credit shall be acceptable to the Commission. A bank that is acceptable to the Commission is

(i) Any United States Bank that

(A) Is among the 50 largest United States banks, determined on the basis of total assets as of the end of the calendar year immediately preceding the issuance of the letter of credit,

(B) Whose deposits are insured by the Federal Deposit Insurance Corporation, and

(C) Who has a long-term unsecured credit rating issued by Standard & Poor's of A- or better (or an equivalent rating from another nationally recognized credit rating agency); or

(ii) Any non-U.S. bank that

(A) Is among the 50 largest non-U.S. banks in the world, determined on the basis of total assets as of the end of the calendar year immediately preceding the issuance of the letter of credit (determined on a U.S. dollar equivalent basis as of such date),

(B) Has a branch office in the District of Columbia or such other branch office agreed to by the Commission,

(C) Has a long-term unsecured credit rating issued by a widely-recognized credit rating agency that is equivalent to an A- or better rating by Standard & Poor's, and

(D) Issues the letter of credit payable in United States dollars.

(2) Reserved.

(b) A winning bidder for Mobility Fund Phase II support shall provide with its Letter of Credit an opinion letter from its legal counsel clearly stating, subject only to customary assumptions, limitations, and qualifications, that in a proceeding under Title 11 of the United States Code, 11 U.S.C. 101 et seq. (the "Bankruptcy Code"), the bankruptcy court would not treat the letter of credit or proceeds of the letter of credit as property of the winning bidder's bankruptcy estate under section 541 of the Bankruptcy Code.

(c) Authorization to receive Mobility Fund Phase II support is conditioned upon full and timely performance of all of the requirements set forth in § 54.1016, and any additional terms and conditions upon which the support was granted.

(1) Failure by a winning bidder authorized to receive Mobility Fund Phase II support to comply with any of the requirements set forth in § 54.1015 or any other term or conditions upon which support was granted, or its loss of eligibility for any reason for Mobility Fund Phase II support will be deemed an automatic performance default, will entitle the Commission to draw the entire amount of the letter of credit, and may disqualify the winning bidder from the receipt of Mobility Fund Phase II support or additional USF support.

(2) A performance default will be evidenced by a letter issued by the Chief of either the Wireless Bureau or Wireline Bureau or their respective designees, which letter, attached to a standby letter of credit draw certificate, and shall be sufficient for a draw on the standby letter of credit for the entire amount of the standby letter of credit.

**§ 54.1018 Mobility Fund Phase II Disbursements.**

- (a) A winning bidder for Mobility Fund Phase II support will be advised by public notice whether it has been authorized to receive support. The public notice will detail disbursement will be made available.
- (b) Mobility Fund Phase II support will be available for disbursement to a winning bidder authorized to receive support on a quarterly basis for ten (10) years following the date on which it is authorized.
- (c) Prior to each disbursement request, a winning bidder for support in a Tribal land will be required to certify that it has substantively engaged appropriate Tribal officials regarding the issues specified in §54.1014(d)(1), at a minimum, as well as any other issues specified by the Commission and to provide a summary of the results of such engagement.
- (d) Prior to each disbursement request, a winning bidder will be required to certify that it is in compliance with all requirements for receipt of Mobility Fund Phase II support at the time that it requests the disbursement.

**§ 54.1019 Annual Reports.**

- (a) A winning bidder authorized to receive Mobility Fund Phase II support shall submit an annual report no later than April 1 in each year for the five years after it was so authorized. Each annual report shall include the following, or reference the inclusion of the following in other reports filed with the Commission for the applicable year:
  - (1) Electronic Shapefiles site coverage plots illustrating the area newly reached by mobile services at a minimum scale of 1:240,000;
  - (2) A list of relevant census blocks previously deemed unserved, with road miles and total resident population and resident population residing in areas newly reached by mobile services (based on Census Bureau data and estimates);
  - (3) If any such testing has been conducted, data received or used from drive tests, or scattered site testing in areas where drive tests are not feasible, analyzing network coverage for mobile services in the area for which support was received;
  - (4) Certification that the winning bidder offers service in supported areas at rates that are within a reasonable range of rates for similar service plans offered by mobile wireless providers in urban areas;
  - (5) Any applicable certifications and showings required in § 54.1014; and
  - (6) Updates to the information provided in § 54.1015(b)(2)(v).
- (b) The party submitting the annual report must certify that they have been authorized to do so by the winning bidder.

(c) Each annual report shall be submitted to the Office of the Secretary of the Commission, clearly referencing WT Docket No. 10-208; the Administrator; and the relevant state commissions, relevant authority in a U.S. Territory, or Tribal governments, as appropriate

**§ 54.1020 Record Retention for Mobility Fund Phase II.**

A winning bidder authorized to receive Mobility Fund Phase II support and its agents are required to retain any documentation prepared for, or in connection with, the award of Mobility Fund Phase II support for a period of not less than ten (10) years after the date on which the winning bidder receives its final disbursement of Mobility Fund Phase II support.

3. Add subpart M to part 54 to read as follows:

**Subpart M – Connect America Fund Phase II Competitive Bidding**

**Sec.**

54.1101 Connect America Fund (CAF) Phase II Competitive Bidding

54.1102 Geographic Areas Eligible for Support

54.1103 Provider Eligibility

54.1104 Service to Tribal Lands

54.1105 Application Process

54.1106 Public Interest Obligations and Annual Reports

54.1107 Connect America Fund (CAF) Phase II Competitive Bidding Disbursements

**§ 54.1101 Connect America Fund (CAF) Phase II Competitive Bidding.**

The Commission will use competitive bidding, as provided in part 1, subpart AA, to determine the recipients of support available through Connect America Fund Phase II Competitive Bidding and the amount(s) of support that they may receive for specific geographic areas, subject to applicable post-auction procedures.

**§ 54.1102 Geographic Areas Eligible for Support.**

(a) CAF Fund Phase II Competitive Bidding support may be made available for census blocks or other areas identified as eligible by public notice.

(b) Except as provided in § 54.1104, coverage units for purposes of conducting competitive bidding and disbursing support based on the number of residential and business locations will be identified by public notice for each area eligible for support.

**§ 54.1103 Provider Eligibility.**

(a) Except as provided in § 54.1104, an applicant shall be an Eligible Telecommunications Carrier in an area in order to receive CAF Phase II Competitive Bidding support for that area. The designation may be conditional subject to the receipt of CAF Phase II Competitive Bidding support.



(b) An applicant shall certify that is financially and technically qualified to provide the services supported by CAF Phase II Competitive Bidding support in order to receive such support.

**§ 54.1104 Service to Tribal Lands.**

(a) A Tribally-owned or –controlled entity that has pending an application to be designated an Eligible Telecommunications Carrier may participate in an auction by bidding for support in areas located within the boundaries of the Tribal land associated with the Tribe that owns or controls the entity. To bid on this basis, an entity shall certify that it is a Tribally-owned or –controlled entity and identify the applicable Tribe and Tribal lands in its application to participate in the competitive bidding. A Tribally-owned or -controlled entity shall receive any CAF Phase II Competitive Bidding support only after it has become an Eligible Telecommunications Carrier.

(b) Tribally-owned or –controlled entities may receive a bidding credit with respect to bids for support within the boundaries of associated Tribal lands. To qualify for a bidding credit, an applicant shall certify that it is a Tribally-owned or –controlled entity and identify the applicable Tribe and Tribal lands in its application to participate in the competitive bidding. An applicant that qualifies shall have its bid(s) for support in areas within the boundaries of Tribal land associated with the Tribe that owns or controls the applicant reduced by twenty-five (25) percent or purposes of determining winning bidders without any reduction in the amount of support available.

(c) A winning bidder for support in Tribal lands shall notify and engage the Tribal governments responsible for the areas supported.

(1) A winning bidder’s engagement with the applicable Tribal government shall consist, at a minimum, of discussion regarding:

- (i) A needs assessment and deployment planning with a focus on Tribal community anchor institutions;
- (ii) Feasibility and sustainability planning;
- (iii) Marketing services in a culturally sensitive manner;
- (iv) Rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and
- (v) Compliance with Tribal business and licensing requirements

(2) A winning bidder shall notify the appropriate Tribal government of its winning bid no later than five (5) business days after being identified by public notice as a winning bidder.

(3) A winning bidder shall certify in its application for support that it has substantively engaged appropriate Tribal officials regarding the issues specified in § 54.1104(c)(1), at a minimum, as well as any other issues specified by the Commission, and provide a summary of the results of such engagement. A copy of the certification and summary shall be sent to the appropriate Tribal officials when it is sent to the Commission.

(4) A winning bidder for support in Tribal lands shall certify in its annual report, pursuant to § 54.1106, and prior to disbursement of support, pursuant to § 54.1107, that it has substantively engaged appropriate Tribal officials regarding the issues specified in § 54.1104(c)(1), at a

minimum, as well as any other issues specified by the Commission, and provide a summary of the results of such engagement. A copy of the certification and summary shall be sent to the appropriate Tribal officials when it is sent to the Commission.

**§ 54.1105 Application Process.**

(a) Application to Participate in CAF Phase II Competitive Bidding. In addition to providing information specified in §1.21001(b) of this chapter and any other information required by the Commission, an applicant to participate in competitive bidding for CAF Phase II support shall:

- (1) Provide ownership information as set forth in § 1.2112(a) of this chapter;
- (2) Certify that the applicant is financially and technically capable of meeting the public interest obligations of § 54.1106 in each area for which it seeks support;
- (3) Disclose its status as an Eligible Telecommunications Carrier in any area for which it will seek support or as a Tribal entity with a pending application to become an Eligible Telecommunications Carrier in any such area, and certify that the disclosure is accurate.
- (4) Make any applicable certifications required in § 54.1104 of this chapter.

(b) Application by Winning Bidders for CAF Phase II Support. (1) Deadline. Unless otherwise provided by public notice, winning bidders for CAF Phase II support shall file an application for CAF Phase II support no later than 10 business days after the public notice identifying them as winning bidders.

(2) Application Contents. (i) Identification of the party seeking the support, including ownership information as set forth in § 1.2112(a) of this chapter.

(ii) Certification that the applicant is financially and technically capable of meeting the public interest obligations of §54.1106 in the geographic areas for which it seeks support.

(iii) Proof of the applicant's status as an Eligible Telecommunications Carrier or as a Tribal entity with a pending application to become an Eligible Telecommunications Carrier in any area for which it seeks support and certification that the proof is accurate.

(iv) Certification that the applicant will offer service in supported areas at rates that are within a reasonable range of rates for similar service plans offered by providers in urban areas for a period extending until 5 years after the date on which it is authorized to receive support.

(v) Any applicable certifications and showings required in § 54.1104.

(vi) Certification that the party submitting the application is authorized to do so on behalf of the applicant.

(vii) Such additional information as the Commission may require.

(3) Application Processing. (i) No application will be considered unless it has been submitted in an acceptable form during the period specified by public notice. No applications submitted or demonstrations made at any other time shall be accepted or considered.

- (ii) Any application that, as of the submission deadline, either does not identify the applicant seeking support as specified in the public notice announcing application procedures or does not include required certifications shall be denied.
- (iii) An applicant may be afforded an opportunity to make minor modifications to amend its application or correct defects noted by the applicant, the Commission, the Administrator, or other parties. Minor modifications include correcting typographical errors in the application and supplying non-material information that was inadvertently omitted or was not available at the time the application was submitted.
- (iv) Applications to which major modifications are made after the deadline for submitting applications shall be denied. Major modifications include, but are not limited to, any changes in the ownership of the applicant that constitute an assignment or change of control, or the identity of the applicant, or the certifications required in the application.
- (v) A tribally-owned or –controlled winning bidder that was not as an Eligible Telecommunications Carrier shall provide its final designation as an Eligible Telecommunications Carrier.
- (vi) After receipt of all necessary information, the Commission shall release a public notice identifying each winning bidder that is authorized to receive CAF Phase II support.

**§ 54.1106 Public Interest Obligations and Annual Reports.**

A winning bidder authorized to receive CAF Phase II shall satisfy all public interest obligations and annual reporting requirements of § 54.313.

**§ 54.1107 Connect America Fund (CAF) Phase II Competitive Bidding Disbursements.**

- (a) A winning bidder for CAF Phase II Competitive Bidding support will be advised by public notice whether it has been authorized to receive support. The public notice will detail how disbursement will be made available.
- (b) CAF Phase II Competitive Bidding support will be available for disbursement to each winning bidder authorized to receive support on a quarterly basis for five (5) years after it is authorized to receive support.
- (c) Prior to each disbursement request, a winning bidder for support in a Tribal land will be required to certify that it has substantively engaged appropriate Tribal officials regarding the issues specified in § 54.1104(c)(1), at a minimum, as well as any other issues specified by the Commission and to provide a summary of the results of such engagement.
- (d) Prior to each disbursement request, a winning bidder will be required to certify that it is in compliance with all requirements for receipt of CAF Phase II Competitive Bidding support at the time that it requests the disbursement.

4. Add subpart N to part 54 to read as follows:

**Subpart N – Remote Areas Fund****Sec.**

54.1201 Remote Areas Fund

54.1202 Geographic Areas Eligible for Support

54.1203 Provider Eligibility

54.1204 Public Interest Obligations and Annual Reports

54.1205 Remote Areas Fund Disbursements

**§ 54.1201 Remote Areas Fund.**

This subpart sets forth procedures for determining the recipients of universal service support pursuant to the Remote Areas Fund and the amount(s) of support that each recipient respectively may receive.

**§ 54.1202 Geographic Areas Eligible for Support.**

Remote Areas Fund support may be made available for census blocks or other areas identified by public notice.

**§ 54.1203 Provider Eligibility.**

(a) An applicant applying for Remote Areas Fund support must be designated an Eligible Telecommunications Carrier in any area for which it will seek support. The designation may be conditional subject to the receipt of Remote Areas Fund support.

(b) An applicant applying for Remote Areas Fund support must certify that is financially and technically qualified to provide the supported services.

**§ 54.1204 Public Interest Obligations and Annual Reports.**

(a) Except as expressly provided in this paragraph or otherwise by the Commission, an applicant authorized to receive Remote Areas Fund support shall satisfy all public interest obligations and annual reporting requirements of § 54.313 for applicants receiving CAF Phase II support.

(b) An applicant for Remote Areas Fund support must pass the per location support received along to the subscriber at the qualifying location as a discount on the price of service. Provided, however, that the subscriber must pay, or provide a deposit of, an amount sufficient to assure that the subscriber is able to pay for the services to which they subscribe and to provide an incentive to comply with any terms of the service agreements regarding use and return of equipment.

**§ 54.1205 Remote Areas Fund Disbursements.**

(a) An applicant for Remote Areas Fund support will be advised by public notice that it is authorized to receive support. Procedures by which applicants authorized to receive support may obtain disbursements will be provided by public notice.

(b) Remote Areas Fund support will be available for disbursement to an applicant authorized to receive support on a quarterly basis for five (5) years following its authorization.

(c) Remote Areas Fund support will be disbursed in an amount calculated based on the number of newly served residences or households within an eligible area. For purposes of this paragraph, “residence” and “household” shall use the same definition applied in the Lifeline Program. Applicants for Remote Areas Fund support must certify the number of qualifying locations newly served in the most recent quarter, specifying the number of signed contracts for qualifying locations, and certify that each location meets the qualifying criteria established by the Commission.

(d) Prior to each disbursement request, an applicant authorized to receive support will be required to certify that it is in compliance with all requirements for receipt of Remote Areas Fund support at the time that it requests the disbursement.

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**APPENDIX C****Explanation of Methodology for Modifications to Corporate Operations Expense Formulae**

1. This appendix describes the procedure used to derive the formulae, set forth in section 36.621, for determining the maximum allowable corporate operations expense recoverable through universal service support mechanisms.

**The Basic Formulae**

2. We conducted a statistical analysis using actual incumbent local exchange carrier data submitted by NECA.<sup>1</sup> We used statistical regression techniques that focused on corporate operations expense per loop and the number of loops, in which the cap on corporate operations expense per loop declines as the number of loops increases so that economies of scale, which are evident in the data, can be reflected in the model. As in the previous corporate operations expense limitation formulae, the linear spline model developed has two line segments joined together at a single point or knot. In general, the linear spline model allows the per-line cap on corporate operations expense to decline as the number of loops increases for the smaller study areas having fewer loops than the knot point. Estimates produced by the linear spline model suggest that the per-loop cap on corporate operations expense for study areas with a number of loops higher than the spline knot is constant.

3. The linear spline model requires selecting a knot, the point at which the two line segments of differing slopes meet. We retained the knot point at 10,000 loops from the Commission's previous analysis. The regression results are as follows:

- for study areas having fewer than 10,000 total working loops, the projected monthly corporate operations expense per-loop equals  $\$ 36.815 - 0.00285 \times (\text{number of working loops})$ ;
- for study areas with total working loops equal or greater than 10,000 loops, the projected monthly corporate operations expense per-loop equals \$8.12.

**Correcting for Non-monotonic Behavior in the Model's Total Corporate Operations Expense**

4. The linear spline model has one undesirable feature. For a certain range, it yields a total allowable corporate operations expense that declines as the number of working loops increases. This occurs because multiplying the linear function that defines the first line segment of the estimated spline model ( $36.815 - (0.00285 \times \text{the number of loops})$ ) by the number of loops defines a quadratic function that determines total allowable corporate operations expense. This quadratic function produces a maximum value at 6,459 loops, well below the selected knot point of 10,000.<sup>2</sup> To correct this problem, we refined the formulae to ensure that the total allowable corporate operations expense always increases

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<sup>1</sup> See NECA 2010 USF Data Filing. Our analysis only examined rural study areas. Additionally, in order to avoid skewed results caused by outliers, we excluded study areas whose corporate operations expense were in excess of \$200 per loop.

<sup>2</sup> The feature exists with all knot points considered. The practical effect of the function peaking at 6,459 loops is that a carrier with more than 6,459 loops, but less than 10,000 loops, will receive less corporate operations expense support than one with just 6,459 loops.

as the number of loops increases. We chose a point to the left of the point at which the total corporate operations expense estimate peaks. At that selected point, the slope of the function defining total corporate operations expense is positive. We then calculated the slope at that point and extended a line with the same slope upward to the right of that point until the line intersected the original estimated total operations expense, which is represented by  $8.315 \times$  the number of loops. Thus, we created a line segment with constant slope covering the region over which the original model of corporate operations expenses declines so that total corporate operations expense continues to increase with the number of loops. We chose the point that leads to a line segment that yields the highest  $R^2$ .

5. Using this procedure, we selected 6,000 as the point. The slope of total operations expense at this point is 2.615 and the line extended intersects the original total operations expense model at 17,887. Accordingly, the line segment formed for total corporate operations expenses, to be applied from 6,000 loops to 17,887 loops, is  $\$2.615 \times$  the number of working loops + \$102,600. Dividing this number by the number of working loops defines the maximum allowable corporate operations expense per-loop for the range from 6,000 to 17,887 working loops, i.e.,  $\$2.615 + (\$102,600/\text{number of working loops})$ . Therefore, the projected per-loop corporate operations expense formulae are:

- for study areas having fewer than 6,000 total working loops, the projected monthly corporate operations expense per-loop equals  $\$36.815 - 0.00285 \times (\text{number of total working loops})$ ;
- for study areas having 6,000 or more total working loops, but less than 17,887 total working loops, the projected monthly corporate operations expense per-loop equals  $\$2.615 + (102,600/\text{number of total working loops})$ ;
- for study areas having total working loops greater than or equal to 17,887 total working loops, the projected monthly corporate operations expense per-loop equals \$8.315.

6. The Commission concluded previously that the amount of corporate operations expense per-loop that is supported through our universal service programs should fall within a range of reasonableness.<sup>3</sup> Consistent with the formulae currently in place, we define this range of reasonableness for each study area as including levels of reported corporate operations expense per-loop up to a maximum of 115 percent of projected level of corporate operations expense per-loop. Therefore, each of the above formulae is multiplied by 115 percent to yield the maximum allowable monthly per-loop corporate operations expense as follows:

- for study areas having fewer than 6,000 total working loops, the maximum allowable monthly corporate operations expense per-loop equals  $\$42.337 - 0.00328 \times \text{number of total working loops}$ ;<sup>4</sup>
- for study areas having 6,000 or more total working loops, but fewer than 17,887 total working loops, the maximum allowable monthly corporate operations expense per-loop equals  $\$3.007 + (117,990/\text{number of total working loops})$ ;

<sup>3</sup> See *Universal Service First Report and Order*, 12 FCC Rcd at 8931, para. 284.

<sup>4</sup> We also retain the existing rule that for incumbents LECs with fewer than 6,000 total working loops, the maximum allowable monthly corporate operations expense per-loop will be the amount produced by this formula or \$50,000/the number of total working loops, whichever is greater. Pursuant to section 36.621(a)(4)(ii), however, the \$50,000 figure has been adjusted for inflation to \$63,000 effective January 1, 2012. See 47 C.F.R. § 36.621(a)(4)(ii).

- for study areas with total working loops greater than or equal to 17,887 total working loops, the maximum allowable monthly corporate operations expense per-loop equals \$9.562.

Consistent with the existing rules, we will adjust the monthly per-loop limit to reflect the annual change in GDP-CPI.<sup>5</sup>

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<sup>5</sup> See 47 C.F.R. § 36.621(a)(4)(iii)(D).



## APPENDIX D

## Puerto Rico Telephone Company Petition for Reconsideration

1. For the reasons set forth below, we deny Puerto Rico Telephone Company, Inc.'s (PRTC) petition to reconsider our decision declining to adopt a new high-cost support mechanism for non-rural insular carriers.<sup>1</sup> For the sake of brevity, we decline to restate PRTC's request or our reasons for having rejected it previously. We emphasize, however, that our rejection of PRTC's request should not be taken to suggest that we are unmindful of the significant challenges facing consumers in Puerto Rico.

2. Reconsideration is appropriate only when the petitioner either shows a material error or omission in the original Order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.<sup>2</sup> PRTC has not done so. Below, we briefly address PRTC's principal arguments and several minor ones.

3. PRTC, in its petition, repeats its assertion that section 254 of the Act requires us to establish a "separate insular support mechanism for insular areas."<sup>3</sup> We have already considered and rejected that interpretation of the statute.<sup>4</sup> Rather, as we explained in the *2010 Insular Order*, "the statute leaves to the Commission's discretion the task of developing one or more mechanisms" to implement the statute's goals.<sup>5</sup>

4. PRTC next asserts that the Commission's decision not to create a separate insular support mechanism is unlawful because it embodies the view that "consumers in Puerto Rico [need not have any] access to wireline service as long as wireless service is available to a substantial majority of the population."<sup>6</sup> PRTC argues that "[b]ecause other areas have access to *both* wireline and wireless services, then insular areas are entitled to 'reasonably comparable' wireline *and* wireless service."<sup>7</sup>

5. PRTC's argument for a separate, dedicated insular fund suffers from a fundamental flaw. PRTC failed to show that consumers in Puerto Rico lack access to supported voice services because of inadequate federal universal service support, a point emphasized by the Commission in the Order. That is, PRTC did not demonstrate that it needs additional high-cost universal service support to deploy

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<sup>1</sup> See *High-Cost Universal Service Support*, WC Docket Nos. 05-337, 03-109, CC Docket No. 96-45, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 4136, 4137-38, paras. 1-3 (2010) (*2010 Insular Order*); Puerto Rico Telephone Company Petition for Reconsideration, WC Docket Nos. 05-337, 03-109, CC Docket No. 96-45 (filed Apr. 27, 2010) (PRTC Petition for Recon).

<sup>2</sup> *Petition for Reconsideration by National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415, para. 4 (2003).

<sup>3</sup> PRTC Petition for Recon at 4.

<sup>4</sup> See *2010 Insular Order*, 25 FCC Rcd at 4148-49, paras. 22-24.

<sup>5</sup> See *2010 Insular Order*, 25 FCC Rcd at 4148, para. 22. As a fallback, PRTC argues that even if the statute is ambiguous with regard to whether a separate insular support mechanism is required, our interpretation of the statute is unreasonable. See PRTC Petition for Recon at 6. We do not believe, however, that the statute is ambiguous on this point. As we have said, the statute provides us with discretion about how to structure universal service support mechanisms, and that discretion includes the discretion to decide whether to create a separate insular mechanism. See *2010 Insular Order*, 25 FCC Rcd at 4148-49, paras. 22-24.

<sup>6</sup> PRTC Petition for Recon at 7.

<sup>7</sup> *Id.*

facilities to provide voice service to unserved communities in Puerto Rico. To the contrary, the Commission noted that PRTC's parent had committed to investing more than \$1 billion to improve services in Puerto Rico.<sup>8</sup> PRTC has never claimed that such a sum would have been inadequate to fund the deployment of wireline facilities to all residents that currently lack them.

6. PRTC, moreover, did not show that it would have to raise rates in order to deploy additional facilities, or that if it did, any such rate increase would result in rates that are not reasonably comparable to the national average urban rate.<sup>9</sup> Indeed, as the Commission noted in the Order, PRTC did not submit any rate data in the record at all, and the rate data submitted by Verizon showed that PRTC's rates were well below the national average urban rate.<sup>10</sup> But even if the foregoing were not so, PRTC did not indicate that, even if it *did* receive additional high-cost universal service support, it would actually deploy wireline facilities. Rather, PRTC initially resisted the idea that any conditions at all should be placed on its receipt of support, and only later informed the Commission that it would "be willing to commit" to apply funding from its proposed support mechanism "for the provision, maintenance, and upgrading of broadband facilities, with the priority of extending broadband capabilities to lines that are not broadband-capable today."<sup>11</sup> However, as the Commission pointed out in the Order, such a commitment would do nothing to address PRTC's allegation that some Puerto Rico consumers lack access to wireline *voice* service, which forms the basis of its demand for additional high-cost support.

7. PRTC alleges that the Commission "reversed course," without adequate explanation, when it declined to follow the tentative conclusion in the *2005 Insular NPRM* that the Commission should create an insular support mechanism.<sup>12</sup> PRTC relies on the Supreme Court's statement in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*<sup>13</sup> which, as quoted by PRTC, holds that "an agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."<sup>14</sup>

8. The passage from *State Farm* cited by PRTC has little bearing on the present situation. Restoring the text that PRTC has omitted (here in italics), the passage reads "an agency changing its course *by rescinding a rule* is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."<sup>15</sup> The Commission did not rescind a rule in the *2010 Insular Order*; instead, it declined to adopt its tentative conclusion, put forward in a notice of proposed rulemaking, that it should amend its rules to create a new insular support mechanism. On that point, another passage from *State Farm* is perhaps more relevant: "If Congress established a presumption from which judicial review should start, that presumption . . . is not *against* . . . regulation, but *against* changes in current policy that are not justified by the rulemaking record."<sup>16</sup> We further note

<sup>8</sup> See *2010 Insular Order*, 25 FCC Rcd at 4154, para. 29.

<sup>9</sup> See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 18 FCC Rcd 22559, 22638, para. 140 (2003) (noting, in discussing PRTC's concerns with the non-rural high cost support mechanism, "the purpose of non-rural high-cost support is to ensure reasonable comparability of rates among states").

<sup>10</sup> *2010 Insular Order*, 25 FCC Rcd at 4153-54, para. 29.

<sup>11</sup> See *id.* at 4153, para. 28 & n.96 (citing Letter from Nancy J. Victory, counsel for PRTC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, WC Docket No. 05-337 at 3 (April 1, 2010)).

<sup>12</sup> PRTC Petition for Recon at 10.

<sup>13</sup> 463 U.S. 29 (1983) (*State Farm*).

<sup>14</sup> PRTC Petition for Recon at 10 n.29 (quoting *State Farm*, 463 U.S. at 42) (ellipses in PRTC Petition for Recon).

<sup>15</sup> *State Farm*, 463 U.S. at 42 (emphasis added).

<sup>16</sup> *Id.* (emphasis in original).

that the D.C. Circuit has considered, and rejected, an argument much like the one PRTC seems to make. As that court put it, “petitioners would have us bind [the agency] to its ‘tentative[]’ [earlier] conclusions.”<sup>17</sup> The court declined to do so, explaining that it “kn[ew] of no authority for this proposition.”<sup>18</sup>

9. Even if the passage from *State Farm* that PRTC relies upon were controlling, which it is not, the Commission would only be required to offer a reasoned explanation for its decision.<sup>19</sup> The Commission did so, and we will not rehash that discussion here.

10. PRTC next takes aim at the reasoned explanation provided by the Commission. First, PRTC attacks the Commission’s reliance on telephone subscribership numbers in Puerto Rico in support of its conclusion that a non-rural insular fund was unnecessary.<sup>20</sup> Those subscribership figures included wireless subscribers, and PRTC argues that the Commission could not rely on those figures because it has previously found, in a different context, that mobile wireless service and wireline service are not perfect substitutes. We are unpersuaded. As the Commission explained in the *2010 Insular Order*, data in the record suggested that “PRTC’s line losses have resulted from customer migration to new service providers, not from the decisions of customers to terminate service entirely because high-cost support levels have rendered local telephone service rates unaffordable.”<sup>21</sup> In the context of universal service, the Commission has never held that we must ignore the fact that some consumers prefer to purchase telephone service from a mobile wireless service provider rather than wireline service provider. Indeed, as the Commission explained in the *2010 Insular Order*, “[t]he Commission measures telephone subscribership based on access to telecommunications service, regardless of whether such service is provided by traditional wireline service or by newer technologies, including wireless.”<sup>22</sup> In any event, as discussed above, there is no evidence that, because of inadequate high-cost support, PRTC’s rates for voice service are so high that they are not reasonably comparable to rates paid by consumers in non-insular areas.<sup>23</sup>

11. PRTC next claims that the telephone subscribership numbers used by the Commission—which include wireless subscribers—demonstrate that additional high-cost universal service support is necessary for Puerto Rico, because those figures show subscribership below the national average.<sup>24</sup> In the *2010 Insular Order*, the Commission recognized that telephone subscribership in Puerto Rico likely falls below the national average because of the number of low-income consumers who are unable to afford

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<sup>17</sup> *New York v. EPA*, 413 F.3d 3, 32 (D.C. Cir. 2005).

<sup>18</sup> *Id.*

<sup>19</sup> See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810-11 (2009).

<sup>20</sup> See PRTC Petition at 12-13.

<sup>21</sup> See *2010 Insular Order*, 25 FCC Rcd at 4151-52, para. 27.

<sup>22</sup> *Id.* PRTC finds no support in the *Qwest II Remand Order* for its position that wireline service “is the proper benchmark for the ‘reasonably comparable’ assessment” required by section 254(b)(3) of the Act. See PRTC Petition at 8 (citing *High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Order on Remand and Memorandum Opinion and Order, 25 FCC Rcd 4072 (2010) (“*Qwest II Remand Order*”). That order relied on the near ubiquitous deployment of wireless services to support the Commission’s conclusion that rates and services are reasonably comparable nationwide. See *Qwest II Remand Order*, 25 FCC Rcd at 4078-81, 4085, 4102-03, paras. 14-18, 22, 55-57.

<sup>23</sup> See *supra* para. 6; see also *2010 Insular Order*, 25 FCC Rcd at 4153-54, para. 29.

<sup>24</sup> See PRTC Petition at 14.

access to telephone service.<sup>25</sup> But if low telephone subscribership is related to consumer income, as PRTC seems to acknowledge, it is not at all apparent why the Commission should establish a new insular high-cost support mechanism rather than increase support for low-income consumers through its existing low-income support programs. Indeed, as the Commission stated in the *2010 Insular Order*, subscribership in Puerto Rico is on the rise due, in part, to efforts by the Commission, the Telecommunications Regulatory Board of Puerto Rico, and telecommunications carriers in Puerto Rico to improve the effectiveness and consumer awareness of federal low-income support programs.<sup>26</sup>

12. PRTC further argues that the Commission erred because, in assessing the total amount of high-cost support that PRTC receives, the Commission relied upon “cherry-picked” data, specifically PRTC’s 2008 data rather than 2009 data.<sup>27</sup> The Commission sufficiently explained why it elected not to rely on the 2009 data—it found the data were not a reliable guide to how much support PRTC could be expected to receive in the future.<sup>28</sup>

13. PRTC argues the Commission erred because it allegedly “failed to consider ‘relevant data’”—specifically, a variety of assertions in the record about the costs and burdens of providing telephone service in Puerto Rico.<sup>29</sup> We disagree. The Commission considered, *inter alia*, evidence regarding telephone subscribership, telephone rates, and high-cost support levels. That the particular obstacles to service in Puerto Rico might include costs related to providing service in “rough, hilly terrain and heavy tropical vegetation,”<sup>30</sup> among other challenges, does not demonstrate that PRTC needs additional high-cost support to keep rates for voice service affordable, or that PRTC requires additional high-cost support to extend lines to areas where it may not already have wireline facilities.<sup>31</sup> This is particularly so given evidence in the record that PRTC’s rates and its costs are both relatively low compared to other carriers.<sup>32</sup>

14. PRTC next argues that the *2010 Insular Order* arbitrarily treats carriers serving insular areas differently from carriers that serve rural areas.<sup>33</sup> In this regard, PRTC cites the Commission’s decision to provide additional high-cost support to a carrier serving Wyoming under a “separate mechanism.”<sup>34</sup> PRTC’s argument suffers from two fatal flaws. The first is that the “separate mechanism” to which PRTC refers is not “separate” at all—Wyoming received additional support under an “exception” or “safety valve” that is equally available to PRTC.<sup>35</sup> Second, PRTC ignores the facts of the Wyoming case. There, the petitioners (the Wyoming Public Service Commission and the Wyoming Office of Consumer Advocate) demonstrated that rates for customers in rural areas in Wyoming were not reasonably comparable to the national average urban rate, and that the state had taken all reasonably

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<sup>25</sup> See *id.* (citing *2010 Insular Order*, 25 FCC Rcd at 4165, para. 49).

<sup>26</sup> See *2010 Insular Order*, 25 FCC Rcd at 4151-52, 4155-57, paras. 27, 33-34 & n.91.

<sup>27</sup> See PRTC Petition at 15.

<sup>28</sup> See *2010 Insular Order*, 25 FCC Rcd at 4143 n.52.

<sup>29</sup> See PRTC Petition at 16 (citing *State Farm*, 463 U.S. at 43).

<sup>30</sup> PRTC Petition at 17.

<sup>31</sup> See *supra* para. 6.

<sup>32</sup> See *2010 Insular Order*, 25 FCC Rcd at 4154, 4160, paras. 29 & 39.

<sup>33</sup> See PRTC Petition at 20.

<sup>34</sup> See *id.* at 20-21 (citing *Qwest II Remand Order*, 25 FCC Rcd at 4116, para. 84 and 47 C.F.R. § 54.316).

<sup>35</sup> See 47 C.F.R. § 54.316.

possible steps to achieve reasonable rate comparability.<sup>36</sup> PRTC provided no comparable evidence. As discussed above, for example, PRTC failed to provide any rate data at all, and the rate data in the record provided by another party indicated that PRTC's rates were below the national average.<sup>37</sup>

15. For these reasons, we deny PRTC's petition for reconsideration.

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<sup>36</sup> See *Qwest II Remand Order*, 25 FCC Rcd at 4117-20, paras. 86-88.

<sup>37</sup> See *2010 Insular Order*, 25 FCC Rcd at 4153-54, para. 29.

## APPENDIX E

**Verizon Wireless Petition for Reconsideration of the  
Wireline Competition Bureau's April 1, 2011 Guidance Letter to USAC****I. INTRODUCTION**

1. For the reasons set forth below, we deny Verizon Wireless's petition for reconsideration of the Wireline Competition Bureau's (Bureau) letter directing the Universal Service Administrative Company (USAC) to implement certain caps on high-cost universal service support for two companies, known as the company-specific caps.<sup>1</sup>

**II. BACKGROUND**

2. In October 2007, as a condition of the Commission's approval of ALLTEL's merger with Atlantis Holdings, Inc., the Commission imposed a cap on high-cost, competitive eligible telecommunications carrier (competitive ETC) support provided to ALLTEL.<sup>2</sup> The Commission imposed a similar interim cap on AT&T when it merged with Dobson Communications Corporation.<sup>3</sup> The caps were not self-executing, however, and required administrative actions to implement. Before the caps were implemented, the Commission issued the *Interim Cap Order*, establishing an industry-wide cap on high-cost, competitive ETC support.<sup>4</sup> The industry-wide cap "supersede[d] the interim caps on high-cost, competitive ETC support adopted in the *ALLTEL-Atlantis Order* and the *AT&T-Dobson Order*."<sup>5</sup>

3. On August 21, 2009, USAC sought guidance from the Commission on how and whether to implement the Commission's Orders imposing the company-specific caps.<sup>6</sup> USAC explained that it "believes that it is required to implement the orders [imposing the] AT&T and ALLTEL company-specific caps for the time period each respective order was in effect until the date it was superseded . . . because the [competitive ETC] industry-wide cap was effective prospectively and did not state that it superseded the company-specific caps retroactively."<sup>7</sup> USAC further stated that "[t]he company specific caps were not implemented prior to the CETC industry-wide cap for administrative reasons only. . . . At

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<sup>1</sup> Letter from Sharon E. Gillett, FCC, to Richard A. Belden, USAC, 16 FCC Rcd 5034 (Wireline Comp. Bur. 2011) (*Guidance Letter*); Verizon Wireless Petition for Reconsideration, WC Docket Nos. 05-337, 06-122, CC Docket No. 96-45 (filed May 2, 2011) (Petition).

<sup>2</sup> *Applications of Alltel Corporation, Transferor, and Atlantis Holdings LLC, Transferee for Consent to Transfer Control of Licenses, Leases and Authorizations*, WT Docket No. 07-128, Memorandum Opinion and Order, 22 FCC Rcd 19517, 19521, paras. 9-10 (2007) (*ALLTEL-Atlantis Order*).

<sup>3</sup> *Applications of AT&T Inc. and Dobson Communications Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 07-153, Memorandum Opinion and Order, 22 FCC Rcd 20295, 20329-30, paras. 71-72 (2007) (*AT&T-Dobson Order*). Both the *ALLTEL-Atlantis Order* and the *AT&T-Dobson Order* noted that the caps would be replaced when the Commission adopted comprehensive universal service reforms. *ALLTEL-Atlantis Order*, 22 FCC Rcd at 19521, para. 9; *AT&T-Dobson Order*, 22 FCC Rcd at 20329, para. 71.

<sup>4</sup> *High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834 (2008) (*Interim Cap Order*).

<sup>5</sup> *Id.* at 8837 n.21.

<sup>6</sup> See Letter from Richard A. Belden, USAC, to Julie Veach, FCC, WC Docket Nos. 05-337, 06-122, at 5 (filed Aug. 24, 2009) (USAC Guidance Request Letter).

<sup>7</sup> *Id.*

the written direction of Commission staff, however, USAC did not [subsequently] implement the company-specific caps” for that time period.<sup>8</sup>

4. The Bureau responded to USAC’s guidance request and directed USAC to implement the company-specific caps from the date each merger took effect until the effective date of the industry-wide cap.<sup>9</sup> The Bureau stated that each cap was “imposed as a condition of the Commission’s approval of a merger” and “the later *Interim Cap Order* superseded the company-specific orders; it did not, however, have any retroactive effect or nullify the prior orders.”<sup>10</sup> Accordingly, the Bureau explained, the earlier Orders imposing the caps should be implemented for the time each was in effect.<sup>11</sup>

### III. DISCUSSION

5. Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original action or raises additional facts not known or existing at the petitioner’s last opportunity to present such matters.<sup>12</sup> Verizon Wireless has not done so.

6. Verizon Wireless’s primary argument is that the Bureau misinterpreted what the Commission meant when it said, in the *Interim Cap Order*, that the industry-wide cap “supersede[d]” the not-yet-implemented company-specific caps on high-cost support.<sup>13</sup> Specifically, Verizon Wireless argues that the Commission’s use of the word “supersede” in that Order meant that USAC should have “implement[ed] the industry cap *instead of* the ALLTEL-specific cap, to the extent the latter had not yet been implemented.”<sup>14</sup> This is so, Verizon Wireless contends, because according to Black’s Law Dictionary, the word supersede means “‘annul, make void, or repeal by taking the place of,’”<sup>15</sup> which “inherently includes the concept of annulling and making void the requirement or obligation that has been superseded.”<sup>16</sup>

7. We disagree. As the Supreme Court has explained, “the term ‘supersede’ ordinarily means ‘to displace (and thus render ineffective) while providing a substitute rule.’”<sup>17</sup> That is precisely what the *Interim Cap Order* did—it displaced the company-specific caps and provided a substitute rule. We do not think the term supersede necessarily carries with it the special additional meaning Verizon Wireless ascribes to it: that a rule that is superseded should be treated as though it never existed, but only to the precise extent that it had not already been applied. Rather, the question of which rule to apply when

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<sup>8</sup> *Id.*

<sup>9</sup> *Guidance Letter*, 16 FCC Rcd at 5035.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See *Petition for Reconsideration by National Association of Broadcasters*, 18 FCC Rcd 24414, 24415, para. 4 (2003). *MetroPCS Communications, Inc.*, AU Docket No. 08-46, Order on Reconsideration, 25 FCC Rcd 2209, 2213, para. 13 (Wireless Telecomm. Bur. 2010); *Christian Voice of Central Ohio, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 15943, 15944, para. 2 (2008).

<sup>13</sup> See *Guidance Letter*, 16 FCC Rcd at 5035.

<sup>14</sup> Petition at 4 (emphasis added).

<sup>15</sup> *Id.* (quoting Black’s Law Dictionary 1576 (9th ed. 2009)).

<sup>16</sup> Petition at 4.

<sup>17</sup> *Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (1999).

considering circumstances that existed in the past, when new law has superseded (that is, displaced or replaced) old law is a distinct one, and a substantial body of law addresses that very issue in various contexts.<sup>18</sup>

8. The Supreme Court’s usage of the term “supersede” is consistent with our view. For example, in *H.P. Welch Co. v. New Hampshire*, appellant, a commercial freight carrier, argued that it could not be punished for violating New Hampshire’s statute limiting the amount of time a commercial driver could operate a vehicle.<sup>19</sup> Prior to the time the company had committed the violations, Congress had enacted a statute that empowered the Interstate Commerce Commission (ICC) to establish rules governing the same issue. The ICC subsequently issued such regulations, though they had not yet gone into effect. The Court “assume[d] . . . that when the federal regulations take effect they will operate to supersede the challenged provisions of the state statute.”<sup>20</sup> But, the Court continued, the relevant question was “whether Congress intended, that from the time of the federal enactment until effective action by the Commission, there should be no regulation of periods of continuous operation by drivers of motor vehicles hauling in interstate commerce.”<sup>21</sup> The Court concluded that Congress did not intend such a result: “it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place.”<sup>22</sup> Nothing in the Court’s opinion suggested that a different case would have been presented if the state had waited until after the federal rules went into effect before initiating the proceedings. Yet if the Court used the term “supersede” in the sense that Verizon Wireless claims, the superseded state statute could not be applied once federal rules superseded it—even to conduct occurring before the effective date of the federal regulations.<sup>23</sup> That, however, is precisely the result the Court rejected.

9. Verizon Wireless’s other definitional arguments are no more persuasive. Verizon Wireless argues that the word “supersede” in the *Interim Cap Order* should be understood to mean the same thing as the word “supersedeas” in the venerable writ of that name. A writ of supersedeas, as Verizon Wireless correctly notes, is a writ commanding an officer not to execute another writ the officer might be about to execute.<sup>24</sup> So, according to Verizon Wireless, the *Interim Cap Order* should be understood to be a writ commanding USAC not to execute the Commission’s previous instruction to it regarding the company-specific caps. We think, however, that the fact that there is a particular writ that uses the Latin word for

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<sup>18</sup> See, e.g., *Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (discussing how to determine whether to apply a new rule announced by the Supreme Court in criminal cases at various stages of review); *Danforth v. Minnesota*, 552 U.S. 264 (2008) (holding that state courts may give greater retroactive effect to Supreme Court decisions than is required under the line of cases discussed in *Whorton*); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) (discussing retroactivity in both civil and criminal contexts).

<sup>19</sup> 306 U.S. 79 (1939).

<sup>20</sup> *Id.* at 84.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 85.

<sup>23</sup> We do not think it makes a difference that the company-specific caps on high-cost support had not been implemented and applied against any carrier while our example of a freight carrier involves a regulation that had been applied against others but not against the carrier in question. The question is whether, when a new rule “supersedes” an old rule, the fact that the old rule has been “superseded” means that it cannot be applied for the time period when it was in effect. We do not see why whether it can be applied against one entity would depend on whether it has previously been applied to another.

<sup>24</sup> See Petition at 5.



supersede and that has a very specific function does not mean that the word can only be used to mean precisely what it means in the context of that writ—just as we do not think that the word “body” can mean only what it means in the context of a writ of habeas corpus. Nor do we find any of Verizon Wireless’s citations to Commission or judicial authority helpful to Verizon Wireless’s argument, as none of them involve the use of the word “supersede” in a context where it actually had the effect that Verizon Wireless claims it ought to have here.<sup>25</sup>

10. Verizon Wireless next argues that implementing the company-specific caps now would be inconsistent with the Commission’s goal in adopting them, which was “to limit the size of the universal service fund and, thereby, to reduce the demand for contributions borne by consumers.”<sup>26</sup> Had USAC implemented the company-specific caps earlier, support recaptured from Verizon Wireless would result in a reduction of the contribution factor borne by consumers pursuant to section 54.709(b) of the Commission’s rules. As Verizon Wireless explains, however, the Commission temporarily waived that provision in the *Corr Wireless Order*.<sup>27</sup> So, at the time the Bureau issued its guidance to USAC regarding the company-specific caps, amounts that USAC might collect in contributions (or amounts recaptured from carriers) beyond what was needed to fund the high-cost program would not result in reductions to the contribution factor, but instead would be reserved as a “down payment on proposed broadband universal service reforms.”<sup>28</sup> In Verizon Wireless’s view, this means that implementing the company-specific caps now would be inconsistent with the purpose the Commission had in adopting them, and, therefore, either unlawful or a mistake of policy.

11. We disagree. The reserve fund was created in order to provide funding for a variety of broadband universal service reforms.<sup>29</sup> As the Commission explained at the time, “[r]eserving funds now, rather than collecting them through a higher contribution factor at a later time, will . . . minimize[e] unnecessary volatility in the contribution factor, which would otherwise decline and then increase . . . . The reclaimed funds will also provide a continuing benefit to the universal service fund by earning interest until they are disbursed.”<sup>30</sup> Verizon Wireless’s argument thus misses the mark both conceptually

<sup>25</sup> We are also unconvinced by Verizon Wireless’s claim that the Commission’s intent was “clear” in the *Interim Cap Order* that the company-specific caps should not be implemented. See Petition at 8-10. Nor do we think the fact that the Commission did not refer to the company-specific caps in subsequent orders, where the effect of the company-specific caps was not at issue, to be particularly relevant. See Petition at 11-13. Verizon Wireless also points to the Commission’s recitation in the *Corr Wireless Order* of an estimate from the National Broadband Plan of the amount of money that Verizon Wireless and Sprint Nextel received in 2008, which seems to have included the full amount each actually received, rather than reflecting the amount Verizon Wireless *would have received* in 2008 if the company-specific cap had already been implemented. See Petition at 11; *High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 12854, 12856, para. 4 (2010) (*Corr Wireless Order*). We think the statement cannot bear the weight Verizon Wireless places on it. For one thing, the language in the *Corr Wireless Order* cites an estimate from the National Broadband Plan of the amount of money the carriers *actually received* in 2008, it does not claim to be an estimate that reflects adjustments like true-ups or the company-specific cap. For another, the *Corr Wireless Order* used the number only to provide context regarding the phasedown. The Commission’s use of a number that was readily at hand in such a situation does not indicate anything in particular about whether it had decided not to implement the company-specific caps.

<sup>26</sup> Petition at 14 (citing *ALLTEL-Atlantis Order*, 22 FCC Rcd at 19520-21, paras. 8-9).

<sup>27</sup> Petition at 15 (citing *Corr Wireless Order*, 25 FCC Rcd at 12862-63, para. 22).

<sup>28</sup> *Corr Wireless Order*, 25 FCC Rcd at 12862, para. 20.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

and in the particulars. That is, by reserving funds, including funds recovered by implementing the company-specific caps, rather than reducing the contribution factor, the Commission will have funds available to disburse to support its reforms. That means a lower contribution factor, at that future time, than would otherwise be the case. And the point of the caps in that regard—both the company-specific caps and the later industry-wide cap—was not to achieve a particular contribution factor. Instead, it was to limit demand for funds and to control the overall size of the Fund. In other words, the goal was to cause the contribution factor to be lower than it otherwise would be absent such a cap. Reserving funds associated with the company-specific caps is consistent with that goal; the result will be a lower contribution factor than would otherwise be required to fund the reforms the Commission adopts today. Second, Verizon Wireless ignores the fact that funds in the reserve earn interest until they are disbursed. To the extent interest income reduces the need for contributions from consumers, the use of the reserve fund directly supports the goal the Commission identified.

12. Verizon Wireless further argues that the Guidance Letter was incorrect to claim that implementing the company-specific caps would not require an adjustment to the industry-wide interim cap amounts. That is, under the *Interim Cap Order*, the interim cap amount for each state is based on the amount of support each competitive ETC in that state was eligible to receive in March 2008.<sup>31</sup> Verizon Wireless claims that the company-specific caps, if implemented, would have reduced the amount of high-cost, competitive ETC support those companies were eligible to receive in March 2008, and, therefore, the interim cap would need to be reduced accordingly, contrary to the Bureau's statement in the Guidance Letter.<sup>32</sup>

13. We disagree. As the Commission explained in the *Corr Wireless Order*, carrier-specific high-cost, competitive ETC support reductions do not influence the amount of the industry-wide cap.<sup>33</sup> To the contrary, "as long as [carriers] continue to be competitive ETCs . . . [they] remain *eligible* for high-cost support, even though they have agreed to surrender such support."<sup>34</sup>

14. Verizon Wireless also argues that it would be manifestly unjust for USAC to recapture the high-cost, competitive ETC support provided to ALLTEL, as ALLTEL—as it was required to do pursuant to Commission rules—already spent that money.<sup>35</sup> In this regard, Verizon Wireless complains that there was no way either ALLTEL or Verizon Wireless could have known that the Commission would later implement the company-specific caps.

15. We are not persuaded. As explained above, we disagree with Verizon Wireless about whether the Commission intended, in the *Interim Cap Order*, to declare that the company-specific caps would never be implemented. Because the Commission never said that the company-specific caps would not be implemented, we find that any assumption otherwise by ALLTEL or Verizon Wireless was unfounded. Nor does Verizon Wireless's repeated assertion that staff informed ALLTEL and USAC that the company-specific caps would not be implemented change our view, as informal staff guidance cannot bind the Commission.<sup>36</sup> In addition, we do not believe that directing USAC to implement the company-

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<sup>31</sup> *Interim Cap Order*, 23 FCC Rcd at 8846, para. 27.

<sup>32</sup> Petition at 2-3.

<sup>33</sup> See *Corr Wireless Order*, 25 FCC Rcd at 12857-58, paras. 7-9.

<sup>34</sup> *Id.* at 12858, para. 10.

<sup>35</sup> Petition at 14-15.

<sup>36</sup> See, e.g., *Petition for Waiver of Section 61.45(d)*, Memorandum Opinion and Order, 21 FCC Rcd 14293, 14299, para. 15 (2006) (finding informal staff letters non-binding on the Commission); *C.F. Communications Corp. v.* (continued...)

specific caps now actually imposes any significant penalty on Verizon Wireless. Thus, to the extent that ALLTEL received and spent support that now must be returned, it was, in effect, simply the recipient of an interest-free loan.

16. Finally, Verizon Wireless argues that the Bureau failed to address its request for a waiver of the company-specific cap.<sup>37</sup> Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.<sup>38</sup> In considering whether to waive its rules, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>39</sup>

17. We do not think Verizon Wireless has shown that good cause exists to grant a waiver in these circumstances. As discussed above, Verizon Wireless has not shown that implementing the company-specific caps will cause hardship or inequity to Verizon Wireless. In addition, the Commission already determined, when it imposed the company-specific caps as conditions of transactions in 2008, that those caps would serve the public interest. Moreover, as noted above, the funding that Verizon Wireless seeks to keep will directly advance the Commission's broadband reforms adopted today. We do not believe that the public interest would now be well served by declining to carry out the Commission's earlier Order.

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*Century Telephone of Wisconsin, Inc.*, Memorandum Opinion and Order on Remand, 15 FCC Rcd 8759, 8768-8769, para. 28 (2000) (finding unpublished letter rulings non-binding on the Commission when no party had actual knowledge of the letters); *Kojo Worldwide Corp. San Diego, California*, Memorandum Opinion and Order, 24 FCC Rcd 14890, 14894, para. 8 (2009) (rejecting argument that staff had promised non-enforcement of provisions of the Act); *Applications of Hinton Tel. Co.*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11625, 11637, para. 42 (1995) (noting that when staff advice is contrary to the Commission's rules, the Commission may enforce its rules despite reliance by the public). This is especially so when the advice is not confirmed by more formal communications.

<sup>37</sup> Petition at 22; Reply Comments of Verizon Wireless, WC Docket Nos. 06-122, 05-337 at 5 (filed June 20, 2011).

<sup>38</sup> *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>39</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

## APPENDIX F

**Petitions for Reconsideration of the *Corr Wireless Order***

1. For the reasons stated below, we deny two petitions for reconsideration of the *Corr Wireless Order*,<sup>1</sup> one filed by a group of carriers including Allied Wireless (collectively, “Allied Wireless”), and one filed by SouthernLINC Wireless and the Universal Service for America Coalition (collectively, “SouthernLINC”).

**1. Allied Wireless Petition for Reconsideration.**

2. *Background.* In a pair of transactions in 2008, Verizon Wireless and Sprint Nextel each agreed to phase out high-cost universal service support over five years.<sup>2</sup> In the *Corr Wireless Order*, the Commission implemented those commitments, and, as relevant here, provided Verizon Wireless and Sprint with two options for electing a baseline against which to measure the phase-out. Sprint elected Option A, under which it would be permitted to receive no more than a specified percentage of its 2008 high-cost support each year—80 percent in 2009, 60 percent in 2010, 40 percent in 2011, 20 percent in 2012, and no support in 2013.<sup>3</sup> Verizon Wireless elected Option B, under which support would be calculated just the same as it otherwise would be, and then a carrier-specific further reduction would be applied, so that in 2009 it would receive 80 percent of the support it would otherwise receive, in 2010, 60 percent, in 2011, 40 percent, in 2012, 20 percent, and no support in 2013.<sup>4</sup> Broadly speaking—and simplifying somewhat—Option A offered carriers certainty about their future caps and would maximize the amount the carrier would receive if its number of eligible lines were to decrease (which might happen if the carrier were relinquishing its ETC designations, for example), while Option B provided less certainty but would maximize the amount the carrier would receive if its number of supported lines were to increase (which might happen because of customer acquisition).

3. In the *Corr Wireless Order*, the Commission also directed USAC to “reserve any reclaimed funds as a fiscally responsible down payment on proposed broadband universal service reforms, as recommended in the National Broadband Plan.”<sup>5</sup>

4. Allied Wireless asserts that including Option B in the *Corr Wireless Order* was unlawful for two reasons. First, Allied Wireless argues that the Commission “violated” its “due process rights” as well as the Administrative Procedure Act (APA) because the Commission did not provide sufficient notice that it was “considering adopting a baseline methodology in this proceeding” or notice of the specific proposals under consideration.<sup>6</sup> Allied also argues that the Commission’s adoption of Option B was arbitrary and capricious.

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<sup>1</sup> *High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 12854 (2010) (*Corr Wireless Order*).

<sup>2</sup> *See id.* at 12854, para. 1.

<sup>3</sup> *See id.* at 12860, para. 16 (setting forth Option A).

<sup>4</sup> *Id.* at 12861, para. 17 (setting forth Option B).

<sup>5</sup> *Id.* at 12862, para. 20. The Commission noted that to effectuate the decision to reserve these funds, two actions were required. First, for the purposes of calculating carrier contributions, it directed USAC to project that competitive ETC support in each state would be disbursed at the interim cap amount. Second, it temporarily waived section 54.709(b) of the Commission’s rules, which normally requires that any excess contributions received in one quarter be used to reduce the required contribution factor for the next quarter. *See id.* at 12862, paras. 21-22.

<sup>6</sup> Allied Wireless Petition for Reconsideration, WC Docket No. 05-337, at 12-13 (filed Oct. 4, 2010) (Allied Wireless Petition).

5. Allied Wireless also contends that the Commission's decision to reserve funds reclaimed from Sprint and Verizon Wireless, rather than to redistribute them to other carriers, was arbitrary and capricious. Specifically, Allied Wireless argues, "the Commission's decision that the *Interim Cap Order* does not require redistribution of the reclaimed support hinges on the agency's determination that Verizon [Wireless] and Sprint would remain 'eligible' to receive support even as this support is being surrendered" and that determination "is problematic" for a variety of reasons.<sup>7</sup>

6. *Discussion.* We disagree with Allied Wireless that notice was required regarding the precise methodology for establishing the baseline for support to be phased down. The Commission required Sprint and Verizon Wireless to surrender support as a condition of its approval of transactions sought by those carriers. The Commission could have further specified in those adjudicatory Orders how the reductions would take place if the carriers accepted the conditions, but it did not. Instead, the Commission did so in the *Corr Wireless Order*. Importantly, that Order did not change any of the rules that govern how support calculations for carriers are generally made. Thus, Allied Wireless had no right protected by the APA or the Due Process Clause to notice and an opportunity to comment, because the Commission in the *Corr Wireless Order* only established the obligations it would impose on Verizon Wireless and Sprint as a part of those adjudicatory proceedings. Moreover, we are unaware of any precedent suggesting that any more notice was required to do in two orders what could have been done in one. We note that in a notice of proposed rulemaking released as part of the same Order, the Commission also proposed to make changes to the Commission's rules that *would* affect how support for carriers like Allied Wireless would be calculated.<sup>8</sup>

7. We likewise are not persuaded by Allied Wireless's second argument that the Commission's adoption of Option B was arbitrary and capricious. Specifically, Allied Wireless claims, "the Commission[] [was wrong in its] assertion that '[r]egardless of the option [Verizon and Sprint] choose, implementation of these options will not have an impact on other competitive ETCs.'"<sup>9</sup> To the contrary, Allied Wireless argues, "the selection of 'Option B' by Verizon will adversely affect all other competitive ETCs."<sup>10</sup> If Verizon Wireless continues to gain lines in a state, claims Allied Wireless, it will receive a greater share of the support available under the interim cap, which results in a reduction of support for other competitive ETCs in that state.<sup>11</sup> In contrast, Allied Wireless asserts, under Option A, support would not increase (and thus would not decrease for other carriers), because Option A uses a frozen baseline.

8. Allied Wireless is mistaken. As an initial matter, Allied Wireless misunderstands how the phasedown for Sprint and Verizon Wireless works. Under both Option A and Option B, support for Sprint and Verizon Wireless (and all other carriers) is calculated precisely the same way that it was calculated prior to the *Corr Wireless Order*, except that, following the final calculation of support under the rules applicable to all carriers, USAC performs an additional step to apply any necessary reduction to support for Sprint and Verizon Wireless. Specifically, USAC compares the amount that Sprint and Verizon Wireless would otherwise receive to each company's specific cap amount and then distributes to each company the lesser of the two amounts. In other words, Allied Wireless's concern about line growth by Verizon Wireless (which elected Option B) is equally applicable to Option A. Under both options, any increase in lines by Sprint or Verizon Wireless in any state would be taken into account in determining support available to other carriers under the interim cap in that state. And that is the same situation Allied Wireless and other competitive ETCs were in before Sprint and Verizon Wireless were subject to any

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<sup>7</sup> *Id.* at 16.

<sup>8</sup> See *Corr Wireless Order*, 25 FCC Rcd at 12863-64, paras. 23-26.

<sup>9</sup> Allied Wireless Petition at 15 (citing *Corr Wireless Order*, 25 FCC Rcd at 12860, para. 14).

<sup>10</sup> Allied Wireless Petition at 10.

<sup>11</sup> *Id.* at 9.

reductions. Put another way, both options have the same effect—which is to say no effect—on the calculation of support for Allied Wireless. But the larger point, and the fatal one for Allied Wireless’s claim, is that Allied Wireless is simply incorrect to assert that Option B has some sort of effect on the calculation of Allied Wireless’s support.

9. Allied Wireless’s principal argument with respect to the reserve account takes issue with the Commission’s conclusion that Sprint and Verizon Wireless remain “eligible” for support that they have agreed to give up. That determination is relevant to Allied Wireless because, under the terms of the *Interim Cap Order*, the amount of money each competitive ETC (like Sprint, Verizon Wireless or Allied Wireless) is eligible for determines how much support every other competitive ETC will receive. If Sprint and Verizon Wireless were not eligible for support they had agreed to give up, then more support would be available under the cap for carriers like Allied Wireless. We do not find Allied Wireless’s arguments on this point persuasive; to see why requires some explanation of how USAC calculates support and applies the interim cap.

10. First, USAC calculates, for the number of lines each competitive ETC reports, how much support the carrier is eligible for under the identical support rule.<sup>12</sup> For each state, USAC sums the amount that all competitive ETCs are eligible for under the identical support rule, and then compares that amount to the interim cap. If competitive ETCs are eligible for support exceeding the cap, USAC applies a state-specific reduction factor to ensure that support does not exceed the cap. As discussed above, to calculate final support amounts for Sprint and Verizon Wireless, USAC performs an additional step (and imposes a further reduction if necessary), to ensure that each carrier receives no more than it should pursuant to its support reduction plan.

11. As this description of the process makes clear, the question of what support a carrier is “eligible” for, in calculating the state-specific reduction factor for the purposes of the interim cap, is the amount that the carrier would receive, or is “eligible” for, under the identical support rule.

12. Understandably, Allied Wireless would have preferred the Commission to have adopted a different method to implement the reductions for Sprint and Verizon Wireless—one that would have resulted in Allied Wireless receiving additional support beyond that which it receives under the interim cap. But that does not mean that the Commission’s chosen approach is arbitrary and capricious. Indeed, to the contrary, the Commission reasonably decided that the public interest would be better served by declining to redistribute that support.<sup>13</sup> Though Allied Wireless wishes that the Commission had chosen differently, it has not shown that the Commission’s decision was unlawful.

13. Allied Wireless next argues that, contrary to the Commission’s assertions otherwise, the support reductions imposed on Sprint and Verizon Wireless were not “voluntary,” and, says Allied Wireless, this means that the Commission’s conclusion that they remain “eligible” for support, as discussed above, “has no basis.”<sup>14</sup> But the reductions were voluntary: the Commission approved transactions involving each carrier on the condition that they give up support, and each carrier elected to go through with the transaction. Such a decision by a company is not an involuntary act. Even if Allied Wireless were right about that, however, its argument would still fail, because, as discussed above, the question of what support a carrier is “eligible” for, as relevant here, is the amount the carrier would receive under the identical support rule, not how much money the carrier is actually going to receive after all adjustments.

14. Allied Wireless also argues that construing Sprint and Verizon Wireless as “eligible” to receive the support they are not, in fact, receiving, violates section 254(e) of the Act, which requires that

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<sup>12</sup> *Interim Cap Order*, 23 FCC Rcd at 8846, para. 27.

<sup>13</sup> *See Corr Wireless Order*, 25 FCC Rcd at 12858-59, paras. 10-11.

<sup>14</sup> Allied Wireless Petition at 17-18.

carriers receiving support shall use it “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”<sup>15</sup> Allied Wireless argues that if Sprint and Verizon Wireless “were not compelled to relinquish support, but instead did so of their own free will, then [they] were violating the statute. Giving back the support forecloses any means of satisfying the statutory obligation to use the support in the manner specified in the statute.”<sup>16</sup> But Sprint and Verizon Wireless did not give back support—they agreed to have their support reduced over time. The statutory provision, by its terms, does not apply to support reclaimed in this manner. Allied Wireless’s argument suffers a second flaw, as well: it proves too much. Again, the amount of support a carrier is eligible for, in this context, is the amount the carrier would otherwise receive, based on its line counts, under the identical support rule. But the amount that any carrier receives is governed by the interim cap, as well. All carriers in states where the interim cap has an effect receive less than they are “eligible” for. Thus, under its own theory, Allied Wireless, like Sprint and Verizon Wireless, is not receiving the support for which it is “eligible,” and therefore is violating the statute.

15. Allied Wireless next argues that Sprint and Verizon Wireless’s commitments to forego support “would make it impossible for them to sustain” their status as ETCs, and that the Commission “did not examine the extent to which either [carrier] in fact currently meets the requirements” of competitive ETCs.<sup>17</sup> We conclude that neither argument has any bearing on the issues addressed in the *Corr Wireless Order*. If either carrier fails, either now or in the future, to satisfy any obligation imposed on it by virtue of its status as an ETC, that is a matter for the relevant designating entity in the first instance. Nor do we see why, in issuing an order detailing procedures for how support for the carriers would be reduced, the Commission was obliged to conduct any sort of investigation into whether they or their various operating company subsidiaries actually were, or ought to be, ETCs in the states where this Commission has granted ETC designation.

16. Allied Wireless’s final argument is that the Commission’s decision to reserve reclaimed funds was procedurally defective, because the Commission was obliged to provide notice and an opportunity for comment before it did so. That is not the case. The Commission established the temporary reserve in the *Corr Wireless Order* through two actions. First, for the purposes of calculating carrier contributions, it directed USAC to project that competitive ETC support in each state would be disbursed at the interim cap amount. The Commission’s rules provide that the Commission has the authority and responsibility to review and approve USAC’s projections and its calculation of the contribution factor each quarter without providing notice and an opportunity to comment.<sup>18</sup> Second, the Commission temporarily waived section 54.709(b) of its rules, which normally requires that any excess contributions received in one quarter be used to reduce the required contribution factor for the next quarter. The notice and comment requirements in the APA only apply to rulemaking, however.<sup>19</sup> Where, as here, the Commission relies on its general authority to waive one of its existing rules for good cause shown,<sup>20</sup> it is thus not required to first provide notice and an opportunity for comment.

17. We note, moreover, that Allied Wireless has been provided an opportunity to comment on the Commission’s decision to reserve reclaimed funds. In the *Corr Wireless Order*, in addition to deciding to reserve the funds reclaimed from Sprint and Verizon Wireless, the Commission issued a notice of proposed rulemaking seeking comment on its proposal to amend section 54.709(b) to enable the

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<sup>15</sup> 47 U.S.C. § 254(e).

<sup>16</sup> Allied Wireless Petition at 18-19.

<sup>17</sup> *Id.* at 19.

<sup>18</sup> See 47 C.F.R. § 54.709(a)(2), (a)(3).

<sup>19</sup> See 5 U.S.C. § 553.

<sup>20</sup> See *Corr Wireless Order*, 25 FCC Rcd at 12862-63, para. 22 & n.46 (citing 47 C.F.R. § 1.3).

Commission to provide alternate instructions to USAC for implementing prior period adjustments.<sup>21</sup> That, the Commission explained, would serve the same purpose as the temporary waiver of section 54.709(b) it adopted in the same Order.<sup>22</sup> In other words, the Commission was seeking comment on its proposal to modify its rules to more readily do the very thing that petitioners fault the Commission for having done without providing notice. Any party that wished to comment on the merits of the decision to reserve funds had an opportunity to do so—and many parties did just that. In the Order, we consider and respond to such comments in adopting the proposed rule change, and we conclude that it is appropriate to create a broadband reserve account and modify our rules to facilitate the management of support funds accordingly.<sup>23</sup> We also direct USAC to wind down the *Corr Wireless* reserve account. And we note that Allied Wireless, in its petition for reconsideration, did not identify any issue that it or any other party has raised or would have raised that we have not now addressed.<sup>24</sup> For these reasons, we conclude that we are not required to alter our original decision to reserve funds or to provide additional opportunity for comment on that issue.

## 2. SouthernLINC Petition for Reconsideration

18. *Background.* SouthernLINC principally argues that the Commission had no authority to establish the broadband reserve fund under the Act, because if the Act did permit such a thing, the Act itself would be unconstitutional under both the Origination Clause and Taxing Clause.<sup>25</sup> It also challenges our action as arbitrary and capricious under the Administrative Procedure Act. We disagree on all points.

19. *Discussion.* The Origination Clause, which provides that a revenue bill must originate in the House of Representatives rather than the Senate, has no application here. The Supreme Court has explained that “a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a ‘Bil[l] for raising Revenue’ within the meaning of the Origination Clause.”<sup>26</sup> The broadband reserve was not intended to “support Government generally.” It was instead designed to (and the statute requires that it must) support universal service consistent with the requirements of section 254 of the Act. While SouthernLINC complains that the Commission was vague about precisely how those funds would be spent, we do not think that raises any issue under the Constitution. The Commission was not vague about whether the funds would be spent on universal service programs—as opposed to being deposited into the United States Treasury to support government operations generally—and that is sufficient.<sup>27</sup> The relevant question under the Origination Clause is whether a statute “raises revenue to support Government generally,” and in our view, the broadband reserve clearly does not.<sup>28</sup>

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<sup>21</sup> See *Corr Wireless Order*, 25 FCC Rcd at 12863, para. 25.

<sup>22</sup> See *id.*

<sup>23</sup> See *supra* Part VII.H.1.

<sup>24</sup> Cf. *U.S. Telecom Ass’n v. FCC*, 400 F.3d 29, 42 (D.C. Cir. 2005) (concluding that any failure to provide notice was harmless where petitioners could not identify any additional comment they would have made if notice had been properly given).

<sup>25</sup> SouthernLINC Petition for Partial Reconsideration, WC Docket No. 05-337. CC Docket No. 96-45, at 7-11 (filed Sept. 29, 2010) (SouthernLINC Petition).

<sup>26</sup> *United States v. Munoz-Flores*, 495 U.S. 385, 397-98 (1990).

<sup>27</sup> See *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 427 (5th Cir. 1999) (rejecting a similar Origination Clause challenge to the Commission’s assessment of universal service contributions).

<sup>28</sup> SouthernLINC also cites dicta in a footnote from *Munoz-Flores*, 495 U.S. at 400 n.7, seemingly to suggest that the reserve fund is unconstitutional because of an insufficient connection between the payors and beneficiaries of the fund. That would be so, SouthernLINC suggests, because there are no defined beneficiaries at all. We are not persuaded. The dicta SouthernLINC cites notes that a different case “might be present” if a funded program were



20. SouthernLINC's challenge under the Taxing Clause fails as well. SouthernLINC argues that the Act cannot be construed to permit the Commission to establish a tax, as opposed to a fee, because only Congress can create a tax. SouthernLINC further argues that the establishment of the broadband reserve must be understood to be a tax, rather than a fee, because the particular uses of the reserve fund were not established in the Order creating it.<sup>29</sup> So, the argument goes, Congress could not, consistent with constitutional requirements, have delegated to the Commission the authority to establish the broadband reserve. We disagree.

21. As the Supreme Court has explained, "the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that . . . applied to other nondelegation challenges."<sup>30</sup> Accordingly, whether assessments for the broadband reserve are characterized as a "tax" or a "fee" has no relevance to SouthernLINC's nondelegation claim.<sup>31</sup> In either case, the question in a nondelegation challenge is whether Congress has laid down an intelligible principle to guide the agency's actions.<sup>32</sup> We have no doubt that section 254 satisfies that threshold.<sup>33</sup>

22. We are similarly unpersuaded by SouthernLINC's APA arguments. SouthernLINC argues that the *Corr Wireless Order* was procedurally defective in two respects. Specifically, SouthernLINC argues that the Commission failed to give adequate notice before it directed USAC to calculate the universal service contribution factor without regard to actual projected disbursements for individual competitive ETCs and temporarily waived section 54.709(b) of the Commission's rules.<sup>34</sup> The second of these complaints we have already discussed and rejected in the context of Allied Wireless's petition for reconsideration.<sup>35</sup>

23. We are likewise unconvinced by SouthernLINC's assertion that the Commission must reconsider its decision to instruct USAC regarding how it should calculate projected demand for support. The Commission's rules provides that the Commission has the authority and responsibility to review and approve USAC's projections and its calculation of the contribution factor each quarter without providing notice and an opportunity to comment.<sup>36</sup> We acknowledge that, by its terms, section 54.709(a)(3) of the Commission's rules only provides that the Commission has up to 14 days to make such adjustments following issuance of a public notice of the proposed contribution factor.<sup>37</sup> But we do not think that

(Continued from previous page) \_\_\_\_\_

"entirely unrelated" to the persons paying for it. *Id.* SouthernLINC apparently believes such a case would be different, though it makes no argument that it would be. In any event, this is not such a case. There is no less connection between these beneficiaries and payors and the beneficiaries and payors under any other of the support mechanisms provided for in section 254, and we do not think those raise any constitutional issue.

<sup>29</sup> SouthernLINC Petition at 8-9.

<sup>30</sup> *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 223 (1989).

<sup>31</sup> See *id.*; see also *Fla. Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988). The question whether an assessment is a tax or a fee is a relevant question under the Origination Clause, but, as explained above, assessments for the broadband reserve are fees for that purpose.

<sup>32</sup> *Skinner*, 490 U.S. at 218-19.

<sup>33</sup> Section 254(b) of the Act sets forth a list of principles on which the Commission and the Joint Board must base universal service policies. See 47 U.S.C. § 254(b)(1)-(7). And universal service contributions collected to subsidize those policies, once enacted, must be "equitable and nondiscriminatory." 47 U.S.C. § 254(d).

<sup>34</sup> See SouthernLINC Petition at 11-16.

<sup>35</sup> See *supra* paras. 16-17.

<sup>36</sup> See 47 C.F.R. § 54.709(a)(2), (a)(3).

<sup>37</sup> See 47 C.F.R. § 54.709(a)(3).

provision forbids the Commission from instructing USAC to alter its projections prior to that time or in a different manner.<sup>38</sup> Rather, it acts as a shot-clock provision, telling USAC that if the Commission has not acted to revise its projections within 14 days of the projections being published in a public notice, the calculated contribution factor set out in the public notice shall take effect. In other words, the rule simply provides guidance to USAC—it provides no rights to a party like SouthernLINC. Even if the rules were construed as SouthernLINC seems to suggest, however, we conclude that any deviation was harmless: By instructing USAC to alter its projections in advance, the Commission provided more notice than it would have provided if it followed the procedure set forth in section 54.709(a)(3).

24. SouthernLINC's final argument is that the Order was arbitrary and capricious because the Commission allegedly did not provide an adequate explanation of why it did not permit support reclaimed from Sprint and Verizon Wireless to be redistributed to other competitive ETCs under the identical support rule.<sup>39</sup> That is because, according to SouthernLINC, the Commission is required to provide support under the identical support rule until that rule is replaced by another rule. We conclude that SouthernLINC's argument on this point is moot, because we have now done what SouthernLINC claims we were required to do—we have eliminated the identical support rule. Even if we had not done so, however, we would reject SouthernLINC's argument. At the time SouthernLINC filed its petition for reconsideration, the identical support rule was not the only rule that determined the amount of support. Instead, support for competitive ETCs like SouthernLINC was capped under the *Interim Cap Order*.<sup>40</sup> And, as explained above, nothing in the *Corr Wireless Order* altered how support for SouthernLINC or other competitive ETCs was calculated.<sup>41</sup> Though SouthernLINC does not develop its argument on this point, it appears that its complaint, based on the theory that carriers like it are entitled to support under the identical support rule, is directed against the *Interim Cap Order*, in which the Commission capped competitive ETC support and ceased providing support solely under the identical support rule. The time for revisiting that Order has long since passed, and we decline to do so now.

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<sup>38</sup> Indeed, this is not the first time that a contribution factor projection was altered outside the 14-day window provided for in 47 C.F.R. § 54.709(a)(3). See Proposed Fourth Quarter 2005 Universal Service Contribution Factor, 20 FCC Rcd 14683, 14684 (Wireline Comp. Bur. 2005) (adjusting USAC projections to account for Hurricane Katrina in the Public Notice setting out the proposed contribution factor, and noting that the Commission would have 14 days to alter those projections pursuant to 54.709(a)(3)).

<sup>39</sup> See SouthernLINC Petition at 16-17.

<sup>40</sup> 23 FCC Rcd 8834.

<sup>41</sup> See *supra* paras. 6-7.

**APPENDIX G**

**Rural Association Proposed Rule Changes for USF Reform**

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**Part 32 – Uniform System of Accounts for Telecommunications Companies**

\* \* \*

**Subpart E – Instructions for Expense Accounts**

\* \* \*

**§ 32.6540 Access expense.**

(a) This account shall include amounts paid by interexchange carriers or other exchange carriers to another exchange carrier or network provider for the provision of carrier's carrier access. This account shall also include expenses related to facilities and bandwidth capacity associated with connecting the Broadband Access Service Connection Point to the Internet backbone (Middle Mile expense).

(b) Subsidiary record categories shall be maintained in order that the entity may separately report interstate and intrastate carrier's carrier expense. Such subsidiary record categories shall be reported as required by Part 43 of this Commission's Rules and Regulations.

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**Part 36 - Jurisdictional Separations**

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**Subpart B – Telecommunications Property**

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**CENTRAL OFFICE EQUIPMENT**

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**§ 36.126 Circuit equipment – Category 4.**

(a) For the purpose of this section, the term "Circuit Equipment" encompasses the Radio Systems and Circuit Equipment contained in Accounts 2230 through 2232 respectively. It includes central office equipment, other than switching equipment and automatic message recording equipment, which is used to derive communications transmission channels or which is used for the amplification, modulation, regeneration, testing, balancing or control of signals transmitted over communications transmission channels. Examples of circuit equipment in general use include:

- (1) Carrier telephone and telegraph system terminals.
- (2) Telephone and telegraph repeaters, termination sets, impedance compensators, pulse link repeaters, echo suppressors and other intermediate transmission amplification and balancing equipment except that included in switchboards.
- (3) Radio transmitters, receivers, repeaters and other radio central office equipment except message switching equipment associated with radio systems.
- (4) Composite ringers, line signaling and switching pad circuits.
- (5) Concentration equipment.
- (6) Composite sets and repeating coils.
- (7) Program transmission amplifiers, monitoring devices and volume indicators.
- (8) Testboards, test desks, repair desks and patch bays, including those provided for test and control, and for telegraph and transmission testing.

(b) For apportionment among the operations, the cost of circuit equipment is assigned to the following subsidiary categories:

- (1) *Exchange Circuit Equipment - Category 4.1.*
  - (i) Wideband Exchange Line Circuit Equipment - Category 4.11.
  - (ii) Exchange Trunk Circuit Equipment (Wideband and Non-Wideband) - Category 4.12.
  - (iii) Exchange Line Circuit Equipment Excluding Wideband - Category 4.13.

(2) *Interexchange Circuit Equipment - Category 4.2.*

(i) Interexchange Circuit Equipment Furnished to Another Company for Interstate Use - Category 4.21.

(ii) Interexchange Circuit Equipment Used for Wideband Services including Satellite and Earth Station Equipment used for Wideband Service - Category 4.22.

(iii) All Other Interexchange Circuit Equipment - Category 4.23.

(3) *Host/Remote Message Circuit Equipment - Category 4.3*

(4) Middle Mile Circuit Equipment – Category 4.4

(4) (5) In addition, for the purpose of identifying and separating property associated with special services, circuit equipment included in Categories 4.12 (other than wideband equipment) 4.13 and 4.23 is identified as either basic circuit equipment, *i.e.*, equipment that performs functions necessary to provide and operate channels suitable for voice transmission (telephone grade channels), or special circuit equipment, *i.e.*, equipment that is peculiar to special service circuits. Carrier telephone terminals and carrier telephone repeaters are examples of basic circuit equipment in general use, while audio program transmission amplifiers, bridges, monitoring devices and volume indicators, telegraph carrier terminals and telegraph repeaters are examples of special circuit equipment in general use. Cost of exchange circuit equipment included in Categories 4.12 and 4.13 and the interexchange circuit equipment in Categories 4.21, 4.22 and 4.23 are segregated between basic circuit equipment and special circuit equipment only at those locations where amounts of interexchange and exchange special circuit equipment are significant. Where such segregation is not made, the total costs in these categories are classified as basic circuit equipment.

(5) (6) Effective July 1, 2001, through June 30, 2011, study areas subject to price cap regulation, pursuant to § 61.41, shall assign the average balances of Accounts 2230 through 2232 to the categories/subcategories as specified in §§ 36.126(b)(1) through (b)(4) based on the relative percentage assignment of the average balances of Accounts 2230 through 2232 costs to these categories/subcategories during the twelve month period ending December 31, 2000.

\* \* \*

(g) Apportionment of Middle Mile Circuit Equipment Among the Operations.

(1) Middle Mile Circuit Equipment – Category 4.4. This category includes circuit equipment associated with connecting the Broadband Access Service Connection Point to the Internet backbone.

(i) Middle Mile Circuit Equipment shall be directly assigned to the Interstate Jurisdiction and allocated to private line services.

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CABLE AND WIRE FACILITIES

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**§ 36.154 Exchange Line Cable and Wire Facilities (C&WF) – Category 1 – apportionment procedures.**

(a) *Exchange Line C&WF-Category 1.* The first step in apportioning the cost of exchange line cable and wire facilities among the operations is the determination of an average cost per working loop. This average cost per working loop is determined by dividing the total cost of exchange line cable and wire Category 1 in the study area by the sum of the working loops described in subcategories listed below. The subcategories are:

Subcategory 1.1 - State Private Lines and State WATS Lines. This subcategory shall include all private lines and WATS lines carrying exclusively state traffic as well as private lines and WATS lines carrying both state and interstate traffic if the interstate traffic on the line involved constitutes ten percent or less of the total traffic on the line.

Subcategory 1.2 - Interstate private lines and interstate WATS lines. This subcategory shall include all private lines and WATS lines that carry exclusively interstate traffic as well as private lines and WATS lines carrying both state and interstate traffic if the interstate traffic on the line involved constitutes more than ten percent of the total traffic on the line.

Subcategory 1.3 - Subscriber or common lines that are jointly used for local exchange service and exchange access for state and interstate interexchange services.

(b) The costs assigned to subcategories 1.1 and 1.2 shall be directly assigned to the appropriate jurisdiction.

(c) Effective January 1, 1986, 25 percent of the costs assigned to subcategory 1.3 shall be allocated to the interstate jurisdiction.

(d)-(f) [Reserved]

(g) Effective July 1, 2001, through June 30, 2011, all study areas shall apportion Subcategory 1.3 Exchange Line C&WF among the jurisdictions as specified in § 36.154(c). Direct assignment of subcategory Categories 1.1 and 1.2 Exchange Line C&WF to the jurisdictions shall be updated annually as specified in § 36.154(b).

(h) *Additional Interstate Assignment.* Effective July 1, 2012 and in each calendar year thereafter, rate of return study areas shall increase the apportionment of Subcategory 1.3 Exchange Line C&WF investment to the interstate jurisdiction based on the Broadband Take Rate. The Broadband Take Rate is the ratio of study area Broadband Lines in service to total Broadband Lines and voice-only common lines in service. The Additional Interstate Assignment attributable to the Broadband Take Rate is equal to the excess of the Broadband Take Rate over 25 percent; provided, however, that where the Broadband Take Rate exceeds 50 percent, the portion of the Broadband Take Rate over 50 percent shall be reduced by one-half, such that the Broadband Take Rate for purposes of calculating the Additional Interstate Assignment shall not exceed 75 percent.

(i) The Additional Interstate Assignment produced by subsection (h) shall be phased-in as follows:

- (1) 0.0415 for the period July 1, 2012 through December 31, 2012;
- (2) 0.166 in 2013;
- (3) 0.25 in 2014;
- (4) 0.333 in 2015;
- (5) 0.416 in 2016;
- (6) 0.50 in 2017;
- (7) 0.583 in 2018;
- (8) 0.667 in 2019;
- (9) 0.75 in 2020;
- (10) 0.833 in 2021;
- (11) 0.916 in 2022;
- (12) 1.000 in 2023 and subsequent years.

\* \* \*

**§ 36.158 Middle Mile Cable and Wire Facilities (C&WF) – Category 5 – apportionment procedures.**

- (a) Middle Mile C&WF – Category 5. The cost of Middle Mile facilities and services used for connecting the Broadband Access Service connection Point to the Internet backbone.

(1) The cost of C&WF applicable to this category shall be directly assigned to the Interstate jurisdiction and allocated to private line services

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**Subpart D – Operating Expenses and Taxes**

\* \* \*

**§36.354 Access expense--Account 6540.**

- (a) This account includes access charges paid to exchange carriers for exchange access service. These are directly assigned to the appropriate jurisdiction based on subsidiary record categories or on analysis and study.

(1) Beginning July 1, 2012, Middle Mile access expense shall be directly assigned to the Interstate jurisdiction and allocated to private line services.



\* \* \*

**§36.392 General and administrative--Account 6720.**

(a) These expenses are divided into two categories:

(1) Extended Area Services (EAS).

(2) All other.

(i) Beginning July 1, 2012, for purposes of computing interstate cost assignments, General and Administrative Expenses shall be limited to the lesser of:

(A) The actual average monthly General and Administrative Expenses for the study period; or

(B) A monthly per-loop amount computed according to paragraphs (a)(2)(i)(B)(1), (a)(2)(i)(B)(2), (a)(2)(i)(B)(3) and (a)(2)(i)(B)(4) of this section, using study period average loops.

(1) For study areas with 6,000 or fewer working loops the amount per working loop shall be  $\$42.337 - (.00328 \times \text{the number of working loops})$ , or,  $\$63,000 \div \text{the number of working loops}$ , whichever is greater;

(2) For study areas with more than 6,000 but fewer than 17,887 working loops, the monthly amount per working loop shall be  $\$3.007 + (117,990 \div \text{the number of working loops})$ ; and

(3) For study areas with 17,887 or more working loops, the amount per working loop shall be  $\$9.562$ .

(4) Beginning, January 1, 2013, the monthly per-loop amount computed according to paragraphs (a)(2)(i)(B)(1) through, (a)(2)(i)(B)(3) of this section shall be adjusted each year to reflect the annual percentage change in the United States Department of Commerce's Gross Domestic Product-Chain Price Index (GDP-CPI).

(5) If a study area's monthly per-loop General and Administrative Expenses require limitation, the per-loop, per-month amount shall be multiplied by 12 months and then by total loops for use in determining maximum expenses permissible for interstate assignment.

(ii) General and Administrative Expenses not assigned to interstate pursuant to §36.392(a)(i)(A or B) shall be assigned to the intrastate jurisdiction.

\* \* \*

\* \* \*

## Subpart F – Universal Service Fund

\* \* \*

**§ 36.606 Limitations on Loop Plant Capital Expenditures Eligible for Support**

(a) For purposes of determining support limitations on loop plant capital expenditures for non-price cap carriers, the following definitions shall apply:

- (1) *Total Loop Investment* is the current gross balance of loop investment adjusted for inflation using the Department of Commerce Gross Domestic Product Chain-type Price Index (GDP-CPI).
- (2) *Total Allowed Loop Expenditure* is the amount of future loop plant that would qualify for support.
- (3) *Annual Allowed Loop Expenditure* is the portion of the Total Allowed Loop Expenditure eligible for support in the investment year.
- (4) *Excess Loop Expenditure* is the amount of loop plant investment in a given year that exceeds the Annual Allowed Loop Expenditure. The Excess Loop Expenditure may be carried forward to future years and be included in the future Annual Allowed Loop Expenditure to the extent permitted within the Total Allowed Loop Expenditure.
- (5) *Loop Depreciation Factor* is the ratio of the total loop accumulated depreciation associated with the total loop investment. This calculation uses the depreciation and investment amounts of the Data Year.
- (6) Data Year is defined as the year prior to the year the Annual Allowed Loop Expenditure is made.

(b) Beginning January 1, 2012, Telecommunications Plant In Service (TPIS) investment in unseparated (i.e. state and interstate) gross plant investment in Exchange Line Circuit Equipment Excluding Wideband Category 4.13, Wideband Exchange Line Circuit Equipment Category 4.11, Wideband and Exchange Trunk Cable and Wire Facilities (C&WF) Category 2, and Exchange Line Cable and Wire Facilities (C&WF) Subcategory 1.3 allowed for inclusion in annual data submissions and support calculations prescribed under this section and in conformity with §54.1104 include any capital expenditures as described in § 36.606(d) and any Excess Loop Expenditure, but cannot exceed the Annual Allowed Loop Expenditure.

(c) A company will determine the limitations on loop plant capital expenditures for inclusion in loop costs by application of the rules in this section to the loop portion of Account 2230, Central Office Transmission, and the loop portion of Account 2410, Cable and Wire facilities. The limitations on loop plant capital expenditures will be applied to Exchange Line Circuit Equipment Excluding Wideband Category 4.13, Wideband Exchange Line Circuit Equipment Category 4.11, Wideband and Exchange Trunk Cable and Wire Facilities (C&WF) Category 2, and Exchange Line Cable and Wire Facilities (C&WF) Subcategory 1.3 through application of the categorization and subcategorization procedures prescribed in this section.

(d) For purposes of this section, the term “capital expenditures” equals the cost of loop plant booked to Account 2001, TPIS, including Account 2230, Central Office Transmission, and Account 2410, Cable and Wire Facilities during the Data Year. Such costs will be determined consistent with the

requirements of §32.2000. Additionally, capital expenditures as used in this section will include the amounts, if any, charged during the Data Year to Account 2681, Capital Leases associated with accounts 2230 or 2410.

(e) For inclusion in Annual Allowed Loop Expenditure, capital expenditures must be for the addition to loop equipment and facilities as referenced in § 36.606(c) that support transmission of broadband between the carrier's central office and end user customer premises or for equipment in the carrier's central office that supports broadband connections for end user customers.

(f) Annual Allowed Loop Expenditure is equal to the Total Loop Investment multiplied by the Annual Allowed Loop Expenditure Factor, plus adjustments, if any, pursuant to § 36.606(i), but cannot exceed the Total Allowed Loop Expenditure.

(1) The Annual Allowed Loop Expenditure Factor is arrived at by applying the following formula:

$$\text{Annual Allowed Loop Expenditure Factor} = (0.15 * \text{Loop Depreciation Factor} + 0.05)$$

(2) The Total Allowed Loop Expenditure is the Total Loop Investment multiplied by the Loop Depreciation Factor. Total Loop Investment is calculated by taking the Data Year year-end balances of the categories and subcategories referenced in § 36.606(c) and adjusting these balances by applying the inflation factor based on Vintages where possible; otherwise the calculated year the loop plant was put in service. The inflation factor to be used will be based on the Department of Commerce GDP-CPI.

(3) Carriers subject to this section will recalculate Annual Allowed Loop Expenditure for each Data Year based on the procedures established in this section. In the event capital expenditures for loop plant are below Annual Allowed Loop Expenditure for a Data Year, there will be no carry forward to future years of unused Annual Allowed Loop Expenditure. The recalculation of Annual Allowed Loop Expenditure for each Data Year will reflect the revised Annual Allowed Loop Expenditure, Loop Depreciation Factor, Total Loop Investment, and Total Allowed Loop Expenditure for the preceding year-end. Year-end calculations will reflect plant additions, plant retirements and depreciation expense during the preceding year. This method will allow for increases in Annual Allowed Loop Expenditure from year to year in the event a low level of capital expenditures is made during a year.

(g) A carrier subject to this section will maintain separate records of accumulated Excess Loop Expenditure for accounts referenced in § 36.606 (c) for the assets in addition to the corresponding depreciation accounts. Excess Loop Expenditure for a year, for an account, are equal to capital expenditures for that account in excess of Annual Allowed Loop Expenditure for the year, if any. Excess Loop Expenditure for the Data Year for each account are added to an accumulated Excess Loop Expenditure account. In the event a carrier makes capital expenditures for an account at a level below Annual Allowed Loop Expenditure for the account, the carrier may reduce accumulated Excess Loop Expenditure effective the Data Year by an amount up to, but not in excess of, the amount by which Annual Allowed Loop Expenditure for the Data year exceeds capital expenditures for the account during the same year.

(h) Carriers subject to this section will follow the requirements for depreciation accounting and computation of depreciation rates prescribed at § 32.2000(g).

(i) A carrier subject to this section may make adjustments to the Annual Allowed Loop Expenditure for any given year for loop capital expenditures associated with any of the following: 1) areas where

there are currently no existing wireline local loop facilities in the support study area, 2) areas where grants funds are used, 3) areas covered by a loan that was in place by January 1, 2012, and 4) projects where carrier, prior to January 1, 2012, had awarded a contract to vendor for construction. A carrier will add the applicable adjustment to the amount of Annual Allowed Loop Expenditure for the year in which the additions to plant are booked to Loop Plant in Service.

(j) In addition to the Annual Allowed Loop Expenditure, a carrier subject to this section may make normal maintenance and routine upgrades to its loop investment. Carriers will be allowed to invest up to five percent (5%) of the Total Loop Investment as described in § 36.606(f) per year. This annual amount shall not be factored into any limitation, cap or reduction of support listed in or as a result of § 36.606.

(k) For instances where a carrier has an Annual Allowed Loop Expenditure that is less than \$4 million, the carrier shall be allowed to increase their Annual Allowed Loop Expenditure to either \$4 million or the Total Allowed Loop Expenditure, whichever is less.

\* \* \*

#### **CALCULATION OF EXPENSE ADJUSTMENT – ADDITIONAL INTERSTATE EXPENSE ALLOCATION**

##### **§ 36.631 Expense adjustment.**

(a)-(b) [Reserved]

(c) Beginning January 1, 1988, for study areas reporting 200,000 or fewer working loops pursuant to § 36.611(h), the expense adjustment (additional interstate expense allocation) is equal to the sum of paragraphs (c)(1) through (2) of this section. After January 1, 2000, the expense adjustment (additional interstate expense allocation) for non-rural telephone companies serving study areas reporting 200,000 or fewer working loops pursuant to § 36.611(h) shall be calculated pursuant to § 54.309 of this Chapter or § 54.311 of this Chapter (which relies on this part), whichever is applicable.

(1) Sixty-five percent of the study area average unseparated loop cost per working loop as calculated pursuant to § 36.622(b) in excess of 115 percent of the national average for this cost but not greater than 150 percent of the national average for this cost as calculated pursuant to § 36.622(a) multiplied by the number of working loops reported in § 36.611(h) for the study area; and

(2) Seventy-five percent of the study area average unseparated loop cost per working loop as calculated pursuant to § 36.622(b) in excess of 150 percent of the national average for this cost as calculated pursuant to § 36.622(a) multiplied by the number of working loops reported in § 36.611(h) for the study area.

(d) Beginning January 1, 1998, for study areas reporting more than 200,000 working loops pursuant to § 36.611(h), the expense adjustment (additional interstate expense allocation) is equal to the sum of paragraphs (d)(1) through (4) of this section. After January 1, 2000, the expense adjustment (additional interstate expense allocation) for non-rural telephone companies serving study areas reporting more than 200,000 working loops pursuant to § 36.611(h) shall be

calculated pursuant to § 54.309 of this chapter or § 54.311 of this chapter (which relies on this part), whichever is applicable.

- (1) Ten percent of the study area average unseparated loop cost per working loop as calculated pursuant to § 36.622(b) in excess of 115 percent of the national average for this cost but not greater than 160 percent of the national average for this cost as calculated pursuant to § 36.622(a) multiplied by the number of working loops reported in § 36.611(h) for the study area;
  - (2) Thirty percent of the study area average unseparated loop cost per working loop as calculated pursuant to § 36.622(b) in excess of 160 percent of the national average for this cost but not greater than 200 percent of the national average for this cost as calculated pursuant to § 36.622(a) multiplied by the number of working loops reported in § 36.611(h) for the study area;
  - (3) Sixty percent of the study area average unseparated loop cost per working loop as calculated pursuant to § 36.622(b) in excess of 200 percent of the national average for this cost but not greater than 250 percent of the national average for this cost as calculated pursuant to § 36.622(a) multiplied by the number of working loops reported in § 36.611(h) for the study area; and
  - (4) Seventy-five percent of the study area average unseparated loop cost per working loop as calculated pursuant to § 36.622(b) in excess of 250 percent of the national average for this cost as calculated pursuant to § 36.622(a) multiplied by the number of working loops reported in § 36.611(h) for the study area.
- (e) Beginning April 1, 1989, the expense adjustment calculated pursuant to § 36.631(c) and (d) shall be adjusted each year to reflect changes in the size of the Universal Service Fund resulting from adjustments calculated pursuant to § 36.612(a) made during the previous year. If the resulting amount exceeds the previous year's fund size, the difference will be added to the amount calculated pursuant to § 36.631(c) and (d) for the following year. If the adjustments made during the previous year result in a decrease in the size of the funding requirement, the difference will be subtracted from the amount calculated pursuant to § 36.631(c) and (d) for the following year.
- (f) Subsequent to July 1, 2012, the interstate expense adjustment attributable to high cost loop support shall be adjusted pursuant to § 54.1103.

#### APPENDIX TO PART 36 – GLOSSARY

The descriptions of terms in this glossary are broad and have been prepared to assist in understanding the use of such terms in the separation procedures. Terms which are defined in the text of this part are not included in this glossary.

\* \* \*

**Broadband Access Service Connection Point** - the network equipment located in a telephone company serving wire center where broadband traffic from one or more telephone company serving wire centers is aggregated.

\* \* \*

**Broadband Line** – loop equipment and facilities that support transmission of voice and broadband data, or broadband data only, between the carrier’s central office and end user customer premises, at a minimum downstream speed of 256 Kbps.

\* \* \*

**Middle Mile** - broadband transmission facilities and services beyond the Broadband Access Service Connection Point as well as facilities and services necessary to connect to the Internet backbone.

\* \* \*

## Part 54 - Universal Service

\* \* \*

## Subpart D – Universal Service Support for High Cost Areas

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\* \* \*

**§ 54.305 Reserved ~~Sale or transfer of exchanges.~~**

(a) ~~The provisions of this section are not applicable to the sale or transfer of exchanges between non-rural carriers after the complete phase-down of interim hold-harmless support, pursuant to § 54.311, for the non-rural carriers subject to the transaction.~~

(b) ~~Except as provided in paragraph (c) of this section, a carrier that acquires telephone exchanges from an unaffiliated carrier shall receive universal service support for the acquired exchanges at the same per-line support levels for which those exchanges were eligible prior to the transfer of the exchanges. If the acquired exchanges are incorporated into an existing rural incumbent local exchange carrier study area, the rural incumbent local exchange carrier shall maintain the costs associated with the acquired exchanges separate from the costs associated with its pre-acquisition study area. The transferred exchanges may be eligible for safety valve support for loop-related costs pursuant to paragraph (d) of this section.~~

(c) ~~A carrier that has entered into a binding agreement to buy or acquire exchanges from an unaffiliated carrier prior to May 7, 1997 will receive universal service support for the newly acquired lines based upon the average cost of all of its lines, both those newly acquired and those it had prior to execution of the sales agreement.~~

(d) ~~Transferred exchanges in study areas operated by rural telephone companies that are subject to the limitations on loop-related universal service support in paragraph (b) of this section may be eligible for a safety valve loop cost expense adjustment based on the difference between the rural incumbent local exchange carrier's index year expense adjustment and subsequent year loop cost expense adjustments for the acquired exchanges. Safety valve loop cost expense adjustments shall only be available to rural incumbent local exchange carriers that, in the absence of restrictions on high-cost loop support in § 54.305(b), would qualify for high-cost loop support for the acquired exchanges under § 36.631 of this chapter.~~

(1) ~~For carriers that buy or acquire telephone exchanges on or after January 10, 2005 from an unaffiliated carrier, the index year expense adjustment for the acquiring carrier's first year of operation shall equal the selling carrier's loop-related expense adjustment for the transferred exchanges for the 12-month period prior to the transfer of the exchanges. At the acquiring carrier's option, the first year of operation for the transferred exchanges, for purposes of calculating safety valve support, shall commence at the beginning of either the first calendar year or the next calendar quarter following the transfer of exchanges. For the first year of operation, a loop cost expense adjustment, using the costs of the acquired exchanges submitted in accordance with §§ 36.611 and 36.612 of this chapter, shall be calculated pursuant to § 36.631 of this chapter and then compared to the index year expense adjustment. Safety valve support for the first period of operation will~~

then be calculated pursuant to paragraph (d)(3) of this section. The index year expense adjustment for years after the first year of operation shall be determined using cost data for the first year of operation of the transferred exchanges. Such cost data for the first year of operation shall be calculated in accordance with §§ 36.611, 36.612 and 36.631 of this chapter. For each year, ending on the same calendar quarter as the first year of operation, a loop cost expense adjustment, using the loop costs of the acquired exchanges, shall be submitted and calculated pursuant to §§ 36.611, 36.612, and 36.631 of this chapter and will be compared to the index year expense adjustment. Safety valve support for the second year of operation and thereafter will then be calculated pursuant to paragraph (d)(3) of this section.

(2) For carriers that bought or acquired exchanges from an unaffiliated carrier before January 10, 2005, and are not subject to the exception in paragraph (c) of this section, the index year expense adjustment for acquired exchange(s) shall be equal to the rural incumbent local exchange carrier's high cost loop expense adjustment for the acquired exchanges calculated for the carrier's first year of operation of the acquired exchange(s). At the carrier's option, the first year of operation of the transferred exchanges shall commence at the beginning of either the first calendar year or the next calendar quarter following the transfer of exchanges. The index year expense adjustment shall be determined using cost data for the acquired exchange(s) submitted in accordance with §§ 36.611 and 36.612 of this chapter and shall be calculated in accordance with § 36.631 of this chapter. The index year expense adjustment for rural telephone companies that have operated exchanges subject to this section for more than a full year on the effective date of this paragraph shall be based on loop cost data submitted in accordance with § 36.612 of this chapter for the year ending on the nearest calendar quarter following the effective date of this paragraph. For each subsequent year, ending on the same calendar quarter as the index year, a loop cost expense adjustment, using the costs of the acquired exchanges, will be calculated pursuant to § 36.631 of this chapter and will be compared to the index year expense adjustment. Safety valve support is calculated pursuant to paragraph (d)(3) of this section.

(3) Up to fifty (50) percent of any positive difference between the transferred exchanges loop cost expense adjustment and the index year expense adjustment will be designated as the transferred exchange's safety valve loop cost expense adjustment and will be available in addition to the per-line loop-related support transferred from the selling carrier to the acquiring carrier pursuant to § 54.305(b). In no event shall a study area's safety valve loop cost expense adjustment exceed the difference between the carrier's study area loop cost expense adjustment calculated pursuant to § 36.631 of this chapter and transferred support amounts available to the acquired exchange(s) under paragraph (b) of this section. Safety valve support shall not transfer with acquired exchanges.

(e) The sum of the safety valve loop cost expense adjustment for all eligible study areas operated by rural telephone companies shall not exceed five (5) percent of the total rural incumbent local exchange carrier portion of the annual nationwide loop cost expense adjustment calculated pursuant to § 36.603 of this chapter. The five (5) percent cap on the safety valve mechanism shall be based on the lesser of the rural incumbent local exchange carrier portion of the annual nationwide loop cost expense adjustment calculated pursuant to § 36.603 of this chapter or the sum of rural incumbent local exchange carrier expense adjustments calculated pursuant to § 36.631 of this chapter. The percentage multiplier used to derive study area safety valve loop cost expense adjustments for rural telephone companies shall be the lesser of fifty (50) percent or a percentage calculated to produce the maximum total safety valve loop cost expense adjustment



~~for all eligible study areas pursuant to this paragraph. The safety valve loop cost expense adjustment of an individual rural incumbent local exchange carrier also may be further reduced as described in paragraph (d)(3) of this section.~~

~~(f) Once an acquisition is complete, the acquiring rural incumbent local exchange carrier shall provide written notice to the Administrator that it has acquired access lines that may be eligible for safety valve support. Rural telephone companies also shall provide written notice to the Administrator defining their index year for those years after the first year of operation for~~

\* \* \*

### Subpart H – Administration

\* \* \*

#### § 54.702 Administrator's functions and responsibilities.

(b) The Administrator, and the divisions therein, shall be responsible for administering the schools and libraries support mechanism, the rural health care support mechanism, the high cost support mechanism, and the low income support mechanism.

(b) The Administrator shall be responsible for billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds.

(c) The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.

\* \* \*

(h) The Administrator shall report quarterly to the Commission on the disbursement of universal service support program funds. The Administrator shall keep separate accounts for the amounts of money collected and disbursed for eligible schools and libraries, rural health care providers, low-income consumers, and high-cost and insular areas. The Administrator's quarterly report for 3<sup>rd</sup> quarter, filed on or about May 2 annually, shall contain projected annual funding requirements for the Connect America Fund, including all high cost funding components, for Price Cap and Rate of Return carriers and the Mobility Fund.

\* \* \*

### New Subpart M – Connect America Fund for Rural Rate of Return Carriers

#### § 54.1100 Terms and Definitions

(a) For purposes of determining Connect America Fund (CAF) support for rural rate of return carriers, the following definitions shall apply:

(1) *Broadband Access Service Connection Point* – the network equipment located in a telephone company serving wire center where broadband traffic from one or more telephone company service wire centers is aggregated.

(2) Broadband Line- loop equipment and facilities that support transmission of voice and broadband data, or broadband data only, between the carrier's central office and end user customer premises, at a minimum downstream speed of 256 Kbps.

(3) Broadband Take Rate – a percentage representing the extent to which a telephone company's customers adopt broadband services. For purposes of computing CAF support, a telephone company's Broadband Take Rate is the ratio of study area Broadband Lines in service to total Broadband Lines and voice-only common lines in service.

(4) Middle Mile - broadband transmission facilities and services beyond the Broadband Access Service Connection Point as well as facilities and services necessary to connect to the Internet backbone.

(5) Second Mile - broadband transmission facilities between the telephone company end office and the Broadband Access Service Connection Point.

(6) Rural Broadband Benchmark - for purposes of computing CAF support for a rate of return carrier, the Rural Broadband Benchmark includes a fixed per-line amount that applies to all study areas and a variable study area-specific amount, as more fully defined below.

(7) Rural Broadband Network Transmission Costs – costs associated with providing Broadband Lines, Second Mile and Middle Mile transmission services on a regulated, common carriage basis, as more fully defined below.

#### **§ 54.1101 Connect America Fund Support for Rural Rate of Return Carriers**

(a) Beginning July 1, 2012, rural rate of return carriers designated as eligible telecommunications carriers under subpart B of this Part shall be eligible to receive Connect America Fund (CAF) support as described in this subpart.

(b) CAF Support for a rural rate of return carrier is equal to the sum of the Rural Broadband Network Transmission Support component calculated pursuant to § 54.1102 below and adjustments to High Cost Loop Support and Interstate Common Line Support as calculated pursuant to § 54.1103 below.

#### **§ 54.1102 Rural Broadband Network Transmission Support Component**

(a) A rural rate of return telephone company's annual Rural Broadband Network Transmission Component support amount shall equal its Rural Broadband Network Transmission Costs minus the result of multiplying the Rural Broadband Benchmark by end of year study area working Broadband Lines times 12 months.

(b) Rural Broadband Network Transmission Costs for a rural rate of return telephone company shall equal the sum of its interstate-assigned common line costs as defined in Part 69 subpart F of this Chapter; its Additional Interstate Assignment determined pursuant to § 36.154(h) of this Chapter; its Middle Mile Broadband Costs; and its Second Mile Costs.

(1) For purposes of this computation Middle Mile Broadband Costs include the fully-distributed embedded costs of providing regulated transmission services between the Broadband Access Service Connection Point and the Internet backbone assigned to

the Middle Mile Special Access subelement defined in § 69.114 (a)(ii) of this Chapter.

- (2) For purposes of this computation Second Mile Costs include the fully-distributed embedded costs of providing regulated transmission services between the telephone company end office and the Broadband Access Service Connection Point assigned to the Second Mile Special Access subelement defined in § 69.114 (a)(ii) of this Chapter.
- (c) The Rural Broadband Benchmark equals the sum of a fixed component applicable to all rural rate of return study areas as calculated in subsection (1) below and a variable, study area-specific component as calculated in subsection (2) below.
- (1) Fixed Component

- (i) For the period July 1, 2012 through December 31, 2012 the fixed component of the Rural Broadband Benchmark shall be \$19.25.
- (ii) For 2013 the fixed component of the Rural Broadband Benchmark shall be \$20.00.
- (iii) For 2014 the fixed component of the Rural Broadband Benchmark shall be \$20.75.
- (iv) For 2015 the fixed component of the Rural Broadband Benchmark shall be \$21.50.
- (v) For 2016 the fixed component of the Rural Broadband Benchmark shall be \$22.25.
- (vi) For 2017 the fixed component of the Rural Broadband Benchmark shall be \$23.00.
- (vii) For 2018 the fixed component of the Rural Broadband Benchmark shall be \$23.75.
- (viii) For 2019, the fixed component of the Rural Broadband Benchmark shall be \$24.50.
- (ix) For 2020, the fixed component of the Rural Broadband Benchmark shall be \$25.25.
- (x) For 2021, the fixed component of the Rural Broadband Benchmark shall be \$26.00.
- (xi) For 2022, the fixed component of the Rural Broadband Benchmark shall be \$26.75.
- (xii) For 2023 and thereafter, the fixed component of the Rural Broadband Benchmark shall be \$27.50.

- (2) Variable Component

- (i) The variable component of the Rural Broadband Benchmark shall be \$6.50 for study areas having a Broadband Take Rate of 25 percent or less.
- (ii) For study areas having a Broadband Take Rate in excess of 25 but less than 50 percent, the variable component is equal to \$6.50 plus the product of the Broadband Take Rate minus 25 percent, divided by 25 percent, and multiplied by \$6.50 multiplied by the following annual transition factor:
  - (1) For the period July 1, 2012 through December 31, 2012, the transition factor for the variable component of the Rural Broadband Benchmark shall be 0.0415.
  - (2) For 2013, the annual transition factor for the variable component of the Rural Broadband Benchmark shall be 0.166.
  - (3) For 2014, the annual transition factor for the variable component of the Rural Broadband Benchmark shall be 0.25.
  - (4) For 2015, the annual transition factor for the variable component of the Rural Broadband Benchmark shall be 0.333.
  - (5) For 2016, the annual transition factor for the variable component of the Rural Broadband Benchmark shall be 0.416.
  - (6) For 2017, the annual transition factor for the variable component of the Rural Broadband Benchmark shall be 0.5.
  - (7) For 2018, the annual transition factor for the variable component of the Rural Broadband Benchmark shall be 0.583.
  - (8) For 2019, the annual transition factor for the variable component of the Rural Broadband Benchmark shall be 0.66.
  - (9) For 2020, the annual transition factor for the variable component of the Rural Broadband Benchmark shall be 0.75.
  - (10) For 2021 the annual transition factor for the variable component of the Rural Broadband Benchmark shall be 0.833.
  - (11) For 2022 the annual transition factor for the variable component of the Rural Broadband Benchmark shall be 0.916.
  - (12) For 2023 and thereafter, the annual transition factor for the variable component of the Rural Broadband Benchmark shall be 1.0.
- (iii) For study areas having a Broadband Take Rate of 50 percent or higher, the variable component shall be calculated as specified in subsection 54.1102(c)(2)(ii) above, except that the portion of the Broadband Take Rate over 50 percent shall be reduced by one-half, such that the Broadband Take Rate for purposes of calculating the variable component shall not exceed 75 percent.

**§ 54.1103 Adjustments to Other Universal Service Support Mechanisms**

(a) *High Cost Loop Support*: To the extent that the sum of the existing High Cost Loop Support calculated in accordance with Part 36 Subpart F of this Chapter plus Safety Net Additive Support calculated in accordance with Part 36 Subpart F of this Chapter plus Safety Valve Support calculated in accordance with § 54.305 of this Chapter exceeds the additional interstate assignment of loop costs calculated pursuant to § 36.154(h) of this Chapter, the study area shall be eligible to receive the difference between the sum of these three mechanisms and the additional interstate assignment of loop costs in addition to the Connect America Fund Support for which it is eligible.

- (1) For purposes of this section the additional interstate assignment of loop cost shall be determined by comparing the interstate Part 69 Common Line results for the study period to the Common Line results from a Part 36/69 cost study, excluding the Broadband Take Rate additive calculated pursuant to § 36.154(h) of this Chapter.

(b) *Transitional Interstate Common Line Support*: Effective July 1, 2012, Interstate Common Line Support available to a rate of return carrier qualifying for Connect America Fund support shall be modified by multiplying the carrier's Interstate Common Line Revenue Requirement and its end user subscriber line charge revenue by (1- its Broadband Take Rate).

(c) The provisions of this section shall be effective as of the effective date of Connect America Fund Support pursuant to section 54.1101, and shall remain effective for so long as section 54.1101 remains in effect.

#### **§ 54.1104 Transitional Stability Plan**

- (a) Connect America Fund (CAF) support available to rate of return carriers shall be subject to Transitional Stability Plan (TSP) adjustments as provided herein. TSP adjustments shall assure that in each year of a transitional period no rate of return study area experiences reductions in total support provided under this Chapter of more than five percent (5%) as a result of rule revisions in Parts 36, 54 and 69 of this Chapter occurring on July 1, 2012, to the extent funding is available as described in (f) below.
- (b) During the period July 1, 2012 through December 31, 2015, annual CAF support amounts payable to a rate of return study area pursuant to §§ 54.1101 and 54.1103 of this Chapter for each calendar year shall be compared to High Cost Loop (HCL) support (including any applicable safety net adjustments or safety valve support) in accordance with Part 36, Subpart F and § 54.305 of this Chapter, and Interstate Common Line Support (ICLS) in accordance with § 54.901 of this Chapter that would have been available to that same study area for that same calendar year if Part 36, 54 and 69 rules in effect prior to July 1, 2012 had remained in effect for the current year (Prior Rule Support). If CAF support amounts are lower than the Prior Rule Support amounts by more than five percent, CAF support payable to the study area for that year shall be adjusted to equal ninety-five percent of the Prior Rule Support amount.
- (c) For the period January 1, 2016 through December 31, 2016, the TSP adjustment described in subparagraph (b) above shall be reduced by one-third.
- (d) For the period January 1, 2017 through December 31, 2017, the TSP adjustment described in subparagraph (b) above shall be reduced by two-thirds.
- (e) Effective January 1, 2018 such TSP adjustments shall no longer be available.

- (f) Funding for the TSP adjustments described above in each calendar year shall be obtained by reducing, on a pro-rata basis, CAF support amounts available under §§ 54.1101 and 54.1103 of this chapter payable to rate of return study areas having an increase in their CAF support in that same calendar year above their Prior Support amount. Such pro-rata adjustments shall apply only to the portion of CAF support for each study area that exceeds its Prior Rule Support. If adequate funding is not available from such increased amounts of CAF support, TSP adjustment amounts otherwise payable to study areas under subparagraphs (b) through (d) above shall be reduced on a pro-rata basis.

**§ 54.1105 Data Reporting and True-up Procedures**

- (a) Each rate of return carrier shall submit to the Administrator annually on March 31st projected data necessary to calculate the carrier's prospective CAF Support for each of its study areas in the upcoming funding year. The funding year shall be July 1 of the current year through June 30 of the next year. Each rate of return carrier will be permitted to submit a correction to the projected data filed on March 31 until June 30 for the upcoming funding year. On June 30 each rate of return carrier will be permitted to submit to the Administrator an update to the projected data for the funding year ending on that date.
- (b) Each rate of return carrier shall submit to the Administrator on December 31st of each year the data necessary to calculate a carrier's CAF Support for the prior calendar year. Such data shall be used by the Administrator to make adjustments to monthly CAF Support amounts in the final two quarters of the following calendar year to the extent of any differences between the carrier's CAF received based on projected data and the support for which the carrier is ultimately eligible based on its actual data during the relevant period.

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## APPENDIX H

**Modeling Limits on Reimbursable Operating and Capital Costs**

1. Overview. This appendix describes a methodology for determining carrier-specific limits on High Cost Loop Support (HCLS) payments to rate-of-return cost carriers with very high capital expenses (capex) and operating expenses (opex) relative to their similarly situated peers.<sup>1</sup> The methodology operates within the current HCLS calculation algorithm, using information that is readily available to the Commission and to the public.<sup>2</sup> This appendix describes both the econometric process used to establish carrier-specific limits to HCLS payments and the implementation process.

2. This work significantly extends the analyses submitted by the Nebraska Rural Independent Companies, which use ordinary least squares regression analysis to develop a framework to predict capital and operating expenditures.<sup>3</sup> The Nebraska study examines data for a subset of rural rate-of-return carriers, and uses proprietary data not available to the Commission or to the public. In contrast, the proposed methodology described herein uses data currently available to the Commission and sets forth a detailed and implementable mechanism for examining all rural rate-of-return cost study areas and limiting HCLS payments in those study areas that have costs higher than the vast majority of their similarly-situated peers. We use quantile regression for parameter estimation rather than ordinary least squares for reasons set forth below. In addition, because directly implementing caps for capex and opex cannot be accomplished without fundamentally altering the way HCLS support payments are calculated today, the methodology we describe can be implemented quickly within the current HCLS framework.

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<sup>1</sup> The term “similarly-situated peers” means that, based on data from all the carriers in the analysis, if there were (hypothetically) 100 study areas with independent variable values that were nearly the same as those with the study area in question, 90 of them would be expected to have values equal to or less than the 90<sup>th</sup> percentile prediction. It does not mean the carriers with the most similar number of loops (or values of the other variables).

<sup>2</sup> The analysis is based on 2010 NECA data. See NECA Annual Universal Service Fund submission, at <http://transition.fcc.gov/wcb/iatd/neca.html>. Rate-of-return study areas affiliated with price cap carriers were excluded because support in those study areas will be frozen at 2011 levels in CAF-Phase I and transitioned to CAF-Phase II. See *supra* para. 133. Also excluded were the exchanges that were acquired by other carrier study areas. Pursuant to section 54.305 of the Commission’s rules, the acquiring carrier receives support for the acquired exchanges at the same per-loop support as calculated at the time of transfer. See 47 C.F.R. § 54.305. Rural carriers who incorporate acquired exchanges into an existing study area are required to provide separately the cost data for the acquired exchanges and the pre-acquisition study area. See NECA 2010 USF Overview, at 5, App. F, <http://transition.fcc.gov/wcb/iatd/neca.html>. The Commission does not have readily available data allowing it to separate these exchanges out from the acquiring exchange, but should be able to do so when running the final analysis. Because of the stable nature of the regression analysis used, staff expects the inclusion of these additional exchanges to have only a small effect on the regression coefficients and therefore on the limits created by the analysis.

<sup>3</sup> See Letter from Thomas Moorman, Counsel to Nebraska Rural Independent Companies, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 05-337, GN Docket No. 09-51, Attach. (Nebraska Rural Independent Companies’ Capital Expenditure Study: Predicting the Cost of Fiber to the Premise) (dated Jan. 7, 2011) (Nebraska Rural Independent Companies’ Study). See also Letter from Paul M. Schudel, Counsel to Nebraska Rural Independent Companies, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 01-92, 96-45, Attach. (Operating Expense Study Sponsored by the Nebraska Rural Independent Companies and Telegee Alliance of Certified Public Accounting Firms: Predicting the Operating Expenses of Rate-of-Return Telecommunications Companies) (dated May 10, 2011).

3. Background. Today, carriers eligible for HCLS file with NECA annual detailed cost data, pursuant to Part 36, at the study area level reporting their costs in many different cost categories.<sup>4</sup> The cost categories are then fed into NECA's 26-step Cost Company Loop Cost Algorithm.<sup>5</sup> The early algorithm steps calculate intermediate values (based on the reported cost categories) and feed into the later algorithm steps which ultimately (in step 26) calculate the carrier's total unseparated cost per-loop for that study area. HCLS for each study area is then calculated by the Expense Adjustment Algorithm.<sup>6</sup> This algorithm determines HCLS payments based on a study area's cost per-loop compared to the nationwide average cost per-loop.<sup>7</sup>

4. Methodology for Imposing Limits. Our methodology creates caps for 11 of the algorithm steps in NECA's 26-step Cost Company Loop Cost Algorithm.<sup>8</sup> These algorithm steps are all functions of cost categories that are defined in NECA's Appendix B.<sup>9</sup> The methodology calculates the maximum amount for each of the 11 algorithm steps as the 90<sup>th</sup> percentile cost for a similarly situated company. A company whose actual costs for a particular step in the algorithm are above the 90<sup>th</sup> percentile, compared to similarly situated companies, would be limited to recovering amounts that correspond to the 90<sup>th</sup> percentile of cost, i.e. the amount of cost that ninety percent of similarly situated companies are at or below when they submit costs for that particular step in the algorithm

5. The methodology involves a quantile regression analysis using data from nearly all the rural rate-of-return cost carriers for each algorithm step.<sup>10</sup> The quantile regression parameter estimates are used to calculate a cap equal to the 90th percentile prediction for each carrier for that algorithm step. This is repeated for each of the rest of the examined algorithm steps. Once all the 90th percentile caps are calculated, the lesser of the company's capped algorithm step value and the original value is inserted into the appropriate algorithm step, which then flows into the later algorithm steps as before. We identify the 11 algorithm steps in the analysis below.

6. We considered using an ordinary least squares-based analysis to set the caps, but decided that quantile regression was preferable for two reasons. First, error terms in bivariate OLS

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<sup>4</sup> See Appendix A of NECA's Annual Universal Service Fund submission to the FCC at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/Monitor/usf10af.zip](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Monitor/usf10af.zip).

<sup>5</sup> See Appendix B of NECA's Annual Universal Service Fund submission to the FCC at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/Monitor/usf10af.zip](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Monitor/usf10af.zip).

<sup>6</sup> See Appendix B of NECA's Annual Universal Service Fund submission to the FCC at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/Monitor/usf10af.zip](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Monitor/usf10af.zip).

<sup>7</sup> The cost per loop used in the HCLS support calculation is annually set at a level to ensure that total HCLS disbursements stay within the HCLS cap that year rather than the actual average loop cost. See 47 C.F.R. §§ 36.603(a), 36.622.

<sup>8</sup> Although NECA labels each algorithm step with a line number, we use the word "step" in our description of the methodology to avoid possible confusion of lines with loops.

<sup>9</sup> See Appendix B of NECA's Annual Universal Service Fund submission to the FCC at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/Monitor/usf10af.zip](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Monitor/usf10af.zip).

<sup>10</sup> There were three study areas for which our source of study area boundaries (Tele Atlas Telecommunications Suite 2010.6) did not provide study area information and therefore we could not properly aggregate census data for those study areas so those study areas were omitted. Further, 25 study area had to be omitted because Tele Atlas Telecommunications Suite 2010.6 labeled two or more distinct study areas as if they were one company, so we could not distinguish the proper boundaries. Although NECA labels each algorithm step with a line number, we use the word "step" in our description of the methodology to avoid possible confusion of lines with loops.



models of each algorithm step on the *loops* variable exhibit heteroscedasticity.<sup>11</sup> While ordinary least squares-based analyses such as weighted least squares can certainly deal with heteroscedasticity, it complicates efforts to deal with other problems such as outliers and non-Gaussian error terms.<sup>12</sup>

7. Further, ordinary least squares can produce biased parameter estimates in the presence of outliers.<sup>13</sup> Ordinary least squares has methods available for dealing with outliers, such as excluding them from the analysis or using dummy variables to deal with them, but that requires exercise of judgment as to which observations are truly outliers. Also, given the data currently available to the Commission, distinguishing between study areas with high idiosyncratic costs (i.e., those that truly are the most expensive-to-serve areas) and others with excessively high cost (e.g., due to imprudent or unnecessarily large past investments) is challenging. Further complicating matters, some carriers may enjoy especially low costs compared to their peers for idiosyncratic reasons. While these observations would be outliers, they would be masked by the virtue that they are somewhat “too low” and therefore it would be difficult to properly identify and deal with those outliers. Thus, simply looking only for observations that are too high may be insufficient. When using ordinary least squares, failing to account for all outliers (including the difficult-to-find outliers that are “too low”) could bias the regression coefficients which would then bias payments to carriers. Quantile regression solves this problem.

8. Use of Quantile Regression. Quantile regression, developed by Roger Koenker and Gilbert Basset in 1978, is a good solution to address these problems.<sup>14</sup> It is similar to ordinary least squares regression, but where ordinary least squares minimizes the sum of squared residuals from the regression line, the median quantile regression minimizes the sum of absolute residuals from the regression line; for quantiles other than the median, quantile regression minimizes the sum of asymmetrically-weighted absolute residuals.<sup>15</sup>

9. While ordinary least squares requires the error terms be homoscedastic, quantile regression makes fewer assumptions about the error term than ordinary least squares, and so there is no need to correct for heteroscedasticity.<sup>16</sup> Thus the quantile regression methodology is robust to error structures that are non-Gaussian or violate the assumption of the normal distribution of errors required for unbiased estimation using ordinary least squares.<sup>17</sup>

10. Quantile regression is also resistant to outliers, so the parameter estimates would be little changed by accounting for (or not) particular observations as outliers.<sup>18</sup> That is, if one were to modify the

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<sup>11</sup> For all the algorithm steps in this methodology, the Breusch-Pagan test rejected the null hypothesis of homoscedasticity. Ordinary least squares requires the variance of the error term to be homoscedastic (constant) and therefore unrelated to the independent variables. William H Greene, *Econometric Analysis* 6<sup>th</sup> Ed. 11 (2008) (Prentice Hall).

<sup>12</sup> Another commonly-used option for correcting for heteroscedasticity is using robust standard errors. That option may work well for statistical inference, but we are most interested in obtaining parameter estimates (so that we can make cost predictions) that are concordant with each other year after year, and robust standard errors does not address this shortcoming.

<sup>13</sup> G.S. Madalla, *Introduction to Econometrics*, 2nd Ed. 88 (1992) (Macmillan Publishing Co).

<sup>14</sup> Koenker, Roger and Gilbert Bassett. 1978. “Regression Quantiles.” *Econometrica*. January, 46:1, pp. 33–50.

<sup>15</sup> Roger Koenker and Keven Hallock, *Journal of Economic Perspectives*, Volume 15, Number 4, Fall 2001, Pages 143–156.

<sup>16</sup> Lingxin Hao and Daniel Q. Naiman, *Quantile Regression* 20 (2007) (Sage Publications).

<sup>17</sup> Koenker, Roger and Gilbert Bassett. 1978. “Regression Quantiles.” *Econometrica*. January, 46:1, pp. 33–50.

<sup>18</sup> Lingxin Hao and Daniel Q. Naiman, *Quantile Regression* 20 (2007) (Sage Publications).

analysis to account for any known outliers, then we would not expect the list of study areas affected by the caps or the levels of those caps to change very much. Given the complexities of identifying outliers mentioned above, this is an attractive property.

11. Another significant advantage of quantile regression is that it allows the independent variables to have different effects on the study areas in the different quantiles. Thus, for illustrative purposes, if the number of housing units in a rural area increased while holding everything else constant, the size of the study area's cost increase could differ based on which quantile it is in. Hypothetically, the marginal effect of a change could even be positive for a carrier in one quantile (such as the 90<sup>th</sup> percentile)<sup>19</sup> and negative for a carrier in another (such as the 10<sup>th</sup> percentile).<sup>20</sup> This is not allowed in ordinary least squares, which assumes that the marginal effect is the same on all carriers. Given that we are examining carriers with high costs relative to other carriers, this is an especially helpful property.

12. Setting the Quantile Threshold. This methodology uses the 90<sup>th</sup> percentile because carriers with costs exceeding 90 percent of their similarly-situated peers may raise questions about the prudence of such expenditures. In the FNPRM, the Commission seeks comment on whether to set the exact quantile to a lower or higher level such as the 85<sup>th</sup> percentile or the 95<sup>th</sup> percentile.<sup>21</sup>

13. All of the regressions were log-log: all dependent and most independent variables were logged using the natural log.<sup>22</sup> For those variables that were logged, we added one before taking the log so that observations with values equaling zero could be included in the analysis.

14. While many of the measures of density are collinear, this is not problematic for this methodology because our goal is prediction, not statistical inference. Multicollinearity does not harm predictions.<sup>23</sup>

15. Dependent Variables. Consistent with the idea of limiting reimbursements for capex, we create caps for algorithm steps 1, 2, 17 and 18.<sup>24</sup> Algorithm steps 1 and 2 represent the two categories of gross plant.<sup>25</sup> Algorithm steps 17 and 18 represent the depreciation and amortization associated with the plant represented in algorithm steps 1 and 2.<sup>26</sup>

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<sup>19</sup> This would be a carrier with very high costs given the number of loops that it serves and other factors.

<sup>20</sup> This would be a carrier with very low costs given the number of loops that it serves and other factors.

<sup>21</sup> Technically, the choice is not limited to percentiles and any quantile can be used, such as the .925 quantile. See *supra* para. 1080.

<sup>22</sup> Weighted density and percent water were not logged. We considered a methodology whereby all the algorithm step dependent variables were unitized by dividing by the number of loops, but we found that approach inferior to the current approach of leaving the algorithm steps non-unitized for two reasons. First, the algorithm steps we are capping are not unitized. Also, the regressions using the unitized algorithm steps lost much of their significance, and we therefore had less confidence in the caps they generated.

<sup>23</sup> Multicollinearity is another reason to be careful when deciding to omit particular variables from the model. T-tests in the presence of multicollinearity can be biased down and can lead one to drop a variable that belongs in the model.

<sup>24</sup> For definitions of these algorithm steps, see Appendix B of NECA's Annual Universal Service Fund submission to the FCC at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/Monitor/usf10af.zip](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Monitor/usf10af.zip)

<sup>25</sup> In particular, step 1 is cable and wire facilities plus the portion of cable and wire facilities leases assigned to Category 1, and step 2 is central office equipment plus the portion of central office equipment leases assigned to Category 4.13.

<sup>26</sup> Specifically, step 17 is depreciation and amortization expense assigned to cable and wireless facility Category 1, and Step 18 is depreciation and amortization expense assigned to central office equipment Category 4.13.

16. Consistent with the idea of limiting reimbursements for opex, we create caps for algorithm steps 7, 8, 13, 14, 15, 16, and 21. Algorithm steps 7 and 8 represent materials and supplies.<sup>27</sup> Algorithm steps 13 and 14 represent maintenance.<sup>28</sup> Algorithm steps 15 and 16 represent network support and general support expenses.<sup>29</sup> Algorithm step 21 represents benefits other than corporate operations expenses.<sup>30</sup> By creating caps for these 11 algorithm steps, we limit the reimbursements for capex and opex expenditures that exceed those of the vast majority of similarly-situated carriers.

17. We exclude algorithm step 19 (corporate operations expense) from our regression analysis because limitations for that cost category have been separately adopted in the Order,<sup>31</sup> and we also exclude algorithm step 20 because it represents taxes. Additionally, we exclude algorithm step 22 (rents) because the regression fit is so poor. Because the regressions are run independently, the exclusion of algorithm step 22 from the methodology does not affect the other regressions.

18. As mentioned above, some of the early algorithm steps calculate factors (based on the reported cost categories) that flow into later algorithm steps. While we do not directly modify algorithm steps 3, 4, 5, 6, 9, 10, 19, 20, and 22, we allow changes in algorithm steps 1 and 2 to flow through to these algorithm steps. For example, algorithm steps 1 and 2 flow into algorithm step 20, which accounts for operating taxes to be assigned to loop costs.<sup>32</sup> Thus, a reduction to algorithm step 1 and/or 2 could lead to a reduction in algorithm step 20, which would be in accordance with the approach of limiting HCLS payments to study areas with very high capital expenses.

19. As we do with the independent variables, the values of the algorithm steps in our analysis were logged to linearize the model. In two instances, a study area had a negative algorithm step value, which prevented us from taking the natural log for those two values. These two observations were omitted. The data from these two study areas were still included in all the other regressions. Where the algorithm step value was negative, the study area's original algorithm step value was retained.

20. Independent Variables. The independent variables in this study are those that we believe correlate with each carrier's costs, are currently available to the Commission, and exist for all study areas in the regression analysis.<sup>33</sup> The independent variables in our methodology are proxies for scale, density, and terrain. Other than the number of loops the study area serves, all the independent variables are from

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<sup>27</sup> Specifically, step 7 is materials and supplies assigned to cable and wireless facility Category 1, and Step 8 is materials and supplies assigned to central office equipment Category 4.13.

<sup>28</sup> In particular, algorithm step 13 represents cable and wire facilities maintenance assigned to Category 1, and algorithm step 14 represents Central Office equipment maintenance expense assigned to Category 4.13.

<sup>29</sup> Specifically, algorithm step 15 is associated with network support expenses plus general support expenses assigned to cable and wire facility category 1 and central office equipment associated with Category 4.13.

<sup>30</sup> Algorithm step 21 is benefits other than corporate operations expense assigned to cable and wire facility Category 1 and central office equipment Category 4.13.

<sup>31</sup> See Section VII.D.4.

<sup>32</sup> Algorithm steps 1 and 2 (combined with 5 and 6) result in an allocation ratio that determines the amount of an expense, such as taxes, that will be assigned to loop costs for purposes of calculating HCLS.

<sup>33</sup> We note that using the Soil Survey Geographic Database (SSURGO) soils data from the Natural Resource Conservation Service (NRCS) that the Nebraska study used to generate soil, frost and wetland variables do not cover the entire United States. The SSURGO data do not cover about 24 percent of the United States land mass (including Puerto Rico, Guam, American Samoa, US Virgin Islands and Northern Mariana Islands). Much, but not all of the missing land area is in Alaska. Thus, there are some study areas where there is no SSURGO data (such as Adak Tel Utility) and other study areas where the SSURGO data do not cover the entire study area such as Matanuska Tel Assoc. We therefore could not use these data in the regression model.

the 2010 United States census.<sup>34</sup> As we do with the algorithm step variables, we took the natural logs of all the independent variables to linearize the model.<sup>35</sup>

21. Census block data were rolled up to study area boundaries using Tele Atlas data.<sup>36</sup> There were 28 study areas without census block information that were excluded from this analysis.<sup>37</sup> There are two significant advantages to using block-level census data. First, census blocks are most granular areas at which the Census Bureau publishes data, so using census blocks allows for the most accurate mapping of demographic data such as housing units to study areas. Second, census blocks are designated as being part of (in decreasing urbanness order) an urbanized area, urbanized cluster or nonurban.<sup>38</sup> In this fashion, we allow the nonurban (rural) independent variables to have different effects from the urban variables. For instance, the additional cost of serving an additional urban housing unit (holding all else constant) is likely to be different than the cost of serving an additional rural housing unit. Therefore, for each of the census-based independent variable in our analysis, we roll the data up based on whether they are in an urbanized area, urbanized cluster or rural area within the study area.

22. Not all the variables are significant in each regression, and there are some variables (such as the log of land area in urbanized clusters) that are not significant in any of the regressions. We chose to use all the variables in all the regressions so long as the parent variable (such as land area) had at least one child variable (such as land area in a non-urbanized area) that was significant for at least one of the regressions in the analysis. While this meant that some regressions had many insignificant variables, this was not a problem because the goal of the regression was not to determine statistically significant correlations, but instead to generate 90<sup>th</sup> percentile predictions, which are unaffected by the addition of insignificant variables.

23. We use two measures of scale, *loops* and *housing units*. The more loops the carrier is serving, the higher its expenses will be. We use the number of loops in NECA's October 2011 filing.<sup>39</sup>

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<sup>34</sup> The census data can be downloaded here: [http://www2.census.gov/census\\_2010/01-Redistricting\\_File--PL\\_94-171/](http://www2.census.gov/census_2010/01-Redistricting_File--PL_94-171/) and the documentation is available here: <http://www.census.gov/prod/cen2010/doc/pl94-171.pdf>. Census has not yet released the urban/rural breakouts for 2010, so we used the 2000 urban/rural breakouts.

<sup>35</sup> Because some of the census variables were sometimes zero (for instance, certain land areas were sometimes zero), we added 1 to each of the census variables (except percent water) before taking the natural log. We accounted for this when creating the 90<sup>th</sup> percentile prediction for each algorithm step.

<sup>36</sup> Census blocks were assigned to study areas based on the location of the block's centroid. Thus, all blocks were assigned to exactly one study area. Tele Atlas Telecommunications Suite 2010.6 was used to determine the study area boundaries for each of the study areas in this analysis. Study area boundaries could not be determined for the territories because Tele Atlas Telecommunications Suite 2010.6 did not provide data for them.

<sup>37</sup> There were three study areas for which we could not find 2010 census data, so those observations were omitted. Further, 25 study area had to be omitted because our source of study area boundaries (Tele Atlas Telecommunications Suite 2010.6) labeled two or more distinct study areas as if they were one company, so we could not distinguish the proper boundaries.

<sup>38</sup> For a discussion of how the Census Bureau determines urbanized areas, urbanized clusters, and rural areas, see <http://www.census.gov/geo/www/ua/2010urbanruralclass.html>.

<sup>39</sup> The most recent year of data was used. See NECA's Overview of Universal Service Fund, which can be found at <http://transition.fcc.gov/wcb/iatd/neca.html>.

The NECA data do not disaggregate loop data by urbanized clusters, urbanized areas or non-urban areas, so we include an additional scale variable with the urbanness breakout: housing units.<sup>40</sup>

24. We include two measures of density in our analysis, the *weighted housing unit density* and the *number of census blocks* in the study area. Because it is easier to wire businesses and homes when they are close to each other than when they are far apart, we expect that costs will decrease with density.<sup>41</sup> There are several ways one can measure density, however.

25. The simple method, which merely divides the study area's number of housing units by total area (or just land area) does not take into account the possibility that large swaths of land in a study area may have absolutely no homes or businesses.<sup>42</sup> So we calculate the weighted average density for each study area using census block data.

26. For each census block in each study area, we calculated the block's density by dividing the number of housing units in the block by the area of the block.<sup>43</sup> We then set the weight for each block equal to the number of housing units in the block divided by the total number of housing units in the study area. Thus, blocks without any homes had no weight. Again, census data do not include the number of businesses in the block, so we could not include them in the density calculation.

27. We include *land* and *percent water* in each study area as a rough indicator of terrain-driven costs. We expect that holding everything else constant, the more land area that a carrier has in its territory, the more expensive it is to serve. Similarly, the more water area in the study area, the more expensive it should be to serve, because roads are typically routed around such water, so the natural pathways for the carrier's cabling are longer than they otherwise would be.

28. Results. The regression analysis was run for the four most recent years of data that NECA reported to the Commission: 2007 – 2010. The results for each year of data were very consistent with each other. The regression results from 2010 are included below.

29. Two versions of the quantile regression analysis are presented: Table 1 includes the *weighted density* variable, and Table 2 excludes it. Perhaps surprisingly, weighted density was significant in only one of the regressions in Table 1. One may think weighted density is insignificant in this model because of the inclusion of the other density measures (the three blocks variables), but weighted density is still insignificant when the *blocks* variables are omitted. (Further, the pseudo  $R^2$  drops when we omit the *blocks* variables, so we keep the *blocks* variables in the analysis and drop the *weighted density* variable.) We therefore use the model that excludes weighted density.

30. As expected, the *loops* variable was the most influential independent variable in predicting the values for the algorithm steps. The remaining variables are significant in many of the regressions (both when including and excluding the *weighted density* variable), and so they remain in the regressions.

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<sup>40</sup> We understand that carriers serve business as well as homes, but we do not have business information with the same urbanness breakout as housing units. We are comfortable with the assumption that businesses and homes are similarly distributed throughout study areas for rate-of-return carriers.

<sup>41</sup> For example, see Nebraska Companies' Capital Expenditure Study at 18.

<sup>42</sup> We estimated with model with the simple calculation of density, and it performed worse than the weighted density variable.

<sup>43</sup> Although the Census Bureau publishes census block area in square meters, the area was converted to square miles for this analysis.

31. As mentioned above, the study area's capped algorithm step values (or the original algorithm step values where they are lower than the capped algorithm step values) are inserted into the algorithm. These step values then flow into later algorithm steps that ultimately determine the Study Area Cost Per Loop value.

32. Implementation. This proposed methodology would be updated annually to establish limits on the Study Area Cost Per Loop values, which are used to determine eligibility for HCLS payments.

Table 1. 90<sup>th</sup> Percentile Quantile Regression Coefficients – Data as of 2010 without weighted density

	AS1	AS2	AS7	AS8	AS13	AS14	AS15	AS16	AS17	AS18	AS21	AS22
<b>Loops</b>	0.885 <sup>***</sup> (15.99)	0.964 <sup>***</sup> (14.49)	1.167 <sup>***</sup> (6.65)	1.291 <sup>***</sup> (9.05)	0.542 <sup>***</sup> (6.40)	0.725 <sup>***</sup> (9.99)	0.919 <sup>***</sup> (6.50)	0.876 <sup>***</sup> (8.86)	0.892 <sup>***</sup> (8.56)	0.834 <sup>***</sup> (8.32)	0.785 <sup>***</sup> (13.26)	0.769 <sup>***</sup> (3.67)
<b>Housing_Units_nu</b>	-0.32 <sup>***</sup>	-0.43 <sup>***</sup>	-0.519 <sup>*</sup>	-0.66 <sup>***</sup>	0.0594	-	-0.185	-	-0.319 <sup>*</sup>	-0.216	-0.125	-0.149
	(-4.57)	(-5.69)	(-2.36)	(-3.70)	(0.61)	0.272 <sup>**</sup>	(-1.05)	0.337 <sup>**</sup>	(-2.43)	(-1.94)	(-1.51)	(-0.55)
<b>Housing_Units_uc</b>	0.166 <sup>**</sup>	0.194 <sup>**</sup>	0.222	0.250	0.0353	0.0261	0.0476	0.223	0.161	0.174	0.241 <sup>*</sup>	0.151
	(2.79)	(2.63)	(0.85)	(0.86)	(0.30)	(0.26)	(0.30)	(1.42)	(1.30)	(1.61)	(1.96)	(0.58)
<b>Housing_Units_ua</b>	-0.0356	0.0895	0.143	-0.0056	0.103	-0.0519	-0.00828	-0.189	-0.0520	0.191	-0.230 <sup>*</sup>	-0.454
	(-0.52)	(0.66)	(0.35)	(-0.01)	(0.52)	(-0.40)	(-0.05)	(-0.80)	(-0.36)	(1.02)	(-2.38)	(-1.11)
<b>Land_Area_nu</b>	0.163 <sup>***</sup>	0.138 <sup>***</sup>	0.218 <sup>**</sup>	0.215 <sup>*</sup>	0.0835	0.143 <sup>**</sup>	0.220 <sup>*</sup>	0.0544	0.117 <sup>*</sup>	0.171 <sup>**</sup>	0.186 <sup>***</sup>	0.222
	(6.11)	(3.57)	(2.60)	(2.42)	(1.74)	(2.86)	(2.91)	(0.68)	(2.30)	(3.05)	(4.33)	(1.69)
<b>Land_Area_uc</b>	0.00647	0.0223	-0.0051	-0.0614	-0.216	-0.0178	0.0292	0.145	-0.0146	-0.109	-0.104	-0.297
	(0.10)	(0.21)	(-0.02)	(-0.22)	(-1.41)	(-0.12)	(0.15)	(0.72)	(-0.13)	(-0.86)	(-0.71)	(-0.98)
<b>Land_Area_ua</b>	-0.101	0.137	0.596	0.265	-0.0041	-0.289 <sup>*</sup>	0.0983	0.219	0.169	0.482	-	-0.467
	(-1.49)	(0.72)	(1.19)	(0.48)	(-0.02)	(-2.33)	(0.24)	(0.68)	(1.36)	(1.86)	0.384 <sup>**</sup>	(-0.95)
<b>Percent_Water</b>	0.866 <sup>***</sup>	-0.0712	-0.434	-1.103	0.299	-0.244	0.808	1.731 <sup>*</sup>	0.577	-0.821	-0.246	-0.0843
	(3.31)	(-0.19)	(-0.36)	(-0.91)	(0.38)	(-0.54)	(0.86)	(2.53)	(1.03)	(-1.37)	(-0.31)	(-0.05)
<b>Census_Blocs_nu</b>	0.134 <sup>*</sup>	0.200 <sup>*</sup>	0.228	0.297	0.0559	0.113	-0.129	0.135	0.176	0.0630	0.0840	-0.259
	(2.44)	(2.37)	(1.27)	(1.53)	(0.58)	(1.05)	(-0.77)	(0.87)	(1.69)	(0.53)	(0.91)	(-1.01)
<b>Census_Blocs_nu</b>	-0.252 <sup>**</sup>	-0.318 <sup>**</sup>	-0.341	-0.388	0.0386	-0.0340	-0.0735	-0.325	-0.251	-0.246	-0.297	-0.0890
	(-2.72)	(-2.89)	(-0.84)	(-0.90)	(0.22)	(-0.22)	(-0.30)	(-1.38)	(-1.29)	(-1.46)	(-1.58)	(-0.22)
<b>Census_Blocs_nu</b>	0.160	-0.123	-0.492	-0.0194	-0.0713	0.303	0.000850	0.228	0.0383	-0.454	0.563 <sup>***</sup>	1.037
	(1.48)	(-0.50)	(-0.66)	(-0.02)	(-0.19)	(1.64)	(0.00)	(0.48)	(0.18)	(-1.35)	(3.42)	(1.34)
<b>Constant</b>	10.38 <sup>***</sup>	8.933 <sup>***</sup>	4.261 <sup>***</sup>	2.419 <sup>***</sup>	7.263 <sup>***</sup>	7.263 <sup>***</sup>	6.055 <sup>***</sup>	6.929 <sup>***</sup>	7.269 <sup>***</sup>	6.547 <sup>***</sup>	5.822 <sup>***</sup>	7.220 <sup>***</sup>
	(50.38)	(36.72)	(6.26)	(3.56)	(19.34)	(21.60)	(10.77)	(12.50)	(19.23)	(17.90)	(17.85)	(8.58)
<i>N</i>	720	720	720	720	720	719	719	720	720	720	720	720
<b>pseudo R<sup>2</sup></b>	0.5863	0.4802	0.2949	0.2745	0.4395	0.3110	0.3648	0.3893	0.5121	0.3790	0.4516	0.0782

*t* statistics in parentheses\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$ 

Notes: All variables except Percent Water are in logs. AS = Algorithm Step; nu = non-urbanized area; uc = urbanized cluster; ua = urbanized area.

Table 2. 90<sup>th</sup> Percentile Quantile Regression Coefficients – Data as of 2010 – with weighted density

	AS1	AS2	AS7	AS8	AS13	AS14	AS15	AS16	AS17	AS18	AS21	AS22
<b>Loops</b>	0.891 <sup>***</sup> (17.29)	0.964 <sup>***</sup> (11.74)	1.008 <sup>***</sup> (8.03)	1.073 <sup>***</sup> (5.79)	0.529 <sup>***</sup> (5.65)	0.716 <sup>***</sup> (8.89)	0.756 <sup>***</sup> (5.67)	0.895 <sup>***</sup> (7.44)	0.762 <sup>***</sup> (9.37)	0.844 <sup>***</sup> (6.92)	0.785 <sup>***</sup> (11.08)	0.621 <sup>*</sup> (2.07)
<b>Weighted_Density</b>	-0.0393 (-1.27)	-0.0231 (-0.54)	-0.0146 (-0.16)	0.0160 (0.13)	-0.0735 (-1.24)	-0.0554 (-1.13)	0.157 <sup>*</sup> (2.29)	-0.0518 (-0.49)	-0.0103 (-0.22)	-0.0102 (-0.18)	0.0504 (1.01)	0.211 (1.33)
<b>Housing_Units_nu</b>	-0.35 <sup>***</sup> (-5.11)	-0.42 <sup>***</sup> (-4.39)	-0.392 <sup>*</sup> (-2.31)	-0.416 (-1.69)	0.0653 (0.61)	-0.287 <sup>**</sup> (-2.84)	-0.0079 (-0.05)	-0.374 <sup>*</sup> (-2.14)	-0.155 (-1.50)	-0.198 (-1.40)	-0.101 (-1.09)	0.0367 (0.09)
<b>Housing_Units_uc</b>	0.139 <sup>*</sup> (2.26)	0.172 <sup>*</sup> (2.12)	0.227 (0.91)	0.248 (0.73)	0.0441 (0.41)	0.0248 (0.25)	-0.0198 (-0.15)	0.176 (0.96)	0.121 (1.19)	0.117 (1.05)	0.220 (1.73)	0.235 (0.74)
<b>Housing_Units_ua</b>	-0.0321 (-0.45)	0.0804 (0.54)	0.305 (1.06)	0.0561 (0.11)	0.121 (0.61)	-0.0907 (-0.72)	-0.0332 (-0.24)	-0.233 (-0.84)	0.136 (1.35)	0.144 (0.85)	-0.205 <sup>*</sup> (-2.03)	-0.417 (-0.92)
<b>Land_Area_nu</b>	0.138 <sup>***</sup> (4.75)	0.135 <sup>**</sup> (3.07)	0.161 <sup>*</sup> (2.03)	0.234 <sup>*</sup> (2.23)	0.0543 (1.05)	0.135 <sup>**</sup> (2.73)	0.204 <sup>**</sup> (3.18)	0.0114 (0.12)	0.125 <sup>**</sup> (3.08)	0.181 <sup>**</sup> (3.00)	0.197 <sup>***</sup> (4.47)	0.321 (1.96)
<b>Land_Area_uc</b>	0.0226 (0.33)	0.0142 (0.12)	-0.0659 (-0.23)	0.0955 (0.29)	-0.214 (-1.45)	-0.0018 (-0.01)	0.0815 (0.53)	0.153 (0.65)	-0.0904 (-1.06)	-0.114 (-0.87)	-0.128 (-0.91)	-0.269 (-0.77)
<b>Land_Area_ua</b>	-0.107 (-1.59)	0.108 (0.51)	0.524 (1.12)	-0.0237 (-0.04)	0.140 (0.56)	-0.242 (-1.95)	0.0972 (0.38)	0.190 (0.50)	-0.110 (-0.84)	0.263 (0.97)	-0.413 <sup>**</sup> (-3.12)	-0.476 (-0.79)
<b>Percent_Water</b>	0.905 <sup>**</sup> (3.00)	-0.0899 (-0.21)	-0.825 (-0.73)	-1.349 (-0.94)	0.167 (0.20)	-0.260 (-0.59)	0.654 (0.84)	1.685 <sup>*</sup> (2.08)	0.375 (0.76)	-0.762 (-1.19)	-0.166 (-0.21)	0.131 (0.07)
<b>Census_Blocs_nu</b>	0.178 <sup>**</sup> (2.95)	0.192 <sup>*</sup> (1.99)	0.301 (1.71)	0.232 (0.98)	0.0850 (0.82)	0.126 (1.17)	-0.107 (-0.75)	0.192 (1.02)	0.140 (1.63)	0.0200 (0.16)	0.0809 (0.85)	-0.352 (-1.06)
<b>Census_Blocs_uc</b>	-0.215 <sup>*</sup> (-2.23)	-0.279 <sup>*</sup> (-2.29)	-0.319 (-0.83)	-0.406 (-0.80)	0.0452 (0.28)	-0.0284 (-0.19)	0.00157 (0.01)	-0.247 (-0.90)	-0.162 (-1.01)	-0.164 (-0.94)	-0.271 (-1.39)	-0.241 (-0.50)
<b>Census_Blocs_ua</b>	0.163 (1.45)	-0.0922 (-0.34)	-0.701 (-1.24)	-0.0939 (-0.10)	-0.173 (-0.47)	0.344 (1.91)	0.0371 (0.19)	0.314 (0.57)	-0.0927 (-0.58)	-0.276 (-0.84)	0.539 <sup>**</sup> (3.22)	0.930 (1.03)
<b>Constant</b>	10.58 <sup>***</sup> (37.30)	9.068 <sup>***</sup> (23.73)	4.426 <sup>***</sup> (5.48)	2.460 <sup>*</sup> (2.26)	7.735 <sup>***</sup> (14.24)	7.748 <sup>***</sup> (17.77)	4.921 <sup>***</sup> (7.72)	7.261 <sup>***</sup> (7.26)	7.234 <sup>***</sup> (17.65)	6.602 <sup>***</sup> (12.92)	5.275 <sup>***</sup> (14.24)	5.705 <sup>***</sup> (4.18)
<b>N</b>	717	717	717	717	717	716	716	717	717	717	717	717
<b>pseudo R<sup>2</sup></b>	0.5931	0.4839	0.3042	0.2747	0.4440	0.3142	0.3718	0.3920	0.5194	0.3818	0.4570	0.0791

*t* statistics in parentheses

\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$

Notes: All variables except Percent Water and Weighted Density are in logs. AS = Algorithm Step; nu = non-urbanized area; uc = urbanized cluster; ua = urbanized area



## APPENDIX I

**Estimated Consumer Benefits of Intercarrier Compensation Reform**

1. This appendix explains Commission staff's estimate that consumers will likely gain benefits worth over \$1.5 billion annually as a result of the ICC reform adopted in the Order.<sup>1</sup> These benefits will come in the form of lower prices, increased service levels at existing prices, and/or more innovative services. This appendix also explains staff's estimate that new Access Recovery Charges (ARCs) that incumbent LECs electing to participate in the recovery mechanism may assess will impose a total, peak-year burden on consumers of less than \$500 million per year. This includes approximately \$1 monthly per line in business ARCs, reflecting 5 years of annual increases of approximately 20 cents monthly per line, most or all of which we expect will ultimately get passed through to customers of these businesses, and approximately \$0.65 monthly per line in residential and single-line ARCs, based on 5 years of annual increases of approximately 12.5 cents monthly per line.<sup>2</sup> Given these estimates, staff expects that the consumer benefit to cost ratio of ICC reform will be greater than 3:1. Although these estimates illustrate the likely consumer benefits of reform, given their inherent uncertainty, they were not relied on in reaching the decisions in the Order.<sup>3</sup>

2. This analysis takes a conservative approach; that is, the analysis makes assumptions likely to understate expected consumer benefits and to overstate the potential costs of the ARC. In particular, this analysis estimates only those consumer gains and losses that will arise as a *direct* result of reforms adopted in the Order: carriers' direct responses to reductions in ICC rates and to the ability to assess ARCs, which will affect how carriers price and deliver calling services. There will also be *indirect* consequences of reform, which staff expects will also be on the whole positive for consumers, such as reductions in billing disputes; more efficient decisions in production, including an accelerated transition to all-IP networks; and innovation more generally.<sup>4</sup> The reforms will also enable consumers to efficiently expand their use of telephone services, compared to what they would have done absent reform, as prices are brought closer to marginal cost.<sup>5</sup> While staff did not attempt to estimate any of these indirect benefits, past experience suggests they will be substantial.<sup>6</sup>

**Consumer Savings: Intercarrier Compensation Charge Reductions**

3. Staff estimates that the consumer benefits from the ICC rate reductions adopted in the Order<sup>7</sup> will scale to between \$1.5 and \$2.6 billion annually.<sup>8</sup> This analysis begins by estimating the

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<sup>1</sup> This Appendix focuses exclusively on the ICC reforms in the Order. It does not address the effects of the Order's universal service reforms.

<sup>2</sup> See *infra* note 296 and accompanying text, see also *supra* para. 852. The average expected business ARCs were calculated using the same method described in the Order for average expected consumer ARCs.

<sup>3</sup> The Order does, however, conclude that the benefits of ICC reform outweigh the costs overall. See *supra* Section XII.A.

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> See *supra* para. 751.

<sup>7</sup> The Order reduces rates for intrastate and interstate terminating end-office switching, reciprocal compensation (*i.e.*, non-access) rates, and certain terminating switched access transport rates (in the case where the tandem and (continued...))

termination charges that interexchange carriers, Commercial Mobile Radio Service (CMRS) providers, and other carriers currently pay to local exchange carriers (LECs) and that will be eliminated as carriers transition to bill and keep arrangements under the Order. For simplicity, staff did not consider ICC savings from reductions of dedicated transport from intrastate to interstate rates; from moving all intraMTA CMRS-to-LEC traffic to bill-and-keep, including rate elements not otherwise reduced in the Order; or from capping all interstate and most intrastate rates not reduced to bill and keep, each of which would increase staff's estimates of consumer savings. The analysis then estimates the fraction of ICC savings that will be passed on to consumers in the form of lower prices or better value for existing prices.

4. To estimate savings from ICC reductions, staff started with incumbent LECs' 2010 ICC revenues, filed in response to the *USF/ICC Transformation NPRM*.<sup>9</sup> These data showed \$2.9 billion of revenues for the ICC rate elements that will be transitioned to a bill-and-keep methodology under the Order.<sup>10</sup>

5. For competitive LECs, staff had to estimate revenues indirectly. Although the *NPRM* requested data from all providers, including competitive LECs, competitive LECs did not file this type of data. To fill this gap, staff estimated competitive LEC ICC revenues based on incumbent LEC revenues, applying a conservative assumption that competitive LECs receive approximately 25 percent less ICC revenue per line than incumbents. This downward adjustment reflects the fact that there has been some dispute regarding payment for termination of VoIP calls, and competitive LECs affiliated with cable companies may be party to a disproportionate share of disputes relating to payment for VoIP traffic compared to incumbent carriers.<sup>11</sup> Based on these calculations, staff estimates that competitive LECs collected a total of approximately \$1.1 billion in 2010 ICC revenues for the ICC rate elements that will be transitioned to bill-and-keep under the Order.<sup>12</sup>

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end-office switches are owned by the same carrier) to a bill-and-keep methodology. These reductions are all included in the staff's analysis. The *Order* also caps all interstate rates, all intrastate rates for price cap carriers, and reduces intrastate dedicated transport rates to interstate levels, but for simplicity the analysis ignores these additional changes in estimating consumer benefits.

<sup>8</sup> All estimates are expressed in 2010 dollars.

<sup>9</sup> See *supra* para. 852, note 1646.

<sup>10</sup> See *supra* note 7.

<sup>11</sup> Staff conservatively assumed that, due to these unresolved disputes, cable-company-affiliated competitive LECs receive only half the termination revenues that would accrue to an incumbent LEC. Cable companies account for 50 percent of competitive LEC voice services, and staff assumed that other competitive LECs receive per line ICC payments equivalent to those of incumbent LECs. Staff therefore estimates that competitive LECs as a whole receive 25 percent less on a per line basis in ICC revenues compared to incumbent LECs. See National Cable and Telecommunications Association, <http://www.ncta.com/Stats/CablePhoneSubscribers.aspx> (at the end of 2010, cable companies provided voice service to 23.9 million voice subscribers); Federal Communications Commission, Local Telephone Competition Status, Industry Analysis and Technology Division Wireline Competition Bureau March 2011, Table 1, page 12, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-305297A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305297A1.pdf) (2010 total of all competitive LEC voice services). Consistent with the prospective approach the *Order* adopts with respect to VoIP payment obligations, the 25 percent per line revenue discount does not reflect any judgment concerning carriers' obligation to pay for VoIP traffic prior to the *Order*'s effective date—it is merely the staff's conservative estimate of 2010 actual collected revenues.

<sup>12</sup> Nationwide, incumbent LECs have approximately two thirds of all fixed (as opposed to mobile) voice customers and competitive LECs have approximately one third. See National Exchange Carrier Association's Annual Submission of Access Minutes of Use Data to the FCC, submitted to the FCC on March 21, 2011, (continued...)

6. Adding incumbent LEC revenues of approximately \$2.9 billion to competitive LEC revenues of approximately \$1.1 billion, staff estimates that, accounting for rounding errors, a total of approximately \$4.1 billion in 2010 ICC revenues will be transitioned to a bill-and-keep methodology over the course of reform. Because these revenues are payments from other carriers, including CMRS and interexchange carriers, the paying carriers will realize savings as ICC rates are phased out.<sup>13</sup> And because these savings are in traffic-sensitive costs, the paying carriers will have a strong incentive to reduce prices or otherwise enhance their offerings so as to encourage greater network use and retain or attract customers.

7. Staff therefore next considered what share of these savings will be passed on to consumers in the form of lower prices, increased service levels at existing prices, and/or more innovative services. To build a simplified, conservative model of consumer pass-through, staff assumed all end users

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[http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/Monitor/netwu10.zip](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Monitor/netwu10.zip). If the equivalent competitive LEC termination revenues were scaled by these line counts, then they would be approximately half of the incumbent LEC's revenues, or approximately \$1.5 billion for 2010. Reducing this amount by 25 percent, allowing for rounding errors, results in approximately \$1.1 billion.

<sup>13</sup> Some ICC payments are internal company transfers, such as when an AT&T LEC or CMRS customer places a long-distance call to an AT&T LEC customer. As explained below, we estimate that these account for less than 20 percent of ICC payments. It might be thought that integrated firms will not view reductions in such payments as savings, and therefore these payments should be excluded when calculating consumer gains. This argument rests on the incorrect assumption that profit-maximizing carriers set retail prices to their customers based solely on their resource marginal cost of call termination for calls going to other on-network customers, rather than based on regulated ICC rates. But as recognized in the economics literature cited below, this assumption ignores an important point: an integrated carrier (i.e., one that also owns a LEC) will recognize that decreases in its retail price typically will divert business to it from competing carriers and, hence, decrease the profit it earns from access paid to it by those carriers. (The decrease is proportional to its access margin and the diversion ratio – the percent of the increase in its minutes that came at the expense of other carriers.) Thus, an integrated carrier will treat its marginal cost for outbound calls as its resource marginal cost of termination plus an opportunity cost reflecting the lost access revenue from other carriers. See, e.g., Gary Biglaiser & Patrick DeGraba, *Downstream Integration by a Bottleneck Input Supplier Whose Regulated Wholesale Prices Are above Costs*, 32 RAND J. Econ. 302 (2001), available at <http://www.jstor.org/stable/2696411>, Yongmin Chen, *On Vertical Mergers and Their Competitive Effects*, 32 RAND J. Econ. 667 (2001), available at <http://www.jstor.org/stable/2696387>, Patrick DeGraba, *A Bottleneck Input Supplier's Opportunity Cost of Competing Downstream*, 23 J. Reg. Econ. 287 (2003), DOI: 10.1023/A:1023364210896, David Sappington, *On the Irrelevance of Input Prices for Make-or-Buy Decisions*, 95 Am. Econ. Rev. (2005), <http://www.jstor.org/pss/4132768>. Correspondingly, a reduction in inter-company access payments will induce integrated carriers to cut their retail prices for two reasons: (a) not only because their retail competitors experience marginal cost reductions, and hence cut retail prices, but also (b) because their own opportunity cost of providing outbound calls falls due to the decreased access revenue earned from competitors. For both reasons, the decrease in industry retail prices – and the corresponding benefits to consumers – would be significantly understated if one projected these benefits based only on reductions in inter-company ICC payments (i.e., excluding all internal ICC payments).

Staff arrived at the estimate that less than 20 percent of ICC expenses are internal payments based on the line-shares of AT&T, Verizon and Verizon Wireless, and CenturyLink. This estimate of intracarrier ICC payments is exaggerated because Verizon does not fully own Verizon Wireless, and so payments between these carriers are not entirely internal. Internal transfers within other carriers should be small. Staff squared each integrated firm's share of total voice lines (ILEC, CLEC, and CMRS) to approximate the percentage of all ICC payments that represent calls from that carriers' customers to other customers of the same carrier (assuming all telephone users are equally likely to call all other telephone users). This calculation implies that approximately 18 percent of ICC expenses are internal transfers.

purchase long distance bundled with local service,<sup>14</sup> and then estimated end users' savings based on the type of carrier they purchase this bundled service from (incumbent LEC, competitive LEC, or wireless provider). Staff assumed that to the extent end users' local service provider purchased wholesale long distance service from an unaffiliated provider, the local carrier would realize 100 percent pass through of the ICC savings,<sup>15</sup> but would pass only a fraction of those savings on to its customers.

8. Specifically, staff began by dividing the total ICC savings from reform among incumbent LEC, competitive LEC, and wireless providers, assuming that each group of carriers realize savings in proportion to their share of total lines.<sup>16</sup> Staff then assumed that incumbent LECs will, on average, pass through at least 50 percent of ICC savings to end users, while CMRS providers and competitive LECs will pass through at least 75 percent of these savings.

9. These are conservative estimates. For example, economic theory suggests that a pure monopolist facing the benchmark case of linear demand would have a 50 percent pass through rate,<sup>17</sup> but many incumbent LECs face at least some direct competition from other fixed voice providers, and virtually all incumbent LECs face at least some competitive pressure in the voice market from CMRS providers, and/or from interconnected or over-the-top VoIP providers. Meanwhile, CMRS providers compete with one or more rivals for virtually all their customers, and, even where CMRS competition is limited, consumers may benefit from nationwide wireless pricing plans. Competitive LECs, likewise, face competition from at least one other wireline provider (the incumbent), as well as, to some degree, from wireless providers. Thus, 75 percent pass through by CMRS carriers and competitive LECs is a conservative estimate. Indeed, in the late 1990s, evidence indicates that reductions of access charges for MCI and AT&T resulted in pass through rates that were close to 100 percent,<sup>18</sup> and even in relatively concentrated industries, pass through rates are generally above 75 percent<sup>19</sup> and findings of higher pass through rates are common.<sup>20</sup>

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<sup>14</sup> This simplifying assumption is likely conservative to the extent that end users, including businesses, that purchase long distance as a stand-alone service are likely to receive greater pass-through of ICC savings than those that purchase the service as part of a bundle. See T.R. Beard, G.S. Ford, R.C. Hill & R. Saba, *The Flow Through of Cost Changes in Competitive Telecommunications: Theory and Evidence*, 30 *Empirical Econ.* 555 (2005) (finding evidence of near-100 percent pass through rates for MCI and AT&T from past ICC reductions).

<sup>15</sup> The interexchange market has been shown to be competitive, *see id.*, and staff had no evidence that suggests this has changed. Any inaccuracy in this 100 percent long-distance pass through assumption is likely offset by the conservative nature of staff's end-user pass through estimates.

<sup>16</sup> Line counts are from CTIA Semi-Annual Wireless Industry Survey, June 2011, at 5, [http://files.ctia.org/pdf/CTIA\\_Survey\\_MY\\_2011\\_Graphics.pdf](http://files.ctia.org/pdf/CTIA_Survey_MY_2011_Graphics.pdf), and Federal Communications Commission, Local Telephone Competition Status, Industry Analysis and Technology Division Wireline Competition Bureau, March 2011, Table 1.

<sup>17</sup> See, e.g., J. Bulow & Pfleiderer, *A Note on the Effect of Cost Changes on Prices*, 91 *J. of Political Economy* 182 (1983); J. Hausman & G. Leonard, *Efficiencies from the Consumer Viewpoint*, 7 *Geo. Mason L. Rev.* 707 (1999).

<sup>18</sup> See T.R. Beard, G.S. Ford, R.C. Hill & R. Saba, *supra* note 14.

<sup>19</sup> See Orley Ashenfelter, David Ashmore, Jonathan B. Baker & Signe-Mary McKernan, Identifying the Firm-Specific Cost Pass-Through Rate, Jan. 1998, <http://www.ftc.gov/be/workpapers/wp217.pdf> (finding 85 percent pass through for an industry-wide cost reduction in a concentrated industry).

<sup>20</sup> See, e.g., Silva-Risso Busse & Zettelmeyer, *\$1,000 cash back: The Pass-Through of Auto Manufacturer Promotions*, 96 *Amer. Econ. Rev.* 1253 (2006) (finding pass through rates for automobile consumer rebates of 70-90 percent, though these fell to 30-40 percent for dealer discounts), D. Besanko, J. P. Dubé, & S. Gupta, *Own-Brand and Cross-Brand Retail Pass-Through*, 24 *Marketing Science* 123 (2005) (finding pass through greater than 100 (continued...))

10. Based on these assumptions, staff concludes that by the end of ICC reform, end users will gain up to \$2.8 billion in annual benefit, compared to 2010, from the reduction of ICC payments subject to the Order's bill-and-keep transition. Because this estimate includes benefits to both businesses and consumers, staff then applied a further discount to account for benefits realized by purchasers of business lines and not passed on to their customers. This leads to an estimate of \$2.6 billion in consumer benefits.<sup>21</sup>

11. This number does not fully reflect the consumer benefits directly attributable to reform, however; it is, instead, an upper bound on those benefits. This is because some reduction in carriers' ICC payments, and therefore some savings to consumers, likely would have occurred even absent reform. In particular, evidence suggests that total termination payments have been on a downward trend in recent years, likely reflecting a combination of three sectoral trends in telephone markets: (1) telephone users dropping fixed voice lines in favor of mobile service (because CMRS carriers cannot collect access revenues, total ICC payments go down as users switch to mobile); (2) telephone users shifting from incumbent LECs to cable-affiliated competitive LECs (to the extent competitive LECs collect lower per-line revenues as a result of VoIP disputes, total ICC payments go down as users switch from wireline incumbents to their cable competitors); and (3) telephone users reducing their per-line minutes-of-use (as minutes of use go down overall, total ICC payments go down). Given these trends, comparing consumer ICC savings under the Order with the savings that would have occurred absent reform requires year-by-year projections of ICC payments over time.

12. To generate these projections, staff separately estimated what ICC revenues price cap incumbent LECs, rate-of-return incumbent LECs, and competitive LECs might each have received absent reform in the coming years. Following the ICC recovery baseline estimates used in the Order, staff assumed price cap carrier revenues would have declined approximately 10 percent annually, and rate-of-return carrier revenues would have declined approximately 5 percent annually, in each case resulting from declines in terminating minutes of use.<sup>22</sup> Incumbent LECs' revenue declines would likely have been  
(Continued from previous page) \_\_\_\_\_

percent for about 14 percent of 78 products analyzed), J.M. Campa & L.S. Goldberg *Exchange Rate Pass-Through into Import Prices*, 87 Review of Economics and Statistics 679 (2005) (finding pass through rates near 100 percent), Besley, T.J. and Rosen, H.S., "Sales Taxes and Prices: An Empirical Analysis," National Bureau of Economic Research Working Paper No. 6667, 1998, available at <http://www.nber.org/papers/w6667> (same), O. Ashenfelter, D. Ashmore, J. B. Baker & S. McKernan, *supra* note 19, J. Menon *Exchange Rate Pass-Through*, 9 Journal of Economic Surveys 197 (1998) (same), J.M. Poterba, *Retail Price Reactions to Changes in State and Local Sales Taxes*, 49 National Tax Journal 165 (1996) (same), D. Genesove & W.P. Mullin *Testing Static Oligopoly Models: Conduct and Cost in the Sugar Industry*, 29 RAND Journal of Economics 355 (1998) (same). Given these data, the estimated CMRS pass through rate of 75 percent can be taken, in the absence of any other information, as a plausible estimate between the monopolist rate of 50 percent, *see supra* note 17, and 100 percent.

<sup>21</sup> Approximately 69 percent of end user lines are residential or single-line businesses. *See* 2010 USF Monitoring Report, Table 7-9, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-303886A9.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303886A9.pdf). To the extent single-line businesses—which are small businesses—operate in competitive environments, their gains will be passed on to their customers; but even if they are not fully passed on, these gains directly benefit the consumer who operates the small (single-line) business. Likewise, multi-line businesses that operate in a competitive environment will pass on their gains through to customers. If these businesses pass through, on average, 75 percent of cost savings onto their customers, *see supra* note 20 (describing pass through results in the economic literature), then of the total end user gains calculated above, it is likely that less than 8 percent of the passed-through benefits estimate is kept by business owners.  $(100\%-75\%) \times 31\% < 8\%$ . Therefore, staff applied an 8 percent discount to end-user benefits to estimate consumer benefits.

<sup>22</sup> *See supra* Section XIII. The Order notes that the status-quo revenue decline for rate-of-return carriers could be as high as 7 percent per year. Staff tested the robustness of the consumer benefits estimate to this assumption, and found that applying a 7 percent decline assumption in place of 5 percent made no significant difference.

offset in part by new revenue to competitive LECs to the extent end users dropping incumbent LEC lines were switching to cable providers or other competitive LECs. Staff lacked reliable data on competitive LEC revenues, however, so staff took a simplified, conservative approach to estimating competitive LEC revenue trends absent reform. Specifically, staff assumed competitive LEC line counts would be generally constant over time, with new customers won from incumbent LECs roughly offsetting any losses, *e.g.*, to CMRS providers, but assuming competitive LECs' total share of fixed lines does not exceed 45 percent.<sup>23</sup> Staff then projected competitive LEC revenue, as described above, assuming competitive LECs receive 25 percent less ICC revenue per line, on average, than incumbent LECs. The result is that staff projects competitive LEC revenue would have decreased moderately over time in the absence of reform, albeit more slowly than for incumbent LECs.

13. These price-cap, rate-of-return, and competitive LEC projections give us year-by-year estimates for the total ICC revenue carriers would have received, absent this Order, for the elements that the Commission is now reforming. For each year of reform under the Order, a growing fraction of per-minute revenues will be eliminated as ICC rates phase down. For purposes of the analysis of consumer benefits, staff focused on 2016 and beyond, at which point the substantial majority of the ICC revenues subject to reform will have been phased down. Specifically, staff estimated that LEC ICC revenues will be less than 10 percent of the no-reform trend line by this point; that is, staff assumed ICC payors will save, in the aggregate, over 90 percent of the no-reform trend line for each year beyond 2016, with the percentage savings growing each year.<sup>24</sup>

14. Finally, staff estimated the pass through of these savings to consumers using the same basic methodology as above—that is, for each year, staff allocated the savings between ILEC, CLEC, and wireless ICC payors based on national line share, then applied a 75 percent pass through rate for wireless and competitive LEC payors and a 50 percent pass through rate for incumbent LEC payors, and then applied an additional small discount to account for business savings not passed on to consumers. Staff estimated the ratio of wireless to wireline lines in each year of reform based on 7.5 percent annual line loss for wireline carriers and no annual growth for wireless carriers or CLECs. Because wireless and competitive LEC lines are in fact growing, this approach likely understates the wireless and competitive LEC share of ICC savings over time, and therefore again provides a conservative estimate of consumer

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<sup>23</sup> This is a conservative assumption. Commission data show that non-LEC lines grew 15 percent from December 2008, when the Commission began line count reporting for interconnected VoIP services, to December 2010. See Federal Communications Commission, Local Telephone Competition: Status, as of December 31, 2010, Industry Analysis and Technology Division Wireline Competition Bureau, Oct. 2011, at Table 1, 12 n.1, [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2011/db1007/DOC-310264A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1007/DOC-310264A1.pdf). In contrast, not only does the staff analysis assume that competitive CLEC lines do not grow over the next several years, the assumption that their market share does not exceed 45 percent further implies that once the competitive LEC share of all LEC lines has reached this threshold, competitive LECs begin to experience line losses. In addition, the staff analysis conservatively assumes that even after incumbent LEC net losses of subscribers to competitive LECs stops, minutes of use declines, and hence revenue losses, continue.

<sup>24</sup> Staff estimated the percentage savings based on the pre-reform blended rates for price-cap and rate-of-return carriers for the rate elements subject to reform. For price cap carriers, the blended rate is \$.011, and for rate-of-return carriers it is \$.044. Under the *Order*, these rates will be reduced to nearly \$.0007 (a 94 percent reduction) and \$.005 (an 89 percent reduction), respectively, by 2016. Weighting these reductions by price-cap and rate-of-return carriers' share of ICC revenues implies a 92 percent reduction in ICC revenues by July 1, 2016. Staff therefore assumed a 90 percent reduction overall in 2016 (including both the January-June period and June-December period), a 94 percent reduction in 2017, and a 98 percent reduction in 2018. Reductions in per minute rates will likely be offset to some extent by increased demand, insofar as lower prices which will result from our reforms will increase consumer usage relative to the no-reform baseline. As described above, however, staff ignored such effects in this analysis in order to be conservative in the estimate of consumer benefits. (Increased usage will translate into increased consumer benefits overall, notwithstanding the additional ICC payments associated with such usage.)

savings.

15. Even taking this conservative approach, staff estimates consumer benefits averaging approximately \$1.5 billion a year between 2016 and 2018. This does not include any estimate of savings to carriers as a result of reduced ICC disputes, or the value of increased certainty in ICC receipts and obligations. These omissions are especially significant given that the \$1.5 billion benefits estimate reflects a comparison of ICC revenues under reform to a trended no-reform baseline: ICC payment declines under the no-reform baseline would likely be accompanied by significant and growing billing disputes, which impose real costs on carriers, and ultimately consumers. Reform reduces total ICC payments without imposing these costs. Given this, and given the other ways in which the \$1.5 billion estimate is conservative, staff concluded that actual benefits to consumers are likely to fall somewhere between this amount and the \$2.6 billion upper bound described above, derived based on untrended 2010 revenues. For example, were one to simply take the midpoint between these values, it would be approximately \$2.1 billion per year.

### **Consumer Payments: Access Recovery Charges**

16. Weighed against these consumer benefits, staff estimated that, at their peak, the annual cost to consumers of ARC increases will likely be less than \$500 million per year, including ARCs paid by businesses, which we expect will be passed through, in whole or in part, to customers, and ARCs paid by consumers directly. The total ARCs that carriers will be permitted to charge under the Order will reach a peak of approximately \$800 million across all end users in 2017 (i.e., including consumers, single-line businesses, and multi-line businesses), and then decline gradually over time with decreases in carriers' Eligible Recovery.<sup>25</sup> The ARC increases that consumers and businesses actually see, however, are likely to be 25 to 50 percent less than allowed ARC increases, on average.<sup>26</sup> Applying this 25 to 50 percent discount to peak allowable ARC implies that, at their peak year, all end users will likely pay a total of approximately \$500 million, and will pay less in preceding and subsequent years. Staff assumed that businesses will pass 100 percent of ARC increases onto their customers,<sup>27</sup> and therefore we estimate total consumer costs will reach approximately \$500 million in the peak year.

17. Comparing this amount to the estimated consumer benefits of ICC reform implies that consumer benefits are likely to outweigh ARC payments by more than 3 to 1, based on a conservative estimate of benefits.

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<sup>25</sup> See *supra* para. 852.

<sup>26</sup> See, e.g., Reply Comments of AT&T Inc. on the Missoula Plan for Intercarrier Compensation Reform, CC Docket No. 01-92, filed Feb. 1, 2007, Exhibit 1 at n. 11 (noting that carriers likely cannot charge full permitted recovery charges on all customers); see also <http://www.phoenix-center.org/perspectives/Perspective11-06Final.pdf> (estimating carriers realize as little as 40 percent recovery of lost ICC revenues from permitted fixed charge increases).

<sup>27</sup> This differs from staff's assumption about multiline businesses' pass through of savings, see *supra* note 21, where staff assumed only 75 percent pass through. Using a higher estimate for cost pass through than for savings pass through makes the estimate of the ratio of consumer payments to consumer benefits conservative.

## APPENDIX J

**List of *USF/ICC Transformation NPRM* Commenters and Reply Commenters****Commenter****Abbreviation**

Accipiter Communications	Accipiter
Ad Hoc Telecommunications Users Committee	Ad Hoc
ADTRAN	ADTRAN
Advanced Regional Communications Cooperative	Advanced Regional
Alaska Regulatory Commission	Alaska Commission
Alaska Communications Systems Group	ACS
Alaska Telephone Association	ATA
Albion Telephone Company	Albion Telephone
Alexicon Telecommunications Consulting	Alexicon
Allband Communications Cooperative	Allband Communications
American Cable Association	ACA
American Library Association	ALA
American Public Communications Council	APCC
AT&T	AT&T
Aventure Communications Technology	Aventure
Blooston Rural Carriers	Blooston
Box Top Solutions	Box Top
Cablevision Systems Corporation	Cablevision
Calaveras Telephone Company	Calaveras Telephone
California Emerging Technology Fund	CETF
California Public Utilities Commission	California Commission
Cambridge Telephone Company	Cambridge Telephone
Cascade Utilities	Cascade
Cbeyond, Integra Telecom and tw telecom	Cbeyond et al.
Cellular South	Cellular South
Center for Social Inclusion	Center for Social Inclusion
Central Texas Telephone Cooperative	Central Texas Telephone
CenturyLink	CenturyLink
Charter Communications	Charter
Coalition for Rational Universal Service and Intercarrier Reform	Coalition for Reform
CoBank	CoBank
Comcast Corporation	Comcast
Communications Workers of America	CWA
COMPTEL	COMPTEL
Connected Nation	Connected Nation
Connectiv Solutions	Connectiv
Core Communications	Core
Cox Communications	Cox
Coalition for Rational Universal Service and Intercarrier Reform	CRUSIR
CTIA – The Wireless Association	CTIA
Custer Telephone Cooperative	Custer Telephone
Delhi Telephone Company	Delhi Telephone
District of Columbia Public Service Commission	DC Commission
Docomo Pacific, PR Wireless, Choice Communications, and	DoCoMo et al.



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AST Telecom, d/b/a BlueSky Communications	
Ducor Telephone Company	Ducor Telephone
EarthLink	EarthLink
Empirix	Empirix
FairPoint Communications	FairPoint
Farmers Mutual Telephone Company	Farmers Mutual
FeatureGroup IP	FeatureGroup IP
Fidelity Telephone Company	Fidelity Telephone
Filer Mutual Telephone – Idaho	Filer Mutual-ID
Filer Mutual Telephone – Nevada	Filer Mutual-NV
Florida Public Service Commission	Florida Commission
Free Press	Free Press
Free State Foundation	Free State
Frontier Communications Corporation	Frontier
General Communication	GCI
Global Crossing North America	Global Crossing
Google	Google
Greenlining Institute	Greenlining
Guadalupe Valley Telephone Cooperative	Guadalupe Valley Telephone
GVNW Consulting	GVNW
Hawaiian Telcom	Hawaiian Telcom
Hill Country Telephone Cooperative	Hill Country Telephone
Hospital Sisters Health System	HSBS
ICORE	ICORE
Independent Telephone & Telecommunications Alliance	ITTA
Indiana Utility Regulatory Commission	Indiana Commission
Information Technology Industry Council	ITI
InterBel Telephone Cooperative	InterBel Telephone
Internet2	Internet2
Internert2 Ad Hoc Health Group	Internet2 Health
Iowa Telecommunications Association	ITA
Iowa Utilities Board	IUB
John Staurulakis	JSI
Kalona Cooperative Telephone Company	Kalona Telephone
Kansas Corporation Commission	Kansas Commission
Kansas Rural Independent Telephone Companies, State Independent Telephone Associations and Rural Telecommunication Management Council	Kansas Rural Companies et al.
Level 3 Communications	Level 3
Louisiana Telecommunications Association Small Company Committee	Louisiana Small Company Committee
Madison Telephone	Madison Telephone
Massachusetts Department of Telecommunications and Cable	Massachusetts DTC
Mercatus Center	Mercatus
MetroPCS Communications	MetroPCS
Michigan Public Service Commission	Michigan Commission
Midvale Telephone Exchange – AZ	Midvale Telephone-AZ
Midvale Telephone Exchange – ID	Midvale Telephone-ID
Mississippi Public Service Commission	Mississippi Commission
Missouri Public Service Commission	Missouri Commission
Missouri Small Telephone Company Group	MoSTCG

Mobile Future	Mobile Future
Moss Adams	Moss Adams
Motalla Telephone Company	Motalla Telephone
MTPCS, d/b/a Cellular One	Cellular One
MTPCS, d/b/a Cellular One, and NE Colorado Cellular, d/b/a Viaero Wireless	Cellular One and Viaero
National Association of Regulatory Utility Commissioners	NARUC
National Association of State Utility Consumer Advocates	NASUCA
National Association of Telecommunications Officers and Advisors	NATOA
National Cable & Telecommunications Association	NCTA
Native Telecom Coalition for Broadband	NTCB
Nebraska Public Service Commission	Nebraska Commission
Nebraska Rural Independent Companies	Nebraska Rural Companies
NECA, NTCA, OPASTCO, WTA and Concurring Associations	Rural Associations
Nehalem Telecommunications	Nehalem Telecom
Neutral Tandem	Neutral Tandem
New America Foundation, Consumers Union and Media Access Project	New America Foundation et al.
The New Jersey Board of Public Utilities	New Jersey Board
New Jersey Division of Rate Counsel	New Jersey Rate Counsel
New York State Public Service Commission	New York Commission
North County Communications Corporation	North County
North Dakota Public Service Commission	North Dakota Commission
Northern Telephone Cooperative	Northern Telephone
NTCH	NTCH
Odessa Office Equipment	Odessa
Ohio Public Utilities Commission	Ohio Commission
Oregon Telecommunications Association	OTA
Pac-West Telecomm	Pac-West
PAETEC, TelePacific RCN and TDS Metrocom	PAETEC et al.
Partner Communications Cooperative	Partner Communications
PCIA—The Wireless Infrastructure Association	PCIA
Pend Oreille Telephone Company	Pend Oreille Telephone
Pine Telephone System	Pine Telephone
Prepaid Card Providers	Prepaid Card Providers
Public Knowledge and the Benton Foundation	Public Knowledge and Benton
Puerto Rico Telephone Company	PRTC
Recently Converted Price Cap Carriers	Price Cap Carriers
Robert Hart	Robert Hart
Rural Broadband Alliance	RBA
Rural Carriers Supporting State Universal Service Funds	Rural Carriers-State USF
Rural Cellular Association	RCA
Rural Independent Competitive Alliance	RICA
Rural Telecommunications Carriers Coalition	RTCC
Rural Telecommunications Group	RTG
Rural Telephone Company – Idaho	Rural Telephone-ID
Rural Telephone Company – Nevada	Rural Telephone-NV
Rural Telephone Service Company	Rural Telephone Service
San Juan Cable, d/b/a OneLink Communications	OneLink
Satellite Broadband Providers	Satellite Providers
Schools, Health and Libraries Broadband Coalition	SHLB Coalition
Scio Mutual Telephone Association	Scio Telephone

SE Acquisitions, d/b/a SouthEast Telephone	SouthEast Telephone
Smith Bagley	Smith Bagley
Sprint Nextel Corporation	Sprint
St. Louis Broadband	St. Louis Broadband
State Members of the Federal State Joint Board on Universal Service	State Members
SureWest Communications	SureWest
TCA	TCA
TDS Telecommunications Corporation	TDS
TechAmerica	TechAmerica
Telecommunications Association of Maine	TAM
Telecommunications Industry Association	TIA
T-Mobile USA	T-Mobile
Texas Statewide Telephone Cooperative	Texas Telephone
Time Warner Cable	Time Warner Cable
United States Cellular Corporation	U.S. Cellular
United States Telecom Association	USTelecom
Universal Service for America Coalition	USA Coalition
Utah Public Service Commission	Utah Commission
Utah Rural Telecom Association	URTA
Verizon and Verizon Wireless	Verizon
ViaSat	ViaSat
Virgin Islands Public Services Commission	Virgin Islands Commission
Virgin Islands Telephone Corporation	Vitelco
Vonage Holdings Corp.	Vonage
Warinner, Gesinger and Associates	WGA
Washington Independent Telecommunications Association	WITA
Washington Utilities and Transportation Commission	Washington Commission
Wheat State Telephone	Wheat State Telephone
Windstream Communications	Windstream
Wireless Internet Service Providers Association	WISPA
XO Communications	XO
ZipDX	ZipDX

**Reply Commenter**

ADTRAN  
 Alaska Federation of Natives  
 Alaska Regulatory Commission  
 Alliance for Community Media  
 American Cable Association  
 American Public Power Association and Iowa Association of  
 Municipal Utilities  
 Arizona Corporation Commission  
 AT&T  
 Bandwidth.com  
 Blooston Rural Carriers  
 Brazos Valley Council of Governments, Health Information Exchange  
 of Montana, New England Telehealth Consortium, Oregon  
 Health Network and Utah Telehealth Network

**Abbreviation**

ADTRAN  
 Alaska Federation  
 Alaska Commission  
 Alliance for Community Media  
 ACA  
 APPA and IAMU  
 Arizona Commission  
 AT&T  
 Bandwidth.com  
 Blooston  
 Brazos Valley Council et al.

Cablevision Systems Corporation	Cablevision
Cbeyond, Integra Telecom and tw telecom	Cbeyond et al.
Cellular South	Cellular South
CenturyLink	CenturyLink
Charter Communications	Charter
Cincinnati Bell	Cincinnati Bell
Comporium Companies	Comporium
Cox Communications	Cox
CTIA – The Wireless Association	CTIA
EarthLink	EarthLink
FairPoint Communications	FairPoint
Fiber-to-the-Home Council	Fiber-to-the-Home
Free State Foundation	Free State
Frontier Communications Corporation	Frontier
General Communication	GCI
Golden West Telecommunications Cooperative, Midstate Communications and Venture Communications Cooperative	Golden West et al.
Granite Telecommunications	Granite
GVNW Consulting	GVNW
Hargray Telephone Company	Hargray Telephone
Hawaii, State of	Hawaii
Hawaiian Telcom	Hawaiian Telcom
HyperCube Telecom	HyperCube
IMPACT 20/20	IMPACT 20/20
Independent Telephone & Telecommunications Alliance	ITTA
Iowa Utilities Board	IUB
IT&E	IT&E
JDS Uniphase Corporation	JDSU
John Staurulakis	JSI
Kansas Rural Independent Telephone Companies, State Independent Telephone Associations and Rural Telecommunication Management Council	Kansas Rural Companies, et al.
LARIAT	LARIAT
Louisiana Telecommunications Association Small Company Committee	Louisiana Small Company Committee
Maine Office of the Public Advocate	Maine Public Advocate
Michigan Public Service Commission	Michigan Commission
Mid-Atlantic Conference of Regulatory Utility Commissions	MACRUC
Mid-Rivers Communications	Mid-Rivers
Minnesota Independent Coalition	MIC
Missouri Small Telephone Company Group	MoSTCG
Montana Independent Telecommunications Systems	MITS
Montana Public Service Commission	Montana Commission
MTPCS, d/b/a Cellular One	Cellular One
National Association of State Utility Consumer Advocates	NASUCA
National Cable & Telecommunications Association	NCTA
Native Telecom Coalition for Broadband	NTCB
Nebraska Rural Independent Companies	Nebraska Rural Companies
NECA, NTCA, OPASTCO, WTA and Concurring Associations	Rural Associations
Neutral Tandem	Neutral Tandem
New America Foundation, Consumers Union and Media Access Project	New America Foundation et al.

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New Jersey Division of Rate Counsel	New Jersey Rate Counsel
New Mexico Public Regulation Commission	New Mexico Commission
NobelTel	NobelTel
Pac-West Telecomm	Pac-West
PAETEC, TelePacific, RCN and TDS Metrocom	PAETEC et al.
PCIA—The Wireless Infrastructure Association	PCIA
Pennsylvania Public Utility Commission	Pennsylvania Commission
Pennsylvania Telephone Association	PTA
Public Service Telephone Company	Public Service Telephone
Puerto Rico Telephone Company	PRTC
Robert Hart	Robert Hart
Rural Broadband Alliance	RBA
Rural Cellular Association	RCA
Rural Telecommunications Carriers Coalition	RTCC
Rural Telecommunications Group	RTG
Rural Telephone Service Company	Rural Telephone Service
San Juan Cable, d/b/a OneLink Communications	OneLink
Satellite Broadband Providers	Satellite Providers
South Dakota Public Utilities Commission	South Dakota Commission
South Dakota Telecommunications Association	SDTA
SouthernLINC Wireless	SouthernLINC
SureWest Communications	SureWest
TCA	TCA
T-Mobile USA	T-Mobile
Total Call International	Total Call
United States Cellular Corporation	U.S. Cellular
Universal Service for America Coalition	USA Coalition
Utah Rural Telecom Association	URTA
Verizon and Verizon Wireless	Verizon
Vermont Department of Public Service and Vermont Public Service Board	Vermont Board
Vonage Holdings Corp.	Vonage
Windstream Communications	Windstream
Wisconsin Public Service Commission	Wisconsin Commission
Wyoming Public Service Commission	Wyoming Commission
XO Communications	XO

## APPENDIX K

**List of *USF/ICC Transformation NPRM* Section XV Commenters and Reply Commenters**

<b><u>Commenter</u></b>	<b><u>Abbreviation</u></b>
01 Communications and Vaya Telecom	01 and Vaya
Advanced Regional Communications Cooperative	Advanced Regional
Alaska Telephone Association	ATA
Alliance for Telecommunications Industry Solutions	ATIS
American Legislative Exchange Council	ALEC
Association of Teleservices International	Teleservices
AT&T	AT&T
Aventure Communications Technology	Aventure
Beehive Telephone Co.	Beehive
Blooston Rural Carriers	Blooston
Bluegrass Telephone Company, d/b/a Kentucky Telephone, and Northern Valley Communications	Bluegrass
Bright House Networks Information Services	Bright House
Cablevision Systems and Charter Communications	Cablevision and Charter
California Public Utilities Commission	California Commission
Cbeyond, Integra Telecom and tw telecom	Cbeyond et al.
CenturyLink	CenturyLink
Coalition for Rational Universal Service and Intercarrier Reform	CRUSIR
Comcast Corporation	Comcast
COMPTEL	COMPTEL
Connectiv Solutions	Connectiv
Consolidated Communications Holdings	Consolidated
Core Communications	Core
Cox Communications	Cox
CTIA – The Wireless Association	CTIA
Communications Workers of America	CWA
EarthLink	EarthLink
Empirix	Empirix
FairPoint Communications	FairPoint
FeatureGroup IP	FeatureGroup IP
Free Conferencing Corporation	Free Conferencing Corporation
Free State Foundation	Free State
Frontier Communications Corporation	Frontier
Global Conference Partners	Global
Google	Google
GVNW Consulting	GVNW
Hawaiian Telcom	Hawaiian Telcom
HyperCube Telecom	HyperCube
ICORE	ICORE
Independent Telephone & Telecommunications Alliance	ITTA
Indiana Utility Regulatory Commission	Indiana Commission
Iowa Utilities Board	IUB
Kansas Corporation Commission	Kansas Commission

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Louisiana Telecommunications Association Small Company Committee	Louisiana Small Company Committee
Leap Wireless International and Cricket Communications	Leap Wireless and Cricket
Level 3 Communications	Level 3
MegaPath and Covad Communications Company	MegaPath
MetroPCS Communications	MetroPCS
Michigan Public Service Commission	Michigan Commission
Mississippi Public Service Commission	Mississippi Commission
Missouri Public Service Commission	Missouri Commission
Missouri Small Telephone Company Group	MoSTCG
National Association of Regulatory Utility Commissioners	NARUC
National Association of State Utility Consumer Advocates and New Jersey Division of Rate Counsel	NASUCA and NJ Rate Counsel
Nebraska Rural Independent Companies	Nebraska Rural Companies
NECA, NTCA, OPASTCO, ERTA and WTA	Rural Associations
Neutral Tandem	Neutral Tandem
North County Communications Corporation	North County
Ohio Public Utilities Commission	Ohio Commission
OmniTel Communications and Tekstar Communications	OmniTel and Tekstar
Pennsylvania Public Utility Commission	Pennsylvania Commission
Pac-West Telecomm	Pac-West
PAETEC, TelePacific and RCN	PAETEC et al.
RNK Communications	RNK
Rural LEC Section XV Group	Rural LECs
Sprint Nextel Corporation	Sprint
St. Louis Broadband	St. Louis Broadband
SureWest Communications	SureWest
TCA	TCA
TDS Telecommunications Corporation	TDS
TEXALTEL	TEXALTEL
T-Mobile USA	T-Mobile
Texas Statewide Telephone Cooperative	Texas Telephone
Time Warner Cable	Time Warner Cable
Toledo Telephone Company	Toledo Telephone
United States Telecom Association	USTelecom
Verizon and Verizon Wireless	Verizon
Voice on the Net Coalition	VON Coalition
Vonage Holdings Corp.	Vonage
Warinner, Gesinger and Associates	WGA
Washington Utilities and Transportation Commission	Washington Commission
Windstream Communications	Windstream
XO Communications	XO
YMax Corporation	YMax
ZipDX	ZipDX

**Reply Commenter****Abbreviation**

AT&T	AT&T
Beehive Telephone Co.	Beehive
Bluegrass Telephone Company, d/b/a Kentucky Telephone, and Northern Valley Communications	Bluegrass
Bright House Networks Information Services	Bright House
Cablevision Systems and Charter Communications	Cablevision and Charter
Cbeyond, Integra Telecom and tw telecom	Cbeyond et al.
CenturyLink	CenturyLink
Coalition for Rational Universal Service and Intercarrier Reform	Coalition for Reform
Comcast Corporation	Comcast
COMPTEL	COMPTEL
Consolidated Communications Holdings	Consolidated
Core Communications	Core
Cox Communications	Cox
Coalition for Rational Universal Service and Intercarrier Reform	CRUSIR
EarthLink	EarthLink
FeatureGroup IP	FeatureGroup IP
Free Conferencing Corporation	Free Conferencing Corporation
Frontier Communications Corporation	Frontier
Global Conference Partners	Global
Halo Wireless	Halo
HyperCube Telecom	HyperCube
Independent Telephone & Telecommunications Alliance	ITTA
Iowa Telecommunications Association	Iowa Telecom Association
Level 3 Communications	Level 3
Michigan Public Service Commission	Michigan Commission
Montana Independent Telecommunications Systems	Montana Telecom Systems
National Association of State Utility Consumer Advocates and New Jersey Division of Rate Counsel	NASUCA and NJ Rate Counsel
Nebraska Public Service Commission	Nebraska Commission
Nebraska Rural Independent Companies	Nebraska Rural Companies
NECA, NTCA, OPASTCO, ERTA and WTA	Rural Associations
North County Communications Corporation	North County
OmniTel Communications and Tekstar Communications	OmniTel and Tekstar
Pac-West Telecomm	Pac-West
PAETEC, TelePacific and RCN	PAETEC et al.
Sprint Nextel Corporation	Sprint
Time Warner Cable	Time Warner Cable
UTEX Communications Corp., d/b/a FeatureGroup IP	UTEX
Vonage Holdings Corp.	Vonage
Verizon and Verizon Wireless	Verizon
XO Communications	XO



## APPENDIX L

## WT Docket No. 10-208

**Lists of *Mobility Fund NPRM* and *Mobility Fund Tribal Public Notice* Commenters  
and Reply Commenters**

**Mobility Fund NPRM****Commenter****Abbreviation**

Alaska Communications Systems	ACS
Alaska Telephone Association	ATA
AT&T	AT&T
Blooston Rural Carriers	Blooston
California Public Utilities Commission	California Commission
Cellular South; NE Colorado Cellular, d/b/a Viaero Wireless; Rural Cellular Association; and Westlink Communications	Cellular South et al.
CenturyLink	CenturyLink
Commnet Wireless	Commnet
CTIA – The Wireless Association	CTIA
Free Press	Free Press
General Communication	GCI
Gila River Telecommunications	Gila River
Greenlining Institute	Greenlining
GVNW Consulting	GVNW
Independent Telephone & Telecommunications Alliance	ITTA
Indiana Utility Regulatory Commission	Indiana Commission
Joint Center for Political and Economic Studies	JCPES
MetroPCS Communications	MetroPCS
Mid-Rivers Telephone Cooperative and Cable & Communications Corporation, d/b/a Mid-Rivers Communications	Mid-Rivers
Mobile Future	Mobile Future
MTPCS, d/b/a Cellular One	Cellular One
National Association of State Utility Consumer Advocates	NASUCA
National Cable & Telecommunications Association	NCTA
National Tribal Telecommunications Association	NTTA
Native Public Media and the National Congress of American Indians	Native Public Media
NECA, NTCA, OPASTCO, ERTA and WTA	NECA et al.
New EA, d/b/a Flow Mobile	New EA
NTCH	NTCH
Ohio Public Utilities Commission	Ohio Commission
PCIA – The Wireless Infrastructure Association	PCIA
PR Wireless	PR Wireless
Rural Cellular Association	RCA
Rural Telecommunications Group	RTG
Sprint Nextel Corporation	Sprint

TechAmerica  
 Telecommunications Industry Association  
 Texas Statewide Telephone Cooperative  
 T-Mobile USA  
 U.S. Cellular  
 United States Telecom Association  
 USA Coalition  
 Verizon and Verizon Wireless  
 Windstream Communications  
 Worldcall Interconnect

TechAmerica  
 TIA  
 Texas Statewide Coop  
 T-Mobile  
 US Cellular  
 USTelecom  
 USA Coalition  
 Verizon  
 Windstream  
 Worldcall

**Reply Commenter**

Alaska Governor's Office  
 Alaska Regulatory Commission  
 American Cable Association  
 Benton Foundation, New America Foundation and Office of  
     Communication for the United Church of Christ  
 Communications Workers of America  
 CTIA – The Wireless Association  
 Florida Public Service Commission  
 General Communication  
 Greenlining Institute  
 Hispanic Information and Telecommunications Network  
 Native Public Media and the National Congress of American Indians  
 Navajo Nation Telecommunications Regulatory Commission  
 NE Colorado Cellular, d/b/a Viaero Wireless  
 PCIA – The Wireless Infrastructure Association  
 PR Wireless  
 Rural Cellular Association  
 Rural Independent Competitive Alliance  
 SouthernLINC Wireless  
 Telecommunications Industry Association  
 Texas Statewide Telephone Cooperative  
 U.S. Cellular  
 USA Coalition  
 Verizon and Verizon Wireless  
 Windstream Communications

**Abbreviation**

Alaska Governor  
 Alaska Commission  
 ACA  
 Benton et al.  
  
 CWA  
 CTIA  
 Florida Commission  
 GCI  
 Greenlining  
 HITN  
 Native Public Media  
 Navajo Commission  
 Viaero Wireless  
 PCIA  
 PR Wireless  
 RCA  
 RICA  
 SouthernLINC  
 TIA  
 Texas Statewide Coop  
 US Cellular  
 USA Coalition  
 Verizon  
 Windstream

**Mobility Fund Tribal Public Notice****Commenter**

Alaska Telephone Association, Alaska Communications  
     and General Communications  
 Kawerak  
 National Tribal Telecommunications Association  
 Native Public Media and the National Congress of American Indians

**Abbreviation**

ATA et al.  
  
 Kawerak  
 NTTA  
 Native Public Media

NTCH  
Smith Bagley  
Southern California Tribal Digital Village  
The Standing Rock Sioux Tribe and Standing Rock  
Telecommunications  
Twin Houses Consulting  
Winnebago Tribe of Nebraska

NTCH  
Smith Bagley  
SoCal TDV  
Standing Rock  
  
Twin Houses  
Winnebago Tribe

## APPENDIX M

List of *August 3, 2011 Public Notice* Commenters and Reply Commenters**Commenter****Abbreviation**

AARP	AARP
ADTRAN	ADTRAN
Ad Hoc Telecommunications Users Committee	Ad Hoc
Alaska Communications Systems Group	ACS
Alaska Rural Coalition	ARC
Alexicon Telecommunications Consulting	Alexicon
American Cable Association	ACA
Asian American Justice Center	AAJC
AT&T, CenturyLink, Fairpoint, Frontier, Verizon and Windstream	ABC Plan Proponents
Arizona Local Exchange Carrier Association	ALECA
Bright House Networks Information Services	Bright House
California Independent Telephone Companies, Colorado	CITC et al.
Telecommunications Association, Idaho Telecom Alliance,	
Montana Telecommunications Association, Oregon	
Telecommunications Association, Washington Independent	
Telecommunications Association and Wyoming	
Telecommunications Association	
California Public Utilities Commission	California Commission
Cbeyond, Integra Telecom and tw telecom	Cbeyond et al.
Cellular South	Cellular South
Charter Communications	Charter
Cincinnati Bell	Cincinnati Bell
Coalition for Rational Universal Service and Inter-carrier Reform	CRUSIR
Comcast Corporation	Comcast
Communications Workers of America	CWA
COMPTEL	COMPTEL
Connecticut Public Utilities Regulatory Authority	Connecticut PURA
Consolidated Communications Holdings	Consolidated
Cox Communications	Cox
CTIA – The Wireless Association	CTIA
Delaware Public Service Commission	Delaware Commission
District of Columbia Public Service Commission	DC Commission
EarthLink	EarthLink
Free Conferencing Corporation	Free Conferencing Corporation
Free Press	Free Press
Free State Foundation	Free State
General Communication	GCI
Gila River Telecommunications	Gila River
Google	Google
Granite Telecommunications	Granite
Greenlining Institute	Greenlining
GTA Telecom	GTA
GVNW Consulting	GVNW

Hargray Telephone Company	Hargray Telephone
Hawaii, State of	Hawaii
Hawaiian Telecom	Hawaiian Telecom
Hispanic Technology and Telecommunications Partnership	HTTP
HyperCube Telecom	HyperCube
iBasis Retail	iBasis
ICORE	ICORE
Illinois Independent Telephone Association	Illinois Independents
InCharge Systems	InCharge
Independent Telephone & Telecommunications Alliance, Cincinnati Bell, Hargray Telephone Company and HickoryTech Corporation	ITTA et al.
Indiana Telecommunications Association	ITA
Indiana Utility Regulatory Commission	Indiana Commission
Iowa Utilities Board	IUB
IT&E	IT&E
Kansas Rural Independent Telephone Companies, State Independent Telephone Associations and Rural Telecommunication Management Council	Kansas Rural Companies, et al.
Level 3 Communications	Level 3
Louisiana Public Service Commission	Louisiana Commission
Louisiana Public Service Commissioner Holloway	Louisiana Comm'r Holloway
Louisiana Public Service Commissioner Skrmetta	Louisiana Comm'r Skrmetta
Louisiana Telecommunications Association Small Company Committee	Louisiana Small Company Committee
Maine Public Utilities Commission and Vermont Public Service Board	Maine and Vermont Commissions
Massachusetts Department of Telecommunications and Cable	Massachusetts DTC
Mendocino Community Network	Mendocino
MetroPCS Communications	MetroPCS
Michigan Public Service Commission	Michigan Commission
Missouri Public Service Commission	Missouri Commission
Missouri Telecommunications Industry Association	MTIA
Mobile Future	Mobile Future
Moss Adams	Moss Adams
MTPCS, d/b/a Cellular One	Cellular One
National Association of Regulatory Utility Commissioners	NARUC
National Association of State Utility Consumer Advocates	NASUCA
National Cable & Telecommunications Association	NCTA
National Tribal Telecommunications Association	NTTA
Native Telecom Coalition for Broadband	NTCB
Nebraska Public Service Commission	Nebraska Commission
Nebraska Rural Independent Companies	Nebraska Rural Companies
NECA, NTCA, OPASTCO and WTA	Rural Associations
Nevada Telecommunications Association	NTA
New Hampshire Public Utilities Commission	New Hampshire Commission
New Jersey Board of Public Utilities	New Jersey Board
New Mexico Exchange Carrier Group	NMECG
New York State Public Service Commission	New York Commission
NE Colorado Cellular, d/b/a Viaero Wireless	Viaero Wireless
Ohio Public Utilities Commission	Ohio Commission

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Ohio Telecom Association	Ohio TA
Oklahoma Telephone Association	Oklahoma TA
Oregon Public Utility Commission	Oregon Commission
Pac-West Telecomm	Pac-West
PAETEC Holding Corp.	PAETEC
Pennsylvania Public Utility Commission	Pennsylvania Commission
Panhandle Telecommunication Systems	Panhandle
Public Knowledge and the Benton Foundation	Public Knowledge and Benton
Puerto Rico Telephone Company	PRTC
Reason Foundation	Reason
Rural Arkansas Telephone Systems	Rural Arkansas
Rural Broadband Alliance	RBA
Rural Cellular Association	RCA
Rural Independent Competitive Alliance	RICA
Rural Telecommunications Group	RTG
Satellite Broadband Providers	Satellite Providers
Schools, Health and Libraries Broadband Coalition	SHLB Coalition
Smith Bagley	Smith Bagley
South Dakota Public Utilities Commission	South Dakota Commission
South Dakota Telecommunications Association	SDTA
SouthernLINC Wireless	SouthernLINC
Sprint Nextel Corporation	Sprint
Standing Rock Sioux Tribe and Standing Rock Telecommunications	Standing Rock
SureWest Communications	SureWest
TCA	TCA
TDS Telecommunications Corporation	TDS
Telecommunications Industry Association	TIA
Tennessee Regulatory Authority	Tennessee Commission
Texas Statewide Telephone Cooperative	Texas Telephone
Time Warner Cable	Time Warner Cable
T-Mobile USA	T-Mobile
United States Cellular Corporation	U.S. Cellular
Universal Service for America Coalition	USA Coalition
U.S. Distance Learning Association	USDLA
Valley Telephone Cooperative	Valley Telephone
Virginia State Corporation Commission Staff	Virginia Commission
Vonage Holdings Corp.	Vonage
Voice on the Net Coalition	VON Coalition
Washington Utilities and Transportation Commission	Washington Commission
Wisconsin Public Service Commission	Wisconsin Commission
Wisconsin State Telecommunications Association	WSTA
XO Communications	XO

**Reply Commenter****Abbreviation**

Alaska Communications Systems Group	ACS
Alaska Regulatory Commission	Alaska Commission
Alaska Rural Coalition	ARC
American Cable Association	ACA
AT&T, CenturyLink, Fairpoint, Frontier, Verizon and Windstream	ABC Plan Proponents
Bandwidth.com	Bandwidth.com
Blooston Rural Carriers	Blooston
Bright House Networks Information Services	Bright House
BT Americas	BT
Cablevision Systems Corporation	Cablevision
Cbeyond, Integra Telecom and tw telecom	Cbeyond et al.
Cellular South	Cellular South
Charter Communications	Charter
Coalition of Large Tribes and Great Plains Tribal Chairman's Association	COLT and GPTCA
Coalition for Rational Universal Service and Intercarrier Reform	CRUSIR
Consumer Federation of America and Consumers Union	CFA and CU
Cox Communications	Cox
Docomo Pacific, PR Wireless and Choice Communications	Docomo et al.
Fiber-to-the-Home Council	Fiber-to-the-Home
Free Conferencing Corporation	Free Conferencing Corporation
General Communication	GCI
GVNW Consulting	GVNW
Hargray Telephone Company	Hargray Telephone
Hawaiian Telcom	Hawaiian Telcom
Home Telephone Company	Home Telephone
HyperCube Telecom	HyperCube
Independent Telephone & Telecommunications Alliance, Cincinnati Bell, Hargray Telephone Company and HickoryTech Corporation	ITTA et al.
Information Technology and Innovation Foundation	ITIF
Iowa Association of Municipal Utilities	IAMU
Iowa Telecommunications Association	ITA
Kansas Corporation Commission	Kansas Commission
LARIAT	LARIAT
Level 3 Communications	Level 3
LightSquared Subsidiary	LightSquared
Maryland Public Service Commission	Maryland Commission
MegaPath and Covad Communications Company	MegaPath
MetroPCS Communications	MetroPCS
Michigan Public Service Commission	Michigan Commission
Midcontinent Communications	Midcontinent
Mid-Rivers Communications	Mid-Rivers
Minnesota Independent Coalition	MIC
Montana Independent Telecommunications Systems	MITS
Montana Public Service Commission	Montana Commission
MTPCS, d/b/a Cellular One	Cellular One
National Association of State Utility Consumer Advocates	NASUCA

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National Congress of Black Women	NCBW
Native Telecom Coalition for Broadband	NTCB
Nebraska Rural Independent Companies	Nebraska Rural Companies
NECA, NTCA, OPASTCO and WTA	Rural Associations
NE Colorado Cellular, d/b/a Viaero Wireless	Viaero Wireless
Neutral Tandem	Neutral Tandem
Nevada Public Utilities Commission	Nevada Commission
New America Foundation, Consumers Union and Media Access Project	New America Foundation et al.
Northern Telephone & Data Corporation	NTD
Pac-West Telecomm	Pac-West
PAETEC Holding Corp.	PAETEC
Pennsylvania Public Utility Commission	Pennsylvania Commission
Puerto Rico Telephone Company	PRTC
Ronan Telephone Company and Hot Springs Telephone Company	Ronan and Hot Springs
Rural Cellular Association	RCA
Rural Coalition	Rural Coalition
Rural Iowa Independent Telephone Association	RIITA
Rural Telecommunications Group	RTG
Satellite Broadband Providers	Satellite Providers
Smith Bagley	Smith Bagley
SouthernLINC Wireless	SouthernLINC
TDS Metrocom	TDS Metrocom
Texas Statewide Telephone Cooperative	Texas Telephone
United States Cellular Corporation	U.S. Cellular
Universal Service for America Coalition	USA Coalition
Virgin Islands Telephone Corporation	Vitelco
Vonage Holdings Corp.	Vonage
WideOpenWest Finance	WOW
Wyoming Public Service Commission	Wyoming Commission



## APPENDIX N

## Illustrative Form of Letter Of Credit

**[Subject to Issuing Bank Requirements]****No. \_\_\_\_\_**

[Name and Address of Issuing Bank]

[Date of Issuance]

[AMOUNT]

[EXPIRATION DATE]

## BENEFICIARY

[USAC]

[Address]

## LETTER OF CREDIT PROVIDER

[Winning Bidder Name]

[Address]

Ladies and Gentlemen:

We hereby establish, at the request and for the account of [Winning Bidder], in your favor, as required under the [Report and Order, adopted on October 27, 2011] issued by the Federal Communications Commission ("FCC") in the matter of [Connect America Fund, WC Docket 10-90] (the "Order"), our Irrevocable Standby Letter of Credit No. \_\_\_\_\_, in the amount of [State amount of Letter of Credit in words and figures. NOTE: The amount of the Letter of Credit shall increase/additional letter(s) of credit shall be issued as additional funds are disbursed pursuant to the terms of the Order], expiring at the close of banking business at our office described in the following paragraph, on [the date which is \_\_\_ years from the date of issuance/ or the date which is one year from the date of issuance, provided the Issuing Bank includes an evergreen clause that provides for automatic renewal unless the Issuing Bank gives notice of non-renewal to USAC by a nationally recognized overnight delivery service, with a copy to the FCC, at least sixty days but not more than ninety days prior to the expiry thereof], or such earlier date as the Letter of Credit is terminated by [USAC] (the "Expiration Date"). Capitalized terms used herein but not defined herein shall have the meanings accorded such terms in the Order.

Funds under this Letter of Credit are available to you against your draft in the form attached hereto as Annex A, drawn on our office described below, and referring thereon to the number of this Letter of Credit, accompanied by your written and completed certificate signed by you substantially in the form of Annex B attached hereto. Such draft and certificates shall be dated the date of presentation or an earlier date, which presentation shall be made at our office located at [BANK ADDRESS] and shall

be effected either by personal delivery or delivery by a nationally recognized overnight delivery service. We hereby commit and agree to accept such presentation at such office, and if such presentation of documents appears on its face to comply with the terms and conditions of this Letter of Credit, on or prior to the Expiration Date, we will honor the same not later than the first banking day after presentation thereof in accordance with your payment instructions. Payment under this Letter of Credit shall be made by [check/wire transfer of Federal Reserve Bank of New York funds] to the payee and for the account you designate, in accordance with the instructions set forth in a draft presented in connection with a draw under this Letter of Credit.

Partial drawings are not permitted under this Letter of Credit. This Letter of Credit is not transferable or assignable in whole or in part.

This Letter of Credit shall be canceled and terminated upon receipt by us of the [USAC's] certificate purportedly signed by two authorized representatives of [USAC] in the form attached as Annex C.

This Letter of Credit sets forth in full the undertaking of the Issuer, and such undertaking shall not in any way be modified, amended, amplified or limited by reference to any document, instrument or agreement referred to herein, except only the certificates and the drafts referred to herein and the ISP (as defined below); and any such reference shall not be deemed to incorporate herein by reference any document, instrument or agreement except for such certificates and such drafts and the ISP.

This Letter of Credit shall be subject to, governed by, and construed in accordance with, the International Standby Practices 1998, International Chamber of Commerce Publication No. 590 (the "ISP"), which is incorporated into the text of this Letter of Credit by this reference, and, to the extent not inconsistent therewith, the laws of the State of New York, including the Uniform Commercial Code as in effect in the State of New York. Communications with respect to this Letter of Credit shall be addressed to us at our address set forth below, specifically referring to the number of this Letter of Credit.

[NAME OF BANK]

[BANK SIGNATURE]

ANNEX A

Form of Draft

To: [Issuing Bank]

DRAWN ON LETTER OF CREDIT No: \_\_\_\_\_

AT SIGHT

PAY TO THE ORDER OF [USAC] BY [CHECK/WIRE TRANSFER OF FEDERAL  
RESERVE BANK OF NEW YORK]

FUNDS TO: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Account (\_\_\_\_\_)

AS [MOBILITY FUND REPAYMENT]

[AMOUNT IN WORDS] DOLLARS AND NO/CENTS

\$(AMOUNT IN NUMBERS)

Universal Service Administrative Company

By:\_\_\_\_\_

Name:

Title:

ANNEX BDraw Certificate

The undersigned hereby certifies to [Name of Bank] (the "Bank"), with reference to (a) Irrevocable Standby Letter of Credit No. [Number] (the "Letter of Credit") issued by the Bank in favor of the Universal Service Administrative Company ("USAC") and (b) [paragraph \_\_\_\_] of the [Report and Order, adopted on October 27, 2011] issued by the Federal Communications Commission in the matter of [Connect America Fund, WC Docket 10-90] (the "Order"), pursuant to which [Name of Winning Bidder] (the "LC Provider") has provided the Letter of Credit (all capitalized terms used herein but not defined herein having the meaning stated in the Order), that:

[The [Name of Winning Bidder] has [describe the event that triggers the draw], and is evidenced by a letter signed by the Chief of the [Wireless Telecommunications Bureau/Wireline Competition Bureau] or [his/her] designee, dated \_\_, 20\_\_, a true copy of which is attached hereto.] Accordingly, a draw of the entire amount of the Letter of Credit No. \_\_\_\_\_ is authorized.]

OR

[USAC certifies that given notice of non-renewal of Letter of Credit No. \_\_\_\_\_ and failure of the account party to obtain a satisfactory replacement thereof, pursuant to the Order, USAC is entitled to receive payment of \$ \_\_\_\_\_ representing the entire amount of Letter of Credit No. \_\_\_\_\_.]

IN WITNESS WHEREOF, the undersigned has executed this certificate as of [specify time of day] on the \_\_\_\_ day of \_\_\_\_\_, 201\_\_.

Universal Service Administrative Company

By: \_\_\_\_\_

Name:

Title:

ANNEX CCertificate Regarding Termination of Letter of Credit

The undersigned hereby certifies to [Name of Bank] (the "Bank"), with reference to (a) Irrevocable Standby Letter of Credit No. [Number] (the "Letter of Credit") issued by the Bank in favor of the Universal Service Administrative Company ("USAC"), and (b) paragraph [\_\_\_\_] of the [Report and Order adopted on October 27, 2011] issued by the Federal Communications Commission ("FCC") in the matter of [Connect America Fund, WC Docket 10-90] (the "Order"), (all capitalized terms used herein but not defined herein having the meaning stated or described in the Order), that:

(1) [include one of the following clauses, as applicable]

(a) The Order has been fulfilled in accordance with the provisions thereof; or

(b) [LC Provider/Winning Bidder] has provided a replacement letter of credit satisfactory to the FCC.

(2) By reason of the event or circumstance described in paragraph (1) of this certificate and effective upon the receipt by the Bank of this certificate (countersigned as set forth below), the Letter of Credit is terminated.

IN WITNESS WHEREOF, the undersigned has executed this certificate as of the \_\_\_\_ day of \_\_\_\_\_, 201\_\_.

Universal Service Administrative Company

By: \_\_\_\_\_ Name:  
Title:

By: \_\_\_\_\_  
Name:  
Title:

COUNTERSIGNED:

Federal Communications Commission

By: \_\_\_\_\_  
Name:  
Its Authorized Signatory

## APPENDIX O

## Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980 (RFA),<sup>1</sup> as amended, Initial Regulatory Flexibility Analyses (IRFAs) were incorporated in the *Notice of Proposed Rule Making and Further Notice of Proposed Rulemaking (USF/ICC Transformation NPRM)*, in the *Notice of Inquiry and Notice of Proposed Rulemaking (USF Reform NOI/NPRM)*, and in the *Notice of Proposed Rulemaking (Mobility Fund NPRM)* for this proceeding.<sup>2</sup> The Commission sought written public comment on the proposals in the *USF/ICC Transformation NPRM*, including comment on the IRFA. The Commission received comments on the *USF/ICC Transformation NPRM* IRFA.<sup>3</sup> The comments received are discussed below. The Commission did not receive comments on the *USF Reform NOI/NPRM* IRFA or the *Mobility Fund NPRM* IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>4</sup>

**A. Need for, and Objectives of, the Order**

2. The Order adopts fiscally responsible, accountable, incentive-based policies to transition outdated universal service and intercarrier compensation (ICC) systems to the Connect America Fund (CAF), ensuring fairness for consumers and addressing the challenges of today and tomorrow, instead of yesterday. We adopt measured but firm glide paths to provide industry with certainty and sufficient time to adapt to a changed landscape, and establish a regulatory framework which will ultimately distribute all universal service funding in the most efficient and technologically neutral manner possible.

3. For decades, the Commission and the states have administered a complex system of explicit and implicit subsidies to support voice connectivity to the highest cost, most rural, and insular communities in the nation. Networks that provide only voice service, however, are no longer adequate for the country's communication needs. Broadband and mobility have become crucial to our nation's economic development, global competitiveness, and civic life. Businesses need broadband and mobile communications to attract customers and employees, job-seekers need them to find jobs and training, and children need them to get a world-class education. Broadband and mobility also help lower the costs and improve the quality of health care, and enable people with disabilities and Americans of all income levels

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<sup>1</sup> 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612 has been amended by the Contract With America Advancement Act of 1996, Public Law No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>2</sup> *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*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554 (2011) (*USF/ICC Transformation NPRM*); *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, Notice of Proposed Rulemaking, 25 FCC Rcd 14,716 (2010) (*"Mobility Fund NPRM"*).

<sup>3</sup> See Furchtgott-Roth Economic Enterprises *USF/ICC Transformation NPRM Ex Parte* Comments at 14; Bluegrass Telephone Company *USF/ICC Transformation NPRM* Comments at 35-36; Letter from Brenda Crosby, President, Cascade Utilities, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, et al., at 3 (filed April 6, 2011); Molalla Telephone Company *USF/ICC Transformation NPRM* at 3; Letter from John Hemphill, Vice President, Pine Telephone System, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, et al., at 3 (filed March 30, 2011); Letter from Dave Osborn, Valley Telephone Cooperative, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, et al., at 3 (filed August 29, 2011).

<sup>4</sup> See 5 U.S.C. § 604.

to participate more fully in society. Broadband-enabled jobs are critical to our nation's economic recovery and long-term economic health, particularly in small towns, rural and insular areas, and Tribal lands.

4. Too many Americans today, however, do not have access to modern networks that support mobility and broadband. Millions of Americans live in areas where there is no access to any broadband network. And millions of Americans live, work, or travel in areas without mobile broadband. There are unserved areas in every state of the nation and its territories, and in many of these areas there is little reason to believe that access to broadband service will be provided to these areas in the near future with current policies.<sup>5</sup>

5. Consistent with the challenge of ensuring that all Americans are offered basic voice service and access to networks that support high-speed Internet access where they live, work and travel, extending and accelerating broadband and advanced mobile wireless deployment have been two of the Commission's top priorities over the past few years. The Order focuses on those remote and expensive-to-serve communities where the immediate prospect for stand-alone private sector action is limited.

6. Our existing voice-centric universal service system is built on decades-old assumptions that fail to reflect today's networks, the evolving nature of communications services, or the current competitive landscape. As a result, the current system is not equipped to address the universal service challenges raised by broadband, mobility, and the transition to Internet Protocol (IP) networks.<sup>6</sup>

7. With respect to voice services, consumers are increasingly obtaining such services over broadband networks as well as over traditional circuit switched telephone networks. In the Order, the Commission amends its rules to specify that the functionalities of eligible voice telephony services. The amended definition shifts to a technologically neutral approach, allowing companies to provision voice service over any platform, including the PSTN and IP networks.

8. With respect to broadband, the component of the Universal Service Fund (USF) that supports telecommunications service in high-cost areas has grown from \$2.6 billion in 2001 to a projected \$4.5 billion in 2011, but recipients lack any accountability for advancing broadband-capable infrastructure that delivers voice service. We also lack sufficient mechanisms to ensure all Commission funded broadband investments are prudent and efficient, including the means to target investment to areas that lack a private business case to build broadband. In addition, the "rural-rural" divide must also be addressed—some parts of rural America are connected to state-of-the-art broadband, while other parts of rural America have no broadband access, because the existing program fails to direct money to all parts of rural America where it is needed. Similarly, the Fund supports some mobile providers, but only based on cost characteristics and locations of wireline providers. As a result, the universal service program provides more than \$1 billion in annual support to wireless carriers, yet there remain many areas of the country where people live, work, and travel that lack mobile voice coverage, and still larger geographic areas that lack mobile broadband coverage.<sup>7</sup>

9. For the first time, the Commission establishes a defined budget for the high-cost component of the universal service fund.<sup>8</sup> Establishing a CAF budget ensures that individual consumers will not pay more in contributions due to the reforms we adopt today. We therefore establish an annual funding target, set at the same level as our current estimate for the size of the high-cost program for FY

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<sup>5</sup> See *supra* Section I.

<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

<sup>8</sup> See *supra* Section VII.B.

2011, of no more than \$4.5 billion. The total \$4.5 billion budget will include CAF support resulting from intercarrier compensation reform, as well as new CAF funding for broadband and support for legacy programs during a transitional period.

10. In the Order, the Commission adopts rules that transform the existing high-cost program—the component of USF directed toward high-cost, rural, and insular areas—into a new, more efficient, broadband-focused Connect America Fund (CAF). In particular, we adopt a framework for the Connect America Fund that will provide support in price cap territories based on a combination of competitive bidding and a forward-looking cost model.

11. In order to take immediate steps to accelerate broadband deployment to unserved areas across America, we modify our rules to provide support to price cap carriers under a transitional distribution mechanism, CAF Phase I, while the cost model is being developed and competitive bidding rules finalized. Specifically, effective in 2012, we freeze support to price cap carriers and their rate-of-return affiliates under our existing high-cost support mechanism: high-cost loop support (HCLS) including safety net additive (SNA), forward-looking model support, local switching support (LSS), interstate access support (IAS), and frozen interstate common line support (ICLS).<sup>9</sup> In addition, we will dedicate up to \$300 million in incremental support to price cap carriers each year of CAF Phase I, allocated to carriers serving areas with the highest costs; carriers accepting incremental support will be required to meet defined broadband deployment obligations.<sup>10</sup>

12. We adopt an approach that enables competitive bidding for CAF Phase II support in the near-term in some price cap areas, while in other areas holding the incumbent carrier to broadband and other public interest obligations over large geographies in return for five years of CAF support. Specifically, we adopt the following methodology for providing CAF support in price cap areas. First, the Commission will model forward-looking costs to estimate the cost of deploying broadband-capable networks in high-cost areas and identify at a granular level the areas where support will be available. Second, using the cost model, the Commission will offer each price cap LEC annual support for a period of five years in exchange for a commitment to offer voice across its service territory within a state and broadband service to supported locations within that service territory, subject to robust public interest obligations and accountability standards. Third, for all territories for which price cap LECs decline to make that commitment, the Commission will award ongoing support through a competitive bidding mechanism.

13. We reform legacy support mechanisms for rate-of-return carriers to transition towards a more incentive-based form of regulation with better incentives for efficient operations. In particular, we implement a number of reforms to eliminate waste and inefficiency and improve incentives for rational investment and operation by rate-of-return LECs. Consistent with the framework we establish for support in price cap territories that combines a new forward-looking cost model and competitive bidding, we also lay the foundation for subsequent Commission action that will advance rate-of-return companies on a path toward a more incentive-based form of regulation.<sup>11</sup>

14. We adopt the following reforms that will ensure that the overall size of the Fund is kept within budget while we transition a system that supports only telephone service to a system that will enable the deployment of modern high-speed networks capable of delivering 21st century broadband services and applications, including voice: First, we establish benchmarks that, for the first time, will establish parameters for what actual costs carriers may seek recovery under the federal universal service

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<sup>9</sup> See *supra* Section VII.C.

<sup>10</sup> See *id.*

<sup>11</sup> See *supra* Section VII.D.



program. Second, we take immediate steps to ensure that carriers in rural areas are not unfairly burdening consumers across the nation by using excess universal service support to subsidize artificially low end-user rates. Third, we eliminate the safety net additive program, which is no longer meeting its intended purpose. Fourth, we eliminate local switching support in July 2012 whereby recovery for switching investment will occur through the ICC recovery mechanism. Fifth, we eliminate support for rate-of-return companies in any study area that is completely overlapped by an unsubsidized facilities-based terrestrial competitor that offers fixed voice as well as broadband services meeting specified performance standards, as there is no need for universal service subsidies in these cases. Sixth, starting January 1, 2012, support in excess of \$250 per line per month will no longer be provided to any carrier.<sup>12</sup>

15. We eliminate the identical support rule. Over a decade of experience with the operation of the current rule and having received a multitude of comments noting that the current rule fails to efficiently target support where it is needed, we conclude that this rule has not functioned as intended. Identical support does not provide appropriate levels of support for the efficient deployment of mobile services in areas that do not support a private business case for mobile voice and broadband. Because the explicit support for mobility that we adopt today will be designed to appropriately target funds to such areas, the identical support rule is no longer necessary or in the public interest.<sup>13</sup>

16. We transition existing competitive ETC support to the CAF, including our reformed system for supporting mobile service over a five-year period beginning July 1, 2012. We find that a transition is desirable in order to avoid shocks to service providers that may result in service disruptions for consumers. During this period, competitive ETCs offering mobile wireless services will have the opportunity to bid in the Mobility Fund Phase I auction in 2012 and participate in the second phase of the Mobility Fund in 2013. Competitive ETCs offering broadband services that meet the performance standards described above will also have the opportunity to participate in competitive bidding for CAF support in areas where price cap companies decline to make a state-level broadband commitment in exchange for model-determined support in 2013. With these new funding opportunities, many carriers, including wireless carriers, could receive similar or even greater amounts of funding after our reforms than before, albeit with that funding more appropriately targeted to the areas that need additional support.<sup>14</sup>

17. For the purpose of this transition, we conclude that each competitive ETC's baseline support amount will be equal to its total 2011 support in a given study area, or an amount equal to \$3,000 times the number of reported lines as of year-end 2011, whichever is lower. Using a full calendar year of support to set the baseline will provide a reasonable approximation of the amount that competitive ETCs would currently expect to receive, absent reform, and a natural starting point for the phase-down of support. In addition, we limit the baseline to \$3,000 per line in order to reflect similar changes to our rules limiting support for incumbent wireline carriers to \$3,000 per line per year.<sup>15</sup>

18. Competitive ETC support per study area will be frozen at the 2011 baseline, and that monthly baseline amount will be provided from January 1, 2012 to June 30, 2012. Each competitive ETC will then receive 80 percent of its monthly baseline amount from July 1, 2012 to June 30, 2013, 60 percent of its baseline amount from July 1, 2013, to June 30, 2014, 40 percent from July 1, 2014, to June 30, 2015, 20 percent from July 1, 2015, to June 30, 2016, and no support beginning July 1, 2016. The purpose of this phase down is to avoid unnecessary consumer disruption as we transition to new programs that will

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<sup>12</sup> *See id.*

<sup>13</sup> *See Supra* Section VII.E.4.

<sup>14</sup> *See Supra* Section VII.E.5.

<sup>15</sup> *Id.*

be better designed to achieve universal service goals, especially with respect to promoting investment in and deployment of mobile service to areas not yet served. We do not wish to encourage further investment based on the inefficient subsidy levels generated by the identical support rule. We conclude that phasing down and transitioning existing competitive support will not create significant or widespread risks that consumers in areas that currently have service, including mobile service, will be left without any viable mobile service provider serving their area. We do, however, delay by two years the phasedown for certain carriers serving remote parts of Alaska and a Tribally-owned competitive ETC, Standing Rock Telecommunications, that received its ETC designation in 2011.<sup>16</sup>

19. We establish the Mobility Fund based on our conclusion that mobile voice and broadband services provide unique consumer benefits and that promoting the universal availability of advanced mobile services is a vital component of the Commission's universal service mission. The Mobility Fund, which will have two phases, will allow funding for mobility while rationalizing how universal service funding is provided, thereby ensuring that funds are cost-effective and targeted to areas that require public funding to receive the benefits of mobility.<sup>17</sup> The purpose of the Mobility Fund is to accelerate the deployment of advanced mobile networks in areas where a private-sector business case is lacking. Mobility Fund recipients will be subject to public interest obligations, including data roaming and collocation requirements.

20. The first phase of the Mobility Fund will provide \$300 million in one-time support to immediately accelerate deployment of networks for mobile broadband services in unserved areas. Mobility Fund Phase I support will be awarded through a nationwide reverse auction. Eligible areas will include census blocks unserved today by advanced mobile wireless services. Carriers will be prohibited from receiving support for areas they have previously stated they plan to cover. The auction will maximize coverage of unserved road miles, with the lowest per-unit bids winning. A 25 percent bidding credit will be available for Tribally-owned or controlled providers that participate in the auction and place bids for the eligible census blocks located within the geographic area defined by the boundaries of the Tribal land associated with the Tribal entity seeking support. The auction will also help the Commission develop expertise in running reverse auctions for universal service support. We expect to distribute this support as quickly as feasible, with the goal of holding an auction in the third quarter of 2012. As part of this first phase, we also establish a separate and complementary one-time Tribal Mobility Fund Phase I to award \$50 million in additional universal service funding for advanced mobile services on Tribal lands and Alaska Native regions.<sup>18</sup> We do so in order to accelerate mobile broadband availability in these remote and underserved areas.

21. We also establish a Mobility Fund Phase II, which will provide up to \$500 million per year in ongoing support to ensure universal availability of advanced mobile services.<sup>19</sup> The Fund will expand and sustain mobile voice and broadband service in communities in which service would be unavailable absent federal support. The Mobility Fund Phase II will include ongoing support for Tribal lands of up to \$100 million per year, as part of the \$500 million total budget. We also establish a budget of at least \$100 million annually for CAF support in remote areas. This reflects our commitment to ensuring that Americans living in the most remote areas of the nation, where the cost of deploying wireline or cellular terrestrial broadband technologies is extremely high, can obtain affordable broadband through alternative technology platforms such as satellite and unlicensed wireless. By setting aside

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<sup>16</sup> *Id.*

<sup>17</sup> *See supra* Section VII.E.

<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

designated funding for these difficult-to-serve areas, we can ensure that those who live and work in remote locations also have access to affordable broadband service.<sup>20</sup>

22. In the Order, we also take steps to comprehensively reform the intercarrier compensation system to bring substantial benefits to consumers, including reduced rates for all wireless and long distance customers, more innovative communications offerings, and improved quality of service for wireless consumers and consumers of long distance services. The existing intercarrier compensation system—built on geographic and per-minute charges and implicit subsidies—is fundamentally in tension with and a deterrent to deployment of all-IP networks. And the system is eroding rapidly as demand for traditional telephone service falls, with consumers increasingly opting for wireless, VoIP, texting, email, and other phone alternatives. To address these issues, we take immediate action to combat two of the most prevalent arbitrage activities today, phantom traffic and access stimulation. We also launch long-term intercarrier compensation reform by adopting bill-and-keep as the ultimate uniform, national methodology for all telecommunications traffic exchanged with a local exchange carrier (LEC). We begin the transition to bill-and-keep with terminating switched access rates, which are the main source of arbitrage today. We also begin the process of reforming originating access and other rate elements by capping all interstate rates and most intrastate rates. We provide for a measured, gradual transition to bill-and-keep for these rates, and adopt a recovery mechanism that provides carriers with certain and predictable revenue streams. We make clear the prospective payment obligations for VoIP traffic and adopt a transitional intercarrier compensation framework for VoIP. And finally, we clarify certain aspects of CMRS-LEC compensation to reduce disputes and eliminate ambiguities in our rules.

23. We first adopt revisions to our interstate switched access charge rules to address access stimulation.<sup>21</sup> Access stimulation occurs when a LEC 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. Consistent with the approach proposed in the *USF/ICC Transformation NPRM*, we adopt a definition of access stimulation which has two conditions: (1) a revenue sharing condition, revised slightly from the proposal in the *USF/ICC Transformation NPRM*; and (2) an additional traffic volume condition, which is met where the LEC either: (a) has a three-to-one interstate terminating-to-originating traffic ratio in a calendar month; or (b) has had more than a 100 percent growth in interstate originating and/or terminating switched access minutes of use in a month compared to the same month in the preceding year. If both conditions are satisfied, the LEC generally must file revised tariffs to account for its increased traffic and will be required to reduce its interstate switched access tariffed rates to the rates of the price cap LEC in the state with the lowest rates, which are presumptively consistent with the Act. The new access stimulation rules will facilitate enforcement when a LEC does not refile as required.

24. Next, we amend the Commission’s rules to address “phantom traffic” by ensuring that terminating service providers receive sufficient information to bill for telecommunications traffic sent to their networks, including interconnected VoIP traffic.<sup>22</sup> “Phantom traffic” refers to traffic that terminating networks receive that lacks certain identifying information. Collectively, problems involving unidentifiable or misidentified traffic appear to be widespread and this sort of gamesmanship distorts the intercarrier compensation system. To address the problem, we adopt the core of the proposal contained in the *USF/ICC Transformation NPRM*—we modify our call signaling rules to require originating service providers to provide signaling information that includes calling party number (“CPN”) for all voice traffic, regardless of jurisdiction, and to prohibit interconnecting carriers from stripping or altering that

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<sup>20</sup> See *supra* Section VII.F.

<sup>21</sup> See *supra* Section XI.A.

<sup>22</sup> See *supra* Section XI.B.

call signaling information. Service providers that originate interstate or intrastate traffic on the PSTN, or that originate inter- or intrastate interconnected VoIP traffic destined for the PSTN, will now be required to transmit the telephone number associated with the calling party to the next provider in the call path. Intermediate providers must pass calling party number or charge number signaling information they receive from other providers unaltered, to subsequent providers in the call path.

25. We adopt bill-and-keep as the methodology for all intercarrier compensation traffic, consistent with the National Broadband Plan's recommendation to phase out per-minute intercarrier compensation rates.<sup>23</sup> Under bill-and-keep arrangements, a carrier generally looks to its end-users—who are the entities making the choice to subscribe to the carrier's network—rather than looking to other carriers and their customers to recover its costs. We have legal authority to adopt a bill-and-keep methodology as the end point for reform pursuant to our rulemaking authority to implement sections 251(b)(5) and 252(d)(2), in addition to authority under other provisions of the Act, including sections 201 and 332.<sup>24</sup>

26. We conclude that a uniform, national framework for the transition of intercarrier compensation to bill-and-keep, with an accompanying federal recovery mechanism, best advances our policy goals of accelerating the migration to all IP networks, facilitating IP-to-IP interconnection, and promoting deployment of new broadband networks by providing certainty and predictability to carriers and investors.<sup>25</sup> We adopt a gradual transition for terminating access, providing price cap carriers six years and rate-of-return carriers nine years to reach the end state.<sup>26</sup> We believe that initially focusing the bill-and-keep transition on terminating access rates will allow a more manageable process and will focus reform where some of the most pressing problems, such as access charge arbitrage, currently arise. The transition we adopt sets a default framework, leaving carriers free to enter into negotiated agreements that allow for different terms.

27. We conclude it is appropriate to clarify certain aspects of the obligations the Commission adopted in the 2005 *T-Mobile Order*, especially as parties have asked the Commission to make clear when they have the ability to require other carriers to negotiate to reach an interconnection agreement.<sup>27</sup> We reaffirm the findings in the *T-Mobile Order* that incumbent LECs can compel CMRS providers to negotiate in good faith to reach an interconnection agreement, and make clear we have authority to do so pursuant to Sections 332, 201, 251 as well as our ancillary authority under 4(i). We also clarify that this requirement does not impose any section 251(c) obligations on CMRS providers, nor does it extend section 252 of the Act to CMRS providers. We decline, at this time, to extend the obligation to negotiate in good faith and the ability to compel arbitration to other contexts.

28. As part of our comprehensive reforms, we adopt a recovery mechanism to facilitate incumbent LECs' gradual transition away from existing intercarrier revenues.<sup>28</sup> This mechanism allows the LECs to recover ICC revenues reduced due to our reforms, up to a defined baseline, from alternate revenue sources: reasonable, incremental increases in end user rates and, where appropriate, through ICC CAF support. The recovery mechanism is limited in time and carefully balances the benefits of certainty and a gradual transition with the need to contain the size of the federal universal service fund and

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<sup>23</sup> See *supra* Section XII.A.

<sup>24</sup> See *supra* Section XII.A.2.

<sup>25</sup> See *supra* Sections XII-XIII.

<sup>26</sup> See *supra* Section XII.C.

<sup>27</sup> See *supra* Section XII.C.

<sup>28</sup> See *supra* Section XIII.

minimize the overall burden on end users. The recovery mechanism is not 100 percent revenue neutral relative to today's revenues, but it eliminates much of the uncertainty carriers face under the existing ICC system, allowing them to make investment decisions based on a full understanding of their revenues from ICC for the next several years.

29. In setting the framework for recovery, we believe that carriers should first look to reasonable but limited recovery from their own end users, consistent with the principle of bill-and-keep and the model in the wireless industry, but take measures to ensure that rates remain affordable and reasonably comparable.<sup>29</sup> Our recovery mechanism has two basic components.<sup>30</sup> First, we define the revenue incumbent LECs are eligible to recover, which we refer to as "Eligible Recovery." Second, we specify how incumbent LECs may recover Eligible Recovery through end-user charges and CAF support. Although we limit a specific recovery mechanism to incumbent LECs, competitive LECs are free to recover their reduced revenues through end user charges.

30. Consistent with past ICC reforms, we permit carriers to recover a reasonable, limited portion of their Eligible Recovery from their end users through a monthly fixed charge called an Access Recovery Charge (ARC).<sup>31</sup> We take measures to help ensure that any ARC increase on consumers does not impact affordability of rates and the annual increase is limited to \$0.50 per month. To protect consumers, and to recognize states that have already rebalanced rates in prior state intercarrier compensation reforms, we adopt a \$30 Residential Rate Ceiling to ensure that consumers paying \$30 or more do not see any increases through ARCs as a result of our current reform. We also take measures to ensure that multi-line businesses' total subscriber line charge (SLC) plus ARC line items are just and reasonable, we do not permit LECs to charge a multi-line business ARC where the SLC plus ARC would exceed \$12.20 per line. Although we limit a specific recovery mechanism to incumbent LECs, competitive LECs are free to recover their reduced revenues through end user charges.

31. The Commission has recognized that some areas are uneconomic to serve absent implicit or explicit support. As we continue the transition from implicit to explicit support that the Commission began in 1997, recovery from the CAF for incumbent LECs will be available to the extent their Eligible Recovery exceeds their permitted ARCs. For price cap carriers that elect to receive CAF support, such support is transitional and phases out over three years, beginning in 2017. For rate-of-return carriers, ICC-replacement CAF support will phase down with Eligible Recovery over time. All incumbent LECs that elect to receive CAF support as part of this recovery mechanism will have broadband obligations and be held to the same accountability and oversight requirements adopted in section VI. Competitive LECs, which have greater freedom in setting rates and picking which customers to serve, will not be eligible for CAF support to replace reductions in ICC revenues.

32. We establish a rebuttable presumption that the reforms adopted in this Order, including the recovery of Eligible Recovery from the ARC and CAF, allow incumbent LECs to earn a reasonable return on their investment.<sup>32</sup> We establish a "Total Cost and Earnings Review," through which a carrier may petition the Commission to rebut this presumption and request additional support. We identify certain factors in addition to switched access costs and revenues that *may* affect our analysis of requests for additional support, including: (1) other revenues derived from regulated services provided over the

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<sup>29</sup> See *supra* Section XIII.

<sup>30</sup> See *supra* Section XIII.

<sup>31</sup> See *supra* Section XIII.

<sup>32</sup> See *supra* Section XIII.

local network, such as special access; (2) productivity gains; (3) incumbent LEC ICC expense reductions and other cost savings, and (4) other services provided over the local network.

33. Under the new intercarrier compensation regime, all traffic—including VoIP traffic—ultimately will be subject to a bill-and-keep framework.<sup>33</sup> As part of our transition to that end point, we adopt a prospective intercarrier compensation framework for VoIP traffic. In particular, we address the prospective treatment of VoIP-PSTN traffic by adopting a transitional compensation framework for such traffic proposed by commenters in the record. Under this transitional framework: we bring all VoIP-PSTN traffic within the section 251(b)(5) framework; default intercarrier compensation rates for toll VoIP-PSTN traffic are equal to interstate access rates; default intercarrier compensation rates for other VoIP-PSTN traffic are the otherwise-applicable reciprocal compensation rates; and carriers may tariff these default charges for toll VoIP-PSTN traffic in the absence of an agreement for different intercarrier compensation.<sup>34</sup> We also make clear providers' ability to use existing section 251(c)(2) interconnection arrangements to exchange VoIP-PSTN traffic pursuant to compensation addressed in the providers' interconnection agreement, and address the application of Commission policies regarding call blocking in this context.<sup>35</sup>

34. To adopt this prospective regime we rely on our general authority to specify a transition to bill-and-keep for section 251(b)(5) traffic.<sup>36</sup> As a result, tariffing of charges for toll VoIP-PSTN traffic can occur through both federal and state tariffs. We do recognize concerns regarding providers' ability to distinguish VoIP-PSTN traffic from other traffic, and, consistent with the recommendations of a number of commenters, we permit LECs to address this issue through their tariffs, much as they do with jurisdictional issues today.

35. As part of our comprehensive ICC reform, we also believe it is also appropriate for the Commission to clarify the system of intercarrier compensation applicable to non-access traffic exchanged between LECs and CMRS providers. Accordingly, we clarify that the compensation obligations under section 20.11 are coextensive with the reciprocal compensation requirements under section 251(b)(5).<sup>37</sup> Although we have adopted a glide path to a bill-and-keep methodology for access charges generally and for reciprocal compensation between two wireline carriers, we find that a different approach is warranted for non-access traffic between LECs and CMRS providers for several reasons. We find a greater need for immediate application of a bill-and-keep methodology in this context to address traffic stimulation. In addition, consistent with our overall reform approach, we adopt bill-and-keep as the default compensation for non-access traffic exchanged between LECs and CMRS providers. We adopt an additional measure to further ease the move to bill-and-keep LEC-CMRS traffic for rate-of-return carriers. Specifically, we limit rate-of-return carriers' responsibility for the costs of transport involving non-access traffic exchanged between CMRS providers and rural, rate-of-return regulated LECs. We find that these steps are consistent with our overall reform and will support our goal of modernizing and unifying the intercarrier compensation system.

36. We address certain pending issues and disputes regarding what is now commonly known as the intraMTA rule, which provides that traffic exchanged between a LEC and a CMRS provider that originates and terminates within the same Major Trading Area (MTA) is subject to reciprocal

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<sup>33</sup> See *supra* Section XIV.

<sup>34</sup> See *supra* Section XIV.

<sup>35</sup> See *supra* Section XIV.

<sup>36</sup> See *supra* Section XIV.

<sup>37</sup> See *supra* Section XV.

compensation obligations rather than interstate or intrastate access charges.<sup>38</sup> We resolve two issues that have been raised before the Commission regarding the correct application of this rule to specific traffic patterns. First, we clarify that a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the call has done so through a CMRS provider. Second, we affirm that all traffic routed to or from a CMRS provider that, at the beginning of a call, originates and terminates within the same MTA, is subject to reciprocal compensation, without exception. In addition to these clarifications, we also deny requests that the intraMTA rule be modified to encompass a geographic license area known as the regional economic area grouping (REAG).

37. Finally, recognizing that IP interconnection between providers is critical, we agree with the record that, as the industry transitions to all IP networks, carriers should begin planning for the transition to all-IP networks, and that such a transition will likely be appropriate before the completion of the intercarrier compensation phase down. Even while our FNPRM is pending, we expect all carriers to negotiate in good faith in response to requests for IP-to-IP interconnection for the exchange of voice traffic. The duty to negotiate in good faith has been a longstanding element of interconnection requirements under the Communications Act and does not depend upon the network technology underlying the interconnection, whether TDM, IP, or otherwise.<sup>39</sup>

#### **B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA**

38. No comments were filed in response to the *Mobility Fund NPRM* IRFA. In response to the *USF/ICC Transformation NPRM* IRFA, four parties filed comments that specifically address the IRFA with respect to proposed universal service reform. Valley Telephone Cooperative, Cascade Utilities, Molalla Communications and Pine Telephone System filed identical but separate comments contending that, since the Commission's universal service proposals will cause significant financial difficulties for many small companies operating in rural America, the Commission's IRFA contained in the *Notice* is inadequate.<sup>40</sup> These commenters state that the Commission needs to do a full analysis of the effect that the proposals will have on small companies serving rural areas.<sup>41</sup> In making the determinations reflected in the Order, we have considered the impact of our actions on small entities.

39. In comments filed in response to the IRFA, concerns were also raised regarding the adequacy of the IRFA with respect to proposed intercarrier compensation reforms. Bluegrass Telephone Company stated that the IRFA was insufficiently specific regarding the proposed access stimulation rules, and that the Commission should decline to act on the proposed access stimulation rules until the Commission releases a more detailed analysis of the rules.<sup>42</sup> Likewise, Furchtgott-Roth Economic Enterprises also states that the IRFA was insufficiently specific regarding the proposed rule for revenue sharing and access charges.<sup>43</sup> We disagree: we believe that the IRFA was adequate and that the

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<sup>38</sup> See *supra* Section XV.

<sup>39</sup> See *supra* Section XVI.

<sup>40</sup> See Letter from Brenda Crosby, President, Cascade Utilities, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, et al., at 3 (filed April 6, 2011); Comments of Molalla Telephone Company at 3 (filed April 18, 2011); Letter from John Hemphill, Vice President, Pine Telephone System, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, et al., at 3 (filed March 30, 2011); Letter from Dave Osborn, Valley Telephone Cooperative, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, et al., at 3 (filed August 29, 2011).

<sup>41</sup> *Id.*

<sup>42</sup> Bluegrass Telephone Company *USF/ICC Transformation NPRM* Comments at 35-36.

<sup>43</sup> Furchtgott-Roth Economic Enterprises *USF/ICC Transformation NPRM* Comments at 14.

opportunity for parties, including small business enterprises to comment in a publicly accessible docket on the proposed rule revisions and other proposals contained in the *USF/ICC Transformation NPRM* was sufficient. The IRFA described that the *USF/ICC Transformation NPRM* sought comment on amendments to the Commission's rules to address access stimulation as well as a range of outcomes for access charge reform.<sup>44</sup> The IRFA further identified carriers, including small entities as possibly being subject to these reforms,<sup>45</sup> including projected reporting or other compliance-related requirements.<sup>46</sup>

**C. Description and Estimate of the Number of Small Entities to which the Proposed Rules Will Apply**

40. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>47</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>48</sup> In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act.<sup>49</sup> A small-business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>50</sup>

41. **Small Businesses.** Nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA.<sup>51</sup>

42. **Wired Telecommunications Carriers.** The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.<sup>52</sup> According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.<sup>53</sup> Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.<sup>54</sup> Thus, under this size standard, the majority of firms can be considered small.

43. **Local Exchange Carriers (LECs).** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest

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<sup>44</sup> *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4803.

<sup>45</sup> *See id.* at 4803-4825.

<sup>46</sup> *See id.* at

<sup>47</sup> *See* 5 U.S.C. § 603(b)(3).

<sup>48</sup> *See* 5 U.S.C. § 601(6).

<sup>49</sup> *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

<sup>50</sup> *See* 15 U.S.C. § 632.

<sup>51</sup> *See* SBA, Office of Advocacy, "Frequently Asked Questions," <http://www.sba.gov/advo/stats/sbfaq.pdf> (accessed Dec. 2010).

<sup>52</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>53</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110" (issued Nov. 2010).

<sup>54</sup> *See id.*



applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>55</sup> According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.<sup>56</sup> Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.<sup>57</sup> Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by the rules and policies proposed in the Order.

44. **Incumbent Local Exchange Carriers (incumbent LECs).** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>58</sup> According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.<sup>59</sup> Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.<sup>60</sup> Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by rules adopted pursuant to the Order

45. We have included small incumbent LECs in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”<sup>61</sup> The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.<sup>62</sup> We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

46. **Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.** Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>63</sup> According to Commission data, 1,442 carriers reported that they were engaged in the provision of either

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<sup>55</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>56</sup> See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

<sup>57</sup> See *id.*

<sup>58</sup> See 13 C.F.R. § 121.201, NAICS code 517110.

<sup>59</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>60</sup> See *id.*

<sup>61</sup> 5 U.S.C. § 601(3).

<sup>62</sup> See Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a); see also 5 U.S.C. § 601(3). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

<sup>63</sup> See 13 C.F.R. § 121.201, NAICS code 517110.

competitive local exchange services or competitive access provider services.<sup>64</sup> Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.<sup>65</sup> In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.<sup>66</sup> In addition, 72 carriers have reported that they are Other Local Service Providers.<sup>67</sup> Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees.<sup>68</sup> Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by rules adopted pursuant to the Order.

47. **Interexchange Carriers (IXCs).** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>69</sup> According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.<sup>70</sup> Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.<sup>71</sup> Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by rules adopted pursuant to the Order.

48. **Prepaid Calling Card Providers.** Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>72</sup> According to Commission data, 193 carriers have reported that they are engaged in the provision of prepaid calling cards.<sup>73</sup> Of these, an estimated all 193 have 1,500 or fewer employees and none have more than 1,500 employees.<sup>74</sup> Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by rules adopted pursuant to the Order.

49. **Local Resellers.** The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>75</sup> According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.<sup>76</sup> Of these, an estimated 211 have 1,500 or fewer employees and

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<sup>64</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>65</sup> See *id.*

<sup>66</sup> See *id.*

<sup>67</sup> See *id.*

<sup>68</sup> See *id.*

<sup>69</sup> See 13 C.F.R. § 121.201, NAICS code 517110.

<sup>70</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>71</sup> See *id.*

<sup>72</sup> See 13 C.F.R. § 121.201, NAICS code 517911.

<sup>73</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>74</sup> See *id.*

<sup>75</sup> See 13 C.F.R. § 121.201, NAICS code 517911.

<sup>76</sup> See *Trends in Telephone Service* at Table 5.3.

two have more than 1,500 employees.<sup>77</sup> Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by rules adopted pursuant to the Order.

50. **Toll Resellers.** The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>78</sup> According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services.<sup>79</sup> Of these, an estimated 857 have 1,500 or fewer employees and 24 have more than 1,500 employees.<sup>80</sup> Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by rules adopted pursuant to the Order.

51. **Other Toll Carriers.** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>81</sup> According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.<sup>82</sup> Of these, an estimated 279 have 1,500 or fewer employees and five have more than 1,500 employees.<sup>83</sup> Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by the rules and policies adopted pursuant to the Order.

52. **800 and 800-Like Service Subscribers.**<sup>84</sup> Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service (toll free) subscribers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>85</sup> The most reliable source of information regarding the number of these service subscribers appears to be data the Commission collects on the 800, 888, 877, and 866 numbers in use.<sup>86</sup> According to our data, as of September 2009, the number of 800 numbers assigned was 7,860,000; the number of 888 numbers assigned was 5,588,687; the number of 877 numbers assigned was 4,721,866; and the number of 866 numbers assigned was 7,867,736.<sup>87</sup> We do not have data specifying the number of these subscribers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small businesses under the SBA size standard. Consequently, we estimate that there are 7,860,000 or fewer small entity 800 subscribers;

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<sup>77</sup> See *id.*

<sup>78</sup> See 13 C.F.R. § 121.201, NAICS code 517911.

<sup>79</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>80</sup> See *id.*

<sup>81</sup> See 13 C.F.R. § 121.201, NAICS code 517110.

<sup>82</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>83</sup> See *id.*

<sup>84</sup> We include all toll-free number subscribers in this category, including those for 888 numbers.

<sup>85</sup> See 13 C.F.R. § 121.201, NAICS code 517911.

<sup>86</sup> See *Trends in Telephone Service* at Tables 18.7-18.10.

<sup>87</sup> See *id.*

5,588,687 or fewer small entity 888 subscribers; 4,721,866 or fewer small entity 877 subscribers; and 7,867,736 or fewer small entity 866 subscribers.

53. **Wireless Telecommunications Carriers (except Satellite).** Since 2007, the SBA has recognized wireless firms within this new, broad, economic census category.<sup>88</sup> Prior to that time, such firms were within the now-superseded categories of Paging and Cellular and Other Wireless Telecommunications.<sup>89</sup> Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.<sup>90</sup> For this category, census data for 2007 show that there were 1,383 firms that operated for the entire year.<sup>91</sup> Of this total, 1,368 firms had employment of 999 or fewer employees and 15 had employment of 1000 employees or more.<sup>92</sup> Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.<sup>93</sup> Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.<sup>94</sup> Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

54. **Broadband Personal Communications Service.** The broadband personal communications service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined “small entity” for Blocks C and F as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.<sup>95</sup> For Block F, an additional classification for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>96</sup> These standards defining “small entity” in the context of broadband PCS auctions have been approved by the SBA.<sup>97</sup> No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90

<sup>88</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>89</sup> U.S. Census Bureau, 2002 NAICS Definitions, “517211 Paging”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>; U.S. Census Bureau, 2002 NAICS Definitions, “517212 Cellular and Other Wireless Telecommunications”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

<sup>90</sup> 13 C.F.R. § 121.201, NAICS code 517210. The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

<sup>91</sup> U.S. Census Bureau, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210” (issued Nov. 2010).

<sup>92</sup> *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “100 employees or more.”

<sup>93</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>94</sup> See *id.*

<sup>95</sup> See generally *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7824 (1996); see also 47 C.F.R. § 24.720(b)(1).

<sup>96</sup> See generally *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7824 (1996); see also 47 C.F.R. § 24.720(b)(2).

<sup>97</sup> See, e.g., *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532 (1994).

winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.<sup>98</sup> In 1999, the Commission re-auctioned 347 C, E, and F Block licenses.<sup>99</sup> There were 48 small business winning bidders. In 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction 35.<sup>100</sup> Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In 2005, the Commission completed an auction of 188 C block licenses and 21 F block licenses in Auction 58. There were 24 winning bidders for 217 licenses.<sup>101</sup> Of the 24 winning bidders, 16 claimed small business status and won 156 licenses. In 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction 71.<sup>102</sup> Of the 14 winning bidders, six were designated entities.<sup>103</sup> In 2008, the Commission completed an auction of 20 Broadband PCS licenses in the C, D, E and F block licenses in Auction 78.<sup>104</sup>

55. **Advanced Wireless Services.** In 2008, the Commission conducted the auction of Advanced Wireless Services (“AWS”) licenses.<sup>105</sup> This auction, which as designated as Auction 78, offered 35 licenses in the AWS 1710-1755 MHz and 2110-2155 MHz bands (“AWS-1”). The AWS-1 licenses were licenses for which there were no winning bids in Auction 66. That same year, the Commission completed Auction 78. A bidder with attributed average annual gross revenues that exceeded \$15 million and did not exceed \$40 million for the preceding three years (“small business”) received a 15 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed \$15 million for the preceding three years (“very small business”) received a 25 percent discount on its winning bid. A bidder that had combined total assets of less than \$500 million and combined gross revenues of less than \$125 million in each of the last two years qualified for entrepreneur status.<sup>106</sup> Four winning bidders that identified themselves as very small businesses won 17

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<sup>98</sup> See FCC News, Broadband PCS, D, E and F Block Auction Closes, No. 71744 (rel. Jan. 14, 1997). See also *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 16436 (1997).

<sup>99</sup> See “C, D, E, and F Block Broadband PCS Auction Closes” *Public Notice*, 14 FCC Rcd 6688 (WTB 1999).

<sup>100</sup> See “C and F Block Broadband PCS Auction Closes; Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 2339 (2001).

<sup>101</sup> See “Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58,” *Public Notice*, 20 FCC Rcd 3703 (2005).

<sup>102</sup> See “Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71,” *Public Notice*, 22 FCC Rcd 9247 (2007).

<sup>103</sup> *Id.*

<sup>104</sup> See “Auction of AWS-1 and Broadband PCS Licenses Rescheduled For August 13, 3008, Notice of Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures For Auction 78,” *Public Notice*, 23 FCC Rcd 7496 (2008) (*AWS-1 and Broadband PCS Procedures Public Notice*).

<sup>105</sup> See *AWS-1 and Broadband PCS Procedures Public Notice*, 23 FCC Rcd 7496. Auction 78 also included an auction of Broadband PCS licenses.

<sup>106</sup> *Id.* at 7521-22.

licenses.<sup>107</sup> Three of the winning bidders that identified themselves as a small business won five licenses. Additionally, one other winning bidder that qualified for entrepreneur status won 2 licenses.

56. **Narrowband Personal Communications Services.** In 1994, the Commission conducted an auction for Narrowband PCS licenses. A second auction was also conducted later in 1994. For purposes of the first two Narrowband PCS auctions, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less.<sup>108</sup> Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.<sup>109</sup> To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order.<sup>110</sup> A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.<sup>111</sup> A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.<sup>112</sup> The SBA has approved these small business size standards.<sup>113</sup> A third auction was conducted in 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.<sup>114</sup> Three of these claimed status as a small or very small entity and won 311 licenses.

57. **Paging (Private and Common Carrier).** In the *Paging Third Report and Order*, we developed a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>115</sup> A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. The SBA has approved these

<sup>107</sup> See “Auction of AWS-1 and Broadband PCS Licenses Closes, Winning Bidders Announced for Auction 78, Down Payments Due September 9, 2008, FCC Forms 601 and 602 Due September 9, 2008, Final Payments Due September 23, 2008, Ten-Day Petition to Deny Period,” *Public Notice*, 23 FCC Rcd 12749 (2008).

<sup>108</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS*, PP Docket No. 93-253, GEN Docket No. 90-314, ET Docket No. 92-100, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196, para. 46 (1994).

<sup>109</sup> See *Announcing the High Bidders in the Auction of Ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674*, Public Notice, PNWL 94-004 (rel. Aug. 2, 1994); *Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total \$490,901,787*, Public Notice, PNWL 94-27 (rel. Nov. 9, 1994).

<sup>110</sup> *Amendment of the Commission’s Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, ET Docket No. 92-100, PP Docket No. 93-253, Narrowband PCS, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000) (*Narrowband PCS Second Report and Order*).

<sup>111</sup> *Narrowband PCS Second Report and Order*, 15 FCC Rcd at 10476, para. 40.

<sup>112</sup> *Id.*

<sup>113</sup> See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from A. Alvarez, Administrator, SBA (Dec. 2, 1998) (*Alvarez Letter 1998*).

<sup>114</sup> See “Narrowband PCS Auction Closes,” *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

<sup>115</sup> See *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, PR Docket No. 93-253, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, 10085–88, paras. 98–107 (1999) (*Paging Third Report and Order*).

small business size standards.<sup>116</sup> According to Commission data, 291 carriers have reported that they are engaged in Paging or Messaging Service.<sup>117</sup> Of these, an estimated 289 have 1,500 or fewer employees, and two have more than 1,500 employees.<sup>118</sup> Consequently, the Commission estimates that the majority of paging providers are small entities that may be affected by our action. An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses.<sup>119</sup> A subsequent auction of MEA and Economic Area (“EA”) licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold.<sup>120</sup> One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, was held in 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.<sup>121</sup> A fourth auction, consisting of 9,603 lower and upper paging band licenses was held in the year 2010. Twenty-nine bidders claiming small or very small business status won 3,016 licenses.<sup>122</sup>

58. **220 MHz Radio Service – Phase I Licensees.** The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to Wireless Telecommunications Carriers (except Satellite). Under this category, the SBA deems a wireless business to be small if it has 1,500 or fewer employees.<sup>123</sup> The Commission estimates that nearly all such licensees are small businesses under the SBA’s small business size standard that may be affected by rules adopted pursuant to the Order.

59. **220 MHz Radio Service – Phase II Licensees.** The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>124</sup> This small business size standard indicates that a “small business” is an entity

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<sup>116</sup> See *Alvarez Letter 1998*.

<sup>117</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>118</sup> See *id.*

<sup>119</sup> See *id.*

<sup>120</sup> See “*Lower and Upper Paging Band Auction Closes*,” Public Notice, 16 FCC Rcd 21821 (WTB 2002).

<sup>121</sup> See “*Lower and Upper Paging Bands Auction Closes*,” Public Notice, 18 FCC Rcd 11154 (WTB 2003). The current number of small or very small business entities that hold wireless licenses may differ significantly from the number of such entities that won in spectrum auctions due to assignments and transfers of licenses in the secondary market over time. In addition, some of the same small business entities may have won licenses in more than one auction.

<sup>122</sup> See “*Auction of Lower and Upper Paging Bands Licenses Closes*,” Public Notice, 25 FCC Rcd 18,164 (WTB 2010).

<sup>123</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>124</sup> See *Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, GN Docket No. 93-252, PP Docket No. 93-253, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068–70, paras. 291–295 (1997) (*220 MHz Third Report and Order*).

that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.<sup>125</sup> A “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years.<sup>126</sup> The SBA has approved these small business size standards.<sup>127</sup> Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.<sup>128</sup> In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.<sup>129</sup>

60. **Specialized Mobile Radio.** The Commission awards small business bidding credits in auctions for Specialized Mobile Radio (“SMR”) geographic area licenses in the 800 MHz and 900 MHz bands to entities that had revenues of no more than \$15 million in each of the three previous calendar years.<sup>130</sup> The Commission awards very small business bidding credits to entities that had revenues of no more than \$3 million in each of the three previous calendar years.<sup>131</sup> The SBA has approved these small business size standards for the 800 MHz and 900 MHz SMR Services.<sup>132</sup> The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction was completed in 1996.<sup>133</sup> Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band.<sup>134</sup> The 800 MHz SMR auction for the upper 200 channels was conducted in 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.<sup>135</sup> A second auction for the 800 MHz band was conducted in 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.<sup>136</sup>

61. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels was conducted in 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15

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<sup>125</sup> See *id.* at 11068–69, para. 291.

<sup>126</sup> See *id.* at 11068–70, paras. 291–95.

<sup>127</sup> See Letter to D. Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998) (*Alvarez to Phythyon Letter 1998*).

<sup>128</sup> See “Phase II 220 MHz Service Auction Closes,” *Public Notice*, 14 FCC Rcd 605 (1998).

<sup>129</sup> See “Phase II 220 MHz Service Spectrum Auction Closes,” *Public Notice*, 14 FCC Rcd 11218 (1999).

<sup>130</sup> 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

<sup>131</sup> 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

<sup>132</sup> See Letter from Aida Alvarez, Administrator, SBA, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, FCC (Aug. 10, 1999) (*Alvarez Letter 1999*).

<sup>133</sup> “FCC Announces Winning Bidders in the Auction of 1,020 Licenses to Provide 900 MHz SMR in Major Trading Areas: Down Payments due April 22, 1996, FCC Form 600s due April 29, 1996,” *Public Notice*, 11 FCC Rcd 18599 (WTB 1996).

<sup>134</sup> *Id.*

<sup>135</sup> See “Correction to Public Notice DA 96-586 ‘FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,’” *Public Notice*, 11 FCC Rcd 18,637 (WTB 1996).

<sup>136</sup> See *Multi-Radio Service Auction Closes*, *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).



million size standard.<sup>137</sup> In an auction completed in 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded.<sup>138</sup> Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

62. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. In addition, we do not know how many of these firms have 1,500 or fewer employees.<sup>139</sup> We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

63. **Broadband Radio Service and Educational Broadband Service.** Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (“MDS”) and Multichannel Multipoint Distribution Service (“MMDS”) systems, and “wireless cable,” transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) (previously referred to as the Instructional Television Fixed Service (“ITFS”)).<sup>140</sup> In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.<sup>141</sup> The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (“BTAs”). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.<sup>142</sup> After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission’s rules. The Commission has adopted three levels of bidding credits for BRS: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) is eligible to receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) is eligible to receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed

<sup>137</sup> See “800 MHz Specialized Mobile Radio (SMR) Service General Category (851-854 MHz) and Upper Band (861-865 MHz) Auction Closes; Winning Bidders Announced,” *Public Notice*, 15 FCC Rcd 17162 (WTB 2000).

<sup>138</sup> See “800 MHz SMR Service Lower 80 Channels Auction Closes; Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 1736 (WTB 2000).

<sup>139</sup> See generally 13 C.F.R. § 121.201, NAICS code 517210.

<sup>140</sup> *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593 para. 7 (1995).

<sup>141</sup> 47 C.F.R. § 21.961(b)(1).

<sup>142</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard.

average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) is eligible to receive a 35 percent discount on its winning bid.<sup>143</sup> In 2009, the Commission conducted Auction 86, which offered 78 BRS licenses.<sup>144</sup> Auction 86 concluded with ten bidders winning 61 licenses.<sup>145</sup> Of the ten, two bidders claimed small business status and won 4 licenses; one bidder claimed very small business status and won three licenses; and two bidders claimed entrepreneur status and won six licenses.

64. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.<sup>146</sup> Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."<sup>147</sup> The SBA defines a small business size standard for this category as any such firms having 1,500 or fewer employees. The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.<sup>148</sup> Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.<sup>149</sup> Thus, under this size standard, the majority of firms can be considered small and may be affected by rules adopted pursuant to the Order.

65. **Lower 700 MHz Band Licenses.** The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.<sup>150</sup> The Commission defined a "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.<sup>151</sup> A "very small business" is defined as an entity that, together with

<sup>143</sup> 47 C.F.R. § 27.1218. *See also* "Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86," *Public Notice*, 24 FCC Rcd 8277, 8296 (WTB 2009) (*Auction 86 Procedures Public Notice*).

<sup>144</sup> *Auction 86 Procedures Public Notice*, 24 FCC Rcd at 8280.

<sup>145</sup> "Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period," *Public Notice*, 24 FCC Rcd 13572 (WTB 2009).

<sup>146</sup> The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on EBS licensees.

<sup>147</sup> U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition); <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>148</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

<sup>149</sup> *See id.*

<sup>150</sup> *See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, GN Docket No. 01-74, Report and Order, 17 FCC Rcd 1022 (2002) (*Channels 52-59 Report and Order*).

<sup>151</sup> *See Channels 52-59 Report and Order*, 17 FCC Rcd at 1087-88 para. 172.

its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.<sup>152</sup> Additionally, the Lower 700 MHz Band had a third category of small business status for Metropolitan/Rural Service Area (“MSA/RSA”) licenses, identified as “entrepreneur” and defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.<sup>153</sup> The SBA approved these small size standards.<sup>154</sup> The Commission conducted an auction in 2002 of 740 Lower 700 MHz Band licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)). Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders.<sup>155</sup> Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.<sup>156</sup> The Commission conducted a second Lower 700 MHz Band auction in 2003 that included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses.<sup>157</sup> Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.<sup>158</sup> In 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz Band, designated Auction 60. There were three winning bidders for five licenses. All three winning bidders claimed small business status.<sup>159</sup>

66. In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order*.<sup>160</sup> The *700 MHz Second Report and Order* revised the band plan for the commercial (including Guard Band) and public safety spectrum, adopted services rules, including stringent build-out requirements, an open platform requirement on the C Block, and a requirement on the D Block licensee to construct and operate a nationwide, interoperable wireless broadband network for public safety users.<sup>161</sup> An auction of A, B and E block licenses in the Lower 700 MHz band was held in 2008.<sup>162</sup> Twenty winning bidders claimed small business status (those with attributable average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years).

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<sup>152</sup> See *id.*

<sup>153</sup> See *id.* at 1088 para. 173.

<sup>154</sup> See *Alvarez Letter 1999*.

<sup>155</sup> See “Lower 700 MHz Band Auction Closes,” *Public Notice*, 17 FCC Rcd 17272 (WTB 2002).

<sup>156</sup> *Id.*

<sup>157</sup> See “Lower 700 MHz Band Auction Closes,” *Public Notice*, 18 FCC Rcd 11873 (WTB 2003).

<sup>158</sup> See *id.*

<sup>159</sup> “Auction of Lower 700 MHz Band Licenses Closes, Winning Bidders Announced for Auction No. 60, Down Payments due August 19, 2005, FCC Forms 601 and 602 due August 19, 2005, Final Payment due September 2, 2005, Ten-Day Petition to Deny Period,” *Public Notice*, 20 FCC Rcd 13424 (WTB 2005).

<sup>160</sup> See *Service Rules for the 698-746, 747-762 and 777-792 MHz Band*, WT Docket No. 06-150, *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephone, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules, Implementing a Nationwide, Broadband Interoperable Public Safety Network in the 700 MHz Band, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Communications Requirements Through the Year 2010, WT Docket Nos. 96-86, 01-309, 03-264, 06-169, PS Docket No. 06-229, *Second Report and Order*, 22 FCC Rcd 15289 (2007) (*700 MHz Second Report and Order*).

<sup>161</sup> *Id.*

<sup>162</sup> See *Auction of 700 MHz Band Licenses Closes*, *Public Notice*, 23 FCC Rcd 4572 (WTB 2008).

Thirty three winning bidders claimed very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years). In 2011, the Commission conducted Auction 92, which offered 16 Lower 700 MHz band licenses that had been made available in Auction 73 but either remained unsold or were licenses on which a winning bidder defaulted. Two of the seven winning bidders in Auction 92 claimed very small business status, winning a total of four licenses.<sup>163</sup>

67. **Upper 700 MHz Band Licenses.** In the *700 MHz Second Report and Order*, the Commission revised its rules regarding Upper 700 MHz band licenses.<sup>164</sup> In 2008, the Commission conducted Auction 73 in which C and D block licenses in the Upper 700 MHz band were available.<sup>165</sup> Three winning bidders claimed very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years).

68. **700 MHz Guard Band Licensees.** In the *700 MHz Guard Band Order*, we adopted a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>166</sup> A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.<sup>167</sup> Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.<sup>168</sup> An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.<sup>169</sup> Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.<sup>170</sup>

69. **Cellular Radiotelephone Service.** Auction 77 was held to resolve one group of mutually exclusive applications for Cellular Radiotelephone Service licenses for unserved areas in New Mexico.<sup>171</sup> Bidding credits for designated entities were not available in Auction 77.<sup>172</sup> In 2008, the Commission completed the closed auction of one unserved service area in the Cellular Radiotelephone

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<sup>163</sup> See “Auction of 700 MHz Band Licenses Closes, Winning Bidders Announced for Auction 92, Down Payments and FCC Forms 601 and 602 Due August 11, 2011, Final Payments Due August 25, 2011, Ten-Day Petition to Deny Period,” *Public Notice*, 26 FCC Rcd 10,494 (WTB 2011).

<sup>164</sup> *700 MHz Second Report and Order*, 22 FCC Rcd 15,289.

<sup>165</sup> See Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 FCC Rcd 4572 (2008).

<sup>166</sup> See *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, WT Docket No. 99-168, Second Report and Order, 15 FCC Rcd 5299 (2000) (*700 MHz Guard Band Order*).

<sup>167</sup> See *id.* at 5343–45 paras. 106–10.

<sup>168</sup> See *id.*

<sup>169</sup> See “700 MHz Guard Band Auction Closes,” *Public Notice*, 15 FCC Rcd 18026 (2000).

<sup>170</sup> See “700 MHz Guard Band Auction Closes,” *Public Notice*, 16 FCC Rcd 4590 (2001).

<sup>171</sup> See “Closed Auction of Licenses for Cellular Unserved Service Area Scheduled for June 17, 2008, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 77,” *Public Notice*, 23 FCC Rcd 6670 (WTB 2008).

<sup>172</sup> *Id.* at 6685.

Service, designated as Auction 77. Auction 77 concluded with one provisionally winning bid for the unserved area totaling \$25,002.<sup>173</sup>

70. **Private Land Mobile Radio (“PLMR”).** PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee’s primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we use the broad census category, Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons.<sup>174</sup> The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. We note that PLMR licensees generally use the licensed facilities in support of other business activities, and therefore, it would also be helpful to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.<sup>175</sup>

71. As of March 2010, there were 424,162 PLMR licensees operating 921,909 transmitters in the PLMR bands below 512 MHz. We note that any entity engaged in a commercial activity is eligible to hold a PLMR license, and that any revised rules in this context could therefore potentially impact small entities covering a great variety of industries.

72. **Rural Radiotelephone Service.** The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.<sup>176</sup> A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (“BETRS”).<sup>177</sup> In the present context, we will use the SBA’s small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.<sup>178</sup> There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies proposed herein.

73. **Air-Ground Radiotelephone Service.** The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.<sup>179</sup> We will use SBA’s small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.<sup>180</sup> There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard and may be affected by rules adopted pursuant to the Order.

74. **Aviation and Marine Radio Services.** Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency

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<sup>173</sup> See *Auction of Cellular Unserved Service Area License Closes, Winning Bidder Announced for Auction 77, Down Payment due July 2, 2008, Final Payment due July 17, 2008*, Public Notice, 23 FCC Rcd 9501 (WTB 2008).

<sup>174</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>175</sup> See generally 13 C.F.R. § 121.201.

<sup>176</sup> The service is defined in 47 C.F.R. § 22.99.

<sup>177</sup> BETRS is defined in 47 C.F.R. §§ 22.757 and 22.759.

<sup>178</sup> 13 C.F.R. § 121.201, NAICS code 517210.

<sup>179</sup> See 47 C.F.R. § 22.99.

<sup>180</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees.<sup>181</sup> Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.<sup>182</sup> Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875-157.4500 MHz (ship transmit) and 161.775-162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a “small” business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$15 million dollars.<sup>183</sup> In addition, a “very small” business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$3 million dollars.<sup>184</sup> There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as “small” businesses under the above special small business size standards and may be affected by rules adopted pursuant to the Order.

75. **Fixed Microwave Services.** Fixed microwave services include common carrier,<sup>185</sup> private operational-fixed,<sup>186</sup> and broadcast auxiliary radio services.<sup>187</sup> At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for Wireless Telecommunications Carriers

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<sup>181</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>182</sup> U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-\\_skip=700&-ds\\_name=EC0751SSSZ5&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en).

<sup>183</sup> See *generally Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853, 19884-88 paras. 64-73 (1998).

<sup>184</sup> See *id.*

<sup>185</sup> See 47 C.F.R. §§ 101 *et seq.* (formerly, Part 21 of the Commission's Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

<sup>186</sup> Persons eligible under parts 80 and 90 of the Commission's Rules can use Private Operational-Fixed Microwave services. See 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

<sup>187</sup> Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. See 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

(except Satellite), which is 1,500 or fewer employees.<sup>188</sup> The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

76. **Offshore Radiotelephone Service.** This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.<sup>189</sup> There are presently approximately 55 licensees in this service. The Commission is unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for the category of Wireless Telecommunications Carriers (except Satellite). Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.<sup>190</sup> Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.<sup>191</sup> Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus, under this category and the associated small business size standard, the majority of firms can be considered small.

77. **39 GHz Service.** The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of \$40 million or less in the three previous calendar years.<sup>192</sup> An additional size standard for “very small business” is: an entity that, together with affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>193</sup> The SBA has approved these small business size standards.<sup>194</sup> The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by rules adopted pursuant to the Order.

78. **Local Multipoint Distribution Service.** Local Multipoint Distribution Service (“LMDS”) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.<sup>195</sup> The auction of the 986 LMDS licenses began and closed in 1998. The

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<sup>188</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>189</sup> This service is governed by Subpart I of Part 22 of the Commission's Rules. See 47 C.F.R. §§ 22.1001-22.1037.

<sup>190</sup> *Id.*

<sup>191</sup> U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-skip=700&-ds\\_name=EC0751SSSZ5&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-_lang=en).

<sup>192</sup> See *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, PP Docket No. 93-253, Report and Order, 12 FCC Rcd 18600, 18661–64, paras. 149–151 (1997).

<sup>193</sup> See *id.*

<sup>194</sup> See Letter to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998).

<sup>195</sup> See *Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997) (“LMDS Second Report and Order”).

Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>196</sup> An additional small business size standard for “very small business” was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>197</sup> The SBA has approved these small business size standards in the context of LMDS auctions.<sup>198</sup> There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. In 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses.

79. **218-219 MHz Service.** The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years.<sup>199</sup> In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we established a small business size standard for a “small business” as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed \$15 million for the preceding three years.<sup>200</sup> A “very small business” is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed \$3 million for the preceding three years.<sup>201</sup> These size standards will be used in future auctions of 218-219 MHz spectrum.

80. **2.3 GHz Wireless Communications Services.** This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined “small business” for the wireless communications services (“WCS”) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million for each of the three preceding years.<sup>202</sup> The SBA has approved these definitions.<sup>203</sup> The Commission auctioned geographic area licenses in the WCS service. In the auction, which was conducted in 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

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<sup>196</sup> See *LMDS Second Report and Order*, 12 FCC Rcd at 12689-90, para. 348.

<sup>197</sup> See *id.*

<sup>198</sup> See *Alvarez to Phythyon Letter 1998*.

<sup>199</sup> See *generally Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fourth Report and Order, 9 FCC Rcd 2330 (1994).

<sup>200</sup> See *generally Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999).

<sup>201</sup> See *id.*

<sup>202</sup> *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (WCS)*, GN Docket No. 96-228, Report and Order, 12 FCC Rcd 10785, 10879 para. 194 (1997).

<sup>203</sup> See Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (Dec. 2, 1998) (*Alvarez Letter 1998*).



81. **1670-1675 MHz Band.** An auction for one license in the 1670-1675 MHz band was conducted in 2003. The Commission defined a “small business” as an entity with attributable average annual gross revenues of not more than \$40 million for the preceding three years and thus would be eligible for a 15 percent discount on its winning bid for the 1670-1675 MHz band license. Further, the Commission defined a “very small business” as an entity with attributable average annual gross revenues of not more than \$15 million for the preceding three years and thus would be eligible to receive a 25 percent discount on its winning bid for the 1670-1675 MHz band license. One license was awarded. The winning bidder was not a small entity.

82. **3650–3700 MHz band.** In March 2005, the Commission released a *Report and Order and Memorandum Opinion and Order* that provides for nationwide, non-exclusive licensing of terrestrial operations, utilizing contention-based technologies, in the 3650 MHz band (*i.e.*, 3650–3700 MHz).<sup>204</sup> As of April 2010, more than 1270 licenses have been granted and more than 7433 sites have been registered. The Commission has not developed a definition of small entities applicable to 3650–3700 MHz band nationwide, non-exclusive licensees. However, we estimate that the majority of these licensees are Internet Access Service Providers (ISPs) and that most of those licensees are small businesses.

83. **24 GHz – Incumbent Licensees.** This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. For this service, the Commission uses the SBA small business size standard for the category “Wireless Telecommunications Carriers (except satellite),” which is 1,500 or fewer employees.<sup>205</sup> To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.<sup>206</sup> Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the Census’ use of the classifications “firms” does not track the number of “licenses”. The Commission believes that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent<sup>207</sup> and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

84. **24 GHz – Future Licensees.** With respect to new applicants in the 24 GHz band, the size standard for “small business” is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of \$15 million.<sup>208</sup> “Very small business” in the 24 GHz band is an entity that, together with controlling interests and affiliates, has

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<sup>204</sup> The service is defined in section 90.1301 *et seq.* of the Commission’s Rules, 47 C.F.R. § 90.1301 *et seq.*

<sup>205</sup> 13 C.F.R. § 121.201, NAICS code 517210.

<sup>206</sup> U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-\\_skip=700&-ds\\_name=EC0751SSSZ5&-\\_lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en).

<sup>207</sup> Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

<sup>208</sup> See *Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967 para. 77 (2000); see also 47 C.F.R. § 101.538(a)(2).

average gross revenues not exceeding \$3 million for the preceding three years.<sup>209</sup> The SBA has approved these small business size standards.<sup>210</sup> These size standards will apply to a future 24 GHz license auction, if held.

85. **Satellite Telecommunications.** Since 2007, the SBA has recognized satellite firms within this revised category, with a small business size standard of \$15 million.<sup>211</sup> The most current Census Bureau data are from the economic census of 2007, and we will use those figures to gauge the prevalence of small businesses in this category. Those size standards are for the two census categories of “Satellite Telecommunications” and “Other Telecommunications.” Under the “Satellite Telecommunications” category, a business is considered small if it had \$15 million or less in average annual receipts.<sup>212</sup> Under the “Other Telecommunications” category, a business is considered small if it had \$25 million or less in average annual receipts.<sup>213</sup>

86. The first category of Satellite Telecommunications “comprises establishments primarily engaged in providing point-to-point telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”<sup>214</sup> For this category, Census Bureau data for 2007 show that there were a total of 512 firms that operated for the entire year.<sup>215</sup> Of this total, 464 firms had annual receipts of under \$10 million, and 18 firms had receipts of \$10 million to \$24,999,999.<sup>216</sup> Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by rules adopted pursuant to the Order.

87. The second category of Other Telecommunications “primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.”<sup>217</sup> For this category, Census Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year.<sup>218</sup> Of

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<sup>209</sup> See *Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967 para. 77 (2000); see also 47 C.F.R. § 101.538(a)(1).

<sup>210</sup> See Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

<sup>211</sup> See 13 C.F.R. § 121.201, NAICS code 517410.

<sup>212</sup> *Id.*

<sup>213</sup> See 13 C.F.R. § 121.201, NAICS code 517919.

<sup>214</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517410 Satellite Telecommunications”.

<sup>215</sup> See 13 C.F.R. § 121.201, NAICS code 517410.

<sup>216</sup> See *id.* An additional 38 firms had annual receipts of \$25 million or more.

<sup>217</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517919 Other Telecommunications”, <http://www.census.gov/naics/2007/def/ND517919.HTM>.

<sup>218</sup> See 13 C.F.R. § 121.201, NAICS code 517919.

this total, 2,346 firms had annual receipts of under \$25 million.<sup>219</sup> Consequently, we estimate that the majority of Other Telecommunications firms are small entities that might be affected by our action.

88. **Cable and Other Program Distribution.** Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”<sup>220</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.<sup>221</sup> According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.<sup>222</sup> Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.<sup>223</sup> Thus, under this size standard, the majority of firms can be considered small and may be affected by rules adopted pursuant to the Order.

89. **Cable Companies and Systems.** The Commission has developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.<sup>224</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.<sup>225</sup> In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.<sup>226</sup> Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.<sup>227</sup> Thus, under this second size standard, most cable systems are small and may be affected by rules adopted pursuant to the Order.

90. **Cable System Operators.** The Act also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose

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<sup>219</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517919” (issued Nov. 2010).

<sup>220</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>221</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>222</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

<sup>223</sup> *See id.*

<sup>224</sup> *See* 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *See Implementation of Sections of the 1992 Cable Television Consumer Protection and Competition Act: Rate Regulation*, MM Docket Nos. 92-266, 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 para. 28 (1995).

<sup>225</sup> These data are derived from R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

<sup>226</sup> *See* 47 C.F.R. § 76.901(c).

<sup>227</sup> WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, “U.S. Cable Systems by Subscriber Size,” page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

gross annual revenues in the aggregate exceed \$250,000,000.”<sup>228</sup> The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>229</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.<sup>230</sup> We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,<sup>231</sup> and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

91. **Open Video Services.** The open video system (“OVS”) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.<sup>232</sup> The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,<sup>233</sup> OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”<sup>234</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.<sup>235</sup> Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.<sup>236</sup> Thus, under this second size standard, most cable systems are small and may be affected by rules adopted pursuant to the Order. In addition, we note that the Commission has certified some OVS operators, with some now providing service.<sup>237</sup> Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.<sup>238</sup> The Commission does not have financial or employment information regarding the entities authorized to

<sup>228</sup> 47 U.S.C. § 543(m)(2); *see also* 47 C.F.R. § 76.901(f) & nn.1–3.

<sup>229</sup> 47 C.F.R. § 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

<sup>230</sup> These data are derived from R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

<sup>231</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules.

<sup>232</sup> 47 U.S.C. § 571(a)(3)–(4). *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, 24 FCC Rcd 542, 606 para. 135 (2009) (“*Thirteenth Annual Cable Competition Report*”).

<sup>233</sup> *See* 47 U.S.C. § 573.

<sup>234</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>235</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

<sup>236</sup> *See id.*

<sup>237</sup> A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsr.html>.

<sup>238</sup> *See Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606-07 para. 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

92. **Internet Service Providers.** Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”<sup>239</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.<sup>240</sup> According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.<sup>241</sup> Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.<sup>242</sup> Thus, under this size standard, the majority of firms can be considered small. In addition, according to Census Bureau data for 2007, there were a total of 396 firms in the category Internet Service Providers (broadband) that operated for the entire year.<sup>243</sup> Of this total, 394 firms had employment of 999 or fewer employees, and two firms had employment of 1000 employees or more.<sup>244</sup> Consequently, we estimate that the majority of these firms are small entities that may be affected by rules adopted pursuant to the Order.

93. **Internet Publishing and Broadcasting and Web Search Portals.** Our action may pertain to interconnected VoIP services, which could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The Commission has not adopted a size standard for entities that create or provide these types of services or applications. However, the Census Bureau has identified firms that “primarily engaged in 1) publishing and/or broadcasting content on the Internet exclusively or 2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals).”<sup>245</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 500 or fewer employees.<sup>246</sup> According to Census Bureau data for 2007, there were 2,705 firms in this category that operated for the entire year.<sup>247</sup> Of this total, 2,682 firms had employment of 499 or fewer employees, and

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<sup>239</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>240</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>241</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110” (issued Nov. 2010).

<sup>242</sup> *See id.*

<sup>243</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171103 (issued Nov. 2010).

<sup>244</sup> *See id.*

<sup>245</sup> U.S. Census Bureau, “2007 NAICS Definitions: 519130 Internet Publishing and Broadcasting and Web Search Portals,” <http://www.naics.com/censusfiles/ND519130.HTM>.

<sup>246</sup> *See* 13 C.F.R. § 121.201, NAICS code 519130.

<sup>247</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 519130” (issued Nov. 2010).

23 firms had employment of 500 employees or more.<sup>248</sup> Consequently, we estimate that the majority of these firms are small entities that may be affected by rules adopted pursuant to the Order.

94. **Data Processing, Hosting, and Related Services.** Entities in this category “primarily ... provid[e] infrastructure for hosting or data processing services.”<sup>249</sup> The SBA has developed a small business size standard for this category; that size standard is \$25 million or less in average annual receipts.<sup>250</sup> According to Census Bureau data for 2007, there were 8,060 firms in this category that operated for the entire year.<sup>251</sup> Of these, 7,744 had annual receipts of under \$ \$24,999,999.<sup>252</sup> Consequently, we estimate that the majority of these firms are small entities that may be affected by rules adopted pursuant to the Order. .

95. **All Other Information Services.** The Census Bureau defines this industry as including “establishments primarily engaged in providing other information services (except news syndicates, libraries, archives, Internet publishing and broadcasting, and Web search portals).”<sup>253</sup> Our action pertains to interconnected VoIP services, which could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The SBA has developed a small business size standard for this category; that size standard is \$7.0 million or less in average annual receipts.<sup>254</sup> According to Census Bureau data for 2007, there were 367 firms in this category that operated for the entire year.<sup>255</sup> Of these, 334 had annual receipts of under \$5.0 million, and an additional 11 firms had receipts of between \$5 million and \$9,999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

#### **D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

96. This Order has two components, modernization of the Commission’s universal service system and reform of the Commission’s intercarrier compensation mechanism. We summarize below the recordkeeping and other obligations of the accompanying Order. Additional information on each of these requirements can be found in the Order.

97. In the Order, the Commission takes several steps to harmonize and update annual reporting requirements relating to universal service recipients. We extend current reporting requirements for voice service to all ETCs, and we adopt uniform broadband reporting requirements for all ETCs. We

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<sup>248</sup> *Id.*

<sup>249</sup> U.S. Census Bureau, “2007 NAICS Definitions: 518210 Data Processing, Hosting, and Related Services”, <http://www.census.gov/naics/2007/def/NDEF518.HTM>.

<sup>250</sup> *See* 13 C.F.R. § 121.201, NAICS code 518210.

<sup>251</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 4, “Establishment and Firm Size: Receipts Size of Firms for the United States: 2007 NAICS Code 518210” (issued Nov. 2010).

<sup>252</sup> *Id.*

<sup>253</sup> U.S. Census Bureau, “2007 NAICS Definitions: 519190 All Other Information Services”, <http://www.census.gov/naics/2007/def/ND519190.HTM>.

<sup>254</sup> *See* 13 C.F.R. § 121.201, NAICS code 519190.

<sup>255</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 4, “Establishment and Firm Size: Receipts Size of Firms for the United States: 2007 NAICS Code 519190” (issued Nov. 2010).

also adopt rules requiring the reporting of financial and ownership information to assist our discharge of statutory requirements.<sup>256</sup>

98. We extend the current federal annual reporting requirements to all ETCs that receive high-cost support, except recipients of only Mobility Fund Phase I support, as a baseline requirement.<sup>257</sup> We also revise the Commission's annual reporting and certification requirements and create new requirements applicable to all ETCs that receive high-cost support, except recipients of only Mobility Fund Phase I support, to ensure carriers are complying with public interest obligations, including new broadband-related requirements, and that they are using the funds they receive for the intended purposes. These requirements include reports and certifications concerning deployment, performance requirements, service quality, rates, and financial and ownership information. Included in these requirements is a requirement that recipients of funding test their broadband networks for compliance with speed and latency metrics and certify to and report the results to the Universal Service Administrative Company on an annual basis. These results will be subject to audit.<sup>258</sup> We also create new reporting requirements for carriers electing to receive CAF Phase I incremental support. Specifically, carriers will be required to file notices identifying where they will deploy broadband in connection with their incremental support, and they will be required, as part of their annual filings, to certify that they have met required deployment milestones. Mobility Fund recipients will be required to file annual reports demonstrating the coverage provided with the Mobility Fund support for a period of five years after qualifying for the support. These annual reports must include information such as project descriptions and data from network coverage drive tests.<sup>259</sup> We also establish certain reporting requirements for applicants seeking to participate in an auction to bid for Mobility Fund support. These requirements include the disclosure of information such as parties' ownership information and the source of the spectrum they plan to use to meet their Mobility Fund obligations in the particular area(s) for which they plan to bid. Winning bidders who apply for funds awarded through the reverse auction must satisfy additional reporting requirements, including the provision of detailed ownership information. These winning bidders must also provide an irrevocable stand-by Letter of Credit in an amount equal to the amount of Mobility Fund support as it is disbursed. All winning bidders, regardless of criteria such as capitalization level, will be required to meet the Letter of Credit requirement. The Commission concluded that limiting the requirement to bidders below a certain level of capitalization would likely disproportionately burden small business entities, even though small entities are often less able to sustain the additional cost burden of posting financial security while still being able to compete with larger entities.

99. Recognizing that existing five-year build out plans may need to change to account for new broadband obligations adopted in the Order, we require all ETCs to file a new five-year build-out plan in a manner consistent with our rules. ETCs will also be required to include in their annual reports information regarding their progress on this five-year broadband build-out plan beginning April 1, 2014. We require all rate-of-return ETCs receiving support to include a self-certification letter certifying that they are taking reasonable steps to offer broadband service throughout their service area and that requests for such service are met within a reasonable amount of time. We also require all ETCs receiving CAF support in price cap territories based on a forward-looking cost model to include a self-certification letter certifying that they are meeting the interim deployment milestones as set forth under our revised public

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<sup>256</sup> See *supra* Section VIII.A.2.

<sup>257</sup> See *id.*

<sup>258</sup> See *supra* Section VI.B.

<sup>259</sup> See *supra* Section VII.E.

interest obligations and that they are taking reasonable steps to meet increased speed obligations that will exist for all supported locations before the expiration of the five-year term for CAF Phase II funding.<sup>260</sup>

100. The rules adopted to address arbitrage practices will affect certain carriers, potentially including small entities. Carriers that meet the definition of access stimulation will generally be required to file revised tariffs to account for the change in the volume of their traffic. Further, the modifications to address phantom traffic will apply to all service providers, including small entities, that originate interstate or intrastate traffic on the PSTN, or that originate inter- or intrastate interconnected VoIP traffic. These measures will require service providers to transmit the telephone number associated with the calling party to the next provider in the call path and intermediate providers to pass calling party number or charge number signaling information they receive from other providers unaltered, to subsequent providers in the call path. Service providers, including small entities, may need to modify some administrative processes relating to their signaling and billing systems as a result of these rule changes.

101. As part of our comprehensive reform of the intercarrier compensation system, we establish a uniform, national transition for default intercarrier compensation rate levels. We set forth two separate transition paths – one for price cap carriers and competitive LECs that benchmark to price cap rates and one for rate-of-return carriers and competitive LECs that benchmark to rate-of-return rates. For the transition of default rates, carriers, including small entities, may be required to adjust their record-keeping, administrative and billing systems, and interstate and intrastate tariff filings in order to effectuate necessary changes to rate levels. At the same time, carriers will remain free to enter into alternative intercarrier compensation agreements.

102. We also adopt a transitional recovery mechanism in order to facilitate incumbent LECs' gradual transition away from existing revenues. The mechanism will allow LECs to partially recover ICC revenues reduced as part of our intercarrier compensation reforms from sources such as reasonable increases to end user charges and, where appropriate, universal service support. As part of our recovery mechanism and to evaluate compliance with the Order and rules, incumbent local exchange carriers electing to participate in the recovery mechanism, including small entities, will be required to file data annually regarding rates, revenues, expenses and demand with the Commission, states, and Universal Service Administrative Company (USAC), as applicable. These data are needed to monitor compliance as well as the impact of the reforms we adopt today and to enable the Commission to resolve the issues teed up in the FNPRM regarding the appropriate transition to bill-and-keep. To minimize any burden, filings will be aggregated at the holding company level when possible, limited to the preceding fiscal year, and will include data carriers must monitor to comply with our recovery mechanism rules. For carriers eligible and electing to receive ICC CAF support, we will ensure that the data filed with USAC is consistent with our request, so that carriers can use the same format for both filings. All such information may be filed under protective order and will be treated as confidential

103. We adopt a prospective intercarrier compensation framework for VoIP traffic. Pursuant to this framework, we allow carriers to tariff default intercarrier compensation charges for toll VoIP-PSTN traffic in the absence of an agreement for different intercarrier compensation. VoIP and other service providers, including small entities, may need to modify or adopt administrative, record-keeping or other processes to implement the new intercarrier compensation framework applicable to VoIP traffic. Service providers may also need to revise their interstate and intrastate tariffs to account for these changes. For interstate toll VoIP-PSTN traffic, the relevant language will be included in a tariff filed with the Commission, and for intrastate toll VoIP-PSTN traffic, the rates may be included in a state tariff.

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<sup>260</sup> See *supra* Section VIII.A.2.



104. Finally, we clarify that the compensation obligations under section 20.11 of our rules, 47 C.F.R. § 20.11 are coextensive with the reciprocal compensation requirements under 251(b)(5) and we adopt bill-and-keep as the default compensation for non-access traffic exchanged between LECs and CMRS providers. To further ease the move to bill-and-keep LEC-CMRS traffic for rate-of-return carriers, we limit rate-of-return carriers' responsibility for the costs of transport involving non-access traffic exchanged between CMRS providers and rural, rate-of-return regulated LECs. In addition, as described above, we make clarifications surrounding the intraMTA rule. As a result of these actions, service providers, including small entities, may need to modify some of their processes surrounding the billing and collection of intercarrier compensation.

**E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

105. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives, among others: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>261</sup>

**1. Universal Service**

106. The Commission is aware that some of the universal service proposals under consideration may impact small entities. The Commission held meetings with small carriers that operate in the most rural areas of the nation and considered the economic impact on small entities, as identified in comments filed in response to the *USF/ICC Transformation NPRM* and the *Mobility Fund NPRM*, in reaching its final conclusions and taking action in this proceeding. In addition, the Commission held a workshop in Nebraska in order to hear directly from small companies serving rural America. The Commission also held various meetings in Alaska and other rural areas, including those in South Dakota.

107. The Commission recognizes that, in the absence of any federal mandate to provide broadband, rate-of-return carriers have been deploying broadband to millions of rural Americans, often with support from a combination of loans from lenders and ongoing universal service support. Rather than establishing a mandatory requirement to deploy broadband-capable facilities to all locations within their service territory, we continue to offer a more flexible approach for these smaller carriers. They will be required to provide their customers with at least the same initial minimum level of broadband service as those carriers who receive model-based support, but given their size, we determine that they should be provided more flexibility in how they make incremental progress in edging out their broadband-capable networks in response to consumer demand; we do not adopt nor impose intermediate build-out milestones. The broadband deployment obligation we adopt is similar to the voice deployment obligations many of these carriers are subject to today.<sup>262</sup>

108. The Commission also considered the economical impact on smaller rate-of-return carriers. Although they serve a smaller portion of access lines in the U.S, smaller rate-of-return carriers operate in many of the most difficult and expensive areas to serve. Recognizing the economic challenges of extending service in the high-cost areas of the country served by rate-of-return carriers, especially smaller carriers, our flexible approach does not require rate-of-return carriers to extend service to customers absent a reasonable request by customers. In addition, we also do not specifically shift these

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<sup>261</sup> 5 U.S.C. § 603.

<sup>262</sup> See *supra*, Section VII.D.2.

smaller rate-of-return carriers from current support mechanisms or shift them to a model or reverse auction mechanism because we realize that these smaller rate-of-return carriers are indeed unique.

109. Many small carriers operating in more remote rural areas have argued that universal service support provides a significant share of their revenues, and thus sudden changes in the current support mechanisms could have a significant impact on their operations. The reforms we adopt today are interim steps that are necessary to allow these rate-of-return carriers to continue receiving support based on existing mechanisms for the time being, but also begins the process of transitioning carriers to a more incentive-based form of regulation.<sup>263</sup>

110. The Commission further recognizes that the existing regulatory structure and competitive trends places many small carriers under financial strain and inhibits the ability of these providers to raise capital. We take a number of important steps to enhance the sustainability of the universal service mechanism in the Order and are careful to implement these changes in a gradual manner so that our efforts do not jeopardize investments made consistent with existing rules. Our goal is to ensure the continued availability and affordability of offerings in the rural and remote communities served by many of these smaller carriers. We provide rate-of-return carriers the predictability of remaining under the legacy universal service system in the near-term, while giving notice that we intend to transition to more incentive-based regulation in the near future. We believe that this approach will provide a more stable base going forward for these carriers and the communities they serve. Today's package of universal service reforms is targeted at eliminating inefficiencies and closing gaps in our system, not at making indiscriminate industry-wide reductions.<sup>264</sup>

111. The Commission also considered the significant economic impact of the CAF Phase I incremental support mechanism on small entities. Most price cap carriers that may receive support under the mechanism are not small. To the extent small carriers elect to receive incremental support, there are additional obligations on such carriers. However, the Commission believes that the burdens associated with meeting these obligations are outweighed by the support provided to meet those obligations, as well as the accompanying public benefits. Carriers may also decline to receive incremental support, and the obligations associated with such support, by filing a notice to that effect.

112. The Commission considered the significant economic impact of eliminating the identical support rule on small entities. Small entities here impacted include small competitive ETCs that receive high-cost universal service support pursuant to the identical support rule. Although retaining the identical support rule may have minimized the significant economic impact for some small competitive ETCs, the Commission concluded that the rule did not efficiently or effectively promote the Commission's universal service goals, including the deployment of mobile services. The Commission did, however, minimize the significant economic impact on small entities by phasing down support over a period of five years, by which time support will be available for many small entities pursuant to Mobility Fund Phase II, Tribal Mobility Fund Phase II, and CAF Phase II. We note that Tribal Mobility Fund Phase II will provide a dedicated form of support for areas that historically have been served by small entities.

113. Further, the Commission took steps to minimize significant economic impacts by automatically pausing the phase-down of support received pursuant to the identical support rule if the Mobility Fund Phase II or, for some small entities, Tribal Mobility Fund Phase II is not operational by June 30, 2014. In addition, the Commission delayed the phase-down for certain carriers serving remote parts of Alaska and a Tribally-owned competitive ETC, Standing Rock Telecommunications, that received its ETC designation in 2011. In the Commission's consideration, these small entities are

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<sup>263</sup> See *supra*, Section VII.D.1.

<sup>264</sup> See *supra*, Section VII.D.10.

potentially subject to significant economic impact as a result of an immediate commencement of the phase-down and the delayed phase-down will minimize the impact.

114. The Order harmonizes and updates the Commission's Universal Service reporting requirements, extending current requirements for voice service to all ETCs. This extension of the reporting requirements will benefit the public interest. The Order seeks to minimize reporting burdens where possible by requiring certifications rather than data collections and by permitting the use of reports already filed with other government agencies, rather than requiring the production of new ones. The Order extends the record retention requirement from a period of five to ten years for purposes of litigation under the False Claims Act. The Commission believes that any burdens that may be associated with these requirements is outweighed by the accompanying public benefits.

## 2. Intercarrier Compensation

115. As a general matter, our actions in the accompanying Order should benefit all service providers, including small entities, by facilitating the exchange of traffic and providing greater regulatory certainty and reduced litigation costs. In the *USF/ICC Transformation NPRM*, we encouraged small entities to bring to the Commission's attention any specific concerns that they had, including on any issues or measures that may apply to small entities in a unique fashion.<sup>265</sup> As described below, in many cases, including for transition paths, recovery, and for certain reporting requirements, we sought to tailor the impact of our reforms to the needs of small entities. In other cases, however, we did not identify any feasible alternatives that would have lessened the economic impact on small entities while achieving the vital reform of the intercarrier compensation system.

116. We considered a range of alternative proposals in regard to our rules designed to address access stimulation.<sup>266</sup> As detailed in the Order,<sup>267</sup> in response to the record, we found it appropriate to include a traffic measurement condition in the definition of access stimulation. Unlike some proposals in the record, however, as part of this measurement condition, we do not require all LECs, including small entities, to file traffic reports. Instead, we allow carriers paying switched access charges to observe and file complaints based on their own traffic patterns. We concluded that this approach is less burdensome to all LECs, including small entities, than a system that would require all LECs to file traffic reports, as some proposed in the record.<sup>268</sup> Similarly, we also rejected the use of alternative definitional triggers for access stimulation, such as per line MOU limits, in part, to avoid the creation of new self-reporting requirements that could prove burdensome to carriers, including small entities. Finally, our access stimulation rules respond to a concern raised by the Louisiana Small Carrier Committee. Specifically, if a carrier terminates its access revenue sharing agreement before the date on which it would be required to file a revised tariff, then that carrier will not be required to file a revised tariff. This will serve to eliminate any potential to burden such carriers when there is no reason to do so.

117. In the Order, we set forth default transition paths for terminating end office switching and certain transport rate elements as part of the transition to a bill-and-keep framework.<sup>269</sup> In adopting these default paths, we take into account the unique concerns facing small entities, including many rate-of-return LECs as well as entities that operate in rate-of-return service areas. Accordingly, we set forth a six-year transition for price cap carriers and competitive LECs that benchmark to price cap rates. We

<sup>265</sup> See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4827-28, App E paras. 78-84.

<sup>266</sup> See *supra* Section XI.A.

<sup>267</sup> See *supra* Section XI.A.

<sup>268</sup> See *supra* Section XI.A.

<sup>269</sup> See *supra* Section XII.C.

adopt a longer nine-year transition for rate-of-return carriers and competitive LECs that benchmark to rate-of-return carrier rates. We found that additional time for rate-of-return carriers and those that benchmark to their rates recognizes the often higher rates of and circumstances unique to these carriers. The longer transition also provides them with a predictable glide path and appropriately balances any adverse impact that could arise from moving carriers too quickly from the existing intercarrier compensation system.

118. The Order establishes a transitional recovery mechanism to help transition incumbent LECs away from existing revenues, but tailored by type of carrier.<sup>270</sup> To this end, we set forth different methodologies for the calculation of Eligible Recovery for price cap carriers and rate-of-return carriers. As we describe in the Order,<sup>271</sup> for price cap carriers, our recovery mechanism will allow them to determine at the outset exactly how much their Eligible Recovery will be each year. For rate-of-return carriers, we adopt a recovery mechanism that provides more certainty and predictability than exists today and rewards carriers for efficiencies achieved in switching costs. Rate-of-return carriers will be able to determine their total intercarrier compensation and recovery revenues for all transitioned elements, for each year of the transition. We find that providing this greater degree of certainty for rate-of-return carriers, which are generally smaller and less able to respond to changes in market conditions than price cap carriers, is necessary to provide a reasonable transition from the existing intercarrier compensation system. And, we further tailor the obligations for broadband deployment applicable to rate-of-return and price cap carriers as well as the phase out period applicable to each for the receipt of CAF support. Whereas the phase out of CAF support for price cap carriers will be three years beginning in 2017, ICC CAF support for smaller rate-of-return carriers will phase down as Eligible Revenue decreases over time, but not be subject to other reductions. In addition, as we note above,<sup>272</sup> we establish a presumption that our reforms allow incumbent LECs to earn a reasonable return on investment, but at the same time establish a “Total Costs and Earnings Review” through which a carrier may petition the Commission to rebut this presumption. This will ensure that individual carriers, including small entities, are able to seek additional recovery to prevent a taking, where necessary. For competitive LECs, which are not subject to the Commission’s end user rate regulations and have greater freedom to set rates and determine which customer to serve, CAF support will not be available for recovery. Competitive LECs may recover lost intercarrier compensation revenues through their end user charges.

119. Above all, our tailored approach to transitional recovery is designed to balance the different circumstances facing the different carrier types and provide all carriers with necessary predictability, certainty and stability to transition from the current intercarrier compensation system. With regard to small carriers in particular, our transitional recovery mechanism includes an assortment of measures to moderate the impact of our reforms on small carriers and provide such carriers with certainty and predictability with regard to their recovery.

120. With respect to the prospective VoIP traffic, we believe that the VoIP-PSTN intercarrier compensation framework that we adopt best balances the policy considerations of providing certainty regarding prospective intercarrier compensation obligations for VoIP-PSTN traffic, while acknowledging the flaws with the current intercarrier compensation regimes. With regard to the scope of our reform, as intercarrier disputes have encompassed all forms of what we define as VoIP-PSTN traffic, including “one-way” VoIP services, we believe addressing this traffic comprehensively will help guard against new forms of arbitrage. As part of our reform, we adopt transitional rules that will specify, prospectively, the default compensation for VoIP-PSTN traffic. We reject approaches, including an immediate adoption of

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<sup>270</sup> See *supra* Section XIII.

<sup>271</sup> See *supra* Section XIII.

<sup>272</sup> See *supra* Section XIII.

a bill-and-keep methodology for VoIP traffic or to delay reform of VoIP traffic to a future point on the glide path. Instead, the framework that we adopt in the Order will provide greater certainty to service providers, including small entities, regarding intercarrier compensation revenue and reduce intercarrier compensation disputes. Our transitional VoIP-PSTN intercarrier compensation framework provides the opportunity for some revenues in conjunction with other appropriate recovery opportunities adopted as part of comprehensive intercarrier compensation and universal service reform. We rely on existing mechanisms, including tariffs to implement our approach. Carriers may tariff charges at rates equal to interstate access rates for toll VoIP-PSTN traffic in federal or state tariffs, though remain free to negotiate interconnection agreements specifying alternative compensation for that traffic. This prospective regime facilitates the benefits that can arise from negotiated agreements, without sacrificing the revenue predictability traditionally associated with tariffing regimes. In contrast to proposals to require certifications regarding carriers' reported VoIP-PSTN traffic,<sup>273</sup> we also provide all carriers, including small entities, with tools to use in their tariffs to help distinguish VoIP-PSTN traffic. The transitional regime for VoIP-PSTN intercarrier compensation, which allows LECs to tariff charges, also mitigates the concerns of some commenters regarding disparate leverage that may exist in interconnection negotiations.<sup>274</sup>

121. Finally, with respect to our reforms applicable to intercarrier compensation for wireless traffic, we note that our decision to treat "reasonable compensation" requirements under section 20.11, 47 C.F.R. § 20.11, as coextensive with the scope of reciprocal compensation requirements under section 251(b)(5) of the Act. We also find it in the public interest to set a default pricing methodology of bill-and-keep for LEC-CMRS intraMTA traffic, which shall reduce growing confusion and litigation for these carriers. This action presents a smaller risk of market disruption than would an immediate shift to bill-and-keep more generally and our recovery mechanism provides incumbent LECs with a stable, predictable recovery for reduced intercarrier compensation revenues and we further limit rate-of-return carriers' responsibility for the costs of transport involving non-access traffic exchange between CMRS providers and rural, rate-of-return LECs.

#### **F. Report to Congress**

122. The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.<sup>275</sup> In addition, the Commission will send a copy of the Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.<sup>276</sup>

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<sup>273</sup> See *supra* Section XIV.

<sup>274</sup> See *supra* Section XV.

<sup>275</sup> 5 U.S.C. § 801(a)(1)(A).

<sup>276</sup> See *id.* § 604(b).

## APPENDIX P

## Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this FNPRM. Written comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the FNPRM. The Commission will send a copy of the FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the FNPRM and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rules**

2. The FNPRM seeks comment on a variety of issues relating to comprehensive reform of universal service and intercarrier compensation. As discussed in the Order accompanying the FNPRM, the Commission believes that such reform will eliminate waste and inefficiency while modernizing and reorienting these programs on a fiscally responsible path to extending the benefits of broadband throughout America. Bringing robust, affordable broadband to all Americans is the infrastructure challenge of the 21<sup>st</sup> century. To allow the Commission to help meet this challenge, the FNPRM asks for comment in a number of specific areas.

**1. Universal Service**

3. First, for providers receiving Connect America Fund (CAF) support, the FNPRM seeks further comment on what public interest obligations should apply to the receipt of these funds.<sup>4</sup> How should broadband service be measured, and how should “reasonable comparability” be determined for fixed and mobile voice and broadband services.<sup>5</sup>

4. The FNPRM also seeks comment on several proposed additional requirements, including whether the Commission should require CAF recipients to offer IP-to-IP interconnection for voice service, beyond whatever framework it adopts more broadly, whether CAF recipients be required to make interconnection points and backhaul capacity available so that unserved high-cost communities could deploy their own broadband networks, and whether the Commission should create a fund for a Technology Opportunities Program in order to assist communities with deploying their own broadband networks.

5. In the Order, the Commission concludes that high-cost support received by incumbent rate-of-return carriers should be phased out over five years in study areas where an unsubsidized facilities-based provider offers voice and broadband services meeting the specified public interest obligations.<sup>6</sup> The FNPRM seeks comment on the specific methodology that should be used to identify

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See *id.*

<sup>4</sup> See *supra* Section XVII.A.

<sup>5</sup> See *supra* Section XVII.A.2.

<sup>6</sup> See *supra* Section VII.D.2.

those areas, including the appropriateness of the preliminary analysis staff performed.<sup>7</sup>

6. The Commission also begins a represcription of the authorized interstate rate of return,<sup>8</sup> and the FNPRM asks parties to identify what data the Commission should collect to complete the represcription, the current applicability of the formulas contained in the Commission's rules for performing necessary calculations, as well as whether the remaining Regional Bell Operating Companies (RBOCs) or some other group of carriers should be used as a surrogate for incumbent local exchange carriers (ILECs) that do not issue stock or borrow money solely to support interstate services.<sup>9</sup>

7. In the Order, the Commission adopts a rule to use benchmarks for reasonable costs to impose limits on reimbursable capital and operating costs for high-cost loop support received by rate-of-return companies, and concludes that it should also impose limits on reimbursable capital and operating costs for interstate common line support received by rate-of-return companies. In the FNPRM, the Commission seeks comments on a specific methodology for calculating individual company caps for HCLS set forth in Appendix H, and seeks comment on how specifically to implement such a limit for ICLS.

8. In response to the *USF/ICC Transformation NPRM*, several associations representing rural ILECs (Rural Associations) proposed the creation of a new broadband-focused CAF mechanism that ultimately would entirely replace existing support mechanisms for rate-of-return carriers. Subsequently, the Rural Associations provided draft rules that provide additional context regarding the operation of their proposed CAF. In the FNPRM, we seek comment on this proposal and ask whether and how it could be modified consistent with the framework adopted in the Order to provide a path forward for rate-of-return carriers to invest in extending broadband to unserved areas.<sup>10</sup>

9. In the FNPRM, the Commission proposes that a recipient of high-cost and CAF support should be required to post financial security as a condition to receiving support to ensure that it has committed sufficient financial resources to complying with its public interest obligations under the Commission's rules.<sup>11</sup> For example, should an irrevocable standby letter of credit be required, and if so, for what amount?<sup>12</sup> Further, the FNPRM seeks comment on what penalties might be appropriate for failure to meet build-out requirements, service quality standards, or failure to provide information to verify continuing eligibility to receive support.<sup>13</sup>

10. The CAF will target funding to areas where federal support is needed to maintain and expand modern networks capable of delivering broadband and voice services. In the FNPRM, aiming to ensure that obligations and funding are appropriately matched while avoiding consumer disruption in access to communications services, we seek comment on what Commission action may be appropriate to adjust existing service obligations for eligible telecommunications carriers (ETCs) as funding shifts to new, more targeted support mechanisms.<sup>14</sup>

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<sup>7</sup> See *supra* Section XVII.D.

<sup>8</sup> See *supra* Section XVII.C.

<sup>9</sup> See *supra* Section XVII.C.

<sup>10</sup> See *supra* Section XVII.B.

<sup>11</sup> See *supra* Section XVII.G.

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> See *supra* Section XVII.F.

11. The FNPRM describes the Phase II of the Mobility Fund, which will provide ongoing support for mobile broadband and high quality voice-grade services.<sup>15</sup> The Commission seeks comment on the overall design for this phase of the Mobility Fund, including the use of reverse auctions, or the possible use of a model.<sup>16</sup> Funding in the second phase of the Mobility Fund is intended for geographic areas where there is no private sector business case to provide mobile broadband and high quality voice-grade services. Comment is sought on how best to: (1) identify these areas; (2) establish bidding and coverage units; (3) maximize consumer benefits; (4) establish the term of support; (5) identify provider eligibility requirements; and (6) set public interest obligations.<sup>17</sup>

12. The FNPRM next proposes general auction rules for Phase II of the Mobility Fund to govern the initial auction process, including options for basic auction design, application procedures, permissible communications and public disclosure of auction-related information, auction defaults, and auction suspension or cancellation.<sup>18</sup> The FNPRM reaffirms the Commission's commitment to address Tribal needs and seeks comment on how ongoing universal service support for mobile advanced services could be tailored to meet the needs in Tribal lands.<sup>19</sup> The Commission seeks comment on the adoption for Mobility Fund Phase II of two bidding mechanisms intended to promote greater service on Tribal lands: a bidding credit for Tribally-owned or controlled entities and a mechanism that would allocate a specified number of "priority units" to particular unserved geographic areas within Tribal lands that would reduce the per-unit amount of bids covering those unserved areas. The Commission also seeks comment on the adoption of a small business bidding preference and the small business definition that should apply if it adopts such a bidding preference. In addition, comment is sought on accountability and oversight rules applicable to the second phase of the Mobility Fund.<sup>20</sup> Finally, the FNPRM seeks comment on the use of an economic model to determine support for mobile wireless providers rather than competitive bidding, including possible model design and potential changes to the proposed framework for mobility support that could be necessary if support is determined using a model.<sup>21</sup>

13. In the Order, the Commission adopts a framework for USF support in areas served by price cap carriers where support will be determined using a combination of a forward-looking broadband cost model and competitive bidding. The FNPRM addresses proposals for this competitive bidding process, where applicable. Comment is sought on: (1) the use of a forward looking engineering cost model to identify areas eligible for competitive bidding; (2) establishing bidding and coverage units; (3) maximizing consumer benefits; (4) establishing the term of support; (5) identifying provider eligibility requirements; and (6) setting public interest obligations.<sup>22</sup>

14. The FNPRM next proposes general auction rules governing the auction process, including options for basic auction design, application procedures, permissible communications and public disclosure of auction-related information, auction defaults, and auction suspension or cancellation.<sup>23</sup> The FNPRM also seeks comment on whether to establish special provisions to help ensure

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<sup>15</sup> See *supra* Section XVII.I.

<sup>16</sup> See *supra* Section XVII.I.1.

<sup>17</sup> See *supra* Section XVII.I.2.

<sup>18</sup> See *supra* Section XVII.I.3.

<sup>19</sup> See *supra* Section XVII.I.4.

<sup>20</sup> See *supra* Section XVII.I.5.

<sup>21</sup> See *supra* Section XVII.I.6.

<sup>22</sup> See *supra* Section XVII.J.

<sup>23</sup> See *supra* Section XVII.J.3.



service in Tribal lands.<sup>24</sup> The FNPRM seeks comment on the adoption for the competitive bidding process of a bidding credit for Tribally-owned or controlled entities and a Tribal priority units mechanism along the same lines proposed for Phase II of the Tribal Mobility Fund.<sup>25</sup> The Commission also seeks comment on the adoption of a small business bidding preference and the small business definition that should apply if it adopts such a bidding preference.<sup>26</sup> In addition, comment is sought on accountability and oversight rules that would apply to recipients of CAF support awarded through a competitive bidding process.<sup>27</sup>

15. In establishing a new Remote Areas Fund (RAF), the budget of which will be at least \$100 million, the Order addresses the Commission's commitment to ensure that the less than one percent of Americans living in areas where the cost of deploying traditional terrestrial broadband networks is extremely high can obtain affordable broadband through other technology platforms.<sup>28</sup> The FNPRM seeks comment on how RAF support should be provided and how the program should be implemented.<sup>29</sup> Comment is sought on how to: (1) identify geographic areas eligible for support; (2) establish bidding and coverage units; (3) maximize consumer benefits; (4) establish the term of support; (5) identify provider eligibility requirements; and (6) set public interest requirements.<sup>30</sup> In addition, the FNPRM seeks comment on how best to structure the RAF general implementation issues, provider qualifications, and public interest obligations, such as service performance criteria and pricing. The FNPRM also seeks comment on related matters like portable consumer subsidy issues and service terms and conditions. In addition, the FNPRM requests comment on several auction approaches to target CAF funding in extremely high cost areas and general auction rules for an auction process, including options for basic auction design and for the auction and post-auction processes, as well as eligibility, accountability, and oversight issues.<sup>31</sup> The FNPRM also seeks comment on the adoption of a bidding preference for small businesses if competitive bidding is used to provide support from the RAF and the size of any small business bidding credit should the Commission adopt one. The Commission seeks comment on the small business definition that should apply if it adopts such a small business preference for remote area support auctions.

## 2. Intercarrier Compensation

16. The Order adopts a bill-and-keep methodology as the default end state for all intercarrier compensation traffic.<sup>32</sup> Although the Order specifies the transition for certain terminating access rates and caps all interstate and most intrastate charges, it does adopt a transition to a bill-and-keep methodology for all ICC rates, including originating switched access, and certain transport rate elements. The FNPRM seeks comment on the appropriate transition to bill-and-keep for those rate elements not reduced in the Order, and asks what recovery, if any, should be provided.<sup>33</sup> The FNPRM also asks

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<sup>24</sup> See *supra* Section XVII.J.4.

<sup>25</sup> See *id.*

<sup>26</sup> See *supra* Section XVII.J.3.

<sup>27</sup> See *supra* Section XVIII.J.5.

<sup>28</sup> See *supra* Section XVII.F.

<sup>29</sup> See *supra* Section XVII.K.

<sup>30</sup> See *supra* Section XVII.K.2.

<sup>31</sup> See *supra* Section XVII.K.4-6.

<sup>32</sup> See *supra* para. 1297.

<sup>33</sup> See *supra* Section XVII.M.

whether Commission action is necessary to address concerns that have been raised regarding transit services,<sup>34</sup> and are other charges implicated by the transition to bill-and-keep?<sup>35</sup>

17. The FNPRM seeks comment on any interconnection and related issues that must be addressed to implement bill-and-keep in an efficient and equitable manner.<sup>36</sup> Specifically, comment is sought on points of interconnection, how they are established, what if anything, the Commission should do going forward, and the continued relevance of points of interconnection in a bill-and-keep regime.<sup>37</sup> Likewise, comment is sought on defining the “network edge,” the point where bill-and-keep applies and the point to which a provider is responsible for delivering its traffic to another provider.<sup>38</sup> Comment is also sought on the role of tariffs and interconnection agreements for structuring intercarrier relationships moving forward, including the feasibility of extending our interconnection rules to all telecommunications carriers, including competitive LECs and IXC,<sup>39</sup> and asks questions about commenters’ concerns about potential arbitrage that might occur under a bill-and-keep methodology.<sup>40</sup>

18. The FNPRM also seeks comment on the recovery mechanism adopted in the Order, as well as the pre-existing rules regarding subscriber line charges (SLCs).<sup>41</sup> With respect to the recovery adopted in the Order, comment is sought about the elimination of the access replacement charge (ARC) at a date certain and, if so, when.<sup>42</sup> The FNPRM also asks about modifying the baseline for recovery for rate-of-return carriers by, for example, increasing the percentage of reduction each year and also alternative approaches to the use of true-ups in calculating recovery for rate-of-return carriers.<sup>43</sup> And, the FNPRM asks if ICC CAF support for rate-of-return carriers should be subject to a defined phase-out?<sup>44</sup> In addition, parties are asked to comment on existing SLCs, which are not addressed in this Order. In particular, the FNPRM asks about the appropriate cap for these charges, the long-term role, if any, for SLCs as carriers move to IP networks, and what, if anything, the Commission should do about how carriers advertise SLCs and ARCs.<sup>45</sup>

19. The FNPRM seeks comment on a number of issues regarding IP-to-IP interconnection in light of the Commission’s goal of facilitating industry progression to all-IP networks.<sup>46</sup> In particular, the FNPRM seeks comments on implementation of the Order’s statement that the Commission expects that all carriers will negotiate in good faith for IP-to-IP interconnection arrangements for the exchange of

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<sup>34</sup> See *supra* paras. 1311-1313.

<sup>35</sup> See *supra* para. 1314.

<sup>36</sup> See *supra* Section XVII.N.

<sup>37</sup> See *supra* paras. 1316-1319.

<sup>38</sup> See *supra* paras. 1320-1321.

<sup>39</sup> See *supra* paras. 1322-1324.

<sup>40</sup> See *supra* para. 1325.

<sup>41</sup> See *supra* Section XVII.O.

<sup>42</sup> See *supra* para. 1327.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.*

<sup>45</sup> See *supra* para. 1333.

<sup>46</sup> See *supra* Section XVII.P.

voice traffic, as well as associated implementation and enforcement.<sup>47</sup> The FNPRM seeks comment on the appropriate statutory authority for our expectation of good faith negotiations, and other possible regulatory authority for the Commission to adopt a policy framework governing IP-to-IP interconnection.<sup>48</sup> In addition, if the Commission addresses IP-to-IP interconnection through a statutory framework historically applied to TDM traffic, the FNPRM seeks comment on whether any resulting changes will be required to the application of those historical TDM interconnection requirements, either through rule changes or forbearance.<sup>49</sup>

20. Comment is also sought on the scope of the traffic exchange that should be encompassed by any IP-to-IP interconnection policy framework to avoid intervention in areas where the market will operate efficiently.<sup>50</sup> The FNPRM seeks comment on the appropriate role for the Commission regarding IP-to-IP interconnection and seeks specific comment on certain proposed policy frameworks, including the policy merits of each approach, and associated implementation issues,<sup>51</sup> including any forbearance from statutory requirements that would be needed to implement the particular framework for IP-to-IP interconnection.<sup>52</sup>

21. The FNPRM asks whether call signaling rules are needed for one-way VoIP providers, and if so, what they should be and how they should apply.<sup>53</sup> And finally, parties are asked to comment on any conflicts or inconsistencies they believe are present as a result of the new rules adopted in the Order, either conflicts or inconsistencies within the new rules or between the new rules and existing Commission rules.<sup>54</sup>

#### **B. Legal Basis**

22. The legal basis for any action that may be taken pursuant to the FNPRM is contained in sections 1, 2, 4(i), 201-205, 214, 218-220, 251, 252, 254, 256, 303(r), 332, 403, and 706 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 201-205, 214, 218-220, 251, 252, 254, 256, 303(r), 332, 403, and 706, and sections 1.1 and 1.1421 of the Commission's rules, 47 C.F.R. §§ 1.1, 1.421.

#### **C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

23. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>55</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>56</sup> In addition, the term "small business" has the

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<sup>47</sup> See *supra* para. 1334.

<sup>48</sup> See *supra* paras. 1340-1341.

<sup>49</sup> See *supra* paras. 1338-1339.

<sup>50</sup> See *supra* Section XVII.P.2.

<sup>51</sup> See *supra* Section XVII.P.4.

<sup>52</sup> See *supra* para. 1379.

<sup>53</sup> See *supra* Section XVII.Q.

<sup>54</sup> See *supra* Section XVII.R.

<sup>55</sup> See 5 U.S.C. § 603(b)(3).

<sup>56</sup> See 5 U.S.C. § 601(6).

same meaning as the term “small-business concern” under the Small Business Act.<sup>57</sup> A small-business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>58</sup>

24. **Small Businesses.** Nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA.<sup>59</sup>

25. **Wired Telecommunications Carriers.** The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.<sup>60</sup> According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.<sup>61</sup> Of this total, 3144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.<sup>62</sup> Thus, under this size standard, the majority of firms can be considered small.

26. **Local Exchange Carriers (LECs).** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>63</sup> According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.<sup>64</sup> Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.<sup>65</sup> Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by the rules and policies proposed in the FNPRM.

27. **Incumbent Local Exchange Carriers (incumbent LECs).** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>66</sup> According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.<sup>67</sup> Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees

<sup>57</sup> See 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>58</sup> See 15 U.S.C. § 632.

<sup>59</sup> See SBA, Office of Advocacy, “Frequently Asked Questions,” <http://www.sba.gov/advo/stats/sbfaq.pdf> (accessed Dec. 2010).

<sup>60</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>61</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110” (issued Nov. 2010).

<sup>62</sup> See *id.*

<sup>63</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>64</sup> See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

<sup>65</sup> See *id.*

<sup>66</sup> See 13 C.F.R. § 121.201, NAICS code 517110.

<sup>67</sup> See *Trends in Telephone Service* at Table 5.3.

and 301 have more than 1,500 employees.<sup>68</sup> Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by rules adopted pursuant to the FNPRM.

28. We have included small incumbent LECs in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”<sup>69</sup> The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.<sup>70</sup> We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

29. **Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.** Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>71</sup> According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.<sup>72</sup> Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.<sup>73</sup> In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.<sup>74</sup> In addition, 72 carriers have reported that they are Other Local Service Providers.<sup>75</sup> Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees.<sup>76</sup> Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by rules adopted pursuant to the FNPRM.

30. **Interexchange Carriers (IXCs).** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>77</sup> According to Commission data,

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<sup>68</sup> See *id.*

<sup>69</sup> 5 U.S.C. § 601(3).

<sup>70</sup> See Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a); see also 5 U.S.C. § 601(3). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

<sup>71</sup> See 13 C.F.R. § 121.201, NAICS code 517110.

<sup>72</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

<sup>77</sup> See 13 C.F.R. § 121.201, NAICS code 517110.

359 companies reported that their primary telecommunications service activity was the provision of interexchange services.<sup>78</sup> Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.<sup>79</sup> Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by rules adopted pursuant to the FNPRM.

31. **Prepaid Calling Card Providers.** Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>80</sup> According to Commission data, 193 carriers have reported that they are engaged in the provision of prepaid calling cards.<sup>81</sup> Of these, an estimated all 193 have 1,500 or fewer employees and none have more than 1,500 employees.<sup>82</sup> Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by rules adopted pursuant to the FNPRM.

32. **Local Resellers.** The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>83</sup> According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.<sup>84</sup> Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.<sup>85</sup> Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by rules adopted pursuant to the FNPRM.

33. **Toll Resellers.** The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>86</sup> According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services.<sup>87</sup> Of these, an estimated 857 have 1,500 or fewer employees and 24 have more than 1,500 employees.<sup>88</sup> Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by rules adopted pursuant to the FNPRM.

34. **Other Toll Carriers.** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is

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<sup>78</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>79</sup> See *id.*

<sup>80</sup> See 13 C.F.R. § 121.201, NAICS code 517911.

<sup>81</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>82</sup> See *id.*

<sup>83</sup> See 13 C.F.R. § 121.201, NAICS code 517911.

<sup>84</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>85</sup> See *id.*

<sup>86</sup> See 13 C.F.R. § 121.201, NAICS code 517911.

<sup>87</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>88</sup> See *id.*

small if it has 1,500 or fewer employees.<sup>89</sup> According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.<sup>90</sup> Of these, an estimated 279 have 1,500 or fewer employees and five have more than 1,500 employees.<sup>91</sup> Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by the rules and policies adopted pursuant to the FNPRM.

35. **800 and 800-Like Service Subscribers.**<sup>92</sup> Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service (toll free) subscribers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>93</sup> The most reliable source of information regarding the number of these service subscribers appears to be data the Commission collects on the 800, 888, 877, and 866 numbers in use.<sup>94</sup> According to our data, as of September 2009, the number of 800 numbers assigned was 7,860,000; the number of 888 numbers assigned was 5,588,687; the number of 877 numbers assigned was 4,721,866; and the number of 866 numbers assigned was 7,867,736.<sup>95</sup> We do not have data specifying the number of these subscribers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small businesses under the SBA size standard. Consequently, we estimate that there are 7,860,000 or fewer small entity 800 subscribers; 5,588,687 or fewer small entity 888 subscribers; 4,721,866 or fewer small entity 877 subscribers; and 7,867,736 or fewer small entity 866 subscribers.

36. **Wireless Telecommunications Carriers (except Satellite).** Since 2007, the SBA has recognized wireless firms within this new, broad, economic census category.<sup>96</sup> Prior to that time, such firms were within the now-superseded categories of Paging and Cellular and Other Wireless Telecommunications.<sup>97</sup> Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.<sup>98</sup> For this category, census data for 2007 show that there were 1,383 firms that operated for the entire year.<sup>99</sup> Of this total, 1,368 firms had employment of 999 or fewer employees and 15 had employment of 1000 employees or more.<sup>100</sup> Similarly, according to

<sup>89</sup> See 13 C.F.R. § 121.201, NAICS code 517110.

<sup>90</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>91</sup> See *id.*

<sup>92</sup> We include all toll-free number subscribers in this category, including those for 888 numbers.

<sup>93</sup> See 13 C.F.R. § 121.201, NAICS code 517911.

<sup>94</sup> See *Trends in Telephone Service* at Tables 18.7-18.10.

<sup>95</sup> See *id.*

<sup>96</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>97</sup> U.S. Census Bureau, 2002 NAICS Definitions, “517211 Paging”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>; U.S. Census Bureau, 2002 NAICS Definitions, “517212 Cellular and Other Wireless Telecommunications”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

<sup>98</sup> 13 C.F.R. § 121.201, NAICS code 517210. The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

<sup>99</sup> U.S. Census Bureau, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210” (issued Nov. 2010).

<sup>100</sup> *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “100 employees or more.”

Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.<sup>101</sup> Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.<sup>102</sup> Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

37. **Broadband Personal Communications Service.** The broadband personal communications service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined “small entity” for Blocks C and F as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.<sup>103</sup> For Block F, an additional classification for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>104</sup> These standards defining “small entity” in the context of broadband PCS auctions have been approved by the SBA.<sup>105</sup> No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.<sup>106</sup> In 1999, the Commission re-auctioned 347 C, E, and F Block licenses.<sup>107</sup> There were 48 small business winning bidders. In 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction 35.<sup>108</sup> Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In 2005, the Commission completed an auction of 188 C block licenses and 21 F block licenses in Auction 58. There were 24 winning bidders for 217 licenses.<sup>109</sup> Of the 24 winning bidders, 16 claimed small business status and won 156 licenses. In 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in

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<sup>101</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>102</sup> See *id.*

<sup>103</sup> See generally *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7824 (1996); see also 47 C.F.R. § 24.720(b)(1).

<sup>104</sup> See generally *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7824 (1996); see also 47 C.F.R. § 24.720(b)(2).

<sup>105</sup> See, e.g., *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532 (1994).

<sup>106</sup> See FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. Jan. 14, 1997). See also *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 16436 (1997).

<sup>107</sup> See “C, D, E, and F Block Broadband PCS Auction Closes,” *Public Notice*, 14 FCC Rcd 6688 (WTB 1999).

<sup>108</sup> See “C and F Block Broadband PCS Auction Closes; Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 2339 (2001).

<sup>109</sup> See “Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58,” *Public Notice*, 20 FCC Rcd 3703 (2005).



Auction 71.<sup>110</sup> Of the 14 winning bidders, six were designated entities.<sup>111</sup> In 2008, the Commission completed an auction of 20 Broadband PCS licenses in the C, D, E and F block licenses in Auction 78.<sup>112</sup>

38. **Advanced Wireless Services.** In 2008, the Commission conducted the auction of Advanced Wireless Services (“AWS”) licenses.<sup>113</sup> This auction, which as designated as Auction 78, offered 35 licenses in the AWS 1710-1755 MHz and 2110-2155 MHz bands (“AWS-1”). The AWS-1 licenses were licenses for which there were no winning bids in Auction 66. That same year, the Commission completed Auction 78. A bidder with attributed average annual gross revenues that exceeded \$15 million and did not exceed \$40 million for the preceding three years (“small business”) received a 15 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed \$15 million for the preceding three years (“very small business”) received a 25 percent discount on its winning bid. A bidder that had combined total assets of less than \$500 million and combined gross revenues of less than \$125 million in each of the last two years qualified for entrepreneur status.<sup>114</sup> Four winning bidders that identified themselves as very small businesses won 17 licenses.<sup>115</sup> Three of the winning bidders that identified themselves as a small business won five licenses. Additionally, one other winning bidder that qualified for entrepreneur status won 2 licenses.

39. **Narrowband Personal Communications Services.** In 1994, the Commission conducted an auction for Narrowband PCS licenses. A second auction was also conducted later in 1994. For purposes of the first two Narrowband PCS auctions, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less.<sup>116</sup> Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.<sup>117</sup> To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.<sup>118</sup> A “small

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<sup>110</sup> See “Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71,” *Public Notice*, 22 FCC Rcd 9247 (2007).

<sup>111</sup> *Id.*

<sup>112</sup> See Auction of AWS-1 and Broadband PCS Licenses Rescheduled For August 13, 3008, Notice of Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures For Auction 78, *Public Notice*, 23 FCC Rcd 7496 (2008) (“AWS-1 and Broadband PCS Procedures Public Notice”).

<sup>113</sup> See AWS-1 and Broadband PCS Procedures Public Notice, 23 FCC Rcd 7496. Auction 78 also included an auction of Broadband PCS licenses.

<sup>114</sup> *Id.* at 23 FCC Rcd at 7521-22.

<sup>115</sup> See “Auction of AWS-1 and Broadband PCS Licenses Closes, Winning Bidders Announced for Auction 78, Down Payments Due September 9, 2008, FCC Forms 601 and 602 Due September 9, 2008, Final Payments Due September 23, 2008, Ten-Day Petition to Deny Period”, *Public Notice*, 23 FCC Rcd 12749 (2008).

<sup>116</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS*, PP Docket No. 93-253, GEN Docket No. 90-314, ET Docket No. 92-100, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196, para. 46 (1994).

<sup>117</sup> See “Announcing the High Bidders in the Auction of Ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674,” *Public Notice*, PNWL 94-004 (rel. Aug. 2, 1994); “Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total \$490,901,787,” *Public Notice*, PNWL 94-27 (rel. Nov. 9, 1994).

<sup>118</sup> *Amendment of the Commission’s Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, ET Docket No. 92-100, PP Docket No. 93-253, Narrowband PCS, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000) (“*Narrowband PCS Second Report and Order*”).

business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.<sup>119</sup> A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.<sup>120</sup> The SBA has approved these small business size standards.<sup>121</sup> A third auction was conducted in 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.<sup>122</sup> Three of these claimed status as a small or very small entity and won 311 licenses.

40. **Paging (Private and Common Carrier).** In the *Paging Third Report and Order*, we developed a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>123</sup> A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. The SBA has approved these small business size standards.<sup>124</sup> According to Commission data, 291 carriers have reported that they are engaged in Paging or Messaging Service.<sup>125</sup> Of these, an estimated 289 have 1,500 or fewer employees, and two have more than 1,500 employees.<sup>126</sup> Consequently, the Commission estimates that the majority of paging providers are small entities that may be affected by our action. An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. A subsequent auction of MEA and Economic Area (“EA”) licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold.<sup>127</sup> One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, was held in 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.<sup>128</sup> A fourth auction of 9,603 lower and upper band paging licenses was held in the year 2010. Twenty-nine bidders claiming small or very small business status won 3,016 licenses.<sup>129</sup>

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<sup>119</sup> *Narrowband PCS Second Report and Order*, 15 FCC Rcd at 10476, para. 40.

<sup>120</sup> *Id.*

<sup>121</sup> See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from A. Alvarez, Administrator, SBA (Dec. 2, 1998) (*Alvarez Letter 1998*).

<sup>122</sup> See “Narrowband PCS Auction Closes,” *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

<sup>123</sup> See *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, PR Docket No. 93-253, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, 10085–88, paras. 98–107 (1999) (*Paging Third Report and Order*).

<sup>124</sup> See *Alvarez Letter 1998*.

<sup>125</sup> See *Trends in Telephone Service* at Table 5.3.

<sup>126</sup> See *id.*

<sup>127</sup> See “Lower and Upper Paging Band Auction Closes,” *Public Notice*, 16 FCC Rcd 21,821 (2002).

<sup>128</sup> See “Lower and Upper Paging Bands Auction Closes,” *Public Notice*, 18 FCC Rcd 11,154 (2003). The current number of small or very small business entities that hold wireless licenses may differ significantly from the number of such entities that won in spectrum auctions due to assignments and transfers of licenses in the secondary market over time. In addition, some of the same small business entities may have won licenses in more than one auction.

<sup>129</sup> See “Lower and Upper Paging Bands Auction Closes,” *Public Notice*, 25 FCC Rcd 18,164 (2010).

41. **220 MHz Radio Service – Phase I Licensees.** The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to Wireless Telecommunications Carriers (except Satellite). Under this category, the SBA deems a wireless business to be small if it has 1,500 or fewer employees.<sup>130</sup> The Commission estimates that nearly all such licensees are small businesses under the SBA’s small business size standard that may be affected by rules adopted pursuant to the FNPRM.

42. **220 MHz Radio Service – Phase II Licensees.** The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>131</sup> This small business size standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.<sup>132</sup> A “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years.<sup>133</sup> The SBA has approved these small business size standards.<sup>134</sup> Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.<sup>135</sup> In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.<sup>136</sup>

43. **Specialized Mobile Radio.** The Commission awards small business bidding credits in auctions for Specialized Mobile Radio (“SMR”) geographic area licenses in the 800 MHz and 900 MHz bands to entities that had revenues of no more than \$15 million in each of the three previous calendar years.<sup>137</sup> The Commission awards very small business bidding credits to entities that had revenues of no more than \$3 million in each of the three previous calendar years.<sup>138</sup> The SBA has approved these small

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<sup>130</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>131</sup> See *Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, GN Docket No. 93-252, PP Docket No. 93-253, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068–70, paras. 291–295 (1997) (*220 MHz Third Report and Order*).

<sup>132</sup> See *id.* at 11068–69, para. 291.

<sup>133</sup> See *id.* at 11068–70, paras. 291–95.

<sup>134</sup> See Letter to D. Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998) (*Alvarez to Phythyon Letter 1998*).

<sup>135</sup> See *Phase II 220 MHz Service Auction Closes*, Public Notice, 14 FCC Rcd 605 (1998).

<sup>136</sup> See *Phase II 220 MHz Service Spectrum Auction Closes*, Public Notice, 14 FCC Rcd 11218 (1999).

<sup>137</sup> 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

<sup>138</sup> 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

business size standards for the 800 MHz and 900 MHz SMR Services.<sup>139</sup> The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction was completed in 1996.<sup>140</sup> Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band.<sup>141</sup> The 800 MHz SMR auction for the upper 200 channels was conducted in 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.<sup>142</sup> A second auction for the 800 MHz band was conducted in 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.<sup>143</sup>

44. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels was conducted in 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard.<sup>144</sup> In an auction completed in 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded.<sup>145</sup> Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

45. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. In addition, we do not know how many of these firms have 1500 or fewer employees.<sup>146</sup> We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

46. **Broadband Radio Service and Educational Broadband Service.** Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (“MDS”) and Multichannel Multipoint Distribution Service (“MMDS”) systems, and “wireless cable,” transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) (previously referred to as the Instructional Television Fixed Service (“ITFS”)).<sup>147</sup> In connection with the 1996 BRS auction, the

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<sup>139</sup> See Letter from Aida Alvarez, Administrator, SBA, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, FCC (Aug. 10, 1999) (*Alvarez Letter 1999*).

<sup>140</sup> “FCC Announces Winning Bidders in the Auction of 1,020 Licenses to Provide 900 MHz SMR in Major Trading Areas: Down Payments due April 22, 1996, FCC Form 600s due April 29, 1996,” *Public Notice*, 11 FCC Rcd 18599 (WTB 1996).

<sup>141</sup> *Id.*

<sup>142</sup> See “Correction to Public Notice DA 96-586 ‘FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,’” *Public Notice*, 11 FCC Rcd 18,637 (WTB 1996).

<sup>143</sup> See “Multi-Radio Service Auction Closes,” *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

<sup>144</sup> See “800 MHz Specialized Mobile Radio (SMR) Service General Category (851-854 MHz) and Upper Band (861-865 MHz) Auction Closes; Winning Bidders Announced,” *Public Notice*, 15 FCC Rcd 17162 (WTB 2000).

<sup>145</sup> See “800 MHz SMR Service Lower 80 Channels Auction Closes; Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 1736 (WTB 2000).

<sup>146</sup> See generally 13 C.F.R. § 121.201, NAICS code 517210.

<sup>147</sup> *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the* (continued...)

Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.<sup>148</sup> The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (“BTAs”). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.<sup>149</sup> After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission’s rules. The Commission has adopted three levels of bidding credits for BRS: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) is eligible to receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) is eligible to receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) is eligible to receive a 35 percent discount on its winning bid.<sup>150</sup> In 2009, the Commission conducted Auction 86, which offered 78 BRS licenses.<sup>151</sup> Auction 86 concluded with ten bidders winning 61 licenses.<sup>152</sup> Of the ten, two bidders claimed small business status and won 4 licenses; one bidder claimed very small business status and won three licenses; and two bidders claimed entrepreneur status and won six licenses.

47. In addition, the SBA’s Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.<sup>153</sup> Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using

(Continued from previous page) \_\_\_\_\_

*Communications Act – Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593 para. 7 (1995).

<sup>148</sup> 47 C.F.R. § 21.961(b)(1).

<sup>149</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard.

<sup>150</sup> 47 C.F.R. § 27.1218. *See also* “Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86,” Public Notice, 24 FCC Rcd 8277, 8296 (WTB 2009) (*Auction 86 Procedures Public Notice*).

<sup>151</sup> *Auction 86 Procedures Public Notice*, 24 FCC Rcd at 8280.

<sup>152</sup> “Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period,” Public Notice, 24 FCC Rcd 13572 (WTB 2009).

<sup>153</sup> The term “small entity” within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on EBS licensees.

wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”<sup>154</sup> The SBA defines a small business size standard for this category as any such firms having 1,500 or fewer employees. The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.<sup>155</sup> Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.<sup>156</sup> Thus, under this size standard, the majority of firms can be considered small and may be affected by rules adopted pursuant to the FNPRM.

48. **Lower 700 MHz Band Licenses.** The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.<sup>157</sup> The Commission defined a “small business” as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.<sup>158</sup> A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.<sup>159</sup> Additionally, the Lower 700 MHz Band had a third category of small business status for Metropolitan/Rural Service Area (“MSA/RSA”) licenses, identified as “entrepreneur” and defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.<sup>160</sup> The SBA approved these small size standards.<sup>161</sup> The Commission conducted an auction in 2002 of 740 Lower 700 MHz Band licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)). Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders.<sup>162</sup> Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.<sup>163</sup> The Commission conducted a second Lower 700 MHz Band auction in 2003 that included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses.<sup>164</sup> Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.<sup>165</sup> In 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz Band, designated Auction 60. There were

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<sup>154</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition); <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>155</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

<sup>156</sup> *See id.*

<sup>157</sup> *See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, GN Docket No. 01-74, Report and Order, 17 FCC Rcd 1022 (2002) (*Channels 52-59 Report and Order*).

<sup>158</sup> *See Channels 52-59 Report and Order*, 17 FCC Rcd at 1087-88 para. 172.

<sup>159</sup> *See id.*

<sup>160</sup> *See id.* at 1088 para. 173.

<sup>161</sup> *See Alvarez Letter 1999*.

<sup>162</sup> *See* “Lower 700 MHz Band Auction Closes,” Public Notice, 17 FCC Rcd 17272 (WTB 2002).

<sup>163</sup> *Id.*

<sup>164</sup> *See* “Lower 700 MHz Band Auction Closes,” Public Notice, 18 FCC Rcd 11873 (WTB 2003).

<sup>165</sup> *See id.*

three winning bidders for five licenses. All three winning bidders claimed small business status.<sup>166</sup>

49. In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order*.<sup>167</sup> The *700 MHz Second Report and Order* revised the band plan for the commercial (including Guard Band) and public safety spectrum, adopted services rules, including stringent build-out requirements, an open platform requirement on the C Block, and a requirement on the D Block licensee to construct and operate a nationwide, interoperable wireless broadband network for public safety users.<sup>168</sup> An auction of A, B and E block licenses in the Lower 700 MHz band was held in 2008.<sup>169</sup> Twenty winning bidders claimed small business status (those with attributable average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years). Thirty three winning bidders claimed very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years). In 2011, the Commission conducted Auction 92, which offered 16 Lower 700 MHz band licenses that had been made available in Auction 73 but either remained unsold or were licenses on which a winning bidder defaulted. Two of the seven winning bidders in Auction 92 claimed very small business status, winning a total of four licenses.<sup>170</sup>

50. **Upper 700 MHz Band Licenses.** In the *700 MHz Second Report and Order*, the Commission revised its rules regarding Upper 700 MHz band licenses.<sup>171</sup> In 2008, the Commission conducted Auction 73 in which C and D block licenses in the Upper 700 MHz band were available.<sup>172</sup>

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<sup>166</sup> “Auction of Lower 700 MHz Band Licenses Closes, Winning Bidders Announced for Auction No. 60, Down Payments due August 19, 2005, FCC Forms 601 and 602 due August 19, 2005, Final Payment due September 2, 2005, Ten-Day Petition to Deny Period,” Public Notice, 20 FCC Rcd 13424 (WTB 2005).

<sup>167</sup> *Service Rules for the 698-746, 747-762 and 777-792 MHz Band, WT Docket No. 06-150, Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephone, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules, Implementing a Nationwide, Broadband Interoperable Public Safety Network in the 700 MHz Band, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Communications Requirements Through the Year 2010, WT Docket Nos. 96-86, 01-309, 03-264, 06-169, PS Docket No. 06-229, Second Report and Order, 22 FCC Rcd 15289 (2007) (700 MHz Second Report and Order).*

<sup>168</sup> *Service Rules for the 698-746, 747-762 and 777-792 MHz Band, WT Docket No. 06-150, Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephone, WT Docket No. 01-309, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket No. 03-264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 06-169, Implementing a Nationwide, Broadband Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86, Second Report and Order, 22 FCC Rcd 15289 (2007) (“700 MHz Second Report and Order”).*

<sup>169</sup> See Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 FCC Rcd 4572 (WTB 2008).

<sup>170</sup> See “Auction of 700 MHz Band Licenses Closes, Winning Bidders Announced for Auction 92, Down Payments and FCC Forms 601 and 602 Due August 11, 2011, Final Payments Due August 25, 2011, Ten-Day Petition to Deny Period,” *Public Notice*, 26 FCC Rcd 10,494 (WTB 2011).

<sup>171</sup> 700 MHz Second Report and Order, 22 FCC Rcd 15,289.

<sup>172</sup> See Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 FCC Rcd 4572 (2008).

Three winning bidders claimed very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years).

51. **700 MHz Guard Band Licensees.** In the *700 MHz Guard Band Order*, we adopted a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>173</sup> A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.<sup>174</sup> Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.<sup>175</sup> An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.<sup>176</sup> Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.<sup>177</sup>

52. **Cellular Radiotelephone Service.** Auction 77 was held to resolve one group of mutually exclusive applications for Cellular Radiotelephone Service licenses for unserved areas in New Mexico.<sup>178</sup> Bidding credits for designated entities were not available in Auction 77.<sup>179</sup> In 2008, the Commission completed the closed auction of one unserved service area in the Cellular Radiotelephone Service, designated as Auction 77. Auction 77 concluded with one provisionally winning bid for the unserved area totaling \$25,002.<sup>180</sup>

53. **Private Land Mobile Radio (“PLMR”).** PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee’s primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we use the broad census category, Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons.<sup>181</sup> The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. We note that PLMR licensees generally use the licensed facilities in support of other

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<sup>173</sup> See *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, WT Docket No. 99-168, Second Report and Order, 15 FCC Rcd 5299 (2000) (*700 MHz Guard Band Order*).

<sup>174</sup> See *id.* at 5343–45 paras. 106–10.

<sup>175</sup> See *id.*

<sup>176</sup> See *700 MHz Guard Band Auction Closes*, Public Notice, 15 FCC Rcd 18026 (2000).

<sup>177</sup> See *700 MHz Guard Band Auction Closes*, Public Notice, 16 FCC Rcd 4590 (2001).

<sup>178</sup> See “Closed Auction of Licenses for Cellular Unserved Service Area Scheduled for June 17, 2008, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 77,” Public Notice, 23 FCC Rcd 6670 (WTB 2008).

<sup>179</sup> *Id.* at 6685.

<sup>180</sup> See “Auction of Cellular Unserved Service Area License Closes, Winning Bidder Announced for Auction 77, Down Payment due July 2, 2008, Final Payment due July 17, 2008,” Public Notice, 23 FCC Rcd 9501 (WTB 2008).

<sup>181</sup> See 13 C.F.R. § 121.201, NAICS code 517210.



business activities, and therefore, it would also be helpful to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.<sup>182</sup>

54. As of March 2010, there were 424,162 PLMR licensees operating 921,909 transmitters in the PLMR bands below 512 MHz. We note that any entity engaged in a commercial activity is eligible to hold a PLMR license, and that any revised rules in this context could therefore potentially impact small entities covering a great variety of industries.

55. **Rural Radiotelephone Service.** The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.<sup>183</sup> A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (“BETRS”).<sup>184</sup> In the present context, we will use the SBA’s small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.<sup>185</sup> There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies proposed herein.

56. **Air-Ground Radiotelephone Service.** The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.<sup>186</sup> We will use SBA’s small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.<sup>187</sup> There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard and may be affected by rules adopted pursuant to the FNPRM.

57. **Aviation and Marine Radio Services.** Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees.<sup>188</sup> Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875-157.4500 MHz (ship transmit) and 161.775-162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a “small” business as an entity that, together with controlling interests and affiliates, has average gross revenues for

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<sup>182</sup> See generally 13 C.F.R. § 121.201.

<sup>183</sup> The service is defined in 47 C.F.R. § 22.99.

<sup>184</sup> BETRS is defined in 47 C.F.R. §§ 22.757 and 22.759.

<sup>185</sup> 13 C.F.R. § 121.201, NAICS code 517210.

<sup>186</sup> See 47 C.F.R. § 22.99.

<sup>187</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>188</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

the preceding three years not to exceed \$15 million dollars.<sup>189</sup> In addition, a “very small” business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$3 million dollars.<sup>190</sup> There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as “small” businesses under the above special small business size standards and may be affected by rules adopted pursuant to the FNPRM.

58. **Fixed Microwave Services.** Fixed microwave services include common carrier,<sup>191</sup> private operational-fixed,<sup>192</sup> and broadcast auxiliary radio services.<sup>193</sup> At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees.<sup>194</sup> The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA’s small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

59. **Offshore Radiotelephone Service.** This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.<sup>195</sup> There are approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA’s small business size standard for Cellular and Other Wireless Telecommunications services.<sup>196</sup> Under that SBA small business size

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<sup>189</sup> See generally *Amendment of the Commission’s Rules Concerning Maritime Communications*, PR Docket No. 92-257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853, 19884–88 paras. 64–73 (1998).

<sup>190</sup> See *id.*

<sup>191</sup> See 47 C.F.R. §§ 101 *et seq.* (formerly, Part 21 of the Commission’s Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

<sup>192</sup> Persons eligible under parts 80 and 90 of the Commission’s Rules can use Private Operational-Fixed Microwave services. See 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee’s commercial, industrial, or safety operations.

<sup>193</sup> Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission’s Rules. See 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

<sup>194</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

<sup>195</sup> This service is governed by Subpart I of Part 22 of the Commission’s Rules. See 47 C.F.R. §§ 22.1001–1037.

<sup>196</sup> See 13 C.F.R. § 121.201, NAICS code 517212 (This category will be changed for purposes of the 2007 Census to “Wireless Telecommunications Carriers (except Satellite),” NAICS code 517210.).

standard, a business is small if it has 1,500 or fewer employees.<sup>197</sup>

60. **39 GHz Service.** The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of \$40 million or less in the three previous calendar years.<sup>198</sup> An additional size standard for “very small business” is: an entity that, together with affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>199</sup> The SBA has approved these small business size standards.<sup>200</sup> The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by rules adopted pursuant to the FNPRM.

61. **Local Multipoint Distribution Service.** Local Multipoint Distribution Service (“LMDS”) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.<sup>201</sup> The auction of the 986 LMDS licenses began and closed in 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>202</sup> An additional small business size standard for “very small business” was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>203</sup> The SBA has approved these small business size standards in the context of LMDS auctions.<sup>204</sup> There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. In 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses.

62. **218-219 MHz Service.** The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years.<sup>205</sup> In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we established a small business size standard for a “small business” as an entity that, together with

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<sup>197</sup> See *id.*

<sup>198</sup> See *Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, PP Docket No. 93-253, Report and Order, 12 FCC Rcd 18600, 18661–64, paras. 149–151 (1997).

<sup>199</sup> See *id.*

<sup>200</sup> See Letter to Kathleen O’Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998).

<sup>201</sup> See *Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997) (“*LMDS Second Report and Order*”).

<sup>202</sup> See *LMDS Second Report and Order*, 12 FCC Rcd at 12689-90, ¶ 348.

<sup>203</sup> See *id.*

<sup>204</sup> See *Alvarez to Phythyon Letter 1998*.

<sup>205</sup> See *generally Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fourth Report and Order, 9 FCC Rcd 2330 (1994).

its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed \$15 million for the preceding three years.<sup>206</sup> A “very small business” is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed \$3 million for the preceding three years.<sup>207</sup> These size standards will be used in future auctions of 218-219 MHz spectrum.

63. **2.3 GHz Wireless Communications Services.** This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined “small business” for the wireless communications services (“WCS”) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million for each of the three preceding years.<sup>208</sup> The SBA has approved these definitions.<sup>209</sup> The Commission auctioned geographic area licenses in the WCS service. In the auction, which was conducted in 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

64. **1670-1675 MHz Band.** An auction for one license in the 1670-1675 MHz band was conducted in 2003. The Commission defined a “small business” as an entity with attributable average annual gross revenues of not more than \$40 million for the preceding three years and thus would be eligible for a 15 percent discount on its winning bid for the 1670-1675 MHz band license. Further, the Commission defined a “very small business” as an entity with attributable average annual gross revenues of not more than \$15 million for the preceding three years and thus would be eligible to receive a 25 percent discount on its winning bid for the 1670-1675 MHz band license. One license was awarded. The winning bidder was not a small entity.

65. **3650–3700 MHz band.** In March 2005, the Commission released a *Report and Order and Memorandum Opinion and Order* that provides for nationwide, non-exclusive licensing of terrestrial operations, utilizing contention-based technologies, in the 3650 MHz band (*i.e.*, 3650–3700 MHz).<sup>210</sup> As of April 2010, more than 1270 licenses have been granted and more than 7433 sites have been registered. The Commission has not developed a definition of small entities applicable to 3650–3700 MHz band nationwide, non-exclusive licensees. However, we estimate that the majority of these licensees are Internet Access Service Providers (ISPs) and that most of those licensees are small businesses.

66. **24 GHz – Incumbent Licensees.** This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of “Cellular and Other Wireless Telecommunications” companies. This category provides that such a company is small if it employs no more than 1,500 persons.<sup>211</sup> We believe that there are only two licensees in the 24 GHz band

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<sup>206</sup> See generally *Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999) (*218-219 MHz Report and Order and Memorandum Opinion and Order*).

<sup>207</sup> See *id.*

<sup>208</sup> *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (WCS)*, GN Docket No. 96-228, Report and Order, 12 FCC Rcd 10785, 10879 para. 194 (1997).

<sup>209</sup> See Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (Dec. 2, 1998) (*Alvarez Letter 1998*).

<sup>210</sup> The service is defined in section 90.1301 *et seq.* of the Commission’s Rules, 47 C.F.R. § 90.1301 *et seq.*

<sup>211</sup> See 13 C.F.R. § 121.201, NAICS code 517210.

that were relocated from the 18 GHz band, Teligent<sup>212</sup> and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

67. **24 GHz – Future Licensees.** With respect to new applicants in the 24 GHz band, the size standard for “small business” is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of \$15 million.<sup>213</sup> “Very small business” in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years.<sup>214</sup> The SBA has approved these small business size standards.<sup>215</sup> These size standards will apply to a future 24 GHz license auction, if held.

68. **Satellite Telecommunications.** Since 2007, the SBA has recognized satellite firms within this revised category, with a small business size standard of \$15 million.<sup>216</sup> The most current Census Bureau data are from the economic census of 2007, and we will use those figures to gauge the prevalence of small businesses in this category. Those size standards are for the two census categories of “Satellite Telecommunications” and “Other Telecommunications.” Under the “Satellite Telecommunications” category, a business is considered small if it had \$15 million or less in average annual receipts.<sup>217</sup> Under the “Other Telecommunications” category, a business is considered small if it had \$25 million or less in average annual receipts.<sup>218</sup>

69. The first category of Satellite Telecommunications “comprises establishments primarily engaged in providing point-to-point telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”<sup>219</sup> For this category, Census Bureau data for 2007 show that there were a total of 512 firms that operated for the entire year.<sup>220</sup> Of this total, 464 firms had annual receipts of under \$10 million, and 18 firms had receipts of \$10 million to \$24,999,999.<sup>221</sup> Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by rules adopted pursuant to the FNPRM.

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<sup>212</sup> Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

<sup>213</sup> See *Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967 para. 77 (2000); see also 47 C.F.R. § 101.538(a)(2).

<sup>214</sup> See *Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967 para. 77 (2000); see also 47 C.F.R. § 101.538(a)(1).

<sup>215</sup> See Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

<sup>216</sup> See 13 C.F.R. § 121.201, NAICS code 517410.

<sup>217</sup> *Id.*

<sup>218</sup> See 13 C.F.R. § 121.201, NAICS code 517919.

<sup>219</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517410 Satellite Telecommunications”.

<sup>220</sup> See 13 C.F.R. § 121.201, NAICS code 517410.

<sup>221</sup> See *id.* An additional 38 firms had annual receipts of \$25 million or more.

70. The second category of Other Telecommunications “primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.”<sup>222</sup> For this category, Census Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year.<sup>223</sup> Of this total, 2,346 firms had annual receipts of under \$25 million.<sup>224</sup> Consequently, we estimate that the majority of Other Telecommunications firms are small entities that might be affected by our action.

71. **Cable and Other Program Distribution.** Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”<sup>225</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.<sup>226</sup> According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.<sup>227</sup> Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.<sup>228</sup> Thus, under this size standard, the majority of firms can be considered small and may be affected by rules adopted pursuant to the FNPRM.

72. **Cable Companies and Systems.** The Commission has developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.<sup>229</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.<sup>230</sup> In addition, under

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<sup>222</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517919 Other Telecommunications”, <http://www.census.gov/naics/2007/def/ND517919.HTM>.

<sup>223</sup> See 13 C.F.R. § 121.201, NAICS code 517919.

<sup>224</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517919” (issued Nov. 2010).

<sup>225</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>226</sup> See 13 C.F.R. § 121.201, NAICS code 517110.

<sup>227</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

<sup>228</sup> See *id.*

<sup>229</sup> See 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. See *Implementation of Sections of the 1992 Cable Television Consumer Protection and Competition Act: Rate Regulation*, MM Docket Nos. 92-266, 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 para. 28 (1995).

<sup>230</sup> These data are derived from R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.<sup>231</sup> Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.<sup>232</sup> Thus, under this second size standard, most cable systems are small and may be affected by rules adopted pursuant to the FNPRM.

73. **Cable System Operators.** The Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>233</sup> The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>234</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.<sup>235</sup> We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,<sup>236</sup> and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

74. **Open Video Services.** The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.<sup>237</sup> The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,<sup>238</sup> OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."<sup>239</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.<sup>240</sup> Of

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<sup>231</sup> See 47 C.F.R. § 76.901(c).

<sup>232</sup> WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

<sup>233</sup> 47 U.S.C. § 543(m)(2); see also 47 C.F.R. § 76.901(f) & nn.1-3.

<sup>234</sup> 47 C.F.R. § 76.901(f); see *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

<sup>235</sup> These data are derived from R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

<sup>236</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.901(f) of the Commission's rules.

<sup>237</sup> 47 U.S.C. § 571(a)(3)-(4). See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, 24 FCC Rcd 542, 606 para. 135 (2009) ("*Thirteenth Annual Cable Competition Report*").

<sup>238</sup> See 47 U.S.C. § 573.

<sup>239</sup> U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>240</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.<sup>241</sup> Thus, under this second size standard, most cable systems are small and may be affected by rules adopted pursuant to the Notice. In addition, we note that the Commission has certified some OVS operators, with some now providing service.<sup>242</sup> Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.<sup>243</sup> The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

75. **Internet Service Providers.** Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”<sup>244</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.<sup>245</sup> According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.<sup>246</sup> Of this total, 3144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.<sup>247</sup> Thus, under this size standard, the majority of firms can be considered small. In addition, according to Census Bureau data for 2007, there were a total of 396 firms in the category Internet Service Providers (broadband) that operated for the entire year.<sup>248</sup> Of this total, 394 firms had employment of 999 or fewer employees, and two firms had employment of 1000 employees or more.<sup>249</sup> Consequently, we estimate that the majority of these firms are small entities that may be affected by rules adopted pursuant to the FNPRM.

76. **Internet Publishing and Broadcasting and Web Search Portals.** Our action may pertain to interconnected VoIP services, which could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The Commission has not adopted a size standard for entities that create or provide these types of services or applications. However, the Census Bureau has identified firms that “primarily engaged in 1) publishing and/or broadcasting content on the Internet exclusively or 2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in

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<sup>241</sup> See *id.*

<sup>242</sup> A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsr.html>.

<sup>243</sup> See *Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606-07 para. 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

<sup>244</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>245</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>246</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110” (issued Nov. 2010).

<sup>247</sup> See *id.*

<sup>248</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171103 (issued Nov. 2010).

<sup>249</sup> See *id.*



an easily searchable format (and known as Web search portals).”<sup>250</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 500 or fewer employees.<sup>251</sup> According to Census Bureau data for 2007, there were 2,705 firms in this category that operated for the entire year.<sup>252</sup> Of this total, 2,682 firms had employment of 499 or fewer employees, and 23 firms had employment of 500 employees or more.<sup>253</sup> Consequently, we estimate that the majority of these firms are small entities that may be affected by rules adopted pursuant to the FNPRM.

77. **Data Processing, Hosting, and Related Services.** Entities in this category “primarily ... provid[e] infrastructure for hosting or data processing services.”<sup>254</sup> The SBA has developed a small business size standard for this category; that size standard is \$25 million or less in average annual receipts.<sup>255</sup> According to Census Bureau data for 2007, there were 8,060 firms in this category that operated for the entire year.<sup>256</sup> Of these, 7,744 had annual receipts of under \$24,999,999.<sup>257</sup> Consequently, we estimate that the majority of these firms are small entities that may be affected by rules adopted pursuant to the FNPRM.

78. **All Other Information Services.** The Census Bureau defines this industry as including “establishments primarily engaged in providing other information services (except news syndicates, libraries, archives, Internet publishing and broadcasting, and Web search portals).”<sup>258</sup> Our action pertains to interconnected VoIP services, which could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The SBA has developed a small business size standard for this category; that size standard is \$7.0 million or less in average annual receipts.<sup>259</sup> According to Census Bureau data for 2007, there were 367 firms in this category that operated for the entire year.<sup>260</sup> Of these, 334 had annual receipts of under \$5.0 million, and an additional 11 firms had receipts of between \$5 million and \$9,999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

#### **D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities**

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<sup>250</sup> U.S. Census Bureau, “2007 NAICS Definitions: 519130 Internet Publishing and Broadcasting and Web Search Portals,” <http://www.naics.com/censusfiles/ND519130.HTM>.

<sup>251</sup> See 13 C.F.R. § 121.201, NAICS code 519130.

<sup>252</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 519130” (issued Nov. 2010).

<sup>253</sup> *Id.*

<sup>254</sup> U.S. Census Bureau, “2007 NAICS Definitions: 518210 Data Processing, Hosting, and Related Services”, <http://www.census.gov/naics/2007/def/NDEF518.HTM>.

<sup>255</sup> See 13 C.F.R. § 121.201, NAICS code 518210.

<sup>256</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 4, “Establishment and Firm Size: Receipts Size of Firms for the United States: 2007 NAICS Code 518210” (issued Nov. 2010).

<sup>257</sup> *Id.*

<sup>258</sup> U.S. Census Bureau, “2007 NAICS Definitions: 519190 All Other Information Services”, <http://www.census.gov/naics/2007/def/ND519190.HTM>.

<sup>259</sup> See 13 C.F.R. § 121.201, NAICS code 519190.

<sup>260</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 4, “Establishment and Firm Size: Receipts Size of Firms for the United States: 2007 NAICS Code 519190” (issued Nov. 2010).

79. In this FNPRM, the Commission seeks public comment on additional steps to complete its comprehensive universal service and intercarrier compensation reform. The transition to complete the reform of the universal service programs and new intercarrier compensation rules could affect all carriers, including small entities, and may include new administrative processes. In proposing these reforms, the Commission seeks comment on various reporting, recordkeeping, and other compliance requirements that may apply to all carriers, including small entities. We seek comment on any costs and burdens on small entities associated with the proposed rule, including data quantifying the extent of those costs or burdens.

### **1. Universal Service**

80. In the Order, the Commission adopts a rule requiring that actual speed and latency be measured on each ETC's access network from the end-user interface to the nearest Internet access point, as well as a rule that requires ETCs to certify to and report the results to USAC on an annual basis. In this FNPRM, the Commission seeks comment on whether the Commission should adopt a specific measurement methodology beyond what is described in the Order and the format in which ETCs should report their results. Specifically, the Commission seeks comment on whether we should specify a uniform reporting format, such as a format that can be produced to the Universal Service Administrative Company ("USAC") and auditable such that USAC or the state commissions may confirm that a provider is, in fact, providing broadband at the required minimum speeds. The Commission also seeks comment on whether providers should be required to provide the underlying raw measurement data to USAC and, if so, whether there are legitimate concerns with the confidentiality of such data. In the alternative, the Commission seeks comment on whether it would be sufficient to have a provider certify to USAC that its network is satisfying the minimum broadband metrics and retain the results of its own performance measurement to be produced on request in the course of possible future audits.

81. In the Order, the Commission also directs the Wireline Competition Bureau and Wireless Telecommunications Bureau to develop and conduct a survey of voice and broadband rates in order to compare urban and rural voice and broadband rates. In this FNPRM, the Commission seeks comment on the components of the survey.

82. In this FNPRM, we seek comment on the Rural Association's proposed creation of a new broadband-focused CAF mechanism that ultimately would entirely replace existing support mechanisms for rate-of-return carriers. We seek comment on what information we would need to require from carriers in order to evaluate and implement this proposal.

83. Under the Order, rate-of-return carriers will continue to receive for some time a modified version of their legacy universal service support. In this FNPRM, we seek comment on the appropriate data and methodologies the Commission should use to calculate the weighted average cost of capital used to identify the rate-of-return required to maintain the current value of a firm.

84. The Commission proposes to apply to recipients of Mobility Fund Phase II support, CAF support, and Remote Areas Fund support the same rules for accountability and oversight. Thus recipients of USF support through any of these funding mechanisms would be required to meet the same reporting, audit, and record retention requirements. Because of differences between Mobility Fund support and other USF high cost support mechanisms, the Commission proposes that Mobility Fund Phase II support recipients include the same additional information in their annual reports as Mobility Fund Phase I support recipients. This information includes maps with service area and population information, linear road mile coverage, and drive test data, as well as updated project information. To minimize waste, fraud, and abuse, the Commission proposes to require individuals who are eligible for CAF support for remote areas to certify that they are eligible and periodically verify their continued eligibility.

85. Where the Commission uses competitive bidding to award Mobility Fund II support, support in areas where the price cap ETC declines to make a state-level commitment, or support for

remote areas, the Commission proposes to use a two-stage application process, including ownership disclosure requirements, similar to that used in spectrum auctions and adopted for Mobility Fund Phase I.

86. The Commission also seeks comment in the FNPRM on whether there are specific requirements in the existing annual reporting rule for ETCs that should be modified to reflect basic differences in the nature and purpose of the support provided for mobile services. The Commission further seeks comment on any other aspects of its annual reporting requirements that should be modified to better reflect the nature of mobile services being offered and the objectives of the USF support provided for them.

## **2. Intercarrier Compensation**

87. In the FNPRM, the Commission seeks comment and data on issues that must be addressed to complete its comprehensive reform of the intercarrier compensation system. These issues include the appropriate path or transition to modernize the existing rules as needed to bring all intercarrier compensation to the ultimate end point of bill-and-keep, if and how carriers should be allowed to recover revenues that might be reduced by any additional intercarrier compensation reforms, and data to analyze the effects of proposed reforms and need for revenue recovery.

88. Compliance with a transition to a new system for all intercarrier compensation may impact some small entities and may include new or reduced administrative processes. For carriers that may be affected, obligations may include certain reporting and recordkeeping requirements to determine and establish their eligibility to receive recovery from other sources as intercarrier compensation rates are reduced. Additionally, these carriers may need to modify some administrative processes relating to the billing and collection of intercarrier compensation to comply with any new or revised rules the Commission adopts as a result of the FNPRM.

89. Modifications to the rules to address potential arbitrage opportunities or additional call signaling rules for VoIP traffic also will affect certain carriers, potentially including small entities. To the extent that the Commission further modifies the rules adopted in the Order as a result of the FNPRM, providers might be required to modify or adopt administrative, recordkeeping, or other processes to implement those changes. Moreover, the FNPRM considers possible rule modifications to require IP-to-IP interconnection, which may require service providers to modify some administrative processes. Further, possible rule modifications to address potential arbitrage, if adopted, may affect certain carriers. For example, carriers that engage in such arbitrage may be subject to revised tariff filing or other requirements. However, these impacts are mitigated by the certainty and reduced litigation that should occur as a result of the reforms adopted, including arbitrage loopholes that the Commission has closed in the Order.

### **E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

90. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”<sup>261</sup>

91. The FNPRM seeks comment from all interested parties. The Commission is aware that

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<sup>261</sup> 5 U.S.C. § 603(c)(1)–(c)(4).

some of the proposals under consideration may impact small entities. Small entities are encouraged to bring to the Commission's attention any specific concerns they may have with the proposals outlined in the FNPRM.

92. The Commission expects to consider the economic impact on small entities, as identified in comments filed in response to the FNPRM, in reaching its final conclusions and taking action in this proceeding. The reporting, recordkeeping, and other compliance requirements in the FNPRM could have an impact on both small and large entities. The Commission believes that any impact of such requirements is outweighed by the accompanying public benefits. Further, these requirements are necessary to ensure that the statutory goals of Section 254 of the Act are met without waste, fraud, or abuse.

93. In the FNPRM, the Commission seeks comment on several issues and measures that may apply to small entities in a unique fashion. Specifically, the FNPRM seeks comment on whether small businesses should be eligible for a bidding preference if competitive bidding is used to provide Mobility Fund Phase II support, support in areas where the price cap ETC declines to make a state-level commitment, or support for remote areas. Entities seeking the small business bidding preference would be required to provide information about their gross revenues. The Commission believes that the benefits to small businesses of a bidding preference, if adopted, would significantly outweigh the burden of any additional information disclosure requirements. In addition, the Commission seeks comment on the data it will need to complete its represcription of the authorized interstate rate of return. Although data is requested from the industry generally, small carriers may be differently affected by the ultimate prescription of a new rate of return.

94. The FNPRM seeks comment on several issues relating to bill-and-keep implementation, including how points of interconnection obligations will function for rural and non-incumbent LECs,<sup>262</sup> definition of the network edge,<sup>263</sup> and the future role of tariffs and interconnection agreements.<sup>264</sup> The Commission also seeks comment on the appropriate sequence and timing of intercarrier rate reductions for those rate elements not covered by its Order adopting of bill-and-keep as the ultimate end-point for reform, particularly for originating switched access, dedicated transport, tandem switching and tandem transport in some circumstances.<sup>265</sup> The Commission seeks comment on the potential impact to small entities of reduced intercarrier rates for these additional rate elements, including whether a different transition period might be appropriate for particular classes of carriers.

95. The FNPRM also seeks comment on how recovery of reduced intercarrier compensation revenues in the future would impact carriers, and how recovery, if any, for those reduced revenues should be addressed.<sup>266</sup> The Commission asks if the recovery approach adopted should be different depending on the type of carrier or regulation.<sup>267</sup> The Commission also invites comment on specific recovery considerations for rate-of-return carriers and whether any cost or revenue recovery mechanism could provide rate-of-return carriers with greater incentives for efficient operation.<sup>268</sup>

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<sup>262</sup> See *supra* para. 1317.

<sup>263</sup> See *supra* paras. 1320-1321.

<sup>264</sup> See *supra* paras. 1312-1314.

<sup>265</sup> See *supra* Section XVII.M.

<sup>266</sup> See *supra* para. 1326.

<sup>267</sup> See *supra* Section XVII.N.

<sup>268</sup> See *supra* Section XVII.P.

96. Finally, the Commission seeks comment on whether separate consideration for small entities is necessary or appropriate for each of the following issues discussed in the FNPRM: the potential impact of additional call signaling rules governing VoIP traffic;<sup>269</sup> the potential impact of rules relating to potential future arbitrage, including revised tariff-filing requirements;<sup>270</sup> and the potential impact of rules relating to IP-to-IP interconnection and related issues.<sup>271</sup> Specifically with regard to the IP-to-IP interconnection, the FNPRM seeks comment on the scope of traffic exchange that should be included, responsibility for costs of IP-to-TDM conversions, and the statutory framework and appropriate scope of any IP-to-IP interconnection obligation.<sup>272</sup>

**F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules**

97. None.

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<sup>269</sup> See *supra* Section XVII.Q.

<sup>270</sup> See *supra* para. 1325.

<sup>271</sup> See *supra* Section XVII.P.4

<sup>272</sup> *Id.*

**STATEMENT OF  
CHAIRMAN JULIUS GENACHOWSKI**

Re: *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; *Mobility Fund*, WT Docket No. 10-208

Today, we take a momentous step in our efforts to harness the benefits of broadband Internet for every American.

I am tremendously grateful to each of my colleagues for working hard and working together to get us here.

This is a once-in-a-generation overhaul of universal service, keeping faith with the nation's long commitment to connecting all Americans to communications services.

We are taking a system designed for the Alexander Graham Bell era of rotary telephones and modernizing it for the era of Steve Jobs and the Internet future he imagined.

We are reaffirming for the digital age the fundamental American promise of opportunity for all.

We are furthering our national goal of connecting the country to wired and wireless broadband.

And we are helping put America on its proper 21<sup>st</sup> century footing, positioning us to lead the world in a fiercely competitive global digital economy.

Infrastructure has always been a key pillar of American economic success, with telephone and other infrastructure connecting consumers and businesses, facilitating commerce, and unleashing innovation. Broadband is the indispensable infrastructure of our 21<sup>st</sup> century economy.

Recognizing this fact, for years, respected voices have called universal broadband an essential ingredient for American economic competitiveness and job creation. In its 2007 report *Rising Above the Gathering Storm*, the National Academy of Sciences said that "[a]ccelerating progress toward making broadband connectivity available and affordable for all is critical" and urged government to "take the necessary steps to meet that goal." Our National Broadband Plan correctly called extending wired and wireless broadband to all Americans the "great infrastructure challenge of the 21<sup>st</sup> century." And last year, IBM CEO Sam Palmisano expressed a view from CEOs, governors, mayors, and consumers. He implored policymakers to "fix the bridges, but don't forget broadband," and said that "a pervasive broadband infrastructure would be a powerful generator of new jobs and economic growth."

Today, building on years of hard work by the FCC and on Capitol Hill, this Commission is acting unanimously – and on a bipartisan basis – to meet this critical national challenge, and bring the Universal Service Fund and intercarrier compensation system into the broadband age.

Our action will enable millions more Americans to work, learn and innovate online. It will open new vistas of digital opportunity, and enhance public safety. It will create jobs in the near term, and lay

the foundation for enduring job creation, economic growth, and U.S. global competitiveness for years to come.

Today's reforms of the multi-billion dollar Universal Service Fund will bring real benefits to consumers and communities in every part of the country.

Over the next year, the Connect America Fund will bring broadband to more than 600,000 Americans who wouldn't have it otherwise. Over the following five years, millions more rural families will be connected. And today's Order puts us on the path to get broadband to every American by the end of the decade – to close the broadband deployment gap which now stands at close to twenty million Americans.

We are also extending the benefits of mobile broadband coverage to tens of thousands of unserved road-miles, areas where millions of Americans work, live, and travel. These are areas of frustration and economic stagnation for so many people – where mobile connections are needed but unavailable, where small businesses lose out on customers and productivity, and where people in traffic accidents can't reach 9-1-1.

Today, we make mobility an independent universal service objective for the first time, providing dedicated support through the world's first Mobility Fund. Over the next three years, we will provide almost \$1 billion in funding per year for universal mobility.

Mobile is one of the fastest-growing and most promising sectors of our economy, and having the world's largest market for 3G and 4G subscribers will be a key competitive advantage enabling us to lead the world in mobile innovation.

New wired and wireless broadband will be a lifeline for rural communities currently being bypassed by the Internet revolution. Young people who didn't see a future in their small hometowns will now be able to access a new world of opportunity. Entrepreneurs in small towns won't need to move to the big city to live their dreams; instead, small business owners doing everything from selling beef to starting hunting lodges – like residents I met in Nebraska wanted to do – will be able to reach customers in the next town, city, state or country, and boost their efficiency and productivity through cloud-based services.

Today's action will empower small businesses that otherwise couldn't exist in small-town America, and create new jobs in those communities.

This includes farmers, who need broadband to access commodity pricing, crop information, real-time weather reports, and online auctions. During our process, we heard this directly from farmers in rural America.

Today's action will help connect anchor institutions, which can play a vital role – for example, in expanding basic digital literacy training – in a world where broadband skills are necessary to find and land jobs.

Today's action has the potential to be one of the biggest job creators in rural America in decades. We estimate that the Order as a whole will unleash billions in private sector broadband infrastructure spending in rural America over the next decade, creating hundreds of thousands of jobs. And by empowering millions more Americans to engage in e-commerce – as buyers and sellers – the Order will grow the size of our overall online marketplace and provide a boost for Main Street businesses across the country.

Today's action will change the landscape for students who are now unserved by broadband – providing educational opportunity that would otherwise be denied.

In now-unserved areas, it will change the landscape for seniors and people with illnesses – providing remote diagnostics and treatment to people who would otherwise have no access or would have to travel for hundreds of miles to get care.

And it will enable parents in now-unserved areas to finally connect with their children in military service overseas through video chat or other modern communications means that require broadband.

By constraining the growth of existing programs, today's reforms will also minimize the burden those programs place on all consumers, keeping hundreds of millions of dollars in consumers' pockets over the next several years. Our overhaul of the intercarrier compensation system will gradually eliminate the billions of dollars in hidden subsidies currently paid by consumers across the country through their wireless and long distance phone bills. Our staff estimates that the consumer benefits of ICC reform will be more than \$2 billion annually. Consumers will get more value for their money and less waste.

These material benefits flow directly from the policy principles and structural reforms that we've embraced in this Order.

The reforms implement the idea that government programs should be modernized to focus on the strategic challenges of today and tomorrow, not yesterday. Starting today, USF will be transformed into the Connect America Fund, which will directly take on our country's 21<sup>st</sup> century infrastructure challenge by enabling the private sector to build robust, scalable, affordable broadband to homes, businesses, and anchor institutions in unserved communities.

Our ICC reforms will also advance the deployment of modern Internet Protocol networks. And as the telephone network transitions to an IP network, the Order affirms our expectation that carriers will negotiate in good faith on IP-to-IP interconnection for voice traffic.

Today's Order also recognizes the growing importance of mobile broadband. As I mentioned, today for the first time we make mobility an independent universal service objective, and take significant concrete steps to meet that objective.

Also a first, today's Order brings market-based competitive bidding into universal service support. In a series of ways, including auctions, we have structured distribution of public funds to ensure real efficiency and accountability in the Connect America Fund.

For the first time, our Order puts the Fund on a firm budget. Fiscal responsibility was a principle we announced on Day One, and we've adhered to that in this Order, protecting the interests of the millions of consumers who contribute into the Fund. And we put in place a series of reforms to eliminate duplicative funding and other funding where it's not needed and can't be justified. We also end arbitrage schemes that take advantage of gaps, closing loopholes in our rules.

Faced with many complex and nuanced policy questions, I believe this Commission has reached the right solutions because we've approached these issues the right way.

We did not rubber stamp or adopt wholesale the proposals of any stakeholder or group of stakeholders. Instead, we made our decisions on what's right for the American people and our economy based on facts and data gathered in one of the most extensive records in FCC history, including hearings



and workshops across the country, and more than 2,700 substantive comments totaling tens of thousands of pages.

We have focused on putting consumers first, calibrating the policies we adopt to maximize consumer benefit. We have been careful to ensure that affected companies have predictable and measured transition paths so they can keep investing in their networks to better serve consumers and support our economy. And we have brought increased clarity to areas of uncertainty created by tensions between new communications services, like VoIP, and old rules.

Getting to this point wasn't easy. It required us to make some tough choices about what the Connect America Fund – and consumers – could and could not support.

Some proposals would have required consumers to pay a greater share of the costs of reform, or increased the size of the Fund. That would have put too much of a burden on consumers during these difficult economic times.

Some said that we should dramatically reduce the size of the Fund – but that would have left behind the millions of Americans being bypassed by broadband and with no prospect of broadband connectivity.

Some would have had us operate as if we were writing on a blank slate – but that would have risked needless consumer disruption, build-out delays, and other unintended and undesirable consequences.

Getting to this point not only required tough choices, it required the engagement of many stakeholders around the country, of our partners in the federal government, the states, Tribal communities, the private sector, and the non-profit and consumer advocacy community. I appreciate the broad level of constructive engagement. That very much includes the many members of Congress, on both sides of the aisle, who have worked for years to reform and improve universal service, and whose ongoing and constructive input is reflected in our action today. There are too many to thank individually, but I am grateful to all of the members of Congress who provided input and guidance.

The President has been a consistent leader on broadband and the opportunities of technology, and our actions today help meet national goals of universal access to wired and wireless broadband.

I also want to thank our state partners, who pioneered many of the reforms we adopt today. Moving forward, I am pleased that the states will continue to play a vital role, including a role in ensuring that consumers are well served by our universal service program.

I'm deeply grateful to my fellow Commissioners, who have worked tremendously hard to make today possible. Commissioners Copps and McDowell have been fighting to fix these programs for years, and Commissioner Clyburn's strong experience at the state level in South Carolina has been invaluable in our efforts. From top to bottom, today's Order reflects the seriousness of purpose and thoughtful input of each of my colleagues on the Commission. It is a better Order as a result, and I thank each of you.

At a time when citizens want solutions, not gridlock, I'm proud that this Commission is approving bipartisan reform of a broken system, reform that will deliver massive benefits for the American people.

This would not have happened without the tremendous work of the staff, without whom we would not have been able to finally accomplish a goal that's been elusive for many years: making reform

a reality. Our staff has not only worked hard, they have performed brilliantly – crunching numbers, mastering complex technologies, and operating at a world-class policy level. Today’s Order is the product of that tremendous effort. I particularly want to thank the leadership team that managed this process: Sharon Gillett, Ruth Milkman, Carol Matthey, Rebekah Goodheart, Jim Schlichting, Michael Steffen, and many others in our Wireline and Wireless Bureaus, our General Counsel’s office, and throughout the agency. I also want to acknowledge the work of the team that developed our National Broadband Plan for laying the groundwork for these reforms. And I want to particularly salute and applaud Zac Katz in my office, the quarterback of our USF and ICC modernization effort. Without your leadership, persistence, and savvy, these reforms simply could not have happened.

Of course, our work is not yet done. We have implementation work ahead, and there will continue to be intensive engagement with all stakeholders in response to the Further Notice of Proposed Rulemaking we adopt today, and in the months to come.

And we still face a tremendous challenge in increasing broadband adoption, an ongoing barrier to opportunity in both rural and urban areas. While there’s no silver bullet, the Lifeline portion of USF is part of the solution – including a significant investment in broadband adoption pilot programs. I’ve asked the staff to gear up Lifeline reform for action this year.

But wait, there’s more. As my colleagues have also noted, there’s work to do on the contribution side. That’s another important USF topic the Commission will address.

I’ll leave you with a closing thought. In the 1930s and 1950s, when Presidents Roosevelt and Eisenhower directed federal funding to roads, tunnels, bridges, and the national highway system, they were investing in then-current technologies to connect our people and our communities. The same was true for electricity and telephone service, also key 20<sup>th</sup> century universal service achievements. These investments have paid tremendous dividends for our economy and our country.

Broadband Internet truly is the information superhighway – the key connective infrastructure of the 21<sup>st</sup> century. It’s what will drive our competitiveness, our economy, and broad opportunity for decades to come.

Our action today is firmly rooted in sound principles that have served our country well in the past, and I’m confident it will help deliver a bright future for all Americans.

STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS

*Re: 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; Mobility Fund, WT Docket No. 10-208*

A lot of folks bet we couldn't get here today. They said Universal Service was too complicated and Intercarrier Compensation too convoluted ever to permit comprehensive reform. Universal Service was sadly out of step with the times, Intercarrier Comp was broken beyond repair. Yet here we are this morning, making telecommunications history with comprehensive reform of both Universal Service and Intercarrier Compensation. The first thing I want to do is congratulate Chairman Genachowski for the leadership he brought to bear in getting us to a place where no previous Chairman has managed to go. Today, thanks to his leadership, we build a framework to support the Twenty-first century communications infrastructure our consumers, our citizens and our country so urgently need. So mighty praise is due the Chairman, and even those who may take exception to parts of what we approve today will join me in thanking him for his commitment, courage and herculean effort to make this happen.

In the face of the complex systems we modernize today, it is all too easy to forget the simple, timeless goal behind our policies: all of us benefit when more of us are connected. The principle of Universal Service is the life-blood of the Communications Act—a clarion call and a legislative mandate to bring affordable and comparable communications services to *all* Americans—no matter who they are, where they live, or the particular circumstances of their individual lives. So it is altogether fitting as we move away from support designed primarily for voice to support for broadband, that we bear witness to the accomplishments USF has made over the years to connect America with Plain Old Telephone Service. The Fund has achieved truly laudable success. Thanks to both high cost support and low income assistance, we now have voice penetration rates in excess of 95% nationally. No other infrastructure build-out has done so much to bind the nation together. Additionally it has enabled millions of jobs and brought new opportunities to just about every aspect of our lives. Some stark challenges remain, of course, particularly in Native areas. The shocking statistic in Indian Country is a telephone penetration rate that at last report hovers in the high 60th percentile. Getting voice service and broadband to Indian Country and other Native areas is a central challenge to implementing the reforms we launch today. Bringing Universal Service into the Twenty-first century is the only way we can extend the full range of advanced communications services to places those services will not otherwise go.

The big news here, of course, is that Universal Service is finally going broadband. This is something I have advocated for a long, long time. It is something a decade and more overdue and a step that the Joint Board on Universal Service strongly backs. These new tools of advanced communications technologies and services are essential to the prosperity and well-being of our country. They are the essential tools of this generation like the hoe and the plow, the shovel and the saw were to our forebears. No matter if we live in city or hamlet, whether we work in a factory or on a farm, whether we are affluent or economically-disadvantaged, whether we are fully able or living with a disability—*every citizen* has a need for, and a right to, advanced communications services. Access denied is opportunity denied. That applies to us as individuals and as a nation. America can't afford access denied—unless we want to consign ourselves and our children to growing, not shrinking, digital divides. We are already skating around the wrong side of the global digital divide in many ways, when we should have learned by now that the rest of the world is not going to wait for America to catch up. But here's the good news. If we seize the power of this technology, and build it out to every corner of the country and make it truly

accessible to every American, there's no telling what we can accomplish. America would be back at the front of the pack.

The current system, for all the good it accomplished, has outlived its time. It has strayed from what Congress intended and consumers deserve. Inefficiencies and waste crept in where efficiency and ongoing oversight should have been standard operating procedure. As problems arose they were too often minimized or allowed to compound. At best, we settled for band-aids that never managed to stanch the hemorrhage. Sometimes we didn't even try band-aids. And the Commission more than once made things worse by calling communications technologies and services things that they were not, engaging in linguistic exegesis with a fury that even the most intense biblical scholars of old were incapable of achieving. In sum, we lost sight of the original purposes of both the Telecommunications Act of 1996 in general and the Universal Service Fund in particular.

Whatever the causes, and we could debate them for hours, our current USF and Intercarrier Compensation regimes are broken. Legacy access rates encourage carriers to maintain yesterday's technology instead of reaping the benefits of today's IP based networks. The hidden manipulations of intercarrier payments cost consumers billions of dollars each year. We reimburse some carriers for whatsoever they choose to invest in certain parts of their networks, regardless of whether a lesser amount was all that was needed to provide service to their customers. In some areas of the country, we subsidize four or more wireless carriers based on the costs of a wireline network. All of this excess is reflected in inflated monthly rates that consumers pay. The old saying is, "If it ain't broke, don't fix it." Well, it's broken. And we are left with no real option short of a major fix. No tinkering around the edges is capable of putting these systems back on a solid footing.

Some will claim we attempt too much today. But we would not have to overhaul these programs so fundamentally had the Commission been attentive to its duty to address these problems as they arose and worsened through the years. It's not that we didn't see the writing on the wall. Many people did. Years ago, as just one example, I proposed putting Universal Service funds to work supporting broadband build-out, like other countries were doing. Four years ago, four of my colleagues here were ready to vote to put USF on a new broadband footing, including a pilot program for competitive auctions. On Intercarrier Compensation, we four were ready to vote at the same time for lowered rates and an end to traffic pumping and phantom traffic. Commissioner McDowell will remember this well because we worked closely together on it.

What we are doing today is repairing two broken systems and putting in place a more credible and efficient framework that will benefit consumers, carriers and the country. We are approving a framework for allocating limited resources to mitigate serious communications shortfalls. It is a framework that should give all stakeholders a clearer picture of how these systems will work going forward and that will provide predictability for rate-payers, businesses and policy-makers. I would have much preferred a higher budget for the Fund—a budget that I believe consumers would accept because of its importance to putting the nation back to work and providing our kids with the tools they need for their futures. That being said, we set out down a good and welcome road here with steps that will make a huge difference, and that is why I am able to approve the item even though it is not, in several respects that would come as a surprise no one, the precise item I would have written.

Our focus is on support targeting the unserved areas that need it most. There is much to be said for this approach at this time because of the harsh budget realities the nation faces and because of the perceived need to limit Universal Service, but I hope and expect that our actions today will have spill-over effects in *under-served* areas, too—because America won't be broadband-sufficient until the under-served become fully-served, too. Inner cities can be just as handicapped as more remote regions. Here, too, access denied is opportunity denied. So I welcome the new approach that takes us from scatter-gun

support of voice based largely on the size of carriers and focuses instead on where private investment for broadband refuses to go. This means targeting money for areas where consumers would not otherwise have service, and I believe this is the first time we can really say that about the Fund.

Acting on another long standing recommendation of the Joint Board, we are for the first time creating a specific funding mechanism to support mobility. This is an historic accomplishment. Clearly there are areas—many areas—where mobile broadband providers are doing very well in delivering services and profiting handsomely and where support isn't needed. But there are other areas that are strangers to reliable mobile voice coverage and where the market will otherwise not go.

The mechanism through which we propose to do this—reverse auctions—is a new tool for the Commission. While we have considerable experience with spectrum auctions, this is in many ways a new species of auction and we will need to be very careful in how we approach and evaluate it. I hope it will live up to the high expectations parties have for it and truly become an efficient way to expend our limited USF dollars to reach unserved areas. I expect we will learn a lot from the first such auction and apply those lessons to the future. Let me also say how much I appreciate the item's prohibition on nation-wide package bidding in the Mobility Fund. I believe this is an important safeguard against gamesmanship and even further consolidation in the industry and that it can only redound to the benefit of rural consumers.

I am also pleased that we are adopting another safeguard to encourage stability during the transition to the new regime for mobile support. The course we adopt today has two auction phases, with the second installment of mobility support dependent upon further Commission decision-making. Understanding the need for maximum predictability throughout these transitions, we will halt reductions in legacy support if for some unlikely and unanticipated reason the second auction phase does not take place as planned.

Given the financial constraints we impose on USF, I also am pleased we were able to grow the Mobility Fund from the initial proposal. I would have supported, and I actively encouraged, a larger number given the scope of the challenges we face, but the increase can at least be seen as an important down-payment on further deployment. I appreciate the Chairman's support for this and particularly commend the leadership of my friend Commissioner Clyburn.

I am also encouraged that we launch a Tribal Mobility Fund specifically to target support for mobile service in Tribal areas. The state of broadband in Indian Country is a national disgrace—somewhere in the embarrassingly low single digits. Again, getting this right will take more money than is being proposed in today's proceedings, but it also hinges on more than money alone. It hinges also on the Commission taking prompt action on other proceedings and spectrum issues pending before us. Even in addition to all this, there are a host of confidence-building and cooperation-building challenges confronting us. I do believe the current Commission is on the right path to rebuilding our consultative mechanisms with Native Nations. We have new dialogues taking place, new inputs being shared, and new commitments to work together. We are also moving toward a fuller appreciation of what tribal sovereignty means and of the need to accord tribes the fuller and more active role they must have in order to ensure the best and most appropriate deployment and adoption strategies for their areas and populations. I feel encouraged that we are at long last positioning ourselves to make progress by working more closely and creatively together. The sad history here, as we all know, is many promises made, many promises broken. We need to turn the page, and I think we are beginning to do that now.

I also applaud the strong-build out benchmarks that will be a condition of receiving Mobility Fund dollars, and indeed support from any of our new programs, with meaningful enforcement and clawback consequences if providers do not meet their obligations to consumers. This injects much-

needed discipline into the system. It is another really important component of our actions today and, strongly enforced, one that will inspire more confidence in the new system than we ever had in the old.

Today is also historic because we finally take on the challenge of Intercarrier Compensation. We take meaningful steps to transform what is badly, sadly broken. This item puts the brakes on the arbitrage and gamesmanship that have plagued ICC for years and that have diverted private capital away from real investment in real networks. By some estimates, access stimulation costs nearly half a billion dollars a year, and phantom traffic affects nearly one fifth of the traffic on carriers' networks. Today, we say "no more." We adopt rules to address these arbitrage schemes head on. And, very importantly, we chart a course toward a bill-and-keep methodology that will ultimately rid the system of these perverse incentives entirely.

My enthusiasm here is tempered by the fact that end-user charges (under the label of "Access Recovery Charges") are allowed to increase, albeit incrementally, for residential consumers. My first preference was to prevent any increase. Alternatively, we could require individual carriers to demonstrate their need for additional revenues before imposing the ARC. Perhaps some of the largest and most profitable companies should not be able to charge the ARC. However, the Commission does adopt some important measures to protect consumers even as it allows additional charges. In particular, consumers already paying local phone rates of \$30 or more cannot be charged the ARC. The use of this ceiling recognizes that some early adopter states have already tackled intrastate access rates, and their citizens may already be footing a reasonable part of the bill. In the end, I am grateful that, at the very least, additional charges to end-users are not as great as they might have been, are spread over a longer period of time, and should be offset (and hopefully more than matched) by savings and efficiencies realized because of the more rational programs we begin to put in place. And I am hopeful the Commission will do everything it can to assure that these savings are passed on to consumers, although I continue to lament that the fact that we don't have a more competitive telecommunications environment that would better ensure consumer-friendly outcomes.

While "The Inside-the-Beltway" crowd and the armies of industry analysts and assorted other savants will be parsing today's items with eyes focused exclusively on which company or industry sector is up or down, who gains the most or least, and on all the other issues that will cause forests to be chopped down and vats of ink drained, I hope we can keep the focus on the consumer benefits of what we are doing. I would not—could not—support what we do today unless the expected consumer benefits are real enough to justify the effort—and, yes, the risks—of so sweeping a plan. Much will depend upon our implementation and enforcement—and I am sure some mid-course corrections—but I believe there are real and tangible consumer benefits in the framework items before us. More broadband for more people is at the top of the list. As just one example, we anticipate significant new investment with over seven million previously-unserved consumers getting broadband within six years. That means more service, more jobs, more opportunities.

Building critical infrastructure—and broadband is our most critical infrastructure challenge right now—has to be a partnership. The states are important and essential partners as we design and implement new USF and ICC programs. I have been a strong advocate for closer federal-state regulatory partnerships since I arrived here more than ten years ago. I have had the opportunity to serve on the Joint Boards with our state colleagues, to be a part of their deliberations, to appreciate the tremendous expertise and dedication they bring to their regulatory responsibilities, and to have learned so much from them. It is just plain good sense to maximize our working relationships with them. More even than my personal preference, which is deeply-held, this is the mandate of the law. Section 254 of the Act is clear—the states have a critical role in the preservation and advancement of Universal Service. While I understand the need for predictability in an ICC regime, I am pleased that my colleagues have retained a key role for states, including arbitrating interconnection agreements; monitoring intrastate access tariffs during the

transition to bill-and-keep; and helping to implement our Universal Service Fund as well as, in many cases, their own state universal service funds. State regulators are by definition closer to the needs of their consumers than federal regulators ever can be, and they retain their role as the likely first venue for consumer complaints. Additionally, I have urged the entire team here, and all stakeholders, to think creatively about how to *expand* the state role as we implement the new systems. I would hope that carriers would see the benefits of this federal-state cooperation, too. But it is unfortunate, and highly counter-productive to consumers, when some companies exercise their huge lobbying machines to encourage state legislatures to effectively cut state public utility commissions out of telecommunications oversight. This makes everyone's job—except the industry giants'—more difficult. And it harms the nation.

On the legal front, some of the calls made in this item are unnecessarily and unfortunately more circuitous than I believe they need to be. We ought to be long past declaring that IP-to-IP interconnection obligations are required under the Act. We had the chance to do this and to declare that VoIP is a telecommunications service back in 2002 and 2005, and our failures to do so have had tangibly perverse consequences. Avoiding action not only harms competition and delays the more efficient build-out of our information infrastructure—it ensures that America will continue to be down the global broadband rankings in a world where that just doesn't cut it for us. We need to *lead* the world not so we can pin a medal on our chest. We need to lead the world to regain our prosperity, our competitiveness and our capacity to provide jobs and opportunity to every one of our citizens.

Broadband adoption is as great, or greater, a challenge than deployment. I will continue to push for doing more on adoption, but we are limited here by the reality that today's emphasis is on reforming infrastructure deployment in high cost areas. That said, I have worked to include adoption in this proceeding. I am pleased that carriers that receive funding will be expected to connect community anchor institutions that they pass. These entities are often the places where unconnected consumers get their first exposure to broadband and learn how to use it. I am similarly pleased that all Universal Service programs now include a real and enforceable requirement for affordability. It is only logical, and indeed consistent with the mandate of section 254, that carriers whose networks are funded by federal Universal Service support should be required to offer service at affordable rates. That said, much of the important adoption items are still ahead of us. We have an imminent opportunity to update our Lifeline and Link-Up programs, and I expect we will be able to accomplish that before the sun sets on the year 2011.

So there is still much work to be done. The success of today's framework depends heavily on the Commission getting related and integral policy calls right. We must revisit our long-overdue special access proceeding, something critical to small businesses and anchor institutions. This is a situation with huge spill-over effects on the excessive rates consumers are forced to pay. It is a problem that needs to be resolved by Report and Order in the next few months because it has simply waited years too long.

Similarly, we must act on contributions methodology. The *distribution* of funds is only part of the broadband challenge. Of equal importance is the *contribution* of funds going into USF. I would have preferred to see such an item in front of us today. There is inherent inequity in a system that funds the deployment of broadband off of assessments on interstate telephony. Once we ensure that double, triple and quadruple play services that benefit from Universal Service bear their fair share, we will not be subject to the unnecessary financial constraints that our current approach imposes. We also need spectrum management decisions that avoid putting still more spectrum in too few hands. Among other good results, that would drive better mobility auctions.

Successful implementation of the steps we present today will demand a degree of stakeholder cooperation that we have not seen in many years. Consumers, states, businesses, the FCC, Congress and the Administration each has a vital role to play. But, as you have heard me say before, stakeholder

partnering is how we managed to build America's infrastructure over the past two-and-a-quarter centuries, from those early post roads, bridges and canals right up through our super-highways and rural electricity. Now is the time to practice that American Way one more time. I believe the process has started off commendably. Everyone has had an opportunity for input. When we approved the NPRM in February, I remarked that everyone would be asked to give up a little so that the country could gain a lot. That spirit of shared sacrifice has made today's action possible. The process has generally—if not perfectly—worked. Stakeholders stepped up to the plate. Their analyses were important, many of their suggestions creative and helpful. Discussions were held between not only likely players, but some unlikely ones, too, and I applaud that process. I have no illusions about what perils may await us, but I do want to suggest how much better off we will all be if our efforts going forward focus on working together to implement these new frameworks, and working constructively to make changes where they may be called for, rather than spending precious time that the country doesn't have on litigation or legislative end-runs that seek to advantage single private interests at the expense of the greater public good. If the generally cooperative spirit of the past several months serves as our guide going forward, we can avoid those pitfalls.

Lots of people made heroic efforts to get us today's historic achievement. I've already mentioned the leadership of Chairman Genachowski. Our internal team, put together by the Chairman, worked mightily and expertly on a whole host of unbelievably complex issues. Zac Katz and the dedicated experts in the Wireline and Wireless Bureaus, Sharon Gillett, Carol Mattey, Rebekah Goodheart, Ruth Milkman, Rick Kaplan and Jim Schlichting, spent many hours answering our questions and discussing our requests, and they were backed up by dozens of our typically brilliant and dedicated FCC Team. My Commissioner colleagues spent weeks and months immersed in the tall weeds, taking hundreds of meetings, talking with one another and developing constructive proposals, and the Eighth Floor advisers, including Angie Kronenberg on Commissioner Clyburn's staff and Christine Kurth on Commissioner McDowell's, worked long days, nights and week-ends to make this happen. In my own office, Margaret McCarthy and Mark Stone provided not only great analysis but creative suggestions for getting us to better outcomes. And, I should note, *ALL* my staff felt the weight of this and all performed at the stardom level. It has been a highly professional effort by a world-class agency of which I am proud to be a member.



**STATEMENT OF COMMISSIONER ROBERT M. McDOWELL  
APPROVING IN PART, CONCURRING IN PART**

Re: *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; *Mobility Fund*, WT Docket No. 10-208

The feat of modernizing the high cost portion of the Universal Service subsidy program to support next-generation communications technologies, while keeping a lid on spending, is monumental. Thus, our action today is a vital first step in reforming USF while ensuring that rural consumers benefit from needed advanced services.

As I have said several times before, the communications needs of rural America are personal to me. My family has deep roots in rural America. My father spent part of his boyhood during the Great Depression on a ranch on the Tex-Mex border without electricity, running water or phone service. With that background in mind, I am committed to carrying out Congress's intent of ensuring the most remote parts of our country are connected.

The challenge of solving the seemingly intractable Universal Service and intercarrier compensation puzzle, however, has cast a long shadow over the FCC for more than a decade. In my nearly five and a half years here, I have traveled across America to learn more about the practical realities of the program. I have held productive policy roundtable discussions with multiple stakeholders in the least populated state, Wyoming, as well as its neighbor South Dakota. I have traversed Tribal lands and some of the least densely populated areas of our country, including Alaska. I've also learned from consumers in urban and suburban areas who pay rates above costs to subsidize rural consumers. And I know that my colleagues have diligently conducted similar field investigations.

In trying to encapsulate what the FCC is accomplishing today, I've turned to one of North America's best telecommunications policy minds, none other than the Great One, Wayne Gretzky. Without any of us realizing it, by implication he predicted what we would do today when he said, "A good hockey player plays where the puck is. A great hockey player plays where the puck is going to be." Today, the FCC is repurposing the high cost program to support unserved consumers' use of communications technologies from where they *are* to where they *are going to be* – in both a technological and geographical sense.

October 27, 2011, is a date that marks a dramatic departure from nearly a century-old policy of opaquely subsidizing analog, circuit-switched voice communications services, to using the efficiencies of market-based incentives to support broadband connectivity in those areas where economic realities have stalled market penetration. Under both Republican and Democratic administrations, the High Cost Fund has become bloated and inefficient. Today, a Republican and three Democrats are taking a giant leap together to fix that. I commend the Chairman for his leadership and fortitude throughout this process. I also thank Commissioners Copps and Clyburn for their thoughtfulness, graciousness and collegiality during this proceeding.

Since I arrived at the Commission in 2006, I have been calling for the FCC to achieve five primary goals when focusing on USF reform, the most important of which is to contain the growth of the Fund. While our efforts are not perfect, today we are largely achieving this goal in a town otherwise known for its *inability* to control spending.

While I'm on that subject, some have suggested that we scrap the USF program altogether. Others can have that debate. In the meantime, we are mindful that Congress created this program and its ultimate survival is a matter only for Congress to determine. We are duty bound to operate within the statutory constructs handed to us.

In the spirit of being fiscally responsible, however, we are mandating that the high cost program of the Universal Service Fund live under a *definitive budget* for the first time in history. Functionally, the budget serves as an annual cap through 2017. Until then, the Fund may not rise higher than \$4.5 billion per year, on average after true-ups, without Commission approval. After that time, it is my hope that competitive forces will flourish and the development of new technologies will create additional efficiencies throughout the system. If so, much of the vacuum will have been filled and the need for future subsidies will have declined substantially. Perhaps the day will come when Congress can determine that subsidies are no longer needed.

Of course, there is nothing we can do to prevent future Commissions from voting to comprehensively alter what we have done and spend more money later. That would be true as a matter of law whether we called our fiscally prudent action today a "definitive budget," "cap," "beret" or "sombbrero." If the FCC of tomorrow wants to undo what we have done today, however, good luck with that. You're going to need it. If history is our guide, the alacrity with which the Commission can accomplish comprehensive USF reform is nothing short of glacial. Nonetheless, I hope future Commissions will keep their caps *on* out of respect for fiscal responsibility and the consumers who pay for these subsidies.

Also, today we are only addressing the high cost program of the distribution side of the Universal Service Fund. We are not addressing the entire Universal Service Fund, which currently distributes over \$8 billion per year. To put that figure in context, USF is larger than the annual revenues of Major League Baseball. In separate proceedings, we will also reform the other USF spending programs. I cannot stress enough that all of the fiscal efficiencies that we will realize in the wake of today's reforms will be lost if similar fiscal discipline is not applied to all Universal Service programs as well.

Moreover, we are only addressing part of the distribution, or spending, side of the Universal Service program. In fact, despite all of the exhaustive efforts to get to this point, our work on comprehensive Universal Service reform is not even half finished. Equally important is the need to reform the contribution methodology, or how we are going to pay for all of this. It is no secret that for years I have been pushing for contribution reform to be carried out at the same time as distribution reform. Obviously, that is not happening today; therefore we must act quickly. The contribution factor, a type of tax paid by consumers, has risen each year from approximately 5.5 percent in 1998 to an estimated 15.3 percent in the fourth quarter of this year. This trend is unacceptable. We must abate this automatic tax increase without further delay. Accordingly, I strongly urge that we work together to complete a proceeding to reform the contribution methodology in the first half of the year.

In the meantime, today we are undertaking significant reforms. Although time does not allow me to discuss each one, I'd like to mention a few of my favorites.

- It may surprise some observers the vigor and breadth to which we give life to competitive bidding, a market-based approach to distributing subsidies, otherwise known as reverse auctions. This is more than I could have hoped for in 2008, when a Republican-controlled FCC teetered on the cusp of comprehensive reform before our efforts were scuttled. Supporting these provisions was likely not easy for some of my colleagues and I thank them for their spirit of compromise.

- We are eliminating the inefficient identical support rule. The wasteful era of subsidizing multiple competitors in the same place has come to an end.
- We are finally giving consumers the benefit of more transparency by phasing out hidden subsidies, albeit 15 years after Congress told us to do so in the Telecommunications Act of 1996. Better late than never, I suppose. As the veil is lifted, however, industry and government alike will have to do their best to keep consumers properly educated on what they will see on their phones bills and what it all means. For the vast majority of consumers, rates should decline or stay the same, so I will look with skepticism on any news stories that claim the FCC is raising rates. The simple truth is: We are not.
- We are creating a frugally-minded, but reasonable, waiver process for highly unlikely cases where carriers are definitively experiencing extreme hardship due to our reforms.
- In the further notice, we propose means testing to identify qualified recipients in remote areas. Such a screening process could save money and maximize the effectiveness of the Fund.

As a legal matter, some question whether the Commission has the authority to use Universal Service funds to support broadband directly. As I have said many times before, I believe the Commission *does* have broad authority to repurpose support to advanced services as handed to us by the plain language of section 254.

In section 254(b), Congress specified that “[t]he Joint Board and the Commission *shall* base policies for the preservation and advancement of universal service on [certain] principles.”<sup>1</sup> Two of those principles are particularly instructive: First, under section 254(b)(2), Congress sets forth the principle that “[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation.”<sup>2</sup> Second, with section 254(b)(3), Congress established the principle that “[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and *information services* . . .”<sup>3</sup>

Also, section 254(b)(7) instructs the Commission and Joint Board to adopt “other principles” that we “determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with” the Communications Act. In that regard, in 2010 the Federal-State Board on Universal Service recommended to the Commission that we use our authority under section 254(b)(7) to adopt a principle to “specifically find that universal service support should be directed where possible to networks that provide advanced services.”<sup>4</sup>

As part of this order today, we agreed with the Joint Board recommendation and adopted “support for advanced services” as an additional principle. Moreover, even if any of the statutory language in

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<sup>1</sup> 47 U.S.C. § 254(b) (emphasis added).

<sup>2</sup> 47 U.S.C. § 254(b)(2).

<sup>3</sup> 47 U.S.C. § 254(b)(3) (emphasis added).

<sup>4</sup> Federal-State Joint Board on Universal Service, CC Docket No. 96-45, WC Docket No. 03-109, *Recommended Decision*, 25 FCC Rcd 15598, 15625 ¶ 75 (2010).

section 254 appears to be ambiguous,<sup>5</sup> the Commission's reasonable interpretation would receive deference from the courts under *Chevron*.<sup>6</sup>

It should come as no surprise, however, that I cannot support the view that section 706 provides the Commission with authority to support broadband through Universal Service funds. As I have said many times before, section 706 is narrow in scope and does not provide the Commission with specific or general authority to do much of anything. We respectfully agree to disagree on that analysis in this order.

Finally, given the breadth and magnitude of today's actions, the effects will not be fully apparent in the near term. Certainly, there will be varied opinions regarding what we have accomplished. That said, Universal Service reform is an iterative process. We will constantly monitor its implementations and quickly make adjustments, if needed.

In sum, I would like to thank all of the people who have sacrificed countless family dinners, weekends, vacations, birthday and anniversary celebrations and such over the past many months to make this day possible. While Sharon Gillett, Carol Matthey, Rebekah Goodheart, Trent Harkrader, Amy Bender, Steve Rosenberg, Brad Gillen, Victoria Goldberg and Marcus Maher of the Wireline Bureau and Rick Kaplan, Margie Weiner and Jim Schlichting of the Wireless Telecommunications Bureau deserve high praise, we all know that legions more dedicated public servants have shed their blood, sweat, toil and tears to make this endeavor possible today. I also commend the Chairman's Chief Counsel, Zac Katz, for his tireless efforts, patience and leadership during this process. Furthermore, I thank Commissioner Copps's legal advisor Margaret McCarthy and Commissioner Clyburn's legal advisor Angie Kronenberg for your collegial efforts during this process. And from my office, Christine Kurth deserves a special mention. When I hired her over two years ago from the Senate I said, "Your main mission is to fix Universal Service." She accepted my offer anyway, and has completed half of that mission today. Many, many thanks to all of you for your incredibly hard work.

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<sup>5</sup> Some contend that the definition of universal service under section 254(c)(1) muddies the water because it does not include "information service." Instead, that provision states that "[u]niversal service is an evolving level of *telecommunications services* . . . taking into account advances in telecommunications and information technologies and services." But, it is also relevant that the term "telecommunications service" is qualified by the adjective "evolving." Even if section 254 were viewed as ambiguous, pursuant to the well established principle of *Chevron* deference, the courts would likely uphold the FCC's interpretation as a reasonable and permissible one. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>6</sup> *Chevron*, 467 U.S. 837; see also *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (relying on *Chevron* deference in affirming FCC authority to implement universal service provisions set forth in the Telecommunications Act of 1996).

**STATEMENT OF  
COMMISSIONER MIGNON L. CLYBURN**

Re: *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; *Mobility Fund*, WT Docket No. 10-208

We are taking a momentous step today—moving ever so close to fulfilling the goal Congress set forth for universal service in the 1996 Telecommunications Act—to ensure that *all* Americans have access to affordable voice and advanced communications services. We would not be here, but for the incredibly hard work of the FCC staff, under the direction and leadership of Chairman Genachowski and his office, as well as significant input from Congress, our State partners, industry, and consumer representatives.

I believe that we have drawn from many competing sources, to form a balanced framework that will promote significant broadband deployment, as quickly as possible, to those consumers that are currently unserved. The painful truth of the matter is that there are 18 million Americans who have not fully benefitted from our current universal service policies, and that is unacceptable. They remain the “have nots” of the broadband world who I am determined will benefit the most from our action today. As I have considered these reforms, it is those unserved consumers who are first and foremost in my mind. This plan provides for speedy broadband deployment to many of these consumers, with an injection of capital in 2012, for both fixed and mobile technologies.

In addition to these immediate needs, I carefully considered how much those consumers are being asked to shoulder, when it comes to the costs of Intercarrier Compensation reform, as well as the impact on those consumers who already have service. It also shouldn’t surprise anyone that it was similarly important to me, that we give service providers and their investors time to adjust to our proposed reforms, because from day one, I made a firm commitment to no flash cuts. A reasonable transition period will help ensure that providers can navigate these reforms successfully. But for those providers who require additional time to adjust, we have in place a waiver process that is firm, predictable, yet fair. Another benefit of this waiver process is that it provides this Commission with a safety net—so that we can adjust support as needed, in order to avoid inadvertently harming the success we have already achieved through our legacy system.

Overall, I believe the Chairman’s proposal, carefully balances these interests and will result in a meaningful difference for many Americans, and I want to commend him and my colleagues, for the significant progress that is reflected in this Order. Accordingly, I offer my full support for the actions we take today.

As you all know, I have a deep connection to rural America. Without comparable modern communications services enjoyed by their urban counterparts, those citizens will never adequately compete in our global economy. They need and deserve reliable fixed as well as mobile broadband in order to thrive. Without this critical broadband infrastructure, rural Americans would be forever left behind. We are aware that the financial needs to provide advanced services in these areas are significant, and yes, I appreciate the fact that setting a budget for the high-cost program will provide overall certainty and predictability. However, it is equally important that we have the flexibility to adjust, as needed, within, and between these high-cost programs. I want to thank my good friends and colleagues, for

working with me, to ensure that we have not unduly limited our ability to revisit our current estimates of the funding that's needed, for the high-cost programs in the future.

An underlying theme of today's reforms is shared sacrifice for the common good. After all, we are talking about the people's money. We are accountable to them, and I am confident that the adjustments being made to the legacy USF support, and the funding mechanisms being adopted for the new Connect America Fund, are sensible. These reforms will put both the USF and ICC regimes on a sounder footing, so we may better accomplish our goal and Congress' mandate, to serve more Americans with advanced communications networks—no matter where they live, work, or travel in this great nation.

For a number of years, the Federal-State Joint Board on Universal Service and its state and federal members, have called for this Commission, to provide for the direct funding of broadband. Early on, they recognized the importance of both broadband and mobility service. I am proud that this Commission has heeded this call and is formally adopting the principle advanced by the Joint Board last year in its Recommended Decision that “universal service support should be directed where possible to networks that provide advanced services, as well as voice services.” Moreover, upon the advice and counsel of our State Members and colleagues, we are adopting a Mobility Fund to infuse \$300 million in capital to extend 3G and 4G networks to more Americans in 2012. In addition, we are adopting a Mobility Fund II, to ensure that consumers have access to mobile broadband services by providing ongoing support to providers in hard-to-serve areas, and we are eliminating our identical support rule.

We owe a debt of gratitude to our State Members. They have been a significant resource for this Commission in our reform process. We sat through numerous workshops and meetings together, hashing out ideas and concepts. They spent countless hours drafting a proposal for our consideration, and they have been more than generous with their time and advice. I want to sincerely thank them for their good counsel in this proceeding and for their service to our nation.

The FCC has heavily relied on the suggestions in their plan. We are requiring USF recipients to meet interim broadband build out milestones, to annually report on their build out and service requirements, and to file those reports jointly at the FCC and the state utility Commissions. We also are implementing a cap on total per-line support, and other fiscally responsible measures, to eliminate waste and inefficiency in the system.

In addition, we are clarifying in our Order that we expect all carriers, to negotiate in good faith in response to requests for IP-to-IP interconnection for the exchange of voice traffic. Not only did we hear from the states about how important it is to ensure that IP interconnection occurs, we also received significant comment from competitive voice providers that the lack of IP interconnection is impeding the development of IP networks, including VoIP services. As such, the Order confirms that the duty to negotiate in good faith, does not depend upon the network technology underlying the interconnection, whether it is TDM, IP, or otherwise, and that we expect good faith negotiations to result in interconnection arrangements between IP networks for the purpose of exchanging voice traffic.

Another topic that I spent a great deal of time on with my state colleagues, was the Intercarrier Compensation regime. Today's decision sets forth a national approach for ICC reform, for both intrastate and interstate access rates. It's probably not surprising that I naturally gravitated to the proposal in our NPRM, that would have had the states reform their own intrastate access rates, and left the interstate reform to this Commission. But after much discussion and consideration, I will accept the Chairman's proposal that a federal approach is the right outcome in this instance. A multi-state process for reform would be long and arduous, costly and demanding on the states, with unpredictable and perhaps inconsistent results. In the meantime, the pressure would continue to build for us to intervene and

stabilize the ICC regime to provide the companies the predictability and certainty they need to continue to invest and innovate for the benefit of consumers.

However, I think it is only appropriate that our actions today carefully preserve and recognize the reforms that some states already have undertaken. Most importantly, we have provided for replacement funding as intrastate access rates decline as a result of our reform which relieves the financial burden that would have been on states in their own attempts at reform. To that end, we also have carefully balanced ICC revenue replacement for providers, with the important goal of not burdening consumers with significant increases in their bills or overburdening the USF which is ultimately paid for by consumers. As indicated by our staff's analysis, we believe that the overall benefits that will flow to consumers as a result of this reform will far outweigh the minimal price increases they will experience on their phone bills due to ICC reform.

I also want to be quite clear that states will continue to have an important role with respect to the arbitration of interconnection agreements and in the operation of USF. With respect to USF, states will continue to designate Eligible Telecommunications Carriers for USF purposes and will continue to protect consumers through their carrier of last resort regulations. As technology evolves, so too must the role of the regulators.

We are experiencing a significant technological evolution as networks are transitioning to Internet Protocol, and consumers are using multiple modes of communications (sometimes simultaneously). Indeed, the underlying cause of the reforms we implement today is due to the enormous technological shift that has occurred in the last ten years. One constant that I have seen, however, is that consumers expect that their state regulators will serve and protect them. Moreover, those of us at the FCC need the states' expertise and knowledge on the ground, to properly execute and operate our new universal service funding mechanisms. For instance, we need the state's assistance in identifying those areas that currently are unserved by broadband. We want to target our limited resources to those consumers who do not have any broadband provider offering them service. Likewise, we will need the states' help assessing that those providers who receive funding meet their public interest obligations to build and serve. As such, I am confident that these reforms are an opportunity for us to continue working hand-in-hand with our state colleagues, to ensure that broadband is available throughout the country, and I look forward to our continued partnership with the states in this important endeavor.

The communications marketplace has changed dramatically, and one significant reason is the explosion of mobile services in the U.S. More and more Americans are relying upon their smartphones to access the Internet, and almost 30% of Americans have cut their telephone cord when it comes to home service. I have worked closely with my colleagues, to ensure that we are providing significant support for mobile services, particularly in rural America. Certainly, rural consumers and those who travel in non-urban areas expect that they will have access to mobile services that are comparable to anywhere else in this nation. We want and expect our devices to work wherever we are. As such, I believe that a budget which reflects the growing importance of mobility to Americans is significant, and that we should offer ongoing support for those areas that would not be served otherwise. I am grateful that the fund for ongoing mobility fund support—Mobility Fund II—has been increased 25% more than what was originally proposed in the circulated draft, reflecting the fact that mobility for rural areas is a priority.

I also want to thank the Chair for agreeing with me that while the identical support should be phased out, we need to ensure that Mobility Fund II is operating and funded before the phase down is completed for wireless CETCs. The pause in the phase down I proposed, is now fully reflected so that wireless carriers can have some confidence that they won't lose more than 40% of funding before they know what support they may qualify for in Mobility Fund II.

While deployment of networks to reach individual consumers has been the paramount purpose of the high-cost program, it also has provided for service to community anchor institutions, including schools, libraries, health care facilities, and public safety agencies. In order to ensure that these vital institutions can obtain the modern services that are essential for service to their communities, we have provided them an opportunity to engage with USF recipients in the network planning stage. As such, their communications needs are fully considered by the providers. Similarly, recipients will detail in their annual reports to the FCC and the state Commissions those community anchor institutions that have received service as a result of the Fund. Accordingly, we will be able to fully account for all of the benefits that local communities' receive as a result of USF support.

Although the reforms we adopt today are extremely important for ensuring that basic and advanced communications services are physically available to all Americans, those services cannot be *truly available*, if consumers cannot afford to purchase them, the devices they need to access them are not available, or if they cannot attain the skills they need to know how to use these services. I appreciate those who have called for us to address these consumer needs today, and I agree with you that we need to do more in this area. Our broadband adoption task force is working diligently to find solutions to these issues, and I fully expect that we soon will be addressing the proposal in our Lifeline proceeding to adopt pilot projects for broadband adoption to benefit low-income Americans who qualify for the Lifeline program. I look forward to our continued work with our task force, including finishing the Lifeline proceeding before the end of the year, so that we can make more headway on this significant issue for low-income consumers.

To our Bureaus and their staffs, I thank you for your tremendous and Herculean efforts throughout this proceeding. I know you have made many personal sacrifices to help us reach this moment, and I wish to commend you for the results. You planned and conduct workshops, reviewed our record, listened to the numerous interested parties in this proceeding, balanced all concerns, crafted the Order and accompanying Further Notice, and put up with our office. Please know how much we appreciate all of you.

I wish I could say that we were at the finish line, but this, indeed, is a marathon. And like those who will compete in this Sunday's race, you have been preparing for months for this milestone that we've reached today, but we are at mile 20—we have a little further to go. I for one look forward to our continued engagement on the implementation of these reforms.

I also want to congratulate the Chairman and my fellow Commissioners on today's vote. The task before us has not been an easy one, but it is certainly one for which I am proud that this Commission has *finally* achieved. Commissioner Copps and Commissioner McDowell, I know you both have witnessed past attempts at USF and ICC reform, and you must be especially proud today. Thank you for your diligence and hard work. And Mr. Chairman, I also want to express my gratitude for your leadership, engagement, willingness to listen to and address my concerns, and your honest attempts to reach consensus.

I also want to express my sincere gratitude for my Wireline Legal Advisor, Angie Kronenberg, who led our office in this endeavor, as well as Louis Peraertz, my Wireless Legal Advisor, who provided his expertise on the mobility issues. Both ensured that the principles I care most about—that we are serving consumers—are truly reflected throughout this item. I also am appreciative for the contributions that Margaret McCarthy, from Commissioner Copps' office made to our deliberations, and to the ringleader on this significant reform today, Zac Katz. Thank you.