

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	

**COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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The National Cable & Telecommunications Association (“NCTA”) hereby submits its comments in response to the Notice of Inquiry issued by the Commission in the above-captioned proceeding.¹

INTRODUCTION AND SUMMARY

NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation’s largest broadband provider of high-speed Internet access after investing over \$145 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art voice service to millions of American homes and are rapidly making these services available nationwide.

The *NOI* is the first step in the Commission’s reassessment of issues regarding the non-rural high-cost mechanism that were remanded by the 10th Circuit in the *Qwest II* case.² But the Commission must consider these issues in a much larger context. As noted in the *NOI*, the

¹ *High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Inquiry, FCC 09-28 (rel. Apr. 8, 2009) (*NOI*).

² *Qwest Communications Int’l, Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005) (*Qwest II*); see also *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2003) (*Qwest I*).

Commission has pending proceedings in which it is considering fundamental reform of existing USF mechanisms to better account for marketplace developments, including the growing importance of broadband services.³ It also has issued a Notice of Inquiry, pursuant to congressional mandate, to begin the process of developing a National Broadband Plan.⁴

The Commission should take the opportunity afforded by this proceeding to take a fresh look at the process for deciding whether, and how much, funding should go to non-rural carriers. In its remand orders, the court has twice raised serious questions about the Commission's analysis of whether rural rates are "affordable" and "reasonably comparable" to urban rates pursuant to Section 254 of the Communications Act. In light of marketplace developments since that provision was enacted, the Commission should find that *existing* levels of high-cost support are more than sufficient to ensure that telecommunications rates are affordable and that rural telecommunications rates are reasonably comparable to urban rates. The Commission does not need to expand the size of the high-cost fund to address the needs of non-rural carriers; it just needs to distribute support more efficiently.

As a first step, the Commission should cap the overall size of the high-cost fund. It then should consider whether there is any need to direct a larger share of total support to rural areas served by non-rural carriers where there is no competition and rates would not be affordable or comparable to urban rates without support. The burden should be on non-rural carriers to demonstrate that existing support levels in the areas they serve are inadequate. In reviewing such requests, the Commission must adopt an approach that reflects the growing facilities-based competition that exists in rural America, the increasing use of national or regional pricing by all

³ *NOI* at ¶ 21.

⁴ *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Notice of Inquiry, FCC 09-31 (rel. Apr. 8, 2009) (*Broadband Plan NOI*).

types of providers, the lack of meaningful cost information collected from non-rural incumbent local exchange carriers (ILECs), and the ability of ILECs to recover costs from the multiple unregulated services they now provide over their networks.

I. USF REFORM IS NECESSARY AND SHOULD BE A KEY COMPONENT OF THE NATIONAL BROADBAND PLAN

In 1999, the Commission established a mechanism to provide funding to non-rural carriers (i.e., carriers not defined as rural telephone companies by the Communications Act) that provide service in high-cost rural areas. The non-rural mechanism originally provided support to areas where the statewide average forward-looking cost per line was more than 135 percent of the nationwide average cost per line.⁵ After that approach was rejected by the court in *Qwest I*,⁶ the Commission adopted a new approach in which support was provided when the statewide average cost was more than two standard deviations above the national average cost.⁷ That approach was rejected by the court in *Qwest II*.⁸

The Commission's inability to develop a support mechanism for non-rural carriers that passes muster with the courts is just one component of a much larger set of problems surrounding the federal universal service program. There is an emerging consensus that the entire high-cost program is in need of major reform. As the Government Accountability Office (GAO) concluded last year, "12 years after passage of the 1996 Act and after distributing over \$30 billion in high-cost program support, [the] FCC has yet to develop specific performance

⁵ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432 (1999). In contrast, the high-cost mechanism for rural carriers relies on embedded costs, rather than forward-looking costs, and average costs across study areas, rather than states.

⁶ *Qwest I*, 258 F.3d at 1195.

⁷ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order on Remand, Further Notice of Proposed Rulemaking and Memorandum Opinion and Order, 18 FCC Rcd 22559 (2003) (*Order on Remand*).

⁸ *Qwest II*, 398 F.3d at 1236-37.

goals and measures for the program.”⁹ GAO also raised concerns about the internal control mechanisms for the high-cost program, which it found are “limited and exhibit weaknesses that, collectively, hinder [the] FCC’s ability to assess the risk of noncompliance with program rules and ensure cost-effective use of program funds.”¹⁰

NCTA shares these concerns. As NCTA has explained previously, with advancements in technology and competition, the need for funding should be declining.¹¹ Unfortunately, because of flaws in the Commission’s rules, these developments have led to escalating support, with the contribution factor at times exceeding 11 percent.¹² As the Congressional Budget Office warned in 2006, there is a risk that the size of the USF program could double in the next few years unless changes are made.¹³ This unchecked growth in the size of the fund, and the corresponding burden on consumers, is directly contrary to the goal of making affordable services available to all consumers.¹⁴

In addition to the obvious need to fix the existing mechanisms, there also is an emerging consensus that these mechanisms should transition from voice-focused to broadband-focused. While the broadband marketplace generally is working to meet the needs of consumers, government support, including subsidies, may be needed to promote both the deployment of

⁹ *FCC Needs to Improve Performance Management and Strengthen Oversight of the High-Cost Program*, GAO-08-633 (June 2008) at 5.

¹⁰ *Id.*

¹¹ Comments of the National Cable & Telecommunications Association, WC Docket No. 05-337 (filed Apr. 17, 2008) at 4-5 (NCTA 2008 Comments).

¹² *Id.* at 7 (“Not only does the current program not reassess whether support is still needed, or whether it is needed at current levels, it actually includes features that lead to ever-increasing growth in the amount of support once competitive entry occurs.”).

¹³ See *Factors That May Increase Future Spending from the Universal Service Fund: A CBO Paper* at 1 (Congressional Budget Office June 2006).

¹⁴ *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) (“Moreover, excessive funding may itself violate the sufficiency requirement of the Act. . . . [E]xcess subsidization may detract from universal service by causing rates unnecessarily to rise”)

networks in unserved areas and the adoption of services by underserved populations. Congress took an important first step to achieve these goals in the American Recovery and Reinvestment Act of 2009,¹⁵ but there is an important role for the Commission as well.

NCTA agrees that both of these steps – fixing the high-cost mechanisms and redirecting funds to focus on broadband deployment and adoption – are appropriate, but the transition process is absolutely critical. Simply put, it would be irresponsible for the Commission to focus on broadband without first fixing the current USF mechanisms to avoid unnecessary and wasteful payments to providers in areas where support is not needed. Accordingly, the first step in any USF reform effort should be for the Commission to cap the total size of the high-cost fund.

Once the fund is capped, the Commission can consider whether to provide a larger share of the total support to non-rural carriers in rural areas where there is no competition and rates otherwise would not be affordable or comparable to urban rates, as Qwest and others have proposed.¹⁶ As we explain below, the Commission must take a fresh approach in deciding what support is needed, both to comply with *Qwest II* and to reflect the significant marketplace changes since the program was established. None of the proposals identified in the *NOI* accomplish this.

In addition to fixing the non-rural support mechanism, the Commission also must begin identifying areas where facilities-based competitors are providing a substitute service without support, thereby indicating that support for the incumbent LEC no longer is necessary. As NCTA proposed previously, the Commission should establish a process by which third parties can prove that circumstances have changed in a particular rural area and government support at

¹⁵ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (Recovery Act).

¹⁶ *NOI* at ¶ 8.

current levels no longer is needed to ensure that telecommunications are available at rates that are affordable and comparable to urban areas.¹⁷

Only after the Commission has made progress in stabilizing the existing high-cost mechanisms should it explore new funding for broadband deployment and adoption. Adapting the USF program to promote deployment of broadband networks in unserved rural areas should be a key element of the National Broadband Plan. As part of that plan, the Commission also should consider program that would promote increased adoption of broadband services. As Congress made clear in the Recovery Act, the federal government has a strong interest in promoting adoption of broadband services, not just deployment.¹⁸

II. THE COMMISSION SHOULD FIND THAT EXISTING SUPPORT LEVELS ARE SUFFICIENT TO KEEP TELECOMMUNICATIONS RATES AFFORDABLE

One of the key goals of the universal service program is to ensure that consumers are able to purchase telecommunications services at affordable rates.¹⁹ The time has come for the Commission to declare victory on this point. As a result of competitive and technological developments, consumers have numerous communications options available to them and the vast majority subscribe to one or more of these services. The fact that over 200 million people purchase wireless service is strong evidence that those services are affordable to the average consumer. Similarly, cable operators now provide voice service to over 20 million households, typically at rates that are lower than the rates offered by the incumbent. Customers with broadband connections also have the option of over-the-top services, including free services like

¹⁷ NCTA 2008 Comments at 8-10.

¹⁸ Recovery Act, §§ 6001(b)(3), (5).

¹⁹ 47 U.S.C. § 254(b)(1) (“Quality services should be available at just, reasonable, and affordable rates.”).

Skype. The overwhelming consumer acceptance of these services demonstrates that voice services generally are available at affordable rates.

The Commission's subscribership statistics support this conclusion. Since the Commission established the USF program in 1996, penetration rates for phone services have remained at consistently high levels. In March 1996, 93.8% of households had phone service.²⁰ Twelve years later, in March 2008, 95.2% of households had service.²¹ Notably, even as consumers have dropped traditional wireline service, which receives the vast majority of USF support, overall penetration has increased because customers have embraced wireless and VoIP services.²² These figures demonstrate that telecommunications services are affordable for the vast majority of American consumers.

While affordability of phone service may remain an issue in some areas of the country, those areas can and should be addressed without increasing the size of the fund. Tribal areas, for example, tend to have lower penetration rates and may not have the same options that are available in most other parts of the country. Concern about the affordability of services in such areas is one reason why it is so important for the Commission to start the process of reforming the high-cost mechanism and directing resources where they are needed most.

²⁰ Telephone Subscribership in the United States, Table 1 (rel. Mar. 2009) (2009 Subscribership Report), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-289169A1.pdf.

²¹ *Id.*

²² Indeed, as reported by the Centers for Disease Control earlier this week, over 20 percent of American households now rely exclusively on wireless service for their telecommunications needs and another 15 percent purchase wireline service but receive all or virtually all of their calls on a wireless phone. Blumberg and Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2008* (rel. May 6, 2009), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200905.pdf>.

III. THE COMMISSION SHOULD FIND THAT RURAL TELECOMMUNICATIONS RATES ARE REASONABLY COMPARABLE TO URBAN RATES

Among the goals established by Congress in Section 254 is ensuring that rates for telecommunications services in rural areas are reasonably comparable to the rates available in urban areas.²³ In the past, the Commission has attempted to achieve this goal by considering the incumbent's *costs* of providing service in rural areas, rather than the *rates* available to consumers, and directing support to non-rural carriers with costs that are much higher than average.²⁴

Whatever the merits of the Commission's prior approach might have been, it no longer represents a rational approach to considering the comparability of rural and urban rates. In particular, the Commission should focus its analysis on rates, not costs, in determining whether urban and rural rates are comparable. As explained in more detail below, in today's marketplace, where competitive options are numerous and LECs provide multiple unregulated services over the same facilities used for supported services, the Commission no longer can assume that the cost of constructing and operating an ILEC's telecommunications network can serve as a proxy for the rates of supported services.

If the Commission focuses on rates offered to consumers, not costs incurred by the incumbent, it will find that rates generally are comparable in rural and urban areas. In most areas of the country, including most rural areas, consumers have multiple options for all-distance voice services from a variety of companies, including LECs, wireless carriers, and cable operators. For example, large cable operators such as Comcast, Time Warner Cable and Cox typically charge

²³ 47 U.S.C. § 254(b)(3).

²⁴ *Order on Remand*, 18 FCC Rcd at 22560-61, ¶ 1 (“We will continue to determine non-rural support by comparing statewide average costs to a national cost benchmark, but we establish a new cost benchmark at two standard deviations above the national average cost.”).

the same rates for voice service without regard to whether they are operating in rural or urban areas. In areas served by these companies, there can be no doubt that rural rates and urban rates are comparable.

Cable operators are not the only providers that have moved to national or regional pricing. Major wireless providers generally offer the same pricing plans in rural areas that they offer in urban areas. Similarly, over-the-top VoIP providers, such as Vonage, offer voice service at the same rate to any customer with a broadband connection. In any rural area where these service options are available, rates should be considered comparable to urban areas.

To be sure, there may still be pockets of the country where these options are not available and rural rates are higher than urban rates, although evidence suggests that incumbent LECs often receive support in areas where their end user rates are well below rates charged in urban areas.²⁵ To the extent that non-rural carriers believe continued funding is necessary in particular areas, the Commission needs to develop a fresh approach to considering requests for support in these areas.

IV. THE COMMISSION NEEDS A NEW APPROACH TO DETERMINING WHETHER, AND HOW MUCH, SUPPORT SHOULD BE PROVIDED TO NON-RURAL LECs

A. The Traditional Cost-Based Approach No Longer Works

As noted above, while rural rates generally are affordable and comparable to urban rates, that may not be the case for some rural areas served by non-rural carriers. The question that the Commission has struggled with is how to determine which areas need support and how much support to provide. For a variety of reasons, the approach used by the Commission in the past, looking solely at the incumbent's cost of providing service, is no longer a rational trigger for

²⁵ See General Accounting Office, *Telecommunications: Federal and State Universal Service Programs and Challenges to Funding* at 15, App. IV (Feb. 2002).

determining whether universal service support is needed. To the extent Qwest and others have proposed using variations on that approach,²⁶ the Commission should reject those proposals.

The traditional cost-based approach is inadequate for a number of reasons. First, the Commission no longer has meaningful, verifiable information regarding non-rural LECs' embedded cost of providing telecommunications services. Most non-rural LECs are no longer subject to cost-based rate regulation and their costs are not reviewed by state or federal regulators. Many states have adopted significant deregulation of local rates and those still subject to regulation generally are governed by price caps, not cost-based regulation. Embarq, for example, has acknowledged that less than 1% of its lines are subject to rate of return regulation at the state level.²⁷

Compounding the problem, the Commission has eliminated key accounting rules that would enable it to determine the costs attributable to telecommunications services. In particular, the Commission granted forbearance with respect to rules that controlled the allocation of costs among different services.²⁸ In conjunction with the ongoing freeze of jurisdictional separations factors,²⁹ any ILEC statement regarding the actual cost of providing supported services is pure speculation that is essentially impossible for the Commission to verify.

²⁶ *NOI* at ¶ 9 (describing Qwest proposal to provide support where wire center costs exceed 125 percent of national urban average); *id.* at ¶ 10 (describing similar proposal submitted by Maine Public Utilities Commission, Vermont Public Service Board and Vermont Department of Public Service).

²⁷ Comments of Embarq, CC Docket No. 80-286 (filed Apr. 17, 2009) at 10.

²⁸ *See 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 No. 07-21, Memorandum Opinion and Order, 23 FCC Rcd 7302 (2008) (AT&T Forbearance Order); *see also Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering*, WC Docket No. 08-190, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 23 FCC Rcd 13647 (2008) (extending same relief to Verizon and Qwest).

²⁹ *See Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Notice of Proposed Rulemaking, FCC 09-24 (rel. Mar. 27, 2009) (soliciting comment on extending the separations freeze until June 30, 2010).

Not only do these developments mean that the Commission is unable to determine a non-rural LEC's embedded cost of providing service, they also make it harder to accurately determine the forward-looking cost of providing service. Many of the inputs used by the Commission in its forward-looking cost model rely on regulatory accounting data. As the Commission explains in the *NOI*, many of these inputs have not been updated since the Commission adopted the model a decade ago.³⁰ The absence of cost data could make the process of updating these inputs extremely challenging. In addition, the line counts used in the model are now seven years old and also would be difficult to update in a meaningful way.³¹

Even if the Commission had better information on non-rural carriers' costs,³² using a cost-based approach would still be problematic because there may be no clear relationship between those costs and a carrier's rates for supported telecommunications services. Certainly there is no basis for continuing the current practice of assuming that all network costs are attributable to supported telecommunications services. Even in rural areas, most LECs now provide multiple services, including long distance, broadband and multichannel video service, over the facilities they use for supported telecommunications services. For USF purposes, this is a positive development. Because those new services generally are not subject to rate regulation, there is no reason why an ILEC should not be required to recover a larger portion of its total network costs from these new services and less from supported telecommunications services.

³⁰ *NOI* at ¶ 24.

³¹ *Id.*

³² Non-rural LECs that were granted forbearance with respect to certain Commission accounting rules are obligated to provide such information upon request of the Commission. *See, e.g., AT&T Forbearance Order* at ¶ 37 (“[W]e expressly condition the forbearance granted in this Order on the provision by AT&T of any accounting data on request, and therefore, the Commission will continue to have access to any accounting data it may need for developing non-rural universal service policy going forward.”).

B. The Commission Must Consider Marketplace Realities In Determining Whether, And How Much, Support Is Necessary

Given these developments, the process for deciding how much support, if any, to provide a non-rural LEC for a particular geographic area must be much more nuanced than it has been in the past. The burden should be on the carrier seeking USF support to demonstrate that, absent such support, it would be unable to charge rates for supported telecommunications services that are affordable and reasonably comparable to urban areas.

When the carrier seeking support offers multiple services over the network used to provide supported telecommunications services, the Commission's determination should include an assessment of all the revenue opportunities available to the carrier, as the Joint Board recommended in 2007.³³ Section 254(k) makes clear that supported services should "bear no more than a reasonable share of the joint and common costs of the facilities used to provide those services"³⁴ and section 254(e) requires that support be used only for supported services.³⁵ Because there is no objective way to allocate joint and common costs among services provided over the same network, the Commission must look at the total cost of providing all services over the network and compare this to the total revenues available from these services. And as NCTA has proposed previously, the provision of multichannel video service by an ILEC should be considered evidence that existing levels of federal USF support are excessive.³⁶

The Commission also should consider the extent to which customers in the study area can take service from alternative providers, particularly competitors that are not receiving subsidies.

³³ *High-Cost Universal Service Support*, WC Docket No. 05-337, Recommended Decision, 22 FCC Rcd 20477, 20485, ¶ 31 (2007).

³⁴ 47 U.S.C. § 254(k).

³⁵ 47 U.S.C. § 254(e).

³⁶ NCTA 2008 Comments at 9-10 ("There is no reason whatsoever that consumers should be subsidizing ILEC video services through the high-cost mechanism or in any other manner. At the very least, the Commission should ensure that ILECs allocate an appropriate portion of their costs to non-regulated services.").

The availability of competitive services from an unsubsidized provider is strong evidence that subsidies are not needed to ensure that rates are affordable in the relevant area. Even where a competitor does not serve the entire area, the important point is that the amount of support should be no more than is needed to bring service to consumers that otherwise would not have the ability to purchase service at rates that are affordable and reasonably comparable to urban rates.

The Commission should not provide support based solely on the population density of a particular geographic area, as proposed by Embarq.³⁷ Although Embarq's proposal avoids the problem of relying on unverifiable cost data, it fails to consider what is actually happening in the marketplace. In particular, it does not consider the extent to which competitive providers are able to serve the area without subsidy, nor does it look at the extent to which network costs can be recovered through the provision of unregulated services. Because of these significant flaws, the Embarq proposal would not be an improvement over the current situation.

³⁷ See *NOI* at ¶ 11.

CONCLUSION

For all the reasons explained above, the Commission should conclude that rates in rural areas generally are affordable and comparable to rates offered in urban areas. To the extent non-rural carriers seek high-cost support for areas where this is not the case, the Commission should develop an approach that reflects marketplace and regulatory realities.

Respectfully submitted,

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