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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF  
IAT COMMUNICATIONS, INC., d.b.a.  
NTCH-IDAHO, INC. OR CLEAR TALK  
FOR DESIGNATION AS AN ELIGIBLE  
TELECOMMUNICATIONS CARRIER

Case No. GNR-T-03-08

IN THE MATTER OF THE APPLICATION  
OF NPCR, INC. d.b.a. NEXTEL PARTNERS  
SEEKING DESIGNATION AS AN  
ELIGIBLE TELECOMMUNICATIONS  
CARRIER

Case No. GNR-T-03-16

**THIRD JOINT MOTION TO TAKE  
OFFICIAL NOTICE**

The Idaho Telephone Association (“ITA”) and Citizens Telecommunications  
Company of Idaho (“Citizens”) request that the Commission take official notice of the attached  
Recommended Decision issued by the Federal-State Joint Board on Universal Service

("FSJBUS") in Case No. 96-45, "In the Matter of Federal-State Joint Board on Universal Service". In support of this Motion, Petitioners state as follows:

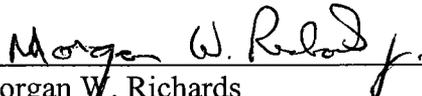
1. Rule 263.01(a)(2) of the Commission's Rules of Procedure provides that the Commission may take official notice of the orders of "any other regulatory agency, state or federal."
2. Evidentiary hearings in this matter concluded on December 11, 2003, and the parties' Briefs were submitted on January 23, 2004. The Joint Board did not release its recommendations until February 27, 2004, too late to be included in the parties' Briefs.
3. The Joint Board Recommendation is very relevant to the Commission's deliberations because it addresses issues relating to the applications by Nextel Partners and Clear Talk for ETC status.
4. No party will be prejudiced by the granting of this Motion.

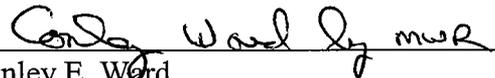
WHEREFORE, ITA and Citizens respectfully request that the Commission enter its order:

1. Taking official notice of the FSJBUS Recommended Decision; and
2. Directing that the FSJBUS Recommended Decision be marked as an exhibit and included in the record as a late-file exhibit.

Oral argument is not requested on this Motion.

Respectfully submitted this 6th day of April, 2004.

  
\_\_\_\_\_  
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\_\_\_\_\_  
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of April, 2004, I caused a true and correct copy of the foregoing **THIRD JOINT MOTION TO TAKE OFFICIAL NOTICE** to be served by the method indicated below, and addressed to the following:

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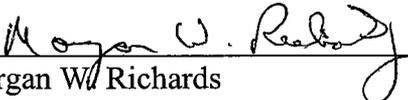
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Morgan W. Richards

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

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	

**RECOMMENDED DECISION**

**Adopted: February 27, 2004**

**Released: February 27, 2004**

By the Federal-State Joint Board on Universal Service: Commissioners Abernathy, Jaber, and Dunleavy, and Consumer Advocate Gregg, issuing separate statements; Commissioner Martin dissenting in part, concurring in part, and issuing a separate statement; Commissioners Adelstein, Thompson, and Rowe approving in part, dissenting in part, and issuing a joint separate statement.

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**Before the  
Federal Communications Commission  
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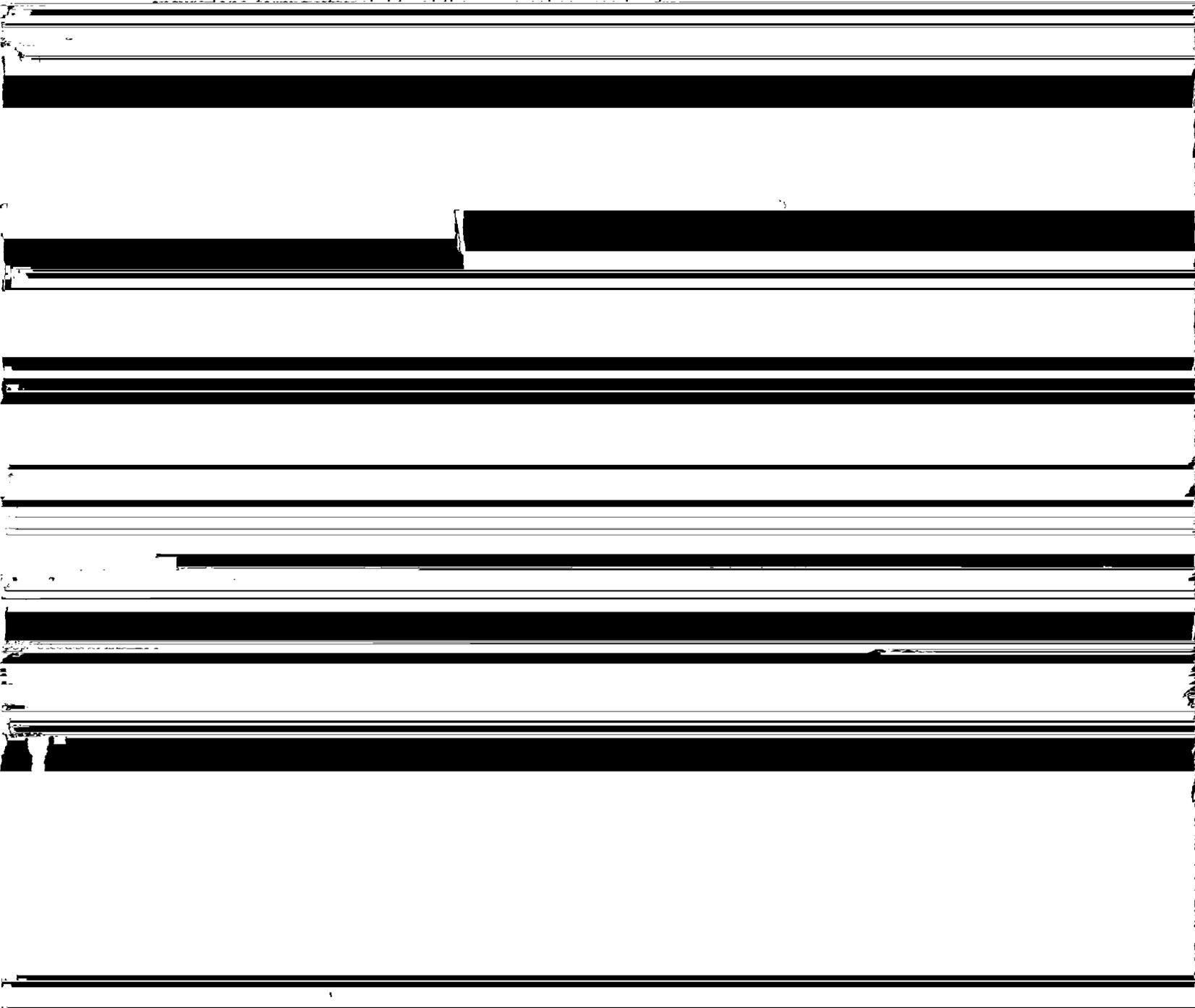
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Appendix A – Parties Filing Comments and Reply Comments

**I. INTRODUCTION**

1. In this Recommended Decision, the Federal-State Joint Board on Universal Service (“Joint Board”) provides its recommendations concerning the process for designation of eligible telecommunications carriers (ETCs) and the Commission’s rules regarding high-cost universal service support. Citing changes in the marketplace since the Commission’s rules were first adopted in 1997, the Commission requested that the Joint Board “review certain of the Commission’s rules relating to the high-cost universal service support mechanisms to ensure that the dual goals of preserving universal service and fostering competition continue to be fulfilled.”<sup>1</sup> Consistent with the Commission’s directive in the *Referral Order*, we sought comment and held a public forum to address concerns regarding the designation and funding of ETCs in high-cost areas.<sup>2</sup> We provide our recommendations based on our review and consideration of the record developed in this proceeding. Overall, we believe that our recommendations will preserve and advance universal service, maintain competitive neutrality, and



necessary to preserve the sustainability of the universal service fund. We also believe that it would send more appropriate entry signals in rural and high-cost areas, and would be competitively neutral. To minimize the potential impact of restricting the scope of support in areas served by rural carriers, we recommend that the Commission seek comment on restating the total high-cost support flowing to a rural carrier in terms of first connections, and on other possible measures.<sup>4</sup> As discussed below, we also recommend that the Commission seek comment on whether to restate support for non-rural carriers.<sup>5</sup> In conjunction with these measures, we also recommend that high-cost support in areas served by rural carriers be capped on a per-line basis where a competitive carrier is designated as an ETC, and adjusted annually by an index factor.<sup>6</sup>

4. At this time, we decline to recommend that the Commission modify the basis of support (i.e., the methodology used to calculate support) in study areas with multiple ETCs. Instead, we recommend that the Joint Board and Commission consider possible modifications to the basis of support as part of an overall review of the high-cost support mechanisms for rural and non-rural carriers.<sup>7</sup> We believe that examining the basis of support for all ETCs under the rural and non-rural federal support mechanisms simultaneously would allow the Joint Board and the Commission to craft a more comprehensive approach and avoid the perils of piecemeal decision-making. If the Commission adopts our recommendations to limit the scope of support and to ensure that ETC designations are appropriately rigorous, such steps should slow fund growth due to competitive entry in the meantime.

## II. ETC DESIGNATION PROCESS

5. We recommend a variety of measures below that relate to state proceedings involving designation of ETCs. To increase the opportunities for state commissions to conduct rigorous proceedings, we recommend that the Commission adopt permissive guidelines for minimum ETC qualifications. We also offer some guidance for state commissions in interpreting the public interest test found in section 214(e). In addition, we address the annual certification requirements under section 254(e) and recommend that the Commission encourage states to use that process to ensure that all ETCs use federal universal service support to provide the supported services and for associated infrastructure costs. Finally, we offer some observations regarding the service area redefinition process and disaggregation of support by rural carriers. We note here that in instances where carriers are not subject to the jurisdiction of a state commission, we urge the Commission to apply these same measures.

---

<sup>4</sup> The term “rural carriers” refers to incumbent local exchange carriers (LECs) that meet the statutory definition of rural telephone company in section 153(37) of the Act. *See* 47 U.S.C. § 153(37). Under this definition, rural telephone companies are incumbent LECs that either serve study areas with fewer than 100,000 access lines or meet one of three alternative criteria. *Id.* The term “non-rural carriers” refers to incumbent LECs that do not meet the statutory definition of a rural telephone company.

<sup>5</sup> *See supra* para. 76.

<sup>6</sup> We note that, if the Commission were to adopt the “hold harmless” approach discussed below, per-line support would not be capped for incumbent carriers. *See infra* at para. 75. For purposes of this Recommended Decision, references to “line” or “per-line” are generally synonymous with “connection” or “per-connection.” The use of the term “line” is intended to relate to services provisioned over either wireline or wireless technology.

<sup>7</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*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244, 11310, para. 169 (2001) (*Rural Task Force Order*); *see also Federal-State Joint Board on Universal Service, Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order*, CC Docket No. 96-45, FCC 03-249 (rel. Oct. 27, 2003) at para. 25 (*Tenth Circuit Remand Order*).

## A. Background

6. Section 254(e) of the Act provides that “only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support.”<sup>8</sup> Pursuant to section 214(e)(1), a common carrier designated as an ETC must offer and advertise the services supported by the federal universal service mechanisms throughout the designated service area, either using its own facilities or a combination of its own facilities and resale of another carrier’s services (including the services offered by another ETC).<sup>9</sup>

7. Section 214(e)(2) of the Act gives state commissions the primary responsibility for performing ETC designations.<sup>10</sup> Under section 214(e)(2), “[u]pon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of 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 designated service area, so long as the requesting carrier meets the requirements of section 214(e)(1). Section 214(e)(2) further states: “[b]efore designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.”<sup>11</sup>

8. A state commission must allow an ETC to relinquish its designation in any area served by more than one ETC pursuant to section 214(e)(4) of the Act.<sup>12</sup> The relinquishing ETC must provide advance notice of such relinquishment to the state commission.<sup>13</sup> Prior to allowing the relinquishing carrier to cease providing universal service, the state commission must require the remaining ETC or ETCs to ensure that all customers served by the relinquishing carrier will continue to be served. The state commission also must require sufficient notice to the remaining ETC or ETCs to permit the purchase or construction of adequate facilities.<sup>14</sup> The state commission must establish a time, not to exceed one year after the state commission approves the relinquishment, within which such purchase or construction by the remaining ETC or ETCs must be completed.<sup>15</sup> The same ETC relinquishment procedure is also required of the Commission in instances where a carrier is not subject to the jurisdiction of a state commission.

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<sup>8</sup> 47 U.S.C. § 254(e).

<sup>9</sup> 47 U.S.C. § 214(e)(1). The “service area” is the geographic area established by the state commission for the purposes of determining universal service support obligations and support mechanisms. 47 U.S.C. § 214(e)(5). In the case of an area served by a rural carrier, “service area” means such company’s “study area” unless and until the Commission and the States, after taking into account the recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company. *Id.*; *see infra* paras. 49-53.

<sup>10</sup> 47 U.S.C. § 214(e)(2). We note that the Commission has authority for performing ETC designations for carriers that are not “subject to the jurisdiction of a State commission” pursuant to 214(e)(6). 47 U.S.C. § 214(e)(6). The Commission’s requirements for ETC designations in section 214(e)(6) parallel the states’ requirements for ETC designations in section 214(e)(2). *Id.*

<sup>11</sup> 47 U.S.C. § 214(e)(2).

<sup>12</sup> *See* 47 U.S.C. § 214(e)(4).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

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

**B. Discussion**

**1. Federal Guidelines for ETC Designations**

9. We recommend that the Commission adopt permissive federal guidelines for states to use when determining whether applicants are qualified to be designated as ETCs under section 214. We believe that guidelines are appropriate because the ETC application and designation process should be one that is rigorous. A rigorous ETC designation process should ensure that only fully qualified applicants receive designation as ETCs and that ETC designees are prepared to serve all customers within the designated service area. Additionally, a core set of minimum qualifications would allow for a more predictable application process among the states. We believe that our recommended guidelines would assist states in determining whether or not the public interest would be served by a carrier's designation as an ETC. We also believe that guidelines should improve the long-term sustainability of the fund, as only fully qualified carriers that are capable of, and committed to, providing universal service would be able to receive support.

10. We believe that federal guidelines concerning ETC qualifications should be flexible and non-binding on the states. Under our recommendation, state commissions would retain their rights to determine eligibility requirements for designating ETCs. Each state commission will be uniquely qualified to determine its own ETC eligibility requirements as the entity most familiar with the service area for which ETC designation is sought. Because these guidelines would be permissive, we reject the parties' arguments suggesting that such guidelines would restrict the lawful rights of states to make ETC

[REDACTED]

12. In recommending federal guidelines, we reject the arguments of some commenters that the current ETC criteria should not be expanded.<sup>20</sup> Instead, we believe that a specific, fact-intensive inquiry is the appropriate way to analyze the public interest when evaluating an ETC application for a rural area. For example, some commissions have cited generalized benefits of competition when evaluating ETC applications. While this may be appropriate, we do not believe that such an analysis is sufficient by itself. Section 214(e)(2) requires states to undertake a fact-intensive analysis to ensure that the designation of any additional ETCs will promote the goals set forth in section 254 of the Act in the affected area. We discuss below some of the factors states may choose to consider in conducting this fact-intensive inquiry.

13. We believe that adopting a core set of minimum qualifications will promote a predictable application process across states and provide certainty for states in terms of what guidelines may be appropriate to consider in the public interest analysis. Many commenters, including incumbent LECs and their competitors, support this goal and achieving this goal should benefit incumbent LECs and competitors alike.<sup>21</sup> Permissive guidelines will enable state commissions, when evaluating ETC designation requests, to evaluate section 214(e)(2) petitions in light of at least a minimum set of criteria. We agree with the commenters that permissive guidelines could improve consistency in the treatment of requests for ETC status.<sup>22</sup> However, the goal of predictability will be promoted if states and the Commission both apply similar guidelines. Thus, we strongly encourage the adoption of the proposed guidelines. Guidelines should also help address arguments about what is appropriate for states to consider as part of the public interest analysis.

**a. Applicability of Guidelines**

14. We recommend that state commissions apply these permissive federal guidelines in all ETC

convenience, and necessity. We believe this statutory requirement demonstrates Congress's intention that state commissions evaluate local factual situations in ETC cases and exercise broad discretion in reaching their ultimate conclusion regarding the public interest, convenience and necessity. This view is also consistent with the ruling of the Fifth Circuit in *TOPUC v. FCC*, which held that states may impose their own eligibility requirements beyond those listed in section 254(b)(1).<sup>27</sup>

16. We also believe that applying the permissive federal guidelines to all state ETC proceedings will best promote federal universal service goals found in section 254(b). While Congress delegated to individual states the right to make ETC decisions, collectively these decisions have national implications. They affect not only the dynamics of competition in the areas subject to the proceedings, but also the national strategies of new entrants. They also affect the overall size of the federal fund. We anticipate that the adoption of recommended federal guidelines would facilitate results that are fully consistent with the goals of section 254. In addition, broadly applied recommended federal guidelines would be most likely to ensure designation of carriers that are: financially viable, likely to remain in the market, willing and able to provide the supported services throughout the designated service area, able to be the sole ETC in a service area if all other ETCs relinquish their designations, and able to provide consumers an evolving level of universal service.

17. Rigorous review of ETC applications assumes added importance in areas served by rural carriers. The Act contains added requirements in these cases. Although Congress provided that states *shall* designate more than one ETC in areas served by non-rural carriers (provided such designation is consistent with the public interest, convenience, and necessity), the Act provides that states *may* designate multiple ETCs in areas served by rural carriers — thereby suggesting that states have greater discretion when evaluating applications for designation in rural carrier service areas.<sup>28</sup> In addition, before a state may designate an additional ETC in an area served by a rural carrier, the state must affirmatively find the designation to be in the public interest.<sup>29</sup> In establishing these additional statutory protections, we believe that Congress intended state commissions to exercise a higher level of scrutiny when evaluating ETC applications for designations in rural carrier service areas.<sup>30</sup> Permissive federal guidelines for minimum eligibility should assist states in effectuating that higher level of scrutiny in areas served by rural carriers.

