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	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES ON THE NOTICE OF PROPOSED RULEMAKING

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TABLE OF CONTENTS

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I. INTRODUCTION

On December 15, 2009, the Federal Communications Commission ("FCC" or "Commission") released a Further Notice of Proposed Rulemaking ("NPRM") to "respond[] to the decision of the United States Court of Appeals for the Tenth Circuit (Tenth Circuit) in *Qwest Communications International, Inc. v. FCC*, in which the court remanded the Commission's rules for providing high-cost universal service support to non-rural carriers."[1] Comments were filed on the NPRM on January 28, 2010.

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[1] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *High-Cost Universal Service Support*, WC Docket No. 05-337 ("96-45/05-337"), FCC 09-112 (rel. December 15, 2009), ¶ 1,citing *Qwest Communications Int'l, Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005) ("*Qwest II*").

The National Association of State Utility Consumer Advocates ("NASUCA")[2] filed comments agreeing with the Commission's tentative conclusion "that the Commission should not attempt wholesale reform of the non-rural high-cost mechanism at this time…."[3] NASUCA also agreed – with one limited exception – with the Commission's tentative conclusion that "the mechanism as currently structured comports with the requirements of section 254 of the Communications Act, and it is therefore appropriate to maintain this mechanism on an interim basis until the Commission enacts comprehensive reform."[4] NASUCA also stated that "the Commission's tentative conclusions should be made final (for this context), and should satisfy the Tenth Circuit."[5]

Comments in response to the NPRM were filed by telephone companies, both non-rural and rural,[6] wireline carrier associations,[7] wireless carriers and their

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[2] NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

[3] NPRM, ¶ 1.

[4] NPRM, ¶ 3. The exception was with regard to the Commission's assertion that the current mechanism "advances" universal service, as directed by 47 U.S.C. § 254(b).

[5] NASUCA Comments at 4.

[6] AT&T Inc. ("AT&T"); CenturyLink, Consolidated Communications, Frontier Communications, Iowa Telecommunications and Windstream Communications ("CenturyLink, et al."); Qwest Communications International Inc. ("Qwest"). Verizon and Verizon Wireless (collectively, "Verizon") filed joint comments.

[7] Independent Telephone & Telecommunications Alliance ("ITTA"); National Cable & Telecommunications Association ("NCTA"); United States Telecom Association ("US Telecom").

associations,[8] cable providers,[9] competitive carriers,[10] state regulators,[11] state regulators together with state consumer advocates,[12] and by individual NASUCA members.[13] Comments were also filed by rural telephone company consultants.[14]

The filed comments are literally all over the map in terms of their recommendations for the Commission. Some advocate major change; others propose various minor changes. Unfortunately, few of the proposals are really focused on meeting the specific concerns raised by the Tenth Circuit, and many forge off in new (and unnecessary, for this purpose and this time) directions. NASUCA's reply comments attempt to address some of the major themes that are common to the comments.[15]

As stated by the Commission,

> In *Qwest II*, the court held that the Commission relied on an erroneous, or incomplete, construction of section 254 of the Communications Act in defining statutory terms and crafting the funding mechanism for non-rural high-cost support. The court directed the Commission on remand to articulate a definition of "sufficient" that appropriately considers the range

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[8] CTIA – The Wireless Association® ("CTIA"); Rural Cellular Association ("RCA"); Sprint Nextel Corporation ("Sprint"); USA Coalition (four rural wireless providers). Sprint, in as agile a piece of special pleading as seen in a long while, argues that because the Commission is not reforming the high-fund at this time, the obligations that Sprint agreed to in merger cases to reduce its take from the high-cost fund should also be delayed. Sprint Comments at 3. There is no connection between the two.

[9] Comcast Corporation ("Comcast").

[10] General Communication, Inc. ("GCI").

[11] Massachusetts Department of Telecommunications and Cable ("Mass DTC"); Wyoming Public Service Commission ("Wy PSC").

[12] Maine Public Utilities Commission, Maine Office of Public Advocate, Montana Public Service Commission, Vermont Public Service Board, and West Virginia Consumer Advocate Division ("Maine PUC, et al."). The Maine Office of Public Advocate and West Virginia Consumer Advocate Division are members of NASUCA.

[13] New Jersey Division of Rate Counsel ("NJ DRC").

[14] GVNW Consulting, Inc.

[15] The Maine Office of Public Advocate does not join these reply comments.

> of principles in section 254 of the Communications Act and to define "reasonably comparable" in a manner that comports with the requirement to preserve and advance universal service. The court found that, "[b]y designating a comparability benchmark at the national urban average plus two standard deviations, the FCC has ensured that significant variance between rural and urban rates will continue unabated." The court also found that the Commission ignored its obligation to "advance" universal service, "a concept that certainly could include a narrowing of the existing gap between urban and rural rates." Because the non-rural high-cost support mechanism rested on the application of the definition of "reasonably comparable" rates invalidated by the court, the court also deemed the support mechanism invalid. The court further noted that the Commission based the two standard deviations *cost* benchmark on a finding that *rates* were reasonably comparable, without empirically demonstrating in the record a relationship between costs and rates.[16]

These issues (and only these issues) are what the Commission must address at this point.

II. MOST OF THOSE WHO SAY CURRENT SUPPORT IS INSUFFