

**STATEMENT OF
COMMISSIONER AJIT PAI
APPROVING IN PART AND DISSENTING IN PART**

Re: *Connect America Fund*, WC Docket No. 10-90, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, *ETC Annual Reports and Certifications*, WC Docket No. 14-58.

In the *Universal Service Transformation Order*, the Commission performed the Heraclean task of reorienting the Universal Service Fund away from supporting telephone service and toward supporting broadband service. But no commissioner is the child of Zeus, so it is unsurprising that the Commission made some mistakes and left some labors unfinished. So here we are, reconsidering the *Transformation Order* for the *seventh* time. I welcome the continued collaboration with my colleagues, but I fear that some of today's decisions just set us up for reconsiderations eight, nine, and beyond. In particular, I strongly disagree with the Commission's decision to substantially increase many rural Americans' phone bills. I accordingly approve in part and dissent in part.

To start with the positive, today's order strikes the quantile regression analysis (QRA) benchmarks from our books.¹ As Chairman Wheeler likes to say, this is a big deal. I applaud him for tackling this challenge, even though the benchmarks had been unanimously adopted in the *Transformation Order*.

This has been a long and hard struggle. When I first questioned whether the QRA benchmarks were good policy in 2012, many, including some in this building, told me that eliminating them was a hopeless cause and incremental change was all that could be accomplished. But as the QRA benchmarks' impact became more apparent, the tide turned. A unanimous vote for adopting the benchmarks turned into a unanimous vote to repeal them.

As we recognize today, whatever the intended purpose of the QRA benchmarks, in practice they chilled the investment climate and impeded the deployment of broadband to rural Americans. Even the U.S. Department of Agriculture's Rural Utilities Service told us that carriers had stopped taking out loans to deploy broadband because of them. The QRA benchmarks introduced substantial uncertainty into the marketplace. Carriers had no idea what support they would be receiving from one year to the next. That's a big problem. Investing in rural America is not a one- or two-year decision but a ten- or twenty-year commitment. Therefore, our policies must reflect the unique challenges that rural carriers face when building their networks. Just as important, the QRA benchmarks were not designed to save the Fund a dollar, so keeping them on our books just meant further hardships for rural America with no federal benefit.

I am also pleased that my colleagues agreed with my suggestion to propose a stand-alone broadband funding mechanism for rate-of-return carriers serving the highest-cost reaches of our country.² Through a quirk of regulatory history, our rules offer universal service support to such carriers to build out broadband, but only when they bundle their broadband services with traditional telephone lines. That system has increasingly come under strain as consumers flee landlines in favor of wireless and over-the-top alternatives. Indeed, it has put some carriers to the Hobson's choice of offering stand-alone broadband—which urban consumers have and rural consumers want—and losing universal service

¹ *Order* at para. 131.

² *Id.* at para. 269.

support, or denying consumers that option, only to have them drop service altogether. The net result is that rural carriers hold back investment because they are unsure if they can deploy the services that consumers are demanding.

A stand-alone broadband mechanism should correct this vestige of our outdated rules. It would give consumers the real option of choosing whether they want to purchase broadband and telephone service from the same company. Removing this barrier will give carriers more assurance that legacy regulations won't prevent them from responding to consumer demand. This will increase broadband deployment. And all of this will be done within the existing budget, something everyone with a phone line can celebrate. For these reasons, I hope that we move forward quickly to adopt final rules implementing a stand-alone broadband mechanism.

Lastly, I welcome my colleagues' support in getting the second phase of the Connect America Fund back on track by fleshing out the mechanics of the competitive bidding process. Importantly, we adopt a rule that parties need not be eligible telecommunications carriers (ETCs) to bid³ and seek comment on sunseting such obligations after the term of support expires.⁴ Such rules are especially important to induce new entrants to bid⁵—and maximizing participation here, as elsewhere, is the best way to ensure a successful auction. And we advance concrete proposals on how to structure the competitive bidding process, proposing to use a multi-round auction with package bidding, setting reserve prices for individual areas based on the Connect America Cost Model and in aggregate based on the budget.⁶ I hope commenters will help us complete the task so that we can finalize these auction rules in the near term and commence the statewide elections and competitive bidding process within the next twelve months.

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Unfortunately, I cannot support every aspect of the item. One particular problem is the Commission's reaffirmation of the "rate floor," an unfortunate legacy of the *Universal Service Transformation Order*. Under that policy, the FCC sets a minimum price that telephone companies can charge their customers for local telephone service—and penalizes those companies that do not comply with this government mandate.⁷ And as a result of that policy, over one million rural Americans can

³ *Id.* at para. 43.

⁴ *Id.* at para. 184.

⁵ *See, e.g.*, Letter from Stephen E. Coran, Counsel for Wireless Internet Service Providers Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, GN Docket No. 13-5, at 2–4 (Apr. 15, 2014); Letter from Thomas Cohen, Counsel for the American Cable Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, at 2–3 (Apr. 11, 2014).

⁶ *See Order* at paras. 227–30. I am less sanguine about a "multi-step approach" to competitive bidding, *see* para. 231, which excludes any mention of evaluating bids based on their efficiency (i.e., choosing bids that cover the highest-cost areas for the least amount of funding) and which includes the option for bids that meet "relaxed performance standards" (i.e., choosing bids that don't offer 10 Mbps or even 4 Mbps down). I just hope that however we evaluate bids, we maximize the broadband bang we get for our universal service buck and do not consign rural America to inferior broadband service by design.

⁷ Like several of our other high-cost rules, the rate floor rule explains what a carrier must do to receive support and the penalty for failure. *See* 47 C.F.R. § 54.318 (a)–(b). I am therefore baffled by the *Order's* claim that "nothing in our rules requires carriers affected by the rate floor to adjust their local rates." *Order* at para. 80. Under the *Order's* logic, are carriers not required to meet our high-cost filing deadlines? *See, e.g.*, 47 C.F.R. §§ 54.313(j), 54.314(d). Surely that cannot be so.

expect their local telephone rates to increase by up to 46 percent as the rate floor rises from \$14.00 to \$20.46 per month.⁸

By design, the rate floor targets our farmers, our ranchers, our small-town entrepreneurs, and other rural Americans for a significant rate hike. It “will harm access to service for some of the most vulnerable consumers in rural America”⁹ and “will impose a disproportionate burden on older Americans, who are much more likely to be living on fixed incomes.”¹⁰ In other words, the rate floor targets those very Americans who are still waiting for the economic recovery to arrive.

But it won’t affect Washington, DC. Even though the local phone rate in the District of Columbia is \$14.10, it’s not subject to the rate floor.¹¹ As a consequence, the FCC will be directing rural Americans to pay 45 percent *more* for local phone service than those living in the nation’s capital do. That’s not a problem for residents of northwest Washington, but I doubt it seems fair to residents of northwest Montana.

Another result of the rate floor will be less broadband deployment. Line loss is an all-too-real problem for rural telephone companies today—about one in seven households with copper dropped their landline in 2012¹²—and government-mandated price increases are only likely to send more consumers off the network. That makes it harder for rural companies to plan for the future and invest in their networks. That creates yet another disincentive to offer stand-alone broadband since those same companies may have to compete with over-the-top providers not subject to the same government-mandated price increases. In short, that moves us in the wrong direction.¹³

⁸ See Petition for Extension of Time by ERTA, ITTA, NECA, NTCA, USTelecom, and WTA, WC Docket No. 10-90, at 5 (Mar. 11, 2014) (Rural Carrier Petition) (“[I]f the rate floor is raised as high \$20, about 1.2 million customers will incur sudden rate increases.”). The *Order* dismisses this concern on the ground that “not all carriers will raise rates to meet the rate floor.” *Order* at para. 81. I cannot so blithely dismiss the well-grounded concern of one million consumers, especially when the evidence shows that carriers *are* raising rates to meet the rate floor. See, e.g., Letter from Michael J. Jacobs, Legal Advisor to the Chief, Wireline Competition Bureau, FCC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed Apr. 2, 2014) (showing that the number of lines with rates below the previous rate floor dropped by 22,048, or 10 percent between July 1, 2013 and January 2, 2014).

⁹ Letter from Jodie Griffin, Public Knowledge, Olivia Wein, National Consumer Law Center, Amalia Deloney, Center for Media Justice, Todd O’Boyle, Common Cause, Edyael Casaperalta, Center for Rural Strategies, and the Rural Broadband Policy Group, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 1 (Apr. 15, 2014) (Public Knowledge et al. *Ex Parte* Letter).

¹⁰ Letter from David Certner, Legislative Counsel and Legislative Policy Director, AARP, to Marlene H. Dortch, Secretary, FCC, at 2 (Apr. 15, 2014) (AARP *Ex Parte* Letter).

¹¹ See Wireline Competition Bureau, 2014 Urban Rate Voice Survey Results, <http://go.usa.gov/kRBY> (Apr. 18, 2014).

¹² See Statement of Commissioner Ajit Pai on the Release of the 2013 Local Telephone Competition Report (Nov. 26, 2013), available at <http://go.usa.gov/kU4J>.

¹³ The *Order* relies on flawed accounting to suggest that to the extent a carrier raises its intrastate rates, it *must* spend an equal amount of universal service funds to deploy broadband-capable networks. *Order* at note 172. Not quite. Although federal law requires universal service support be used “for the provision, maintenance, and upgrading of facilities and services for which the support is intended,” 47 U.S.C. § 254(e); 47 C.F.R. § 54.314, that’s not a high bar for those receiving high cost loop support (HCLS). One way to meet this accounting requirement is to show that a rate-of-return carrier’s intrastate rates plus its intrastate universal service support (i.e., HCLS) do not exceed its intrastate costs (i.e., $R + USF \leq C$). Recall that the HCLS program reimburses a rate-of-return carrier for up to 87–100 percent of its monthly intrastate costs *above* \$42.85 per line. See NECA USF Filing Overview 2013 at 4 (Sept. 30, 2013). In other words, if a carrier receives x dollars in HCLS, it must have costs of at least $\$42.85 + x$. Accordingly, a carrier receiving HCLS can always show that it meets the federal requirement without deploying

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So what justifies mandating higher prices and less broadband deployment for rural America? Not the Communications Act.¹⁴ It requires that telephone rates in rural areas be “reasonably comparable to rates” in urban areas and “affordable” to all consumers.¹⁵ And until the *Universal Service Transformation Order*, those principles had consistently been interpreted to mean that our universal service policies should aim to reduce—not increase—the amount that rural consumers pay for telephone service.¹⁶ Which is hardly surprising given that rates can hardly be made more “affordable” by increasing them.¹⁷

Moreover, the rate floor assumes that what’s affordable in our country’s largest cities is the same as what is affordable in the countryside.¹⁸ But that’s just not the case. Jobs pay more in the big cities. And families living there often have more disposable income. To illustrate, compare Washington, DC, where the monthly rate will remain \$14.10, to Ouachita County, Arkansas, where we have mandated an increase up to \$20.46. In DC, the median household income is \$64,627; in Ouachita County, it’s not even half that, \$32,032. So what does that mean? One year of phone service in DC will cost \$169.20, or about 0.26 percent of the median family’s household income. But one year of phone service will cost the median Ouachita County family \$245.52, so that family will need to spend 0.77 percent of their annual income on phone service, about three times as much as the family in Washington, DC. I cannot fathom how mandating such a result serves the public interest.¹⁹

Nor, as some have claimed, does the rate floor reduce excessive subsidies for basic phone service. Recall that the rate floor was expressly designed to increase rural rates *without* reducing the subsidies that

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more broadband so long as its rates are below \$42.85 ($R + x \leq \$42.85 + x \rightarrow R \leq \42.85). And since those affected by the rate floor have rates far below \$42.85 (and the rate floor is unlikely to exceed \$42.85 in the foreseeable future), federal law does not compel additional broadband deployment. As such, it comes back to basic economics—and the *Order* does not contest that the rate floor will make it harder, not easier, to deploy broadband to rural America.

¹⁴ The *Order* appears to agree and justifies the rate floor on the non-statutory principle of “fairness.” *Order* at paras. 77, 86.

¹⁵ 47 U.S.C. § 254(b)(1), (3).

¹⁶ See, e.g., 47 C.F.R. § 54.316 (2011) (requiring states to certify that state-set rates in rural areas were no higher than two standard deviations above the average urban rate).

¹⁷ The *Order* oversimplifies when it states that “the Lifeline program [is] the primary means by which the Commission seeks to ensure that rates are affordable for low-income households.” *Order* at para. 77. Until the rate floor came into effect, our high-cost policies had consistently aimed to reduce rates and accordingly make them more affordable for all consumers (not just the low-income consumers). Moreover, the rate floor seeks to displace state-set rates, despite our precedent that “states are better equipped to determine which additional factors can and should be used to measure affordability.” *Federal-State Joint Board on Universal Service, Access Charge Reform*, CC Docket Nos. 96-45, 96-262, 14 FCC Rcd 8078, 8096, para. 38 (1999).

¹⁸ As Arctic Slope points out, “a broad brush policy that ignores the totality of disparity between urban and rural America and instead focuses on one aspect of disparity is poorly conceived. For instance, in ASTAC’s serving area, gasoline can exceed \$10 a gallon, staples like milk \$18 per gallon and electricity is \$.29 per kilowatt hour, almost three times the national average of \$.1029 per kilowatt hour. . . . For those who choose to live and work in rural America, there is no comprehensive comparability to urban areas where there is greater median income, better health care options, transportation and electrical grid infrastructure, faster and inexpensive broadband and advanced wireless communications.” Letter from Steve Merriam, CEO, Arctic Slope Telephone Association Cooperative, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 05-337, at 1 (Apr. 16, 2014).

¹⁹ Rather than explain the logic of such a result (one that could be replicated many times over), the *Order* observes that the high-cost mechanism historically distributes support “without consideration of . . . relative income levels.” *Order* at para. 77. True enough, but eliminating the rate floor would end this absurd and arbitrary result while still distributing high-cost support without regard to income.

carriers receive. So long as carriers raise their rates up to the rate floor, they receive the *same* subsidy. Even with rural consumers paying more, there's no savings to the Fund that could be used to decrease everyone's rates or deploy more broadband.²⁰

So what justifies the rate floor policy? How should we respond to consumers like Tressa White of Ouachita County, Arkansas, who wrote the Commission to complain that her local telephone company is raising rates to meet our floor? She asked, what she will “be receiving because of this increase in my monthly rate.”²¹ In a word, Tressa, nothing. As the AARP puts it, the rate floor “is a punitive burden on those households that continue to purchase wireline telephone service, with the higher rates benefitting only the local telephone company.”²² Or as the National Tribal Telecommunications Association wrote, “asking . . . consumers to pay more for nothing in return is counterproductive to universal voice and broadband service goals.”²³ As far as I can tell, the purpose of the rate floor is to increase rural telephone rates for the sake of having higher rural telephone rates.

I am not alone in thinking this policy makes no sense. Over the past few weeks, we've seen an outpouring of concern from all quarters about the continued implementation of the rate floor. Telephone companies like Pioneer in Kansas, Copper Valley in Alaska, and Frontier in West Virginia oppose the rate floor and the burden it will place on their customers.²⁴ The independent carrier associations in Colorado, Idaho, Nevada, Oregon, and Washington have called for a “moratorium” and a “re-examination of the public policy issues surrounding the urban rate floor concept.”²⁵ A group of rural telecom associations has called on the FCC to “revisit the fundamental operation of the rate floor.”²⁶ Public Knowledge, the National Consumer Law Center, the Center for Media Justice, Common Cause, the Center for Rural Strategies, and the Rural Broadband Policy Group have asked us to “hit the pause button, step back and examine whether the proposed rate floor changes and implementation plan serve the underlying reasons for creating a rate floor in the first place.”²⁷

²⁰ To be fair, not all carriers may be able to increase their rates to keep pace with the ever-rising rate floor the Commission adopts today. As the rural carriers ably documented in seeking an extension of time to comply with this year's rate floor, many states cap yearly rate increases, which may make strict compliance with the rate-floor mandate impossible. *See* Rural Carrier Petition at 3 n.12. But it is a strange thing to tout the monetary penalties we impose on carriers that do not comply with our mandate because states do not permit them to increase their rates as high or as quickly as the FCC would like.

²¹ Tressa White Comments, WC Docket No. 10-90 (Apr. 21, 2014).

²² AARP *Ex Parte* Letter at 3.

²³ National Tribal Telecommunications Association Comments at 6 (Mar. 31, 2014).

²⁴ *See* Pioneer Communications Reply at 4 (Mar. 31, 2014); Letter from David Dengel, CEO, Copper Valley Telephone Cooperative, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 05-337, at 1–2 (Apr. 16, 2014); Frontier Communications Reply at 2 (Mar. 31, 2014).

²⁵ *See* Comments of the Colorado Telecommunications Association, Idaho Telecom Alliance, Nevada Telecommunications Association, Oregon Telecommunications Association, and Washington Independent Telecommunications Association at 3 (Mar. 31, 2014).

²⁶ *See* Reply Comments by NTCA – the Rural Broadband Association, the National Exchange Carrier Association, Inc., the Eastern Rural Telecom Association, and WTA – Advocates for Rural Broadband at 4.

²⁷ Letter from Jodie Griffin, Public Knowledge, Olivia Wein, National Consumer Law Center, Amalia Deloney, Center for Media Justice, Todd O'Boyle, Common Cause, Edyael Casaperalta, Center for Rural Strategies, and the Rural Broadband Policy Group, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 1 (Apr. 15, 2014).

Nor is this a partisan issue. Senator Mark Pryor of Arkansas has urged us to reconsider the rate floor, as has his colleague Senator John Boozman.²⁸ Alaska Senators Mark Begich and Lisa Murkowski and Congressman Don Young jointly have asked the FCC to freeze the rate floor and reexamine the underlying policy.²⁹ And Senator Jerry Moran of Kansas has reminded us that the rate floor “only makes phone service less affordable in rural areas, where incomes are lower and families have fewer telecommunications options.”³⁰

Rural Americans aren’t asking for free phones or free service. They’re just asking the government not to mandate a 46 percent increase in their monthly bill. And when so many voices make such a reasonable request, it’s very disappointing that the Commission’s answer today is no. If we are trying to keep rural America in mind in everything that we do, our response should be different.

Yet the Commission moves forward, deciding today the rate floor will go into effect, albeit later than originally proposed. At least the delay is a good thing. By pushing back the first phase of the increase to January 1, 2015, the Commission has opened up a six-month window for us to reexamine this policy before it hits rural America.

That’s especially important because the Commission released the rate-floor data and methodology just five days before the vote.³¹ With six more months, we can respond to the request of our state counterparts—those with actual authority over local telephone rates—to let the public study and comment on the data and methodology before the rate floor takes effect.³² That would be consistent with our past practice.³³ It also would give time to the Universal Service Administrative Company to collect data on the actual number of consumers that will be hit by the rate floor (information the *Order* expects will be collected this July).³⁴

²⁸ Letter from the Honorable John Boozman, U.S. Senator, to the Honorable Tom Wheeler, Chairman, FCC (Apr. 3, 2014); Letter from Mark Pryor, U.S. Senator, to the Honorable Tom Wheeler, Chairman, FCC (Mar. 26, 2014).

²⁹ Letter from the Honorable Mark Begich, U.S. Senator, Lisa Murkowski, U.S. Senator, and Don Young, U.S. Representative, to the Honorable Tom Wheeler, Chairman, FCC, at 3 (Apr. 21, 2014).

³⁰ Letter from the Honorable Jerry Moran, U.S. Senator, to the Honorable Tom Wheeler, Chairman, FCC (Apr. 22, 2014).

³¹ See Wireline Competition Bureau, 2014 Urban Rate Voice Survey Methodology, <http://go.usa.gov/kRZJ> (Apr. 18, 2014); Wireline Competition Bureau, 2014 Urban Rate Voice Survey Results, <http://go.usa.gov/kRBY> (Apr. 18, 2014). The *Order* repeatedly suggests that the rate-floor methodology was established long ago. See *Order* at paras. 73, 82. But no one outside the Bureau knew the methodology before mid-April. For example, no one could have anticipated that the Bureau would cull 73 percent of census tracts from its statistically valid sample (362 out of 497 census tracts were dropped) nor that the Bureau would treat some unregulated rates differently from others (VoIP rates for incumbents are included, while VoIP rates for competitive providers are excluded). Similarly, no one could have anticipated that the Bureau would exclude charges for measured or messaged service entirely (services typically cheaper than unlimited local service) nor how the Bureau handled non-recurring charges (a question neither the 2013 order nor the recent guidance answered). While these after-the-fact decisions may be perfectly reasonable, they are not what was adopted last year and have not been subject to the notice-and-comment process.

³² Petition of NARUC, WC Docket No. 10-90, at 7 (Apr. 15, 2014). I am disheartened that the *Order* now denies NARUC’s petition. See *Order* at paras. 82, 353. The Commission never sought comment on that petition, the public has never had the opportunity to voice its opinion on that petition, and fully resolving that petition was not even a question at the April 2014 meeting when we adopted this *Order*.

³³ As NARUC points out, until April 18, “unlike prior surveys, there [was] no public access to the underlying data/methodology.” Petition of NARUC, WC Docket No. 10-90, at 7 (Apr. 15, 2014).

³⁴ *Order* at paras. 75, 84.

As such, I believe the Commission should reconsider the rate floor later this year with a more fulsome record—as a data-driven agency should. Such consideration will give us the opportunity to review, for example, whether it makes sense for rural rates in some states to “leapfrog the prevailing local telephone rates in the more urban areas of the state”³⁵ or “whether more localized survey data would better serve the goal of ensuring reasonably comparable service at reasonably comparable rates.”³⁶ We can address whether the “FCC’s rate floor requirement attempts to usurp State commission authority over local rates,”³⁷ in contravention of the Act’s stricture that the FCC shall not have jurisdiction over rates “for or in connection with intrastate communication service.”³⁸ And we can decide whether states like West Virginia should have the “flexibility of preserving a low-cost basic tier of service to protect access to voice service for low-income and fixed income consumers” or if instead “[h]ampering a state’s ability to protect its most vulnerable consumers erodes a key foundation of the network compact.”³⁹

So as the tide turned with the QRA benchmarks, I still hold out hope that it can be turned here. Just as tinkering around the edges wasn’t good enough to save the QRA benchmarks, I don’t believe that phasing in a big price hike for rural Americans will make this issue go away. I, for one, intend to keep making my voice heard.

Our decision with respect to the rate floor is all the more disappointing because today the Commission missed a chance to substantially reduce excessive subsidies in a manner that actually would have saved consumers money. Specifically, this item recognizes that wireless providers are deploying mobile broadband far more quickly, and far more extensively, than the Commission anticipated in the *Transformation Order*. Accordingly, the Commission does not need all the funding it has collected for the Mobility Fund Phase II in order to extend mobile broadband service to otherwise unserved areas including Tribal lands. I therefore proposed that we return up to \$400 million a year to American consumers over the next five years. Rather than take this approach, however, the *Order* proposes to keep the majority of the Mobility Fund Phase II intact—not because it’s needed for deployment or even for maintaining service but instead because that’s how much regional wireless providers are getting, even when they are using that money to compete with private investment and duplicate each other’s service areas.⁴⁰

³⁵ Washington Utilities and Transportation Commission Reply at 3 (Mar. 31, 2014).

³⁶ Public Knowledge et al. *Ex Parte* Letter at 2.

³⁷ Hot Springs Telephone Company and Ronan Telephone Company Reply at 1–2.

³⁸ 47 U.S.C. § 152(b). The item’s chief defense on this point appears to be that the rate floor only “might have an incidental effect on [intrastate] rates” and thus does not amount to intrastate regulation. *Order* at note 183 (citing *Cable & Wireless PLC v. FCC*, 166 F.3d 1224, 1230 (D.C. Cir. 1999), and *Cellular Telecomms. Indus. Ass’n v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999)). If that were true, this would be an easy case. But increased intrastate rates are hardly an incidental effect of the rate floor: Low intrastate rates are the trigger, carriers with such low rates are the target, withholding universal service funding from such carriers is the enforcement mechanism, and increased intrastate rates bring relief. The Commission has even amended its rules to give carriers additional time to raise their intrastate rates and additional ways to alert the Commission of rate increases. *See Connect America Fund et al.*, WC Docket No. 10-90 et al., Third Order on Reconsideration, 27 FCC Rcd 5622, 5629, paras. 19–20 (2012). In short, increased intrastate rates are not merely incidental to the rate floor—they’re the whole point.

³⁹ Public Knowledge et al. *Ex Parte* Letter at 3. The *Order* responds that states are “free” to “maintain intrastate rates significantly lower than the national urban average” so long as they do not do so “in a manner that would burden ratepayers nationwide.” *Order* at para. 77. This is a strange claim given that, before the rate floor was imposed, a state’s decision to increase or decrease rates had *absolutely no effect* on the universal service burdens of ratepayers nationwide. And it is especially odd given that rate floor’s perverse incentive: A state with below-floor rates can now act to “burden ratepayers nationwide,” and it does so by increasing rates, not maintaining them.

⁴⁰ *See Order* at paras. 243–47.

In sum, my proposals, taken together, would have cut unnecessary subsidies, protected rural Americans from substantial price increases, and lowered all consumers' phone bills. Unfortunately, today's item does the opposite. It leaves excessive subsidies untouched, raises rural Americans' phone rates by up to 46 percent, and doesn't return any money to American consumers.

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I cannot square one last aspect of the *Order* with the Communications Act. Specifically, the *Order* finds it permissible to impose broadband common-carriage obligations on incumbent local exchange carriers (LECs). But it does so despite the fact that section 3 states that “telecommunications carrier shall be treated as a common carrier under [the Communications Act] *only to the extent* that it is engaged in providing telecommunications services.”⁴¹ And it does so without finding that the legacy universal service offered is in fact “sufficient” to meet these new obligations as required by section 254.⁴² I accordingly cannot support this determination.