18. The characteristics of many rural carrier service areas also support a more rigorous standard of eligibility. Rural carrier service areas often have low customer densities and high per-customer costs. Subsidies flowing from federal and state universal service funds are often substantial. The Rural Task Force in White Paper #2 documented these effects and explained that rural carriers serve areas with lower population and line density and serve a smaller proportion of business customers.<sup>31</sup> These circumstances support our belief that state commissions should apply a particularly rigorous standard to the minimum

<sup>27</sup> See *TOPUC v. FCC*, 183 F.3d at 418.

<sup>28</sup> 47 U.S.C. § 214(e)(2). See also *TOPUC v. FCC*, 183 F.3d at 418. We note that the Arkansas Telecommunications Regulatory Reform Act of 1997 states that for purposes of the Arkansas state universal service fund and the federal universal service fund, there “shall be only one. . . [ETC] which shall be the incumbent [LEC] that is a rural telephone company. . .” See Act 77 of 1997, Senate Bill 54, 81st General Assembly, Regular Session, codified at Ark. Code. Ann. § 23-17-405(d)(1).

<sup>29</sup> 47 U.S.C. § 214(e)(2).

<sup>30</sup> In its comments, OPASTCO argues that Congress recognized in section 214(e)(2) of the Act that supporting competition would not always serve the public interest in areas served by rural telephone companies. See OPASTCO Comments at 40-41.

<sup>31</sup> The Rural Difference, Rural Task Force, White Paper 2, January 2000, at 9-11 (*RTF White Paper*).

qualifications of applicants seeking ETC designation in rural carrier service areas.<sup>32</sup>

### ~~Existing Minimum Eligibility Requirements~~

19. Before suggesting new minimum eligibility requirements, we begin with a review of the requirements for designation of ETCs as specified by section 214(e)(1) of the Act. First, a common carrier designated as an ETC must offer the services supported by the federal universal service mechanisms throughout the designated service area.<sup>33</sup> The ETC must offer such services either using its own facilities or a combination of its own facilities and resale of another carrier's services.<sup>34</sup> The services that are supported by the federal universal service support mechanisms are defined as: (1) voice grade access to the public switched network;<sup>35</sup> (2) local usage;<sup>36</sup> (3) Dual Tone Multifrequency (DTMF) signaling or its functional equivalent;<sup>37</sup> (4) single-party service or its functional equivalent;<sup>38</sup> (5) access to

emergency services, including 911 and enhanced 911;<sup>39</sup> (6) access to operator services;<sup>40</sup> (7) access to interexchange services;<sup>41</sup> (8) access to directory assistance;<sup>42</sup> and (9) toll limitation for qualifying low-

<sup>32</sup> We also recognize that there are rural communities that are served by non-rural carriers. See *RTF White Paper* at 8 (stating that both rural and non-rural carriers service rural communities).

<sup>33</sup> 47 U.S.C. § 214(e)(1)(A).

<sup>34</sup> *Id.* An entity that offers the supported services exclusively through resale shall not be designated as an ETC. See 47 C.F.R. § 54.201(i).

<sup>35</sup> "Voice grade access" is defined as a "functionality that enables a user of telecommunications services to transmit voice communications, including signaling the network that the caller wishes to place a call, and to receive voice communications, including receiving a signal indicating there is an incoming call." For the purposes of Part 54, bandwidth for voice grade access should be, at a minimum, 300 to 3,000 Hertz. 47 C.F.R. § 54.101(a)(1).

<sup>36</sup> "Local usage" means an "amount of minutes of use of exchange service, prescribed by the Commission, provided free of charge to end users." 47 C.F.R. § 54.101(a)(2).

<sup>37</sup> "Dual tone multi-frequency" (DTMF) is defined as a "method of signaling that facilitates the transportation of

income customers.<sup>43</sup> Second, throughout the service area for which designation is received, the ETC must advertise the supported services and the charges therefore using media of general distribution.<sup>44</sup> Pursuant to section 214(e)(1)(B), an ETC is required to advertise the availability and prices charged for the services that are supported by federal universal service support.<sup>45</sup> An ETC must also advertise the availability of Lifeline and Link Up services in a manner reasonably designed to reach those likely to qualify for those services.<sup>46</sup>

20. While section 214(e)(1) requires an ETC to “offer” the services supported by the federal universal service support mechanisms, the Commission has determined that this does not require a competitive carrier to actually provide the supported services throughout the designated service area before designation as an ETC.<sup>47</sup> In the *Section 214(e) Declaratory Ruling*, the Commission concluded that interpreting section 214(e)(1)(A) to require the provision of service throughout a service area before ETC designation prohibits, or has the effect of prohibiting, the ability of competitive carriers to provide telecommunications service, in violation of section 253(a).<sup>48</sup> The Commission found that such an interpretation of section 214(e)(1) is not competitively neutral, consistent with section 254, or necessary to preserve and advance universal service. In addition, the Commission concluded that such a requirement conflicts with section 214(e) and stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress as set forth in section 254.<sup>49</sup> Consequently, the Commission concluded that requiring the provision of service throughout the service area before designation would effectively preclude designation of new entrants as ETCs in violation of the intent of Congress.

**c. Additional Minimum Eligibility Requirements**

21. For the reasons stated above, we recommend that state commissions consider the additional minimum qualifications listed below when evaluating ETC designation requests.

<sup>43</sup> “Toll limitation” means either toll blocking or toll control for ETCs that are incapable of providing both services.

**(i) Adequate Financial Resources**

22 We recommend that the Commission adopt guidelines encouraging states to evaluate whether

ETC applicants have the financial resources and ability to provide quality services throughout the designated service area. We believe that it would neither be prudent nor serve the public interest if a financially unsound carrier is designated as an ETC, receives universal service support and yet is still unable to achieve long-term viability that is sufficient to sustain its operations. In order to provide guidance in this area, we recommend that the Commission seek to further develop the record on the ways in which state commissions may determine whether an ETC applicant has adequate financial resources. Long-term viability can be based, for example, on plans that tie investment to customer growth and demands. In this regard, we note that the Commission has held that a new entrant "cannot reasonably be expected to be able to make the substantial financial investment required to provide the supported services in high-cost areas without some assurance that it will be eligible for federal universal service support" and "[i]n fact, the carrier may be unable to secure financing or finalize business plans due to uncertainty surrounding its designation as an ETC."<sup>50</sup>

**(ii) Commitment and Ability to Provide the Supported Services**

23. We recommend that the Commission adopt a guideline encouraging state commissions to require ETC applicants to demonstrate their capability and commitment to provide service throughout the designated service area to all customers who make a reasonable request for service. States should require a demonstration of capability and commitment because this will help them ensure that an ETC applicant is willing and able to provide the supported services throughout the designated service area and to be the sole ETC in a service area if the incumbent LEC relinquishes its designation. States should have flexibility in implementing this guideline.

24. State commissions may choose to implement this requirement, for example, by requiring a formal build-out plan for areas where facilities are not yet built out at the time the ETC application is considered. State commissions have examined ETC applicants' plans to serve new customers and build out their networks in a variety of ways. For example, the Arizona Corporation Commission (Arizona Commission) has evaluated an ETC's plans to assist potential customers to receive service by employing various technical means.<sup>51</sup> The Arizona Commission noted that the ETC had been operating for nearly ten years and had worked with five Native American tribes to secure adequate cell sites on Native

through a variety of measures including additional cell sites, cell extenders, rooftop antennae, high-powered phones, and the resale of existing service; and was willing to address a customer's request for service by developing a schedule for extending service.<sup>54</sup> The Regulatory Commission of Alaska (Alaska Commission) recently granted ETC status to a commercial mobile radio services (CMRS) provider and stated that the provider need not prove its ability to build facilities throughout every portion of the incumbent LEC's service area but must demonstrate that its methods of providing service throughout the incumbent LEC's service area are reasonable.<sup>55</sup> The Alaska Commission found reasonable a seven-step plan that Alaska Digitel proposed for serving customers.<sup>56</sup>

25. In the Minnesota proceeding discussed above, the Minnesota ALJ examined the cost of equipment as another way to determine whether the carrier was willing and able to compete for local exchange service as an ETC.<sup>57</sup> Specifically, the ALJ determined that the cost of installation and customer premises equipment necessary to provide the ETC applicant's basic universal service package should be considered as part of this analysis. The ALJ found that the cost of this equipment to the consumer is relevant in determining whether a carrier has a bona fide intent to compete for local exchange service. Further, the ALJ determined that the ETC applicant's commitment to provide the necessary equipment at little or no cost was driven by a desire to compete for local service.

26. State commissions may also choose to require competitive ETCs to explore the possibility of serving customers through the resale of another carrier's service. If an ETC receives a reasonable request for service and yet is unable to extend its network to meet the request, it still has the option of serving that customer through resale. States have discretion to require ETC applicants to incorporate resale in their plans to serve all customers upon reasonable request as a condition of ETC designation. The commitment to incorporate resale into such plans may demonstrate an applicant's capability and commitment to providing service. We note that, while section 214(e)(1) permits an ETC to offer the services supported by universal service using its own facilities, or a combination of its own facilities and resale, ETCs may

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<sup>54</sup> See *Minnesota Midwest Wireless ETC Order* at 6.

<sup>55</sup> See *Alaska Digitel ETC Order* at 8-9. A "commercial mobile service" is defined as any mobile service that is provided for profit and makes interconnected service available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission. 47 U.S.C. § 332(d)(1). A "mobile service" is defined as a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes: (1) both one-way and two-way radio communication services; (2) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed as an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation; and (3) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" or any successor proceeding. 47 U.S.C. § 153(27).

<sup>56</sup> See *Alaska Digitel ETC Order* at 8-9. The plan states that if a customer is not in an area where the CMRS provider, Alaska Digitel, currently provides service, Alaska Digitel will: (1) Determine whether the customer's equipment can be modified or replaced to provide acceptable service; (2) Determine whether a roof-mounted antenna or other network equipment can be deployed at the premises to provide service; (3) Determine whether adjustments at the nearest cell site can be made to provide service; (4) Determine whether a cell extender or repeater can be employed to provide service; (5) Determine whether there are any other adjustments to network or customer facilities that can be made to provide service; (6) Explore the possibility of resale; and (7) Determine whether an additional cell site can be constructed to provide services, and evaluate the costs and benefits of using high cost support to serve the number of customers.

<sup>57</sup> See *Minnesota ALJ ETC Recommendation* at 14-15.

not provide such services solely through resale.<sup>58</sup> A state commission is not authorized to designate as an ETC a carrier that offers the supported services solely through the resale of another carrier's services.<sup>59</sup>

27. States should determine, pursuant to state law, what constitutes a "reasonable request" for service. Once designated as an ETC, a new entrant is required, as the incumbent LEC is required, to serve new customers upon reasonable request.<sup>60</sup> For example, as part of the seven-step plan in the *Alaska Digital ETC Order*, if the ETC finds that it is unable to provide service to a customer short of constructing a new cell site, the ETC will report that to the Alaska Commission, providing the cost of construction, its position on whether the request for service is reasonable and whether high-cost funds should be expended

for the request.<sup>61</sup> The Alaska Commission found that the ETC applicant's plan was a reasonable means

[REDACTED]

stated that it believed that any determination regarding equal access would be premature because of the scope of the instant proceeding.<sup>67</sup> It deferred consideration of the equal access issue pending resolution of this proceeding.<sup>68</sup> As discussed below, we decline to recommend that the Commission modify the basis of support in areas served by multiple ETCs at this time, but recommend that the Joint Board and the Commission continue to consider possible modifications to the basis of support in a broader context.<sup>69</sup> We make no recommendation as to whether to include equal access in the definition of universal service at this time.

29. We recommend that the Commission clarify its decision in the *Western Wireless Kansas CMRS Order*.<sup>70</sup> In that order, the Commission determined that Western Wireless' Basic Universal Service (BUS) offering in Kansas was a CMRS service and therefore, the Kansas Corporation Commission was preempted from regulating BUS entry or rates and from requiring equal access for telephone toll services.<sup>71</sup> We believe that this case could be interpreted as precluding states from imposing equal access requirements on CMRS carriers under any conditions. We believe, however, that section 332(c)(8) may be interpreted differently, and we recommend that the Commission clarify what it intended. For example, in a separate proceeding some parties argued that section 332(c)(8) of the Act does not prevent the Commission from requiring CMRS providers to provide equal access in order to receive universal service funds.<sup>72</sup> They argued that section 332(c)(8) only prevents the Commission from requiring CMRS carriers to provide equal access as a general condition of mobile service.<sup>73</sup>

### (iii) Ability to Remain Functional in Emergencies

30. We recommend that the Commission adopt a guideline encouraging states to require ETC applicants to demonstrate the ability to remain functional in emergency situations. We believe this to be an important guideline because as noted by at least one commenter, the "security of a carrier's network and the ability to protect critical telecommunications infrastructure should be a major consideration in evaluating the public interest."<sup>74</sup> We recommend that the Commission further develop the record on specific requirements state commissions may choose to consider in evaluating an ETC applicant's ability to remain functional in emergencies. For example, the State of Vermont Public Service Board (Vermont Commission), in analyzing the public interest in an ETC proceeding, recently examined an ETC applicant's ability to remain functional in emergencies.<sup>75</sup> The Vermont Commission made a detailed factual finding about the applicant's technical capabilities to remain functional in emergencies, as well as

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See *infra* discussion at Part IV.

<sup>70</sup> *Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas Is Subject to Regulation as Local Exchange Service*, Memorandum Opinion and Order, WT-Docket No. 00-239, 17 FCC Rcd 14802 (2002) (*Western Wireless Kansas CMRS Order*).

<sup>71</sup> *Id.* at 14820, para. 34.

<sup>72</sup> *Definitions Order*, 18 FCC Rcd at 15103, para. 31.

<sup>73</sup> *Id.*

<sup>74</sup> OPASTCO Comments, Attachment at 35.

<sup>75</sup> See *Vermont Unicef ETC Order* at 12-13.

the applicant's track record for maintaining its network in a power outage.<sup>76</sup> Additionally, the Public Utility Commission of Texas (Texas Commission), as a condition of receiving universal service support, required an ETC to provide a minimum of four hours of battery reserve without voltage falling below the level required for proper operation of all equipment.<sup>77</sup>

(iv) **Consumer Protection**

31. We recommend that the Commission adopt a guideline indicating that state commissions may properly impose consumer protection requirements as part of the ETC designation process. We believe that imposing consumer protection requirements as part of the ETC designation process may be consistent with "the public interest, convenience and necessity" to ensure that consumers are able to receive an evolving level of universal service.<sup>78</sup> Any consumer protection requirements imposed on ETCs should further the universal service goals contemplated in section 254(b) of the Act, and should not be imposed merely for the sake of regulatory parity.<sup>79</sup>

32. State commissions have imposed various consumer protection requirements as a condition of granting a request for ETC designation. The Vermont Commission, for example, has subjected ETCs to its rules regarding disconnections and treatment of customer deposits as a condition of ETC designation.<sup>80</sup> Similarly, as a condition of receiving ETC designation, the Arizona Commission required a wireless carrier to submit consumer complaints "arising from its offering as an ETC."<sup>81</sup> In extending consumer protection requirements to competitive ETCs as a condition of granting ETC designations, state commissions have noted that states are free to impose their own eligibility requirements in making ETC determinations, consistent with the Fifth Circuit's interpretation of the Act.<sup>82</sup>

33. We reject arguments that subjecting competitive ETCs, particularly wireless competitive

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<sup>76</sup> *Id.* ("RCC provides most cell sites with backup power to maintain the continuity of its service in the event its main power supply goes down. RCC uses batteries that provide between two to three hours of power backup. RCC also equips hub cell sites . . . or remote cell sites with additional power backup from a propane or diesel generator, which extends the power backup to at least 12 hours. RCC maintains a large diesel generator at its switch location in Colchester, Vermont, that will provide up to two days of extended power backup before requiring refueling. The power backup facilities enable RCC to maintain its wireless network, including its 911 service, even in the event of a sustained power outage. RCC demonstrated its ability to maintain its network during the 1998 ice storm, with its resultant extended power and landline-telephone-service outages, when RCC kept a majority of its cell sites and switch operational, served as the primary line of communications for public-safety personnel, and donated numerous cell phones to the National Guard, Red Cross and the State Police to ensure those organizations maintained critical lines of communications.").

<sup>77</sup> See *Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier Pursuant to 47 U.S.C. § 214(e) and PUC Subst. R. 26.418*, PUC Docket No. 22289, SOAH Docket No. 473-00-1167, Order at 25 (Tex. Pub. Util. Comm'n Oct. 30, 2000) (*Texas WWC ETC Order*).

<sup>78</sup> See 47 U.S.C. § 254(c).

<sup>79</sup> 47 U.S.C. § 254(b).

<sup>80</sup> *Vermont Unicel ETC Order* at 74.

<sup>81</sup> *Arizona Smith Bagley ETC Order* at 14 (finding that Smith Bagley's ETC designation application should be granted subject to the condition that the carrier submit consumer complaints arising from its offering as an ETC to the Arizona Commission's Consumer Service Division and provide a regulatory contact).

<sup>82</sup> *Vermont Unicel ETC Order* at 23-34; *Arizona Smith Bagley ETC Order* at 12-14.

ETCs, to consumer protection requirements is inconsistent with section 332 of the Act.<sup>83</sup> While section 332(c)(3) of the Act generally preempts states from regulating the rates and entry of CMRS providers, it specifically allows states to regulate the other terms and conditions of commercial mobile services.<sup>84</sup> Accordingly, while wireless competitive ETCs, for example, otherwise may not be subject to state consumer protection requirements, we believe that states may extend generally applicable requirements to all ETCs in order to preserve and advance universal service, consistent with sections 214 and 254 of the Act.<sup>85</sup> In addition, seeking ETC designation is a choice. We therefore agree with commenters that preemption from state regulation afforded under section 332 of the Act should not be equated with conditions that apply only to carriers that choose to seek ETC designation and universal service support.<sup>86</sup>

34. Even if some ETCs, including CMRS carriers, otherwise would not be subject to state consumer protection requirements, states may extend generally applicable requirements to all ETCs to ensure that universal service goals are met. Our recommendation here, however, is not that competitive ETCs should be required to comply with all of the standards imposed on wireline incumbent LECs as some commenters have proposed.<sup>87</sup> States should not require regulatory parity for parity's sake. Rather, requirements should be imposed on ETCs only to the extent necessary to further universal service goals, including the provision of high-quality service throughout the designated service area.

**(v) Local Usage**

35. Consistent with the requirement that ETCs offer local usage, states may consider how much local usage ETCs should offer as a condition of federal universal service support. In the *First Universal Service Report and Order*, the Commission determined that ETCs should provide some minimum amount of local usage as part of their "basic service" package of supported services.<sup>88</sup> Thus, local usage is one of the supported services that ETCs are required to provide in order to receive federal universal service support. Although the Commission has not set a minimum local usage requirement, there is nothing in the Act, Commission's rules, or orders that would limit state commissions from prescribing some amount of local usage as a condition of ETC status. As determined by the Fifth Circuit in *TOPUC v. FCC*, states may establish their own eligibility requirements for ETC applicants.<sup>89</sup> In fact, in recently deciding that

<sup>83</sup> Western Wireless Reply Comments at 45-47; Rural Cellular Ass'n/Alliance of Rural CMRS Carriers Comments at 18.

<sup>84</sup> See 47 U.S.C. § 332(c)(3). Additionally, section 332(c)(3) of the Act also states that "[n]othing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications services at affordable rates." We note, however, that at this time, although they may reach this level in the future, commercial mobile services are not yet known to be a substitute for a substantial portion of communications in any state.

<sup>85</sup> 47 U.S.C. §§ 214, 254.

<sup>86</sup> See, e.g., CenturyTel Reply Comments at 7-9; Nebraska Rural Indep. Cos. Comments at 30; OPASTCO Reply Comments at 27-28.

<sup>87</sup> See, e.g., CenturyTel Reply Comments at 6-8; OPASTCO Reply Comments at 25-28; USTA Comments at 14.

<sup>88</sup> See *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776, 8812-14 (1997) (*First Universal Service Report and Order*) (subsequent history omitted). Although the Commission's rules define "local usage" as "an amount of minutes of use of exchange service, prescribed by the Commission, provided free of charge to end users," the Commission has not specified a number of minutes of use. See 47 C.F.R. § 54.101(a)(2).

<sup>89</sup> See *TOPUC v. FCC*, 183 F.3d at 418.

unlimited local usage should not be added to the list of services supported by federal universal service, the Commission found that the states are in a better position to determine whether unlimited local usage offerings are beneficial in particular circumstances.<sup>90</sup>

36. In considering local usage, states may choose to compare an incumbent LEC's offering of a local calling plan to the local calling plan proposed by the ETC applicant. For example, the Arizona Commission noted an ETC applicant's plan to propose 30 free minutes per month throughout its network, which was a much larger area than the local exchange area provided by the LECs in the same region.<sup>91</sup> The Arizona Commission compared the ETC applicant's calling plan with that of the landline service offerings and determined that based on the size of the calling area, toll calling on the ETC applicant's network would cost the same, or less, as it would on the incumbent LEC's network.<sup>92</sup> It also considered the applicant's plan to provide unlimited free calls to a long list of government, social service, health facilities, educational institutions, and emergency numbers.<sup>93</sup>

## 2. Public Interest Determinations

37. The minimum eligibility requirements recommended above will assist states in ensuring that additional ETCs are able and willing to serve all customers in the designated service area upon reasonable request. Before an additional ETC can be designated, however, the state commission must also determine that the designation is consistent with the public interest, convenience and necessity. Additionally, for areas served by rural carriers, the Act requires a separate finding that designation of an additional ETC is in the public interest. While Congress did not specifically prescribe how these public interest tests would be applied, state commissions and the Commission have developed analyses that address various factors affecting the public interest. These include, but are not limited to, benefits of increased competition and choice and potential harm to consumers. Below, we discuss the statutory public interest requirement, how different states have applied it, and additional factors states may consider in making public interest determinations. Before reaching those factors, however, we make some observations concerning the statutory provisions that apply when an ETC application covers an area served by a rural carrier.

### a. Additional ETCs in Areas Served by Rural Carriers

38. The Joint Board interprets section 214(e)(2) as contemplating use of a higher level of scrutiny for ETC applicants seeking designation in areas served by rural carriers.<sup>94</sup> In these areas, the public interest determination for an additional ETC is subject to two special statutory rules. First, section 214(e)(2) requires states to designate more than one ETC in areas served by non-rural carriers (so long as doing so is "consistent with the public interest, convenience, and necessity"); but it confers discretion on the states to designate more than one ETC in areas served by rural carriers. In these areas, the Act provides that a state commission "may" grant the designation.<sup>95</sup> Also, as noted above, the last sentence of

<sup>90</sup> See *Definitions Order*, 18 FCC Rcd at 15096, para. 14.

<sup>91</sup> *Arizona Smith Bagley ETC Order* at 6.

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section 214(e)(2) requires that before a state designates an additional ETC in an area served by a rural carrier, the state must find the designation to be in the public interest.<sup>96</sup> These two additional requirements demonstrate Congress's recognition that supporting competition might not always serve the public interest in areas served by rural carriers, and Congress' intent that state commissions exercise discretion in deciding whether the designation of an additional ETC serves the public interest. As discussed above, the low customer densities and high per-customer cost characteristics of many rural carrier study areas also support a more rigorous standard of eligibility.<sup>97</sup> Thus, we agree with commenters that section 214(e)(2) provides the state commissions with the obligation and statutory duty to perform an in-depth public interest analysis concerning ETC applications in rural carrier study areas.<sup>98</sup>

**b. Public Interest Considerations**

39. While Congress did not establish specific criteria to be applied under the public interest tests in section 214(e)(2) of the Act, it is clear that the public interest must be analyzed in a manner that is consistent with the purposes and goals of the Act itself.<sup>99</sup> Certain state commissions have already based

their public interest findings on relevant universal service principles. For example, the public interest test performed by the Texas Commission is guided by the fundamental goals of preserving and advancing universal service, and the component goals of ensuring the availability of quality telecommunications services at just, reasonable and affordable rates, and promoting the deployment of advanced telecommunications and information services to all regions of the Nation, including rural and high-cost areas.<sup>100</sup>

40. Several state commissions have considered various additional factors in analyzing the public interest, such as the potential benefits consumers could receive from designation of an additional ETC in a particular area.<sup>101</sup> The elements that the Alaska Commission has considered in determining the public interest include: new choices for customers; affordability; quality of service; service to unserved customers; comparison of benefits to public cost; and considerations of material harm.<sup>102</sup> Similarly, the Commission has considered whether consumers were likely to benefit from increased competition; whether the additional designation will provide benefits not available from incumbent carriers; whether consumers may be harmed should the incumbent withdraw from the service area; and whether there would be harm to a rural incumbent LEC.<sup>103</sup>

41. These commissions have also applied the public interest factors to the particular facts before

them in an ETC proceeding. In evaluating service to unserved customers, the Alaska Commission took

<sup>96</sup> 47 U.S.C. § 214(e)(2).

<sup>97</sup> See *supra* para. 18.

<sup>98</sup> See, e.g., Fred Williamson and Assocs. Comments at 19; OPASTCO Comments at 40-41.

<sup>99</sup> Western Wireless Comments, Attachment E at 7.

<sup>100</sup> See generally *Texas WWC ETC Order*. See also 47 U.S.C. § 254.

<sup>101</sup> See *Alaska Digital ETC Order* at 12.

<sup>102</sup> *Id.* at 12-16.

<sup>103</sup> See, e.g., *Federal-State Joint Board on Universal Service: Western Wireless Corporation Petition for Designation*

note of an ETC's plan to build out six additional cell sites and ability to reach unserved customers in three specific communities if it received ETC designation.<sup>104</sup> The Commission, in evaluating whether an additional designation would provide benefits not available from incumbent carriers, noted that the ETC applicant could offer a wider local calling area than that provided by the rural incumbent LEC and could provide a variety of calling plans to consumers.<sup>105</sup> The Commission determined that such options may make intrastate toll calls more affordable to those consumers.<sup>106</sup> The Commission also evaluated whether there would be harm to the rural incumbent LEC and affected rural consumers by undertaking an extensive cream skimming analysis.<sup>107</sup> Based on the analysis, the Commission determined that the ETC applicant would not be serving only low-cost areas at the exclusion of any high-cost areas.<sup>108</sup>

42. We disagree with commenters who contend that we should encourage states to adopt a specific cost-benefit test for the purpose of making public interest determinations.<sup>109</sup> Several commenters propose that state commissions should more explicitly balance the benefits of granting an ETC application (e.g., enhancement of competition, extension of service to previously unserved areas, or introduction of mobile services) against the costs (e.g., impact of supporting multiple ETCs on fund growth).<sup>110</sup> While we agree that a consideration of both benefits and costs is inherent in conducting a

public interest analysis, we decline to provide any more specific guidance on how this balancing should be performed. We believe that the difficulty of quantifying and weighing the various factors that may be relevant to determining the public interest militate against attempting to create a rigid formula for balancing costs and benefits.

43. We believe, however, that states making public interest determinations may properly consider the level of federal high-cost per-line support to be received by ETCs.<sup>111</sup> High-cost support is an explicit subsidy that flows to areas with demonstrated levels of costs above various national averages. Thus, one relevant factor in considering whether or not it is in the public interest to have additional ETCs designated in any area may be the level of per-line support provided to the area. If the per-line support level is high enough, the state may be justified in limiting the number of ETCs in that study area, because funding multiple ETCs in such areas could impose strains on the universal service fund. Moreover, if the Commission were to cap per-line support upon entry of a competitive ETC and impose a primary-connection restriction, as discussed below, designating an excessive number of ETCs could dilute the amount of support available to each ETC to the point that each carrier's ability to provide universal service might be jeopardized. State commission consideration of high-cost support on a dollar per line basis would allow equivalent comparison of support among study areas. Per-line support is a single "marker" that encompasses various underlying factors that may impact the determination of whether it is in the public interest to have an additional subsidized carrier entering a carrier's study area. Many factors

may all affect the level of high-cost support received in an individual study area. High-cost support is also a concrete, objective, transparent, and readily obtainable factor that may help state commissions avoid generalized or abstract arguments about the harms or benefits of additional ETCs.<sup>112</sup>

44. Although we believe that state commissions may consider the amount of per-line support as part of the public interest analysis, we decline to adopt specific benchmarks based on per-line support to guide the states' public interest determinations. We are concerned that any benchmark we recommend would be arbitrary. We do, however, recommend that the Commission solicit comment on whether such national benchmarks merit additional consideration. We recommend that the Commission solicit comment on the basis, calculation, practical impact, and examples of any proposed benchmarks based on per-line support.

45. We also recommend that the Commission seek comment on the applicability of the proposed designation guidelines to ETCs that have already been designated. We believe states (and the Commission) already possess the authority to rescind ETC determinations for failure to comply with the requirements of Section 214(e) of the Act and any other conditions imposed by the state.<sup>113</sup> The Commission should provide guidance on whether states choosing to apply the new federal guidelines to currently designated competitive ETCs should also rescind the designation of a previously designated competitive ETC if the state finds that the competitive ETCs designation no longer serves the public interest. We believe the Commission should also consider if it would be beneficial to issue guidance on whether states should allow ETCs some reasonable transition period to bring their operations into compliance with any new state ETC requirements. Alternatively, the Commission may wish to consider whether ETC designation for competitive carriers could be grandfathered for some period of time to avoid significant market disruptions.

### 3. Annual Certification Requirement

46. We recommend that the Commission encourage states to use the annual certification process for all ETCs to ensure that federal universal service support is used to provide the supported services and for associated infrastructure costs. We make this recommendation in order to ensure the accountability of

all ETCs for proper use of funds. Annual review provides states the opportunity for periodic review of ETC fund use.<sup>114</sup> Additionally, we continue to believe that the state certification process provides the most reliable means of determining whether carriers are using support in a manner consistent with section

254.<sup>115</sup>

47. States should use the annual certification process to ensure that federal universal service

<sup>112</sup> Line counts and support amounts for each study area served by rural carriers are published quarterly by the Universal Service Administrative Company (USAC).

<sup>113</sup> See *Section 214(e) Declaratory Ruling*, 15 FCC Rcd at 15174, para. 15. By this Recommended Decision, it is not the intent of the Joint Board to limit the discretion possessed by states and the Commission to review and rescind previous ETC determinations.

<sup>114</sup> See *Federal-State Joint Board on Universal Service*, Ninth Report and Order and Eighteenth Order on Reconsideration, CC Docket No. 96-45, 14 FCC Rcd 20432, 20482-83, para. 95 (1999) (*Ninth Report and Order*) (stating that accountability for the use of federal funds in the state ratemaking process is an appropriate mechanism to ensure that non-rural carriers use high-cost support for the provision, maintenance and upgrading of facilities and services for which the support is intended); see also *Rural Task Force Order*, 16 FCC Rcd at 11317-18, para. 187 (anticipating that states would take the appropriate steps to account for the receipt of high-cost support and ensure

support is used to provide the supported services and for associated infrastructure costs. States should examine compliance with build-out plans. Some commenters also suggest that states should consider instituting reporting requirements and conducting audits on all ETCs.<sup>116</sup> States could implement regulatory provisions similar to those in Alaska where the competitive ETC is required to make the same filing that the rural carriers makes through the Alaska Commission's annual use-of-funds certification process.<sup>117</sup> As a condition of ETC status, the Public Service Commission of West Virginia required a competitive carrier to file annual certifications including the amount of support it received in the year and a statement of how such funds were spent or invested.<sup>118</sup> The Minnesota Commission requires ETCs to file affidavits, additional documentation pertaining to the amount of federal high-cost support received for the prior year, and the ETC's operational and capital expenditures.<sup>119</sup> These are merely examples of what a state commission's annual certification requirement may entail. State commissions will, of course, have the flexibility to adopt certification requirements that are appropriate for their state and the particular service area in which an ETC is designated.<sup>120</sup>

48. Where an ETC fails to comply with requirements in section 214(e) and any additional requirements proposed by the state commission, the state commission may decline to grant an annual certification or may rescind a certification granted previously.<sup>121</sup> Several states have already adopted such requirements in their ETC designation processes. The Alaska Commission required a competitive ETC to file an annual certification in order to monitor the continued appropriate use of funds.<sup>122</sup>

#### **4. Service Area Redefinition Process/Rural Carrier Disaggregation of Support**

49. In this subsection, we review the service area redefinition process for areas served by rural carriers and assess the impact that disaggregation and targeting of support has on that process. We begin by reviewing service area redefinition procedures. Section 214(e)(5) of the Act provides that states may establish geographic service areas within which ETCs are required to comply with universal service obligations and are eligible to receive universal service support.<sup>123</sup> However, the Act states that for an area served by a rural carrier, a company's service area for the purposes of ETC designation will be the rural carrier's study area "unless and until the Commission and the States, after taking into account the

standards for determining ETC service areas depending on whether a rural or non-rural carrier's study area is involved.

50. In the *First Recommended Decision*, the Joint Board generally recommended that the Commission retain the study areas of rural telephone companies as the service areas for ETCs. The Joint Board provided three reasons for its recommendation: (1) the potential for "cream skimming" is minimized by retaining study areas because competitors, as a condition of eligibility, must provide services throughout the rural carrier's study area; (2) the 1996 Act, in many respects, places rural carriers on a different competitive footing from other local exchange companies; and (3) there would be an administrative burden imposed on rural carriers by requiring them to calculate costs at something other than the study area level.<sup>125</sup>

51. In response to the Joint Board's recommendations, the Commission agreed that, at that time, the study areas of rural telephone companies should be retained as the rural carrier service areas.<sup>126</sup> However, the Commission also discussed the state commissions' authority to redefine the service area served by a rural carrier and adopted rules providing the process for service area redefinition.<sup>127</sup> Section 54.207(c) of the Commission's rules provides the mechanism by which a state commission may propose to redefine a rural carrier's service area for purposes of determining universal service obligations and support mechanisms.<sup>128</sup> Section 54.207(c)(3) provides that the Commission may initiate a proceeding to

52. In the *First Universal Service Report and Order*, the Commission also interpreted the language in Section 214(e)(5) of the Act requiring state commissions and the Commission to take into account the recommendations of the Joint Board.<sup>133</sup> The Commission concluded that this language indicates that the states and the Commission must give full consideration to the Joint Board's recommendations on service area redefinition and must explain why they are not adopting the recommendations of the Joint Board.<sup>134</sup> When proposing to redefine service areas, state commissions and the Commission have considered the Joint Board's recommendations in the *First Recommended Decision* and evaluated the Joint Board's reasons for recommending that the Commission retain the study area of a rural carrier as the service area.<sup>135</sup> Therefore, when proposing to redefine rural carrier service areas, state commissions and the Commission have analyzed the potential for cream skimming as a result of the proposed redefinition.<sup>136</sup>

53. In evaluating whether a service area redefinition will provide opportunities for cream skimming, some state commissions and the Commission have considered, among other things, whether universal service support in the affected rural service area has been disaggregated.<sup>137</sup> In the *Rural Task Force Order*, the Commission determined that support should be disaggregated and targeted below the study area level to eliminate uneconomic incentives for competitive entry caused by the averaging of support across all lines served by a carrier within its study area.<sup>138</sup> Under disaggregation and targeting, per-line support is more closely associated with the cost of providing service.<sup>139</sup> In the *Rural Task Force Order*, the Commission also concluded that one of the factors the state commissions should consider in determining whether to certify new ETCs for a service area other than the entire study area of a rural carrier is the level of disaggregation.<sup>140</sup>

54. The provisions contained in the *Rural Task Force Order* for disaggregation and targeting of universal service support may help alleviate some concerns regarding cream skimming. Permitting rural carriers to disaggregate and target universal service support allows them to direct universal service support to those zones within the study area where support is most needed. Targeting support in this manner also promotes a better matching of per-line support to the rural carriers' costs of providing

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<sup>133</sup> By its rules the Commission has concluded that the Joint Board referred to in Section 214(e)(5) of the Act is the Federal-State Joint Board on Universal Service. We endorse this interpretation. We do not believe that the Act requires a special Joint Board to be convened every time there is a request for rural service area redefinition. Such an interpretation would obviously be administratively unworkable.

<sup>134</sup> *First Universal Service Report and Order*, 12 FCC Rcd at 8880-81, para. 187.

<sup>135</sup> See, e.g., *Petition of the Minnesota Public Utilities Commission for Agreement to Redefine the Service Areas of Twelve Minnesota Rural Telephone Companies*, CC Docket No. 96-45, filed on August 7, 2003 (*Minnesota Redefinition Petition*); *Petition by the Colorado Public Utilities Commission, Pursuant to 47 C.F.R. § 54.207(c), for Commission Agreement in Redefining the Service Area of Wiggins Telephone Association, A Rural Telephone Company*, CC Docket No. 96-45, filed on May 30, 2003; *RCC Holdings Order*, 17 FCC Rcd at 23547-48, paras. 38-41.

<sup>136</sup> *Id.* See also *Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, FCC 03-338 (rel. Jan. 22, 2004), at paras. 41-42 (*Virginia Cellular ETC Order*).

<sup>137</sup> See, e.g., *RCC Holdings Order*, 17 FCC Rcd at 23544, para. 31; *Minnesota Redefinition Petition* at 11-12.

<sup>138</sup> See *Rural Task Force Order*, 16 FCC Rcd at 11302, para. 145.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 11308-09, para. 164. The Commission stated that it believed that the level of disaggregation should be considered to ensure that competitive neutrality is maintained between incumbents and competitive ETCs. *Id.*

service, and helps reduce the economic distortions that could lead to cream skimming. In a study area with disaggregated support, a competitive ETC designated for a service area smaller than the study area will be limited to receiving only the per-line support established for that area. In many cases, the levels of disaggregated support have been established by the rural carrier itself under "Path 3" disaggregation.<sup>141</sup> Although disaggregation may alleviate some concerns regarding cream-skimming by competitive ETCs, we hesitate to say that it necessarily addresses all concerns. For instance, the Commission has recognized that cream skimming may still be a concern where a competitor proposes to serve only the low-cost areas of a rural carrier's study area to the exclusion of high-cost areas.<sup>142</sup>

55. We continue to endorse the procedures established by the Commission in 1997 for redefinition of rural service areas. These procedures establish a presumption that a rural carrier's study area should be the service area for any ETC unless and until the state and the Commission working in

concert decide that a different service area definition would better serve the public interest.<sup>143</sup> In making this determination, the states and the Commission place the burden of proof upon the ETC applicant. If a service area redefinition is proposed, the existing rules also require the states and the Commission to analyze the Joint Board's previously expressed concerns about cream skimming in the particular area covered by the ETC application.<sup>144</sup> Public comment is invited during every step in this process. Because we believe these rules are working to thoroughly examine public interest concerns inherent in service area redefinition, we do not believe any change is needed in these rules at this time. As with other aspects of the ETC designation process discussed above, we encourage the states and the Commission to conduct a rigorous and fact-intensive analysis of requests for service area redefinition.

### III. SCOPE OF SUPPORT

56. We recommend that the Commission limit the scope of high-cost support to a single connection that provides access to the public telephone network. As discussed below, we believe that supporting a single connection is more consistent with the goals of section 254 than the present system, and is necessary to preserve the sustainability of the universal service fund. We also believe that it would send more appropriate entry signals in rural and high-cost areas and would be competitively neutral. To

flowing to a rural carrier's study area on "primary" or single connections, and on other possible measures. Restating support would avoid any immediate effect on the total amount of high-cost support that a rural carrier receives: its support would be reduced in the future only to the extent that a competitive FTC

forward-looking cost methodology was unnecessary.<sup>152</sup> At the request of the Joint Board and rural carriers, the Commission concluded that it would establish a forward-looking mechanism for non-rural

60. Consistent with the blueprint for universal service reform established in the *First Universal Service Report and Order*, the Commission took action to establish a forward-looking cost mechanism for non-rural carriers in 1999.<sup>154</sup> In May 2001, the Commission adopted a modified embedded cost mechanism for rural carriers for a five-year period.<sup>155</sup> The Commission found that continuing to base high-cost support for rural carriers on embedded costs for five years, rather than attempting to modify the forward-looking high-cost support mechanism for non-rural carriers so that it could be applied to rural carriers, was a reasonable approach to take in light of the record in the proceeding.<sup>156</sup> In so doing, the Commission and the Joint Board recognized that the plan adopted in the *Rural Task Force Order* was an interim plan.<sup>157</sup>

61. The Commission did not adopt the Rural Task Force's specific proposal to freeze per-line high-cost loop support upon competitive entry into a rural carrier study area, concluding that adoption of the proposal was not warranted at that time.<sup>158</sup> The stated purpose of this proposal was to prevent excessive growth in the universal service fund as a result of an incumbent carrier's loss of lines to a

<sup>152</sup> *Id.* In the *First Universal Service Report and Order*, the Commission concluded that, ultimately, universal service support should be based on the forward-looking economic costs of constructing and operating the network used to provide the supported services, rather than embedded costs. The Commission indicated that, as it developed a forward-looking methodology, it would evaluate whether it was appropriate to continue supporting multiple connections for residences and businesses. *Id.* at 8829-30, 8927, 8937, paras. 95-96, 274, 296.

<sup>153</sup> *Id.* at 8934-37, paras. 291-95. The Commission established timeframes for transitioning carriers to a forward-looking cost methodology. Recognizing that, compared to non-rural LECs, rural LECs generally receive fewer

competitive ETC.<sup>159</sup> While the Commission recognized that excessive growth in the fund might be possible during the life of the five-year plan under certain circumstances, it concluded that the likelihood of excessive fund growth due to an incumbent carrier's loss of lines to a competitive ETC in the immediate future was speculative.<sup>160</sup> The Commission, however, indicated its intent to closely monitor these matters, consistent with its obligation under section 254 to maintain a specific, predictable, and sufficient universal service fund.<sup>161</sup>

## B. Discussion

### 1. Supporting a Single Connection Is Consistent With the 1996 Act

62. We believe that limiting the scope of high-cost support to a single connection to the public telephone network would be more consistent with the goals of section 254 than the present system. Supporting a single connection to the public telephone network fulfills the goal of "reasonably comparable" access in all regions of the Nation.<sup>162</sup> Section 254(b)(3)'s objective is that consumers in rural areas have access to rates and services, including advanced services, that are reasonably comparable to those available in urban areas.<sup>163</sup> Supporting a single connection provides access to all of the services included in the definition of universal service under section 254(c), because each ETC is required to provide all of the supported services.<sup>164</sup> Supporting a single connection also provides access to all of the additional telecommunications and information services, including advanced services, available to consumers through the public telephone network.<sup>165</sup> Thus, supporting multiple connections is not necessary to achieve reasonably comparable access in rural areas. Supporting a single connection faithfully accomplishes this objective.<sup>166</sup>

63. We disagree with commenters who argue that supporting a single point of access is

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<sup>159</sup> *Id.* at 11294, para. 125.

<sup>160</sup> *Id.* at 11294, 11325-26, paras. 123-24, 207 ("[A]s an incumbent "loses" lines to a competitive eligible telecommunications carrier, the incumbent must recover its fixed costs from fewer lines, thus increasing its per-line costs. With higher per-line costs, the incumbent would receive greater per-line support, which would also be available to the competitive eligible telecommunications carrier for each of the lines that it serves. Thus, a substantial loss of an incumbent's lines to a competitive eligible telecommunications carrier could result in excessive fund growth.").

<sup>161</sup> *Id.* at 11297-98, para. 131.

<sup>162</sup> 47 U.S.C. § 254(b)(3).

<sup>163</sup> *Id.*; *see also id.* at § 254(b)(2) ("Access to advanced telecommunications and information services should be provided in all regions of the Nation.").

<sup>164</sup> *Id.* at § 254(c); *see id.* at § 214(e)(1)(A).

<sup>165</sup> *See Rural Task Force Order*, 16 FCC Rcd at 11322, para. 200 ("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."); *see also Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review - Review of Computer III and ONA Safeguards and Requirements*, Notice of Proposed Rulemaking, CC Docket Nos. 02-33, 95-20, 98-10, 17 FCC Rcd 3019, 3025-26, para. 11 n.19 (2002) ("With the addition of certain electronics to the telephone line, carriers can transform the copper loop that already provides voice service into a conduit for high-speed traffic.").

<sup>166</sup> *See First Recommended Decision*, 12 FCC Rcd at 132-33, para. 89 ("We conclude that support for a single residential connection will permit a household complete access to telecommunications and information services.").

inconsistent with section 254(b)(3) because rates might rise for second lines, which are often used for access to information services such as dial-up Internet access or fax services.<sup>167</sup> We recognize, of course, that supporting multiple connections is advantageous to consumers in high-cost areas. Section 254(b)(3) encourages access to connectivity, however, not unlimited connections at supported rates. Advanced services increasingly are being provided along with voice services over a single connection.<sup>168</sup> Nothing in the Act supports the argument that multiple connections should be supported for access to dial-up Internet access or fax services, neither of which is a supported service. For similar reasons, we disagree with commenters who argue that supporting multiple connections is necessary to ensure reasonably comparable access to wireless service in rural areas.<sup>169</sup> Mobility is not a supported service.<sup>170</sup> Deployment of rural wireless infrastructure is an important policy goal,<sup>171</sup> but the reasonable comparability principle does not justify supporting multiple connections to achieve it. We emphasize that, under our recommended approach, support would be available for wireless connections to the extent that customers choose to obtain connectivity through primary connections provided by wireless ETCs.

64. We also believe that supporting a single connection would fulfill the statutory principles of sufficiency and predictability.<sup>172</sup> The Joint Board and the Commission have defined sufficiency as enough support to achieve relevant universal service goals without unnecessarily burdening all consumers for the benefit of support beneficiaries.<sup>173</sup> The Fifth Circuit similarly noted that excessive funding may

<sup>167</sup> See, e.g., Idaho Tel. Ass'n Comments at 9; OPASTCO Reply Comments at 21; Texas Statewide Tel. Coop. Comments at 11. Some commenters challenge the assumption that rates for second lines will rise if support is limited to single connections. See, e.g., AT&T Comments at 16 ("The costs of digging the trench or erecting the poles must be incurred fully in order to provide first-line service. There are few incremental costs to providing additional connections."); NASUCA Reply Comments at 14-15 ("Given the architecture of both wireline and wireless facilities, it is very likely that the cost of subsequent connections by either type of provider is much lower than the initial connection. Second lines provided by a single firm to a single household or business tend to be more profitable than the initial line. . . . Therefore, second lines may be provided at an affordable price in rural areas even without support, obviating concerns about increases to the price of second lines."); see also GCI Comments at 68-69 ("The vast majority of multiple connections provided today – the overwhelming bulk of the 148 million CMRS handsets – are not subsidized. . . . Moreover, studies have shown little if any difference in pricing between rural and urban markets.").

<sup>168</sup> See OPASTCO Comments at 6 ("many rural [incumbent] LECs provide DSL services, which provide a substitute for the second line a customer may have purchased to use for dial-up Internet access."). Commission data indicate that most asymmetric DSL connections are provided by LECs, which generally provision the service over the same line as their voice service. See Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of December 31, 2002* at Tbl. 5 (rel. June 10, 2003), available at [www.fcc.gov/wcb/stats](http://www.fcc.gov/wcb/stats) (high-speed asymmetric DSL technologies in service increased by 27% during the second half of 2002, from 5.1 million to 6.5 million lines).

<sup>169</sup> See, e.g., Western Wireless Comments at 10-11, Attachment B at 3-7.

<sup>170</sup> See AT&T Comments at 10-11 ("if wireless functionality were added to the characteristics of a supported service in Section 54.101(a), non-wireless carriers (including [incumbent] LECs' wireline operations) could no longer be ETCs because they would not be able to provide a component of the supported services.").

<sup>171</sup> See generally *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, Notice of Inquiry, WT Docket No. 02-381, 17 FCC Rcd 25554 (2003).

<sup>172</sup> See 47 U.S.C. §§ 254(b)(5), 254(e).

<sup>173</sup> *Tenth Circuit Remand Order*, FCC 03-239 at paras. 36-37 ("We also agree with the Joint Board that the principle of sufficiency encompasses the idea that the amount of support should be only as large as necessary to achieve the relevant statutory goal. Because support is ultimately recovered from customers, collecting more support than is necessary to benefit certain customers would needlessly burden all customers."); see also *Federal-State Joint Board* (continued....)

violate the sufficiency requirements of the Act, because excess support may detract from universal service by causing unnecessary increases in rates, thereby pricing some consumers out of the market.<sup>174</sup> Supporting multiple connections for multiple networks is not necessary to achieve reasonably comparable

access in rural areas, and creates a potential for fund growth that threatens the sustainability of the universal service fund.<sup>175</sup> Accordingly, supporting primary connections better fulfills the sufficiency requirements of the Act.

65. Furthermore, contrary to the arguments of some commenters, the sufficiency and predictability principles do not provide that cost recovery should be guaranteed for particular carriers. OPASTCO, for example, argues that “[i]f rural ILECs are uncertain that they will be able to recover their network costs due to a primary connection support restriction, the incentive to continue investing in infrastructure will be inhibited. As a result, rural consumers’ access to high-quality services that are reasonably comparable to those offered in urban areas will be jeopardized.”<sup>176</sup> Notably, no rural carrier would lose any high-cost support under our recommended approach unless a competitive ETC captures primary connections from the rural carrier following competitive ETC entry.<sup>177</sup> But even if a rural carrier were to lose support in the future, that would not be inconsistent with sufficiency or predictability. The Fifth Circuit explained that “[t]he Act does *not* guarantee all local telephone service providers a sufficient return on investment; quite to the contrary, it is intended to introduce competition into the market. . . .

66. Although we do not believe that the federal support mechanism should continue to support multiple connections, we believe that states have the flexibility to establish their own support mechanisms for multiple connections, mobility, or other functionalities not supported at the federal level. Section 254(f) makes clear that states “may adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service” and that a state may “provide for additional definitions and standards” so long as those supplements do not rely on or burden the federal support mechanisms.<sup>181</sup>

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incumbent LECs as early as January 1, 2001.<sup>187</sup> Support for rural carriers likely will continue to be based on embedded costs at least until mid-2006, however.<sup>188</sup> We believe that the Commission should no longer defer limiting the scope of high-cost support. By limiting fund growth due to competitive ETC entry in rural and high-cost areas, our recommended approach would protect fund sustainability. High-

available to all ETCs for providing primary connections. To the extent that a competitive ETC replaced an incumbent ETC as the primary connection provider, the competitive ETC would receive support for providing the connection.<sup>194</sup> In addition, rural carriers would no longer be insulated from the effects of universal service competition, because they would lose per-line support to the extent that they lose primary connections.<sup>195</sup> Our recommended approach also would prevent upward spirals in per-line support amounts as a result of loss of lines by incumbent carriers, an unfortunate effect of the current rules that commenters argue creates potential windfalls for competitive ETCs.<sup>196</sup>

71. We disagree with commenters who argue that limiting support to a single connection would unfairly advantage incumbent LECs because they preceded competitive ETCs in rural and high-cost areas.<sup>197</sup> Under our recommended approach, consumers would be free to designate any ETC as "primary" based on the service attributes that it offers.<sup>198</sup> We also reject an alternative proposal from Western

Wireless to cap total high-cost support in an area where competitive ETCs exist and all cost the amount

among ETCs based on market share, in lieu of limiting support to a single connection.<sup>199</sup> Western Wireless contends that its alternative proposal would contain fund growth due to competitive ETC entry, but would be more competitively neutral and less administratively burdensome than a primary-connection limitation.<sup>200</sup> In our view, however, this measure would continue support of multiple connections for multiple networks, contrary to the provisions of the Act discussed above. It also could lead to sudden, major shifts in support in areas where a new competitive ETC already serves a significant number of

**a. Restatement Proposal**

73. One way the Commission might accomplish this end would be to restate total current support paid to a rural carrier in terms of first lines. Rural carriers are eligible for high-cost support based on total embedded costs averaged on a study-area level.<sup>201</sup> The total amount of high-cost support flowing to an area served by a rural carrier could be restated in terms of support *per first line*, rather than support *per line*, without any effect on the amount of support received by the rural carrier at the time support is restated.<sup>202</sup> Restating support is a method of limiting the scope of support in areas served by rural carriers without modifying the basis of support (that is, the methodology used to calculate support).<sup>203</sup>

**b. Lump Sum Payment Proposal**

74. Alternatively, rather than increase the amount of per-line support available in areas served by rural carriers by restating support in terms of first lines, the Commission could provide supplemental lump sum payments to avoid any immediate effects on rural carriers as a result of limiting the scope of support. Under this approach, a rural carrier would receive the same amount of high-cost support on a per-line basis as it did previously, but would receive such support only for primary lines. The rural carrier also would receive a lump sum payment to compensate for the loss of support associated with existing second lines. Thus, this interim lump sum proposal, like the restatement proposal described in the previous paragraph, would prevent support reductions in rural areas based on the termination of support for second lines; high-cost support would be reduced only with the future loss of primary lines *to competitors*. But unlike the restatement proposal, the lump sum payment alternative would not increase the amount of per-line support for incumbent carriers, and thus would not encourage competitive carriers to seek ETC status merely for arbitrage purposes.<sup>204</sup> On the other hand, we recognize that making lump-sum payments available to incumbents, but not to competitive ETCs, could be inconsistent with the principle of competitive neutrality.<sup>205</sup>

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<sup>201</sup> See 47 C.F.R. §§ 36.601, *et seq.* (high-cost loop support), 54.301 (local switching support), 54.303 (long term support), 54.901, *et seq.* (interstate common line support). Interstate access support also is available to rural carriers subject to price cap regulation of their interstate access rates. See 47 C.F.R. § 54.801, *et seq.* The Joint Board does not recommend limiting the scope of interstate access support at this time, because the interstate access support methodology prevents support increases due to competitive ETC entry. See AT&T Comments at 13 (“Because [interstate access support] is subject to a hard cap, it cannot be the source of uncontrolled High Cost Support growth.”).

<sup>202</sup> See AT&T Comments at 13.

<sup>203</sup> As discussed below, we recommend that the Joint Board and the Commission consider possible modifications to the basis of support for all ETCs when they undertake the “comprehensive review of the high cost support mechanisms for rural and non-rural carriers as a whole to ensure that both mechanisms function efficiently and in a coordinated fashion” in the Rural/Non-Rural Review proceeding. Our recommendations do not impact or prejudge anything that the Joint Board and Commission may do in the future in examining the basis of support for all ETCs in all areas.

<sup>204</sup> Several commenters argue that providing support to competitive carriers based on the incumbent LEC’s costs creates arbitrage opportunities, because competitive carriers generally have lower costs. See *e.g.*, Alaska Tel. Ass’n Reply Comments at 18-19; CenturyTel Comments at 32-39; South Dakota Telecomms. Ass’n Reply Comments 4-6. To the extent this problem exists in some areas, increasing the amount of per-line support available to competitive carriers would exacerbate it.

<sup>205</sup> We recommend that the Commission seek comment on whether to phase out the lump sum available to incumbent carriers, and, if so, over what time period.

c. “Hold Harmless” Proposal

75. We also seek comment on a different alternative designed to maintain support for rural areas that does not encourage competitive carriers to seek ETC status merely for arbitrage purposes. Under this proposal, per line support available to competitive ETCs would freeze upon competitive entry. Competitive ETCs would only be able to obtain USF support for customers who designated their service as the primary line. We recognize that many parties contend that a per-line approach would jeopardize the sufficiency of support distributed to incumbent carriers. Such parties note that incumbent LECs have made substantial investments in infrastructure in reliance on such support. This proposal would not cap per-line support for incumbent carriers and would thus “hold harmless” incumbent carriers from the loss of universal service support.

76. We recommend that the Commission seek comment on the relative pros and cons of the restatement, the lump sum and hold harmless proposals. Leaving aside the question of which of these approaches has the most merit, we believe that if the Commission implements a primary-line restriction, it must adopt some means of preventing or mitigating reductions in the support available to rural carriers. The Joint Board and the Commission consistently have recognized the importance of a cautious approach to universal service reform in areas served by rural carriers, in light of their size, diversity, and regulatory history.<sup>206</sup> Restating support or implementing the lump sum or hold harmless proposal would avoid any immediate effects on rural carriers as a result of limiting the scope of support, by placing them in the same total support position as they were in beforehand.<sup>207</sup> In other words, a rural carrier would not be required to forego any of the support that it received before implementation of the primary-line restriction. Its support would be reduced in the future only to the extent that a competitive ETC captures primary lines from the rural carrier (except under the hold harmless proposal). Rural carriers also would forego future support increases associated with new, non-primary lines.<sup>208</sup> Restating support, providing a lump sum payment, or adopting a hold-harmless proposal will ensure that the transition to supporting basic access is not unduly disruptive in areas served by rural carriers.<sup>209</sup> We also recommend that the Commission seek comment on whether to restate support, provide lump sum payments or hold-harmless

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<sup>206</sup> See, e.g., *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Federal-State Joint Board on Universal Service, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, Prescribing the Authorized Rate of Return From Interstate Services of Local Exchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, Report and Order in CC Docket No. 98-77, Report and Order in CC Docket 98-166, 16 FCC Rcd 19613, 19620, 19668-69, paras. 12, 130-31 (2001) (*MAG Order*), *recons. pending; Rural Task Force Order*, 16 FCC Rcd at 11247, paras. 4-5.

<sup>207</sup> For example, if an incumbent rural ETC receives \$10,000 in high-cost support based on its embedded costs for that study area, and provides supported services to 9,000 first lines and 1,000 additional lines, it receives high-cost support that equates to \$1.00 per line under the current rules. Under our recommended approach, that incumbent rural ETC would continue to receive a total of \$10,000 in high-cost support based on its embedded costs, but restating its support in terms of first lines would translate into \$1.11 effective per-first line support.

<sup>208</sup> We believe that such increases likely would be minimal due to trends such as the provision of voice and data services over a single digital subscriber line. See OPASTCO Comments at 6-7. Both rural carriers and competitive ETCs would be eligible for additional support for primary service to new customers previously unserved by any ETC. See NASUCA Comments at 6.

<sup>209</sup> See e.g., NASUCA Reply Comments at 25-26 (asserting that rebasing “will reduce the impact on the smaller rural incumbent LECs” of a single-line limitation).

support in areas served by non-rural carriers.<sup>210</sup>

**5. Cap on Per-Line Support Upon Competitive Entry**

77. In conjunction with the measures discussed above, we recommend that high-cost support in areas served by rural carriers be capped on a per-primary line basis when a competitive ETC is present or when a competitive ETC enters the market and be adjusted annually by an index factor. This recommendation is a modified version of a Rural Task Force proposal.<sup>211</sup> Under our recommended approach, the total support flowing to a rural carrier (including high-cost loop support, local switching support, long term support, and interstate common line support<sup>212</sup>) would be capped on a per-primary line basis upon competitive entry. Thereafter, per-primary line support would be adjusted annually based on an index factor, rather than changes in the rural carrier's embedded costs. We also recommend that the Commission seek comment on the alternative approach of capping per-primary line support available to competitive ETCs upon competitive entry, consistent with the "hold-harmless" proposal discussed above.<sup>213</sup>

78. Capping per-primary line support in areas served by rural carriers is necessary to implement a ~~primary-line limitation and to prevent an upward spiral in support due to capture of primary connections~~

by competitive ETCs. As we have stated, the high-cost universal service mechanisms calculate support for rural carriers based on total embedded costs averaged on a study-area basis. Under these mechanisms, a rural carrier's per-primary line support automatically increases as its total embedded costs are spread over fewer lines.<sup>214</sup> This has several implications for purposes of a primary-connection limitation. First, absent a per-primary line cap, a rural carrier would continue to receive support for new lines served—regardless of whether such lines provide primary connectivity—because any costs associated with the new connections would increase the rural carrier's total embedded costs and, therefore, the per-line support associated with the primary lines it serves. Likewise, a rural carrier would not lose support if it

Task Force's proposal at this time. As discussed above, support for competitive ETCs has increased dramatically since 2001, and the danger of excessive fund growth that the Commission recognized at the time of the *Rural Task Force Order* is now clear and present.<sup>217</sup> In addition, the Commission viewed the



consumer choice.<sup>224</sup> Nevertheless, we recognize that limiting the scope of high-cost support presents administrative challenges. The present record does not allow us to resolve these issues. We recommend, therefore, that the Commission further develop the record on how to implement support for primary connections. Our recommendations are conditioned on the Commission's ability to develop competitively neutral rules and procedures that do not create undue administrative burdens.

82. In particular, we recommend that the Commission further develop the record on proposals to allow consumers with more than one connection to designate an ETC's service as "primary."<sup>225</sup> We believe that this is a promising approach because it would allow consumers—the intended beneficiaries of universal service<sup>226</sup>—to decide whether an ETC's service is "truly a substitute for basic universal service."<sup>227</sup> Such proposals also have the merit of competitive neutrality, as consumers would be free to designate a primary ETC based on the service attributes that the ETC offers. In addition, they may avoid the need for complex and possibly artificial distinctions between primary and other connections by placing choice in the hands of consumers. We are not persuaded by arguments that competition for primary designations would disserve the public interest by diverting ETCs' resources from infrastructure investment to marketing and promotion.<sup>228</sup> Where a state makes the threshold determination under the Act that universal service competition in a rural area would serve the public interest,<sup>229</sup> we expect that increased competition and choice will encourage investment and benefit consumers.

83. We also recommend that the Commission further develop the record on rate issues associated with supporting primary connections. Some commenters argue that limiting the scope of high-cost support would require local rate increases or pricing flexibility for second connections, and create ratemaking complexities for states.<sup>230</sup> Others argue that supporting a single point of access need not

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<sup>224</sup> NASUCA Comments at 7 (asserting that LECs are currently required to distinguish between primary and other lines for assessing subscriber line charges (SLCs) and allowing Lifeline support, and noting that "[w]hen equal access and intraLATA presubscription began, every customer had to make new choices that were more complicated than a selection of what firm provides the primary line."). Opponents argue that difficulties in administering a primary/non-primary line distinction for price cap carriers' SLC rates would be exacerbated for small rural carriers in a multi-carrier environment. *See e.g.*, OPASTCO Comments at 35-37.

<sup>225</sup> *See* NASUCA Comments at 6 ("The primary line should be designated by each customer with more than one line, and carriers should be free to compete for the designation as 'primary.' The Commission should allow a reasonable transition period within which consumers could exercise their choice if they have more than one line or if they are served by more than one ETC. However, the Commission will have to devise a system to deal with customers who fail to indicate a choice by the end of the transition period. One way to determine the primary line would be to designate the initial [incumbent] LEC line as the default primary connection. Another alternative is to require a ballot to be submitted by every customer with multiple connections, which entails more administrative burden. While the default assumption would be that a single address represents a single household, there should be flexibility to allow a customer to rebut that presumption by submitting contrary information to the carrier."); *see also* Western Wireless Comments, Attachment J at 6-7 (advocating use of vouchers or "phone stamps" as a means of implementing a primary connection restriction with consumer choice).

<sup>226</sup> *Alenco v. FCC*, 201 F.3d at 621 ("The purpose of universal service is to benefit the customer, not the carrier.").

<sup>227</sup> NASUCA Comments at 6.

<sup>228</sup> *See, e.g.*, Rural Cellular Ass'n/Alliance of Rural CMRS Carriers Comments, Exhibit 1 at 20; Letter from Karen Brinkman, Counsel for CenturyTel Inc., to Marlene Dortch, FCC, dated Dec. 18, 2003 (CenturyTel Dec. 18 *ex parte*)

<sup>229</sup> *See* 47 U.S.C. § 214(e)(2).

<sup>230</sup> *See, e.g.*, OPASTCO Comments at 38-39; MUST Comments at 36; Townes et al. Comments at 8-9; *see also* AT&T Comments at 24-27; SBC Comments at 16-17.

mean different end-user rates for primary and other connections.<sup>231</sup> AT&T argues that rate-of-return carriers should be permitted to increase federal subscriber line charges on non-supported lines to recover any lost interstate common line revenues, although it maintains that such increases are unlikely.<sup>232</sup> States will determine local rate issues in the intrastate ratemaking process, but further development of the record may assist states in addressing these issues.

## 7. Other Issues

84. We also recommend that the Commission further develop the record on the appropriate treatment of businesses with multiple connections, particularly small businesses, under our recommended approach.<sup>233</sup> Historically, the Joint Board and Commission have concluded that universal service concerns are not as great for multi-line business customers.<sup>234</sup> Some commenters, however, have raised concerns that limiting support to a single point of access provided for residential and business customers may discourage operation of businesses, particularly small businesses, in rural areas.<sup>235</sup> Commenters have noted that rural economies are highly dependent on the presence of businesses to provide jobs and services.<sup>236</sup> Restating support should address these concerns to a large extent by avoiding upward pressure on rates for all customers in rural areas.<sup>237</sup> Nevertheless, we believe that these concerns warrant careful consideration. One possible means to address such concerns with regard to small businesses is to allow high-cost support for some designated number of multiple connections for businesses, rather than restricting support to a single business connection.<sup>238</sup>

85. As the Commission develops the record in this proceeding, it also should consider the treatment of lines provided by unbundled network element (UNE)-based competitive ETCs under our recommended approach. Unlike loss of a customer to a facilities-based carrier, loss of a customer to a UNE-based provider does not eliminate the need to continue operating the incumbent's network for the benefit of that customer.<sup>239</sup> UNE rates compensate incumbent LECs for the forward-looking economic

<sup>231</sup> See NASUCA Reply Comments at 10-11. NASUCA argues that carriers can charge averaged rates, and that states can provide support for secondary connections if they so choose. See *id.* at 13-14, 22-23.

<sup>232</sup> See AT&T Comments at 24-27.

<sup>233</sup> Under the Regulatory Flexibility Act, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. 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). 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 Small Business Administration. 15 U.S.C. § 632.

<sup>234</sup> See, e.g., *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, First Report and Order, CC Docket Nos. 96-262, 91-213, 95-72, 12 FCC Rcd 15982, 16005, paras. 58-60 (1997) (*Access Charge Reform Order*) (subsequent history omitted) (concluding that higher SLC caps were warranted for such users).

<sup>235</sup> See, e.g., *Id.* at 13-14, 22-23.

costs of providing UNEs under the current rules.<sup>240</sup> Some commenters, however, argue that UNE rates do not compensate incumbents for their embedded costs of providing UNEs and that this disparity creates arbitrage opportunities.<sup>241</sup> Under the current universal service rules, incumbent LECs do not normally

exceeds the UNE price.<sup>242</sup> We believe that these matters warrant consideration by the Commission.

86. More generally, we encourage the Commission to seek comment on the impact of our primary connection proposal on investment in rural areas. Opponents of this proposal contend that it would undermine investment by incumbent LECs and competitors.<sup>243</sup> We do not expect such an outcome, but we urge the Commission to give this issue careful consideration.

87. Finally, we encourage the Commission to consider whether it should adopt transitional measures for support in areas where competitive ETCs are operating as of the release date of this Recommended Decision. We recognize that business plans may be contingent on support received under the current rules. Like restating per-line support for rural carriers, transitional measures for support received by competitive ETCs may be appropriate. Transitional measures also may be appropriate to avoid rapid shifts in support and provide all ETCs with time needed to adjust their business plans. One

making. For the present, the Joint Board will continue its review of the methodology for calculating support for ETCs in areas with multiple ETCs.

### A. Background

89. In the *First Universal Service Report and Order*, the Commission determined that federal high-cost support for all eligible carriers eventually should be based on the forward-looking economic cost of constructing and operating the network facilities and functions used to provide the supported services.<sup>247</sup> The Commission agreed with the Joint Board that, “in the long run, forward-looking economic cost best approximates the costs that would be incurred by an efficient carrier in the market,”<sup>248</sup> and, therefore, the use of forward-looking economic cost as the basis for determining support will send the correct signals for entry, investment, and innovation.<sup>249</sup> The Commission concluded that “the 1996 Act’s mandate to foster competition in the provision of telecommunications services in all areas of the country and the principle of competitive neutrality compel [the Commission] to implement support mechanisms that will send accurate market signals to competitors.”<sup>250</sup>

90. Although the Commission generally concluded that federal high-cost support should be based on forward-looking economic costs rather than embedded costs, it agreed with the Joint Board that rural carriers should transition to support based on forward-looking costs at a later date than non-rural carriers.<sup>251</sup> The Commission wanted to allow ample time for rural carriers to adjust to any changes in support calculations. In the meantime, rural carriers would receive support based on the existing embedded cost mechanisms, as modified in the *First Universal Service Report and Order*.<sup>252</sup>

91. In order not to discourage competition in high-cost areas, the Commission determined that an incumbent’s high-cost support should be portable to other eligible carriers prior to the transition to forward-looking economic cost mechanisms.<sup>253</sup> The Commission found that the least burdensome way to administer the support mechanisms would be to calculate an incumbent LEC’s per-line support amount based on its embedded costs and provide this per-line amount to all ETCs serving customers within the service territory.<sup>254</sup> The Commission recognized that a competitive ETC may have different costs than the incumbent LEC, but explained that competitive ETCs must comply with section 254(e) of the Act, and that section 214(e) requirements would prevent competitive ETCs from profiting by limiting service to low cost areas.<sup>255</sup> In addition, the Commission determined that the alternative, requiring competitive ETCs to submit forward-looking cost studies without requiring the incumbent LEC’s support to be calculated in the same manner, could place either the incumbent LEC or the competitive ETC at a

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<sup>247</sup> See *First Universal Service Report and Order*, 12 FCC Rcd at 8899, para. 224; see also *First Recommended Decision*, 12 FCC Rcd at 230-32.

<sup>248</sup> *First Universal Service Report and Order*, 12 FCC Rcd at 8899, para. 224; see also *First Recommended Decision*, 12 FCC Rcd at 230, para. 270.

<sup>249</sup> See *First Universal Service Report and Order*, 12 FCC Rcd at 8899, para. 224.

<sup>250</sup> *First Universal Service Report and Order*, 12 FCC Rcd at 8935, para. 292.

<sup>251</sup> *Id.* at 8934-37, paras. 291-95.

<sup>252</sup> *Id.* at 8937-45, paras. 297-313.

<sup>253</sup> *Id.* at 8934, 8944, paras. 291, 311.

<sup>254</sup> *Id.* at 8933, 8945, paras. 288, 313.

<sup>255</sup> *Id.* at 8933, para. 289.

competitive disadvantage.<sup>256</sup>

92. In the *Rural Task Force Order*, the Commission further modified the embedded cost support mechanisms for rural carriers for a five-year period based on the recommendations of the Rural Task

mechanism to succeed the Rural Task Force plan.<sup>257</sup> In the context of the Joint Board's consideration of an appropriate rural mechanism, the Commission stated that it anticipated "conducting a comprehensive review of high-cost support mechanisms for rural and non-rural carriers as a whole to ensure that both mechanisms function efficiently and in a coordinated fashion."<sup>258</sup> The Commission said that it would "use the transitional period during which a modified embedded cost mechanism is in place to develop a long-term universal service plan that better targets support to rural telephone companies serving the highest cost areas and recognizing the significant distinctions among rural carriers and between rural and non-rural carriers."<sup>259</sup> The Commission also said that it would include consideration of general issues related to excessive fund growth and competitive neutrality in that comprehensive review.<sup>260</sup>

93. In the *Referral Order*, the Commission asked the Joint Board to review the methodology for calculating support for ETCs in competitive study areas.<sup>261</sup> The Commission noted that some groups have argued that basing a competitive ETC's support on the incumbent LEC's embedded costs provides a windfall and creates an unfair advantage for competitive ETCs with lower costs, whereas others have argued that the current rules are necessary for competitive neutrality and are the least administratively

comprehensive review of the high-cost support mechanism for rural and non-rural carriers as a whole to ensure that both mechanisms function efficiently in a coordinated fashion.”<sup>265</sup> Because the Commission anticipates that the Joint Board will conduct a comprehensive review of both rural and non-rural mechanisms in the context of our consideration of an appropriate rural mechanism, we recommend that the Joint Board be asked to consider the basis of support for all ETCs in all areas in the Rural/Non-Rural Review proceeding. For the present, the Joint Board will continue its review of the methodology for calculating support for ETCs in areas with multiple ETCs.<sup>266</sup>

95. Considering the basis of support under the rural and non-rural mechanisms simultaneously would allow the Joint Board to craft a more comprehensive approach and avoid the perils of piecemeal decision-making. We anticipate that the Commission in the Rural/Non-Rural Review proceeding will ask us to simultaneously consider both the rural and non-rural support mechanisms and to develop recommendations regarding the possible harmonization of the divergent approaches (embedded costs vs. forward-looking costs).<sup>267</sup> We believe that it would be appropriate to consider the basis of support in competitive areas in this broader context. Our approach to harmonizing the two mechanisms will necessarily influence our recommendations on the basis of support in competitive areas.<sup>268</sup>

96. For areas served by rural carriers, we are concerned that funding a competitive ETC based on the incumbent LEC's embedded costs may not be the most economically rational method for calculating support. However, we do not yet have an adequate record to analyze and understand the consequences of recommending a change in the basis of support for areas served by rural carriers that face competition.

We agree that universal service payments should not distort the development of nascent competitive markets. Universal service support should neither incent nor discourage competitive entry. We also

believe that further work may be needed to decide if and how support should be adjusted to reflect differences in service obligations, service quality and functionality. While we do not have an adequate record at this time to determine how, and if, the current basis of support should be modified to achieve these goals, we are concerned about any potential negative consequences for rural markets. Therefore, we believe that further analysis should be conducted before potential changes are made. Rural carriers were put on notice that the Joint Board and Commission would begin reviewing the current mechanism that provides support to rural carriers based on their embedded costs before 2006. In the Rural/Non-Rural Review proceeding, we plan to consider methods for determining support to high cost areas. These methods should be competitively neutral, administratively simple and consistent with the Commission's goal of ensuring that the high-cost mechanisms function efficiently. We encourage all carriers that may

<sup>265</sup> *Tenth Circuit Remand Order*, FCC 03-249 at para. 25.

<sup>266</sup> *Referral Order*, 17 FCC Rcd at 22645, para. 7 (asking Joint Board "to review the methodology for calculating support for ETCs in competitive study areas.").

<sup>267</sup> In developing a long-term universal service plan, the Commission said that it intends "to consider all options, including the use of forward-looking costs, to determine appropriate support levels for both rural and non-rural carriers." *Rural Task Force Order*, 16 FCC Rcd at 11310, para. 170. The Commission also emphasized that the Act does not require separate rural and non-rural support mechanisms. *Id.* at 11310, para. 171 n.402. Although the Commission found that a distinct rural mechanism, based on embedded cost, was appropriate for the five-year period, it expressed its belief "that there may be significant problems inherent in indefinitely maintaining separate mechanisms based on different economic principles." *Id.* at 11311, para. 173.

<sup>268</sup> Many commenters agree that the basis of support for competitive ETCs is "inextricably linked" with broader issues in the Rural/Non-Rural Review proceeding. *See, e.g.*, Western Wireless Comments at 4 ("the issues raised to date in this proceeding are inextricably linked with the broader issues involved with the forthcoming 'comprehensive review of the high-cost support mechanisms for rural and non-rural carriers as a whole to ensure that both mechanisms function efficiently and in a coordinated fashion,' a process that the Commission has stated it intends to complete by 2006.").

be affected by this potential change to actively participate in the development of the record. We also emphasize that we have not yet determined whether it is appropriate to continue to maintain separate support mechanisms for rural and non-rural carriers.

97. We do not believe that delaying our consideration of the basis of support will undermine the sustainability of the universal service fund. Because the Commission determined that the Rural Task Force plan should remain in place until 2006, the Joint Board and the Commission have adequate time to conduct a comprehensive proceeding on the basis of support.<sup>269</sup> Moreover, if the Commission adopts the Joint Board's recommendations, discussed above, to adopt a primary-connection restriction and measures to ensure that ETC designations are appropriately rigorous, such steps should slow fund growth due to competitive ETC entry in the meantime. Accordingly, we recommend that the Commission refer to the Joint Board early this year the Rural/Non-Rural Review proceeding, including the consideration of the basis of support for all ETCs.

**V. OTHER ISSUES**

**A. Identification of Wireless Customer Location**

**1. Background**

98. Currently competitive ETCs that provide mobile wireless service are required to use the

customer's billing address to identify the location of a mobile wireless customer within a disaggregation zone.<sup>270</sup> In the *Rural Task Force Order*, the Commission concluded that this approach was reasonable and the most administratively simple solution to the problem of determining the location of a wireless customer for universal service purposes.<sup>271</sup> The Commission recognized, however, that the use of a customer's address could allow arbitrage, such as "identifying a customer in a high-cost zone when service is primarily taken in a low-cost zone for the purpose of receiving a higher level of per-line support."<sup>272</sup> The Commission stated that it would take appropriate enforcement action if an ETC were to engage in such arbitrage and that it might revisit the use of a customer's billing address as more mobile

wireless carriers are designated as eligible to receive support.<sup>273</sup>

of primary use.”<sup>275</sup> The place of primary use is defined as “the street address representative of where the customer’s use of the mobile telecommunications service primarily occurs, which must be—(A) the residential street address or the primary business street address of the customer; and (B) within the licensed service area of the [customer’s mobile telecommunications service provider].”<sup>276</sup> In declining to adopt the MTSA definition to determine wireless customer location for universal service purposes, the Commission expressed concern that states might not have established databases pursuant to the Act, and that use of the MTSA definition might impose undue administrative burdens on mobile wireless ETCs.<sup>277</sup>

100. Commenters allege that some ETCs may be engaged in the type of arbitrage that the Commission identified in the *Rural Task Force Order*, and state that the Commission should direct the Universal Service Administrative Company (USAC) to take measures to prevent abuse regarding the location of the connections of the wireless provider’s customers.<sup>278</sup> A number of commenters also express a general concern that the billing address for a mobile wireless phone number has no relationship to where the customer actually uses the phone.<sup>279</sup> Other commenters advocate defining mobile wireless customer location in terms of the place of primary use, and offer different proposals for defining this concept, including the MTSA definition.<sup>280</sup> The Texas Commission requires wireless ETCs to provide a wireless access unit (WAU) to determine the actual location of a connection for universal service purposes.<sup>281</sup>

101. Other commenters advocate the continued use of billing addresses to determine mobile wireless customer location.<sup>282</sup> One commenter asserts that billing address is an accurate means to determine the location for high-cost support purposes,<sup>283</sup> and others point out that line counts are publicly available and can be audited by USAC. BellSouth suggests that wireless ETCs be required to

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<sup>275</sup> The MTSA gives states the option of providing mobile providers with a statewide database that designates the appropriate taxing jurisdiction for each street address in the state, including, to the extent practicable, multiple postal addresses applicable to one street location. If the state fails to provide such a database, the mobile provider may use an enhanced zip code system to assign each street address to a specific taxing jurisdiction. Under the MTSA, a mobile provider that uses a state-assigned database or an enhanced zip code system to assign addresses will be held harmless for any taxes that might otherwise be due as a result of erroneous assignment. Mobile Telecommunications Sourcing Act, 4 U.S.C. §§ 116-126.

<sup>276</sup> *Id.*

<sup>277</sup> *Rural Task Force Order*, 16 FCC Rcd 11315, para. 182.

<sup>278</sup> See OPASTCO Comments at 24-26, Reply Comments at 15-16. OPASTCO cites comments filed by the Washington Indep. Tel. Ass’n, USTA, and SBC to support the contention that the record documents the potential abuse of the rules that use a customer’s billing address to identify the service location of a mobile wireless customer’s service area.

<sup>279</sup> *Id.*

demonstrate that they provide a signal to a customer's billing address. BellSouth states that this

demonstration could take the form of a customer certification that service at the billing address is available, working, and adequate.<sup>284</sup>

## 2. Discussion

102. The Joint Board recommends that the Commission further develop the record on defining mobile wireless customer location in terms of place of primary use for universal service purposes. The Joint Board believes that the place of primary use represents the preferred definition of wireless customer location for universal service purposes because it reflects whether a customer actually uses mobile wireless phone service as a primary connection in a high-cost area. Based on our examination of the present record, however, we cannot determine whether any of the definitions proposed by commenters, including the MTSA definition, are capable of being implemented in a competitively neutral manner that would not impose undue administrative burdens. Accordingly, the Joint Board recommends that the Commission further develop the record on this matter.

103. In particular, the Joint Board recommends that the Commission develop the record on the following issues: First, is the MTSA's place of primary use approach an efficient method to redefine the location of mobile service lines? This may in part depend on the extent to which post office boxes are used to misrepresent customer locations. Second, should the use of a place of primary use-based definition be optional or mandatory? Third, what amount of fraudulent use of billing addresses is occurring today that use of a definition based on place of primary use would address? If place of primary use is adopted how should it work in conjunction with virtual NXX?

### B. Accurate, Legible, and Consistent Maps

#### 1. Background

104. Under the Commission's rules, a rural carrier electing to disaggregate and target high-cost support must submit to USAC "maps which precisely identify the boundaries of the designated disaggregation zones of support within the carrier's study area."<sup>285</sup> In the *Rural Task Force Order*, the Commission explained that "the integrity and flow of information to competitors is central to ensuring that support is distributed in a competitively neutral manner."<sup>286</sup> The Commission went on to state that, "in order to ensure portability and predictability in the delivery of support," it would require rural carriers to "submit to USAC maps in which the boundaries of the designated disaggregation zones of support are clearly specified."<sup>287</sup> USAC was directed to make those maps available for public inspection by competitors and other interested parties.<sup>288</sup> Some commenters indicate that the maps filed by rural carriers pursuant to section 54.315(f)(1) and the information available through USAC are of varying quality and utility.<sup>289</sup> Others suggest that improved quality and reliability of maps submitted by

<sup>284</sup> See BellSouth Comments at 2, Reply Comments at 5; see also GVNW Comments at 11, Reply Comments at 8-9.

<sup>285</sup> 47 C.F.R. § 54.315(f)(4).

<sup>286</sup> *Rural Task Force Order*, 16 FCC Rcd at 11307-08, para. 161

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> See, e.g., USCC Comments at 17-18; Rural Indep. Competitive Alliance Comments at 27.

incumbents would allow for better targeting of support.<sup>290</sup>

## 2. Discussion

105. We recommend that the Commission delegate authority to USAC to develop standards for the submission of any maps that ETCs are required to submit to USAC under the Commission's rules in a uniform, electronic format. We believe that the development of such standards would promote the integrity and flow of information to competitive ETCs by increasing the accuracy, consistency, and usefulness of maps submitted to USAC, and that as the universal service administrator USAC is the appropriate entity to develop such standards.

## VI. RECOMMENDING CLAUSE

106. For the reasons discussed herein, the Federal-State Joint Board on Universal Service, pursuant to sections 254(a)(1) and 410(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 254(a)(1), 410(c), recommends that the Commission adopt recommendations set forth herein concerning the program for disbursement of eligible telecommunications carriers and the Commission's rules regarding

high-cost universal service support.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**APPENDIX A**  
**PARTIES FILING COMMENTS AND REPLY COMMENTS**

<u>Commenter</u>	<u>Abbreviation</u>
ACS of Fairbanks, Inc.	ACS-F
Alaska Telephone Association	Alaska Tel. Ass'n
AT&T Corp.	AT&T
Beacon Telecommunications Advisors, LLC	Beacon
BellSouth Corporation	BellSouth
Cellular Telecommunications & Internet Association	CTIA
CenturyTel, Inc.	CenturyTel
Dobson Communications Corporation	Dobson
Fred Williamson and Associates, Inc.	.
Chouteau Telephone Company (Oklahoma)	
H&B Telephone Communications, Inc. (Kansas)	
Moundridge Telephone Company, Inc. (Kansas)	
Pine Telephone Company, Inc. (Oklahoma)	
Pioneer Telephone Association, Inc. (Kansas)	
Totah Telephone Company, Inc. (Kansas & Oklahoma)	
Twin Valley Telephone, Inc. (Kansas)	Fred Williamson & Assocs.
General Communication, Inc.	GCI
GVNW Consulting, Inc.	GVNW
ICORE, Inc.	ICORE
Idaho Telephone Association	Idaho Tel. Ass'n
Interstate Telcom Consulting, Inc.	ITCI
Montana Telecommunications Association	Montana Telecomms. Ass'n
Montana Universal Service Task Force	MUST
Moultrie Independent Telephone Company	Moultrie Indep. Tel. Co.
National Association of State Utility Consumer Advocates	NASUCA
National Telecommunications Cooperative Association	NTCA
Nebraska Rural Independent Companies	Nebraska Rural Indep. Cos.
Nextel Communications, Inc. and Nextel Partners, Inc.	Nextel
Organization for the Promotion and Advancement of Small Telecommunications Companies	OPASTCO
Rural Cellular Association and Alliance of Rural CMRS Carriers	Rural Cellular Ass'n/Alliance of Rural CMRS Carriers
Rural Independent Competitive Alliance	Rural Indep. Competitive Alliance
Rural Telephone Finance Cooperative	Rural Tel. Finance Coop.
SBC Communications Inc.	SBC
Several Rural Telephone Companies	
Accipiter Communications, Inc. (Arizona)	

Alenco Communications, Inc. d/b/a ACI (Texas)	
Arkansas Telephone Company, Inc. (Arkansas)	
Beehive Telephone Company, Inc. Nevada (Nevada)	
Beehive Telephone Company, Inc. (Utah)	
Blossom Telephone Company, Inc. (Texas)	
Central Arkansas Telephone Cooperative, Inc. (Arkansas)	
Chickasaw Telephone Company (Oklahoma)	
Goodman Telephone Company, Inc. (Missouri)	
North Central Telephone Cooperative, Inc. (Tennessee)	
Ozark Telephone Company (Missouri)	
Pioneer Telephone Cooperative, Inc. (Oklahoma)	
San Carlos Apache Telecommunications Utility, Inc. (Arizona)	
Santa Rosa Telephone Cooperative, Inc. (Oklahoma)	
Scott Country Telephone Company, Inc. (Arkansas)	
Seneca Telephone Company (Missouri)	
South Arkansas Telephone Company, Inc. (Arkansas)	
Star Telephone Company, Inc. (Louisiana)	
Valliant Telephone Company (Oklahoma)	Assorted Rural Tel. Cos.
Smith Bagley, Inc.	Smith Bagley
Sprint Corporation	Sprint
TCA, Inc. – Telcom Consulting Associations	TCA
Texas Public Utility Commission	Texas Commission
Texas Statewide Telephone Cooperative, Inc.	Texas Statewide Tel. Coop.
Townes Telecommunications, Inc.	Townes et al.
United States Cellular Corporation	USCC
United States Telecom Association	USTA
United Utilities, Inc.	United Utilities
Verizon Telephone Companies	Verizon
Washington Independent Telephone Association	Washington Indep. Tel. Ass'n
Washington Utilities and Transportation Commission	Washington Commission
Western Alliance	Western Alliance
Western Wireless Corporation	Western Wireless
WorldCom, Inc., D/B/A MCI	MCI

**Reply Commenter****Abbreviation**

AT&T Corp.	AT&T
ACS of Fairbanks, Inc.	ACS-F
Alabama Rural Local Exchange Carriers	
Ardmore Telephone Company	
Blountsville Telephone Company	
Brindlee Mountain Telephone Company, Inc.	
Butler Telephone Company, Inc.	
Farmers Telephone Cooperative, Inc.	
Frontier Communications of Alabama, Inc.	

Frontier Communications of Lamar County, Inc.

Graceba Total Communications, Inc.  
 GTC, Inc.  
 Gulf Telephone Company  
 Hayneville Telephone Company, Inc.  
 Hopper Telecommunications Company, Inc.  
 Interstate Telephone Company  
 Millry Telephone Company, Inc.  
 Mon-Cre Telephone Cooperative, Inc.  
 Moundville Telephone Company, Inc.  
 National Telephone Company of Alabama, Inc.  
 New Hope Telephone Cooperative, Inc.  
 Oakman Telephone Company  
 OTELCO Telephone LLC  
 Peoples Telephone Company  
 Pine Belt Telephone Company, Inc.  
 Ragland Telephone Company  
 Roanoke Telephone Company, Inc.  
 Union Springs Telephone Company, Inc.  
 Valley Telephone Company

Alaska Telephone Association  
 Beacon Telecommunications Advisors, LLC

Alabama Rural LECs  
 Alaska Tel. Ass'n  
 Beacon

BellSouth Corporation  
 Cellular Telecommunications & Internet Association  
 Centennial Communications Corp.  
 CenturyTel, Inc.  
 Dobson Communications Corporation  
 General Communication, Inc.  
 GVNW Consulting, Inc.  
 Independent Telephone & Telecommunications Alliance  
 Montana Universal Service Taskforce  
 National Association of State Utility Consumer Advocates  
 National Telecommunications Cooperative Association

BellSouth  
 CTIA  
 Centennial  
 CenturyTel  
 Dobson  
 GCI  
 GVNW  
 Indep. Tel. & Telecomms. Alliance  
 MUST  
 NASUCA  
 NTCA

Washington Independent Telephone Association  
Western Wireless Corporation  
WorldCom, Inc. D/B/A MCI

Washington Indep. Tel. Ass'n  
Western Wireless  
MCI

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**SEPARATE STATEMENT OF  
COMMISSIONER KATHLEEN O. ABERNATHY**

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*Re: Federal-State Joint Board on Universal Service, Recommended Decision*

This Recommended Decision addresses several critical issues regarding the distribution of universal service support to carriers serving rural areas. These issues concern the designation

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and funding of eligible telecommunications carriers (ETCs) in rural areas facing competition, and they go to the heart of the Commission's administration of the federal high-cost support mechanisms. As Chair of the Joint Board, I have made this undertaking our highest priority, and I am grateful that my colleagues have responded with extremely thoughtful recommendations. While our work continues in some important respects, I am proud of the progress we have made, and I commend my colleagues and the outstanding staff for their diligent and insightful participation in this proceeding. We were able to reach consensus on several critical issues and we narrowed our differences on others. Where we have been forced to disagree, our divergences have been principled and respectful. It has been a privilege for me to serve with such a committed group of public servants.

A major impetus for initiating this proceeding was widespread uncertainty regarding the appropriate standards for determining whether the designation of a competitive ETC serves the public interest. We have responded to requests for guidance from state commissions and carriers by setting forth a comprehensive set of recommended minimum standards for the designation of ETCs. As I explained in a recent FCC designation decision, I believe that an ETC must be prepared to serve all customers upon reasonable request, and it must offer high-quality services at affordable rates throughout the designated service area.<sup>291</sup> State commissions, acting under section 214(e)(2), and the FCC, acting under section 214(e)(6), plainly should be able to impose conditions designed to ensure that all ETCs are appropriately qualified. Perhaps most importantly, the certifying authority should make sure that a prospective ETC has the ability and commitment to build out facilities as necessary to serve the entire designated area. I am pleased that my federal and state colleagues have unanimously agreed on this principle as well as other core standards that should make the designation process more rigorous, and also more uniform and predictable. I hope that state commissions and the FCC heed this guidance in upcoming designation proceedings.

The Commission's other principal charge to the Joint Board was to consider a variety of means to ensure the sustainability of high-cost funding in rural areas as competition grows. A majority of the Joint Board believe that the most promising proposals call for some kind of modification to the current system that funds all connections from all carriers (although, as discussed below, I believe that we must also continue to explore possible changes to the basis for calculating support). I do not know at this stage whether I will ultimately vote to adopt a primary-line restriction of the sort discussed in this Recommended Decision, but it seems clear that the universal service fund can no longer subsidize an unlimited number of connections

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<sup>291</sup> Separate Statement of Commissioner Kathleen Q. Abernathy, *Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, FCC 03-338 (rel. Jan. 22, 2004).

provided by an unlimited number of carriers. Nor do I believe that the Communications Act contemplates such a result. Section 254 at bottom requires a “lifeline” connection to the PSTN — in other words, reasonably priced access to the network that provides the core “supported services” that make up universal service.<sup>292</sup> That goal will be fulfilled as long as the Commission continues to support a primary connection for every consumer living in high-cost rural areas.

Critics of primary-line proposals have raised legitimate concerns about administrability and the impact on investment in rural communities. In response, the Joint Board’s recommendation is contingent on the Commission’s ability to develop a workable primary-line rule. Moreover, my colleagues and I have worked hard to develop a variety of proposals that should mitigate the impact of any support restriction on rural consumers and carriers, and we have expressly recommended seeking further comment on this issue. Contrary to what some parties may have assumed, the Joint Board has never contemplated a sudden withdrawal of support for existing second lines. Rather, we have suggested further consideration of two straightforward propositions. First, a competitive carrier should receive support only to the extent that it “wins” the customer. And second, an incumbent ETC might risk losing the support associated with a customer when it no longer serves that customer. In rural areas that lack multiple ETCs — which is the vast majority of them — the primary-line proposals outlined in this Recommended Decision would bring about *no change* in the flow of high-cost funding. And even where competition has eroded rural carriers’ customer base to some extent, the Joint Board has recognized the need to proceed cautiously before imposing any restrictions on the amount of available support. Given these efforts to protect consumers in rural areas, I believe it would be short-sighted to terminate our consideration of these proposals at this early stage.

Finally, I am pleased that we will continue to examine proposals to modify the basis of support for ETCs. Notably, every member of the Joint Board has recognized that “funding a competitive ETC based on the incumbent LEC’s embedded costs may not be the most economically rational method for calculating support.”<sup>293</sup> While we agree on the problem, the solution has been elusive. If the Commission wanted to fund competitors based on their own embedded costs, the record does not tell us how to calculate such costs, given that competitive carriers are not subject to a regulatory accounting regime. More troublingly, several parties have suggested that wireless carriers’ per-line support would be *higher* than incumbents’ if calculated based on their own network costs, given the new entrants’ lower penetration rates — and obviously that would frustrate our goal of *restraining* growth in high-cost funding. Alternatively, if we were to pursue a forward-looking cost methodology, similar questions remain about how to implement such an approach at this time. And several parties have argued convincingly that, instead of focusing narrowly on the basis of support for competitive carriers, the Joint Board should comprehensively review the basis of support for *all* ETCs — as the Commission pledged in its *Rural Task Force Order* to do by 2006. The Joint Board has

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<sup>292</sup> Support for the networks that provide the core services also enables consumers in rural areas to receive all of the other services — including advanced services — available over those networks.

<sup>293</sup> Recommended Decision, para. 96.

accordingly recommended that the Commission refer this broader issue for its consideration, and I hope that the FCC takes that step in the very near future.

**SEPARATE STATEMENT OF COMMISSIONER LILA A. JABER,  
FLORIDA PUBLIC SERVICE COMMISSION**

*Re: Federal-State Joint Board on Universal Service, Recommended Decision*

The FCC has asked the Joint Board to review the FCC's current rules relating to high-cost universal service support mechanisms to ensure that the dual goals of preserving universal service and promoting competition continue to be fulfilled. By no means is this an easy task. On the other hand, this review is overdue in light of an evolving telecommunications market and the ongoing responsibility to maintain accessible, affordable telephone service for every American, while addressing the unintended consequence of a rapidly growing federal universal service fund. In meeting these obligations, I am optimistic that the recommended decision, if adopted by the FCC, has the potential of advancing the goal of universal service, ensuring long-term sustainability of the fund, and maintaining competitive neutrality. With that said, I recognize that there may be administrative difficulties that will have to be overcome should the FCC choose to go forward with our recommendations. I do believe that these difficulties, or "opportunities," can be addressed. This recommended decision at the very least will generate additional comments and constructive implementation suggestions to the FCC from various stakeholders.

I recognize the hard work of the universal service joint board staff and offer my sincere thanks. Their dedication and expertise in putting this complex matter into a simple form is evident in the work product. This document is yet another example of federal-state cooperation. In that same spirit, I applaud the tireless efforts of my joint board colleagues. This was an extremely difficult decision with good, plausible arguments on each side of every issue. At the end of the proverbial day, I remain hopeful that the ongoing dialogue from this point forward will result in optimal solutions to these matters.

ETC Designation Process

In the recommended decision, we propose that the FCC adopt permissive, minimum guidelines that state commissions and the FCC may use for all ETC designation proceedings. Use of these permissive guidelines should provide a more consistent application process among states. More importantly, these guidelines should further assist state regulators in determining if

the public interest would be served by designating additional carriers as ETCs, thereby qualifying additional carriers for federal universal service support. I agree with the commenters who suggested that encouraging a more rigorous fact-finding ETC designation process for all carriers, in both rural and nonrural areas, should ensure that only carriers fully committed to meeting universal service obligations have access to the already-growing federal universal service fund.<sup>294</sup> Examples of the guidelines we propose be considered in the review process

guidelines eminently reasonable. In fact, it should be clear that a state may impose additional requirements for ETC certification if the state so chooses. By this recommended decision, we clearly intend to maintain state flexibility in the ETC designation process — authority some state commissions can clearly find in Section 214(e)(2). For other states, where certain carriers are not subject to the jurisdiction of a state commission, this recommended decision clarifies that the FCC, in implementing Section 214(e)(6), should apply these same guidelines.

Scope of Support

At the center of this recommended decision is a proposal to limit high-cost support to a

structure that allows all ETCs to receive federal universal service support for all lines. This structure has created a situation where multiple ETCs in high-cost rural areas automatically receive support even if a carrier does not have an economically rational business case to support such entry. We should not support the current framework that allows subsidies to flow to multiple competitors where it is already cost prohibitive for a single provider. Some commenters believe that states have used multiple carrier ETC designation as a means to attract more universal service funds into the state.<sup>295</sup> While I do not know if this has happened, I do believe that the universal service fund should not be used to artificially induce competitive entry that would not have otherwise occurred. Instead, universal service funds should be used for the purpose intended --- to provide universal access to a customer by providing the appropriate

can be selected by customers as the primary carrier, thus enabling wireless carriers to receive support from the fund in rural and other areas. Recently in addressing Virginia Cellular's application for ETC designation, FCC Chairman Powell stated that, "[d]espite the importance of making rural, facilities-based competition a reality, we must ensure that increasing demands on the fund should not be allowed to threaten its viability."<sup>296</sup> I wholeheartedly agree. Consistent with Chairman Powell's statement, our recommended decision on this issue is an example of balancing legitimate concerns of our rural citizens with the goal of ensuring the long-term sustainability to the fund.

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<sup>296</sup> See Separate Statement of Chairman Michael K. Powell in Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, Memorandum Opinion and Order, CC Docket No. 96-45, FCC 03-338 (rel. January 22, 2004).

**SEPARATE STATEMENT OF COMMISSIONER THOMAS J. DUNLEAVY,  
NEW YORK STATE PUBLIC SERVICE COMMISSION**

*Re: Federal-State Joint Board on Universal Service, Recommended Decision*

The issues referred to us in this phase of this proceeding are among the most complex and contentious we have been asked to address. They go to the heart of what we expect a universal service program to achieve and how we expect it to interact with the forces of a competitive market. Although this Recommended Decision does not resolve all the issues before us, I believe the recommendations we make here today will help sustain the federal universal service program, enabling it to more effectively achieve our dual goals of fostering competition while preserving universal service. I support this Recommended Decision as a reasonable step in the right direction.

Perhaps the most significant recommendation we make here today is to provide federal high cost support only for a subscriber's or household's primary connection to the telephone network. I believe this recommendation is entirely consistent with the fundamental purpose of the federal universal service program – ensuring that all homes and businesses can affordably connect to the rest of the world. When the Telecommunications Act of 1996 was being crafted, I doubt many people anticipated that in less than a decade most households would have both a wireline and a wireless phone and that many would have multiple wireless phones. I am convinced that, however much we might like to, we simply cannot sustain a universal service program that provides support to two, three, four or more phones in most households. At the same time, rules that would effectively preclude support to wireless services would not be competitively or technologically neutral and might artificially slow the deployment of desirable and potentially less costly services to high cost areas. While implementation of our recommendation to support only primary lines will no doubt involve some administrative complexities, I am confident that reasonable solutions will be found through further development of the record, as we here recommend. I also am confident that resolution of those challenges will place far fewer demands on the high cost support mechanism than will continuing to support multiple lines per household.

That said, I am keenly aware that our primary line proposal could significantly affect the support currently provided to existing eligible telecommunications carriers. No rule should be thought to be permanent, yet when changes are made reasonable efforts should be made on a transitional basis to mitigate sudden and severe negative consequences. I am pleased that our

Recommended Decision recognizes this by offering several alternative proposals for further comment. Without expressing a preference for any of the alternatives, I would emphasize that

no mitigation effort can be expected to live on in perpetuity, nor should one be used as a means to forestall competition in any area. Congress was quite clear; it intended to open all

understand the issues and our options and reducing our thoughts to writing. I offer them all my sincere appreciation.

**SEPARATE STATEMENT OF BILLY JACK GREGG,  
DIRECTOR OF THE CONSUMER ADVOCATE DIVISION,  
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA**

*Re: Federal-State Joint Board on Universal Service, Recommended Decision*

The most important aspect of our recommendation today is the decision to limit support to multiple lines. Not only will this action slow the growth of the high cost fund stemming from

support of multiple lines of multiple networks within the same area, but it will also fundamentally change the calculus for designating additional eligible telecommunications carriers (ETC's) in areas served by rural carriers. Since current Commission rules provide support to all lines of all ETC's, states have been faced with the perverse incentive of gaining

loss or dilution of current levels of support, then under Section 214(e)(2) of the Act, it should find that additional ETC's are not "in the public interest."<sup>301</sup> If, on the other hand, states or the Commission find that multiple ETC's are appropriate in a particular area, then the portability rules should apply equally to all ETC's, regardless of the technology used, and regardless of whether the ETC is an incumbent or a new-comer. Proposals to reserve some support as the exclusive province of incumbent ETC's - regardless of previous public interest decisions under Section 214(e)(2) - violate, in my judgment, the principle of competitive neutrality.<sup>302</sup>

I believe that there are certain areas of this country where it is so expensive to provide service that it makes no sense to have more than one carrier subsidized by the federal universal service fund.<sup>303</sup> Moreover, I believe that it is relatively easy to determine where these areas are. The universal service fund provides various levels of support to over 1400 incumbent study areas in this country. At root, these support levels are based on the cost to provide service to the number of customers within each area. By comparing the average levels of per line support provided to each study area, the Commission should be able to determine per line support benchmarks that divide study areas where multiple ETC's are presumably in the public interest, and those areas where they are not.

Adoption of such benchmarks will provide guidance to competitors and incumbents, will introduce a degree of certainty into the telecommunications marketplace, and will greatly simplify ETC decisions for state commissions. After further development in proceedings before the Commission, I hope that this benchmarking concept is adopted to guide public interest determinations under Section 214(e)(2) of the Act.

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<sup>301</sup> See *Alenco*, at 621-622: "To the extent petitioners argue Congress recognized the precarious competitive positions of rural LEC's, their concerns are addressed by 47 U.S.C. §214(e), which empowers state commissions to regulate entry into rural markets."

<sup>302</sup> The Commission has defined "competitive neutrality" as "...universal service support mechanisms and rules [that] neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." *First Report and Order*, ¶47. In *Alenco* the 5<sup>th</sup> Circuit found competitive neutrality to be an integral component of portability: "...portability is not only consistent with predictability, but also is dictated by principles of competitive neutrality and the statutory command that universal service support be spent 'only for the provision, maintenance, and upgrading of facilities and services for which the [universal service] support is intended.'" *Alenco*, at 622. The Commission has also previously addressed the inappropriateness of support programs available only to incumbents: "We have previously held, in interpreting section 254 of the Communications Act, that 'competitive neutrality in the collection and distribution of funds and determination of eligibility in universal service support mechanisms is consistent with congressional intent and necessary to promote a procompetitive, de-regulatory national policy framework.' As discussed above, it is doubtful that a universal service funding program that restricts eligibility to ILECs could be considered competitively neutral. Thus, a program of this nature may well be found to be inconsistent with and to impede the achievement of important Congressional and Commission goals." *In the Matter of Western Wireless Corp. Petition for Preemption*, Memorandum Opinion and Order, File No. CWD 98-90, 15 FCC Rcd 16227 (Aug. 28, 2000) at ¶11.

<sup>303</sup> Indeed, but for explicit subsidies from the universal service fund and other federal programs, there would be no telephone service in large areas of this country.

**SEPARATE STATEMENT OF  
COMMISSIONER KEVIN J. MARTIN  
DISSENTING IN PART, CONCURRING IN PART**

*Re: Federal-State Joint Board on Universal Service, Recommended Decision*

I am troubled by today's Recommended Decision because it fails to provide sufficient guidance or a meaningful public interest test on the process for designating and funding eligible telecommunications carriers ("ETCs") that enter the market in high cost areas to serve rural consumers.

As I have stated in the past, I have concerns with policies that use universal service support as a means of creating "competition" in high cost areas.<sup>304</sup> In my view, the main goals of the universal service program are to ensure that all consumers--including those in high cost areas--have access at affordable rates. I remain hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. The Joint Board's recommendations may continue to make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in rural areas.

I believe the Joint Board should have recommended more immediate steps that the Commission should take to reform the ETC designation process. For example, I would have preferred that the Joint Board recommend that the Commission require ETCs to provide the same type and quality of services throughout the same geographic service area as a condition of receiving universal service support. In my view, competitive ETCs seeking universal service support should have the same "carrier of last resort" obligations as incumbent service providers in order to receive universal service support. Adopting the same "carrier of last resort" obligation for all ETCs is fully consistent with the Commission's existing policy of competitive and technological neutrality amongst service providers.

As I have supported in the past, I would have recommended that the Commission require ETCs to provide equal access. Equal access provides a direct, tangible consumer benefit that allows individuals to decide which long distance plan, if any, is most appropriate for their needs. As I have stated previously, I believe an equal access requirement would allow ETCs to continue to offer bundled local and long distance service packages, while also empowering consumers with the ability to choose the best calling plan for their needs.<sup>305</sup> An equal access obligation is also fully consistent with the Commission's existing policy of competitive neutrality amongst

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<sup>304</sup> Separate Statement of Commissioner Kevin J. Martin, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket (No. 00-256)(rel. October, 11, 2002); Separate Statement of Commissioner Kevin J. Martin, *Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, FCC 03-338 (Jan. 22, 2004).

<sup>305</sup> Separate Statement of Commissioner Kevin J. Martin, *Federal-State Joint Board on Universal Service*, CC Docket No.96-45, (rel. July 10, 2002); Separate Statement of Commissioner Kevin J. Martin, *Federal-State Joint Board on Universal Service, FCC 03-170*, CC Docket No. 96-45, (rel. July 14, 2003).

service providers, facilitating competition on the basis of price and service quality for comparable service offerings.

I would have also preferred that the Joint Board recommend that the Commission require ETCs to provide service throughout the same geographic service area in order to receive

universal service support. This obligation would help guard against the potential for creamskimming. I would have supported a recommendation to deny future requests to redefine the service areas of incumbent rural telephone companies--and to deny ETC designations in instances where an ETC's proposed service area does not cover the entire service area of the incumbent service provider.

Given that a majority of my colleagues were unwilling to recommend that the Commission adopt these same competitively neutral obligations for all ETCs, I concur in the Joint Board's recommendation to seek alternative means of limiting fund growth. To help slow the growth of the universal service fund, I specifically support one particular alternative of the primary line proposal. My support for the primary line proposals is limited to that "hold harmless" proposal.

Under the "hold harmless" alternative, per line support available to competitive ETCs would freeze upon competitive entry. Competitive ETCs would only be eligible for universal service support for customers who designated their service as the primary line. Unlike the other primary line proposals, however, this alternative would not cap per-line support for incumbent carriers and would thus "hold harmless" incumbent carriers from the loss of universal service support. As my colleague Commissioner Rowe has observed, this proposal would work to address the incumbents overall network costs that are incurred.

I look forward to working with my colleagues on the Commission as we address these critical issues regarding the distribution of universal service support to ETCs in high cost areas while ensuring that we maintain and preserve universal service in rural America.

**JOINT SEPARATE STATEMENT OF  
COMMISSIONERS JONATHAN S. ADELSTEIN,  
G. NANETTE THOMPSON, REGULATORY COMMISSION OF ALASKA,  
AND BOB ROWE, MONTANA PUBLIC SERVICE COMMISSION  
APPROVING IN PART, DISSENTING IN PART**

*Re: Federal State Joint Board on Universal Service Recommended Decision*

We are pleased that this Joint Board has determined that it is useful to employ guidelines to ascertain whether it is appropriate to designate multiple eligible telecommunications carriers in particular areas. We are pleased that this Joint Board recognizes, as Congress did in 1996,

that when designating an ETC in an area served by a rural telephone company we must take greater care in examining the public interest to determine the wisdom of multiple ETCs in rural, high cost areas. Establishing a meaningful public interest test<sup>306</sup> and providing meaningful guidance on ETC designations will help to limit federal universal service funding to those providers who are committed to serve rural communities.<sup>307</sup>

We disagree, however, with the majority's recommendation to limit funding to primary lines. We believe it is inconsistent with Congress' intent when codifying the Universal Service provisions in the 1996 Act. It is also inconsistent with the December 18, 2003 letter from Senators Dorgan, Burns, Snowe, Johnson, Baucus, Lincoln and Daschle, stating that a primary line restriction would be "a major step backward that would thwart the essential purpose of universal service." A primary line restriction would reduce incentives for deployment of both wireless and wireline networks. We are also disappointed that the Joint Board cannot yet make progress on how to determine the basis of support, which was a core element of this "portability" referral.

markets in a way that would ultimately undermine the goal of universal service. Such a result is anathema to the purpose of universal service funding and the intent of Congress.

We believe that a better policy would be to put in place a more stringent public interest test, as we recommend today, and to move away from the identical support rule by basing each ETC's support on its own costs. This would limit fund growth, comply with Section 254(e) and encourage continued investment in rural markets. It also would limit funding only to those providers, whether incumbents or new entrants, who are committed to serve rural communities.

#### Designating Primary Lines

The majority recommends that support be distributed based on a carrier's number of primary lines and that support, under one option, be "rebased" to ensure that the amount does not change initially. If the number of primary lines were to increase in the future, however, support would increase. Likewise, if the number of primary lines were to decrease, support would decrease in proportion. Future support therefore depends upon an ETC's ability to get customers who will designate their line as primary. We foresee a number of harmful effects from such a system.

The primary line recommendation would be harmful to consumers. Section 254(b)(3) of the statute directs us to make reasonably comparable services available to consumers nationwide at reasonably comparable rates:

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, *including interexchange services and advanced telecommunications and information services*, that are reasonably comparable to those services provided in urban areas and are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

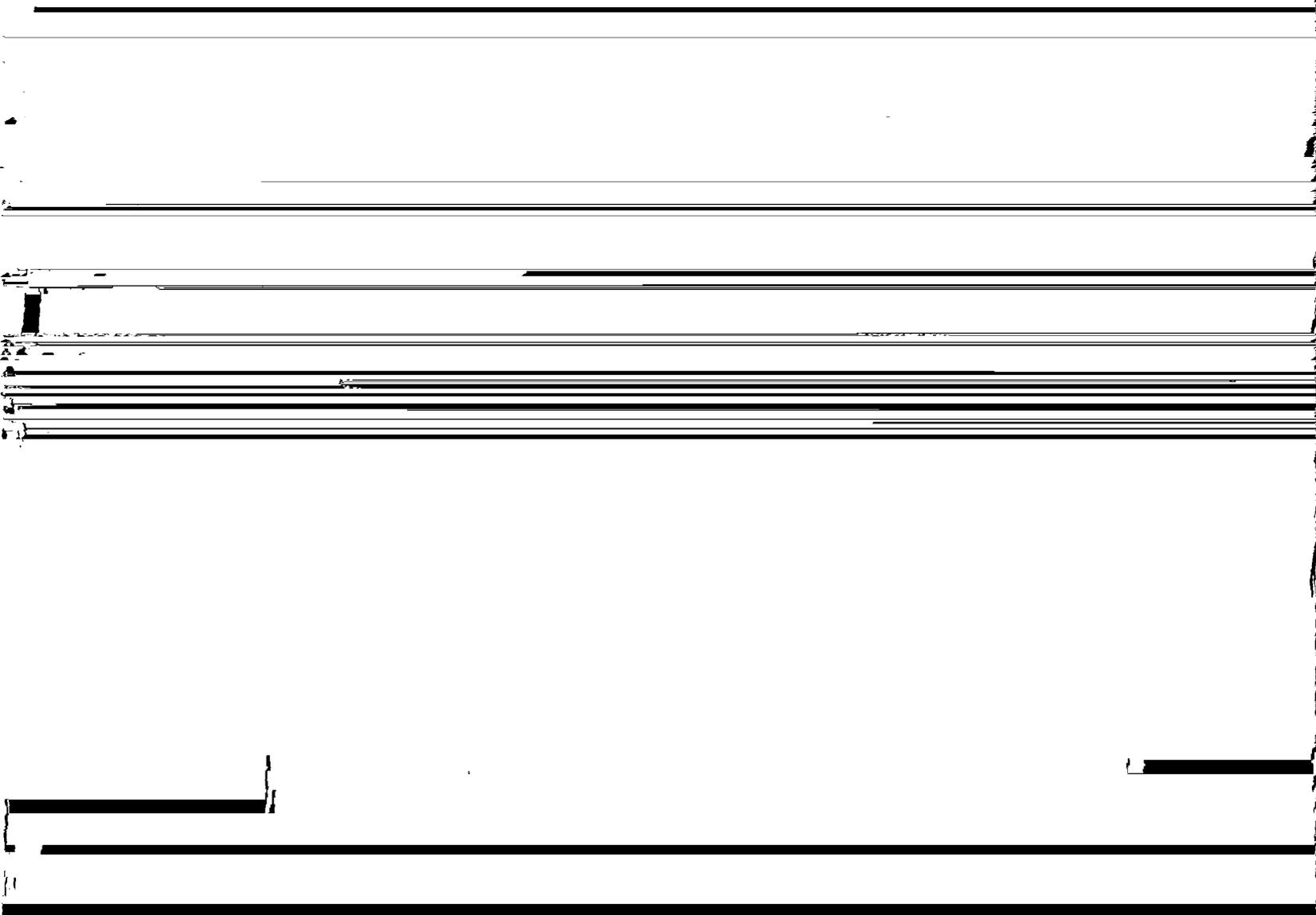
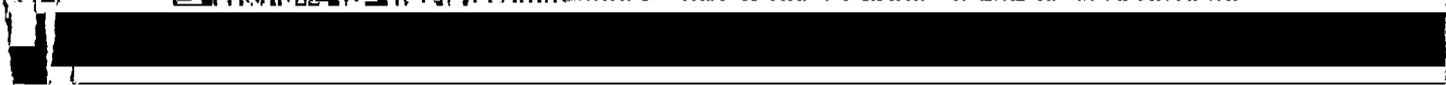
This section provides not only that *the rates for* services should be reasonably comparable, but also that *access* should be reasonably comparable. Moreover, the statute covers not just basic service, but also advanced telecommunications services and information services.<sup>308</sup> Limiting support to primary lines would deny rural consumers comparable access to a variety of telecommunications services: voice, data, fixed, and mobile.

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<sup>308</sup> If this provision applied only to "access," then the statute would use the singular "is" to describe what must be reasonably comparable. We therefore conclude that the "reasonably comparable" language in Section 254(b)(3) focuses both on telecommunications *and* information services."

The majority's recommendation would deny support for all second lines, including those used as second voice lines and data lines.<sup>309</sup> The economic development effects in rural areas could be quite harmful. Rates could become unaffordable for second lines in high cost areas because all consumers will be asked to pay the cost of a second line without any offsetting support. While the majority has offered options (e.g., rebasing, hold harmless provisions) to attempt to ameliorate the harmful affects of the lost support, we believe these options are likely to be anti-competitive, or will prove ineffective and impractical.

Rural business customers would be particularly disadvantaged because they frequently have more than one line. Net costs for telephone service would increase significantly for many of these rural business customers.<sup>310</sup> Consumers would also face higher costs for "data lines" or fax lines. Given the distance limitations inherent in DSL services, these fax and data lines are essential to the economic life of rural communities. Just as one example, it will be very difficult



The primary line recommendation will also be harmful to existing ETCs, especially rural carriers. The majority says that its proposal would protect rural providers. In reality, the proposal offers only a limited and temporary protection. It presumes not only that services and rates are now comparable between rural and urban areas, but also that the level of service will remain adequate in perpetuity. Markets are not static, and as time progresses, existing ETCs in many areas will lose primary line “market share.” If the competitor is a wireless ETC, the loss in primary line market share may occur though the incumbent continues to serve their existing wireline customer base. Under the primary line proposal, even with the initial rebasing option, ETCs that lose primary line market share will lose support. Over time, this will jeopardize the ability of carriers to provide rural consumers with access to comparable services at comparable rates.

For at least seventy years, and both before and after 1996 when universal service principles were codified, universal service policies have supported the cost of *networks* in high cost areas. Customers are not served by individual lines, but by networks.<sup>311</sup> While “basic access” has been the touchstone of the Lifeline program, the rural high cost program has traditionally recognized the importance of network support and cost recovery of network investment to keep rates and services comparable. Adopting a primary line approach would reverse this historical policy and fundamentally redefine universal service for rural communities. The primary lines approach is contrary to the Act because, as its authors understood, communications work through networks, not individual connections.<sup>312</sup>

Support limited to primary lines would not be sufficient in rural areas. Congress stated in Section 254(b)(5) that support must be “specific, predictable and sufficient.” Rural carriers have higher operating costs and equipment costs because they have lower subscriber density and lack economies of scale. Losing support for “all lines” would potentially undermine the ability of these carriers to recoup their network costs without raising rates for rural consumers. Rebasing and similar hold harmless and lump sum payments would at best only temporarily address this problem. We should not be applying more temporary solutions to remedy the universal service programs. It is time to fix them with an eye towards the long term sustainability of the programs.

Telecommunications technology is advancing rapidly. If, as the Act provides, rural services are to be comparable to urban services, rural carriers must continue to invest in state-of-the-art equipment. But under the majority’s primary line method, future revenues become much more uncertain. Any primary line market share loss to a competitor not only reduces the incumbent’s customer revenue, but it also reduces universal service revenue. This magnification of investor risk is likely to discourage prudent carriers from installing costly new technology.

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<sup>311</sup> Technology has not yet obviated the need for physical networks. Even the most exciting new technologies are deployed either in or over networks. Networks are efficient in themselves, and they create opportunities for innovation by network users of all kinds. That’s what customers need and expect.

<sup>312</sup> The economics of providing telephone service results in substantial fixed costs for the network capable of providing any service throughout the service area. Those costs do not vary significantly if the lines per customer location change. Therefore, reducing support to a carrier if its primary lines decrease almost guarantees insufficient support in the future for that carrier.

The Joint Board majority has cited with approval several recommendations in the 2000 report of the Rural Task Force.<sup>313</sup> An important concept in the Rural Task Force report was that there should be "no barriers" to deployment of advanced facilities.<sup>314</sup> While the Commission has never endorsed that concept fully, it has agreed that universal service policies should not

inadvertently create barriers to the provision of access to advanced services. It also has stated a belief that the current universal service system does not create such barriers.<sup>315</sup> The majority here moves away from effectuating a "no barriers" approach. By basing support on primary lines, the majority would substantially reduce the incentive for continued rural investment in any facilities by creating uncertainty of sufficient universal service funding. This is indeed a substantial barrier, and one that is contrary to the spirit of the Rural Task Force Report

demand.<sup>318</sup> The principle of a carrier of last resort is essential to universal service. However, by limiting funding to primary lines, we may inadvertently destroy the incentive to accept this responsibility.<sup>319</sup>

The majority's recommendation would effectively establish a virtual voucher system. Congress squarely addressed this issue in 1995, and dispatched it. During the debates about high cost funding, an amendment was offered that would have replaced the high cost funding mechanism with a voucher mechanism under which low income individuals would receive a voucher and then determine which carrier would get that funding. Essentially, the individual customer would have been given the opportunity choose his or her primary carrier. This amendment would have conflated the high-cost and low-income programs. It was soundly defeated. Congress clearly rejected efforts to merge the high-cost and low-income funds and to establish a voucher system. The majority's primary line recommendation violates Congressional intent in both ways.

Basing support on primary lines would raise serious administrative issues and would create opportunities for gaming that will disadvantage and confuse consumers. Defining primary lines is problematic in a multitude of housing and living situations. We cannot expect providers to investigate and police the panoply of American housing and living arrangements. Who is to decide which line is primary? If we shift the focus away from funding the network and give each individual or household a choice of primary line, we will have to define "household" and "individual." The telecommunications industry and its regulators are not well equipped to resolve these questions.

A primary line restriction is also unauditible. A consumer could easily have his wireline bill sent to a residence, and a wireless bill sent to a post office box. The inability to verify that the funds are being used appropriately compromises both the fund's integrity and the FCC's ability to ensure that the funds are being properly expended. We are concerned that any potential gains from restricting funding to primary lines will be outweighed by the administrative costs of administering funding only to primary lines and the risks that necessarily follow an unauditible restriction.

The FCC has moved away from its primary/non-primary residential line distinction in the interstate ratemaking process. For price-cap carrier, the FCC found that different Subscriber Line Charges (SLCs) created consumer confusion and unnecessary costs that were ultimately borne by consumers. Later, the FCC abandoned the distinction entirely in the Multi Association Group (MAG) proceeding and cited the Federal Regulatory Flexibility Act, which requires the Commission to take into account the potential impact of its rules on small, local telephone companies.

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<sup>318</sup> States assign the COLR obligation differently, but it has consistently been an important policy tool to insure that all potential customers in high cost and hard to serve areas receive service.

<sup>319</sup> If the cost of acting as COLR is definable, the FCC should consider it as part of a funding system that bases support on provider costs.

Carriers and customers would have a real opportunity for gaming with the primary line designation. The problem here is greater than with residential SLCs because there is potentially more money at stake. Carriers would have incentives to “slam” customers, and consumers would have incentives to game the system in order to maximize their household’s funding. Past problems with slamming in long distance competition will pale in comparison to those that could arise when carriers can collect funding for winning primary line designations. Rather than competing to best serve customers, providers will compete for new ways to win designation as the primary carrier.

### Basis of Support

We are disappointed that the Joint Board did not make greater progress on the issue of the basis of support. We believe that we have a sufficient record to recommend a policy goal that the amount of universal service support paid to competitive providers should not be based on the incumbent’s costs.<sup>320</sup> We understand that our record does not support a final decision on how we would fairly administer support based on the competitors’ costs.<sup>321</sup> We are pleased that our Joint Board colleagues recognize the need to consider modifying the basis of support.<sup>322</sup> However, we believe that a clear policy statement here would better guide the development of the record and better enable the FCC to resolve sooner this complex issue.

### Equal Access

Commissioner Adelstein deferred his vote on the inclusion of equal access in the list of supported services to this proceeding because he believed that there was intent to address and resolve the basis of support question. We should at least have addressed the issue of the funding impact of equal access.<sup>323</sup>

Under the MAG plan, the Commission reduced access charges, and to make the universal service mechanism more explicit, moved that amount into the universal service fund. This was responsive to the need to make explicit, as far as possible, those federal universal service subsidies that were implicit, as intended by Congress. The resulting program, Interstate Common Line Support (ICLS) includes the cost of providing equal access. At the very least, this

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<sup>320</sup> Commissioners Adelstein and Rowe recommend that carriers receive support based on their own costs. Commissioner Thompson would not vet rule out the options that in high cost competitive markets support be based

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on a forward looking methodology or a bidding process.

<sup>321</sup> For example, we need to understand how support will be calculated when providers use different technologies to serve customers, have different accounting systems and varying levels of service. We would consider specific interim measures to address immediate concerns, like a rigorous, interactive workshop to develop an appropriate costing regime. We suggest that the FCC ask for comments on whether reopening the “Path 3” window for self-certification of disaggregation would address cream-skimming concerns until a new basis of support is implemented.

<sup>322</sup> The deadline for review of the use of embedded costs to determine rural carrier support looms, and providers in those markets are better served by as much advance notice of possible changes as we can provide so that they can make reasonable planning decisions.

<sup>323</sup> Commissioner Thompson opposed including equal access in the list of supported services. Commissioner Rowe supported its inclusion.

Joint Board should recommend to the Commission that, pending determination of the appropriate basis of support, competitors that do not provide equal access should not receive at least that portion of ICLS that is based upon equal access costs.

For these reasons, we approve in part and dissent in part. We concur in the portion of the recommended decision relating to certification of eligible telecommunications carriers, but dissent from the portion relating to designation of primary lines.