The “broadband public interest obligations,” as the *Order* styles them, smack of common carriage. Incumbent LECs “must make . . . broadband service available at rates that are reasonably comparable to offerings of comparable broadband services in urban areas.”⁴³ The *Transformation Order* spelled out the characteristics of that service in terms of speed,⁴⁴ latency,⁴⁵ and capacity,⁴⁶ and required annual compliance testing and reporting that the provisioned broadband met these metrics.⁴⁷ The incumbent LEC must either charge prices below a Commission-determined benchmark or geographically average its rates so that its rural rates do not exceed its urban rates⁴⁸; either way, the incumbent LEC must report its prices to the Commission each year for review.⁴⁹ And rate-of-return LECs must specifically provide broadband “upon reasonable request” and “within a reasonable amount of time,” an obligation the *Transformation Order* said was “similar to the voice deployment obligations many of these carriers are subject to today.”⁵⁰ In other words, incumbent LECs cannot “make individualized decisions, in particular cases, whether and on what terms to deal,”⁵¹ but instead must offer a specific service at reasonable rates to all consumers in its service territory (or at least those that reasonably request service) and file with the Commission a schedule of charges along with compliance information. Absent formal tariffs or reticulated accounting practices, it's hard to see how such an indiscriminate obligation to offer service could better map onto the definition of a common carrier: “It shall be the duty of every common

⁴¹ 47 U.S.C. § 153(51) (emphasis added); *see also Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014) (“We think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers.”).

⁴² 47 U.S.C. § 254(b)(5).

⁴³ *Connect America Fund et al.*, WC Docket Nos. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17695, para. 86 (2011) (*Universal Service Transformation Order*).

⁴⁴ *Id.* at 17697, para. 94 (4 Mbps downstream, 1 Mbps upstream).

⁴⁵ *Id.* at 17698, para. 96 (“sufficiently low . . . to enable use of real-time applications”).

⁴⁶ *Id.* at 17698–99, paras. 98–99 (at least 10 GB and “reasonably comparable to usage limits for comparable broadband offerings in urban areas”).

⁴⁷ 47 C.F.R. § 54.313(a)(11).

⁴⁸ *See Order* at para. 313 (proposing that ETCs certify that their rates comply with these standards).

⁴⁹ 47 C.F.R. § 54.313(a)(7).

⁵⁰ *Universal Service Transformation Order*, 26 FCC Rcd at 17740–41, paras. 206–08.

⁵¹ *Verizon v. FCC*, 740 F.3d 623, 651 (D.C. Cir. 2014) (quoting *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976)).

carrier . . . to furnish such communication service upon reasonable request therefor” at rates that are “just and reasonable.”⁵²

Moreover, the Commission cannot credibly claim that incumbent LECs “voluntarily assume[d]” these common-carriage obligations as conditions on the receipt of federal universal service subsidies.⁵³ At least since the passage of the Telecommunications Act of 1996, federal law has imposed on incumbent LECs telephone service obligations without the legal means to recover all the associated costs from their customers.⁵⁴ Indeed, the *Transformation Order* itself eliminated intercarrier compensation over time but prohibited incumbent LECs from recovering all of the lost revenue from customers, thus necessitating the creation of the CAF-ICC mechanism.⁵⁵ And if an incumbent LEC turned down high-cost support today, (a) it would still need to offer voice telephony and other telecommunications services at regulated (below-cost) rates,⁵⁶ (b) it would still need to negotiate, interconnect, offer unbundled access to its network, resale, and collocation, and notify the public of certain network changes as an incumbent,⁵⁷ and (c) it would still need to offer Lifeline service unless another ETC is present in the area.⁵⁸ And elsewhere, the *Order* is unable to state whether incumbents can escape *any* high-cost ETC obligations by relinquishing

⁵² 47 U.S.C. § 201(a), (b). Contra the *Order*’s suggestion to the contrary, most common carriers “are free to set their own prices” and “may charge different rates to different end-user customers,” *Order* at para. 125, so long as those rates and classifications are reasonable, *see* 47 U.S.C. § 201(b). The Commission has spelled out particular charges for only one set of common carriers (incumbent LECs), and even those carriers may offer rates below those specified in our rules in certain circumstances. *See, e.g.*, 47 C.F.R. Part 69, Subpart H (setting forth the Commission’s pricing flexibility rules for special access services).

⁵³ *Order* at para. 120. My point is not, as the item implies, that “incumbent LECs are entitled to universal service subsidies,” *Order* at para. 121, nor that all “regulatory obligations [of] incumbents” turn on the receipt of universal service support, *id.* at para. 122. It is instead that incumbent LECs, like all common carriers, are entitled to a reasonable opportunity to recover their costs, so the FCC cannot cap prices below cost unless it offers some other means of recovery. Our rules do in fact set end-user rates below cost for many incumbent LECs (including every incumbent that receives interstate common line support), *see* 47 C.F.R. § 69.104(n)(1) (capping a rate-of-return carrier’s subscriber line charge even when its costs are higher). Thus, we must offer such carriers a means to recover their costs—and the only means we have offered is universal service funding. The *Order* does not dispute these facts or the conclusion that our tariffing rules would be confiscatory in many cases absent universal service support, but instead ignores them to rebut claims that no one has made.

⁵⁴ *See, e.g.*, 47 C.F.R. § 54.901 (providing rate-of-return carriers with interstate common line support to compensate for the portion of their common line revenue requirement that such carriers are prohibited from recovering from end users); *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers et al.*, CC Docket No. 00-256 et al., Second Report and Order and Further Notice of Proposed Rulemaking, Fifteenth Report and Order, and Report and Order, 16 FCC Rcd 19613, 19664, para. 120 (2001) (“Interstate Common Line Support will provide support for rate-of-return carriers to the extent that [subscriber line charge] caps do not permit them to recover their common line revenue requirements.”).

⁵⁵ *See Universal Service Transformation Order*, 26 FCC Rcd at 17958–61, paras. 852–53 (limiting incumbent LEC charges to end users while allowing access to universal service support); *compare id.* (allowing competitive LECs to increase end-user charges without constraint but disallowing access to additional universal service support).

⁵⁶ *See* 47 U.S.C. § 214.

⁵⁷ 47 U.S.C. § 254(c).

⁵⁸ *Order* at para. 197.

support.⁵⁹ In other words, incumbent LECs hardly “retain[] the ability to opt out of [their associated federal obligations] entirely by declining . . . federal universal service subsidies.”⁶⁰

Given all the obligations that incumbent LECs cannot escape and given that legacy support is calculated to enable each incumbent to meet its obligations, it is no wonder that the *Order* does not attempt to explain how adding new obligations but no new funding complies with the statutory requirement that support be “sufficient . . . to preserve and advance universal service.”⁶¹ The Commission has repeatedly held that “the statutory principle of ‘sufficiency’ proscribes support in excess of that necessary to achieve the Act’s universal service goals”⁶²—so if incumbent LECs have received support sufficient, but no greater than necessary, to carry out their telephone common-carriage obligations, it is hard to see how the same amount of support could be sufficient to cover new broadband common-carriage obligations.⁶³ Perhaps if we had a stand-alone broadband mechanism in place for rate-of-return carriers it would be different, but today we only propose such reforms. We cannot ignore the statutory command of sufficiency in hopes that it will disappear, but that is what the *Order* appears to do.

For all these reasons, I approve in part and respectfully dissent in part.

⁵⁹ *Id.* Accordingly, I cannot take seriously the *Order*’s suggestion that “price cap carriers have the option of declining legacy high-cost support if they do not want to comply with the broadband public interest conditions in the *USF/ICC Transformation Order*.” *Order* at para. 120.

⁶⁰ *WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262, 1274 (10th Cir. 2007). In contrast, applying these common-carriage obligations to the funds disbursed in CAF Phase I, CAF Phase II, and the various Mobility Funds is permissible because participation in any such fund is actually voluntary.

⁶¹ 47 U.S.C. § 254(b)(5); *see also* U.S. Telecom Petition for Reconsideration, WC Docket No. 10-90 et al., at 9–10 (Dec. 29, 2011) (“In essence, the Commission impermissibly bootstraps a broadband deployment and maintenance obligation onto carriers that only receive federal universal service for the provision of voice telephony service in their geographic serving areas, while turning a blind eye to the sufficiency of the support necessary to satisfy this obligation.”).

⁶² *See, e.g., High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Alltel Communications, Inc., et al. Petitions for Designation as Eligible Telecommunications Carriers; RCC Minnesota, Inc. and RCC Atlantic, Inc. New Hampshire ETC Designation Amendment*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834, 8839, para. 8 (2008), *upheld by Rural Cellular Association v. FCC*, 588 F.3d 1095, 1102–03 (D.C. Cir. 2009).

⁶³ Over two paragraphs, the *Order* reiterates the determination in the *Universal Service Transformation Order* that the overall budget for the Connect America Fund is sufficient and that market trends support this conclusion. *See Order* at para. 123–24. For what it’s worth, I agree that the \$4.5 billion budget is sufficient (indeed, the Fund is running a surplus today). But that determination says nothing about the sufficiency of the legacy support offered to each individual carrier to meet the new broadband common-carriage obligations. On that question, the *Order* has no response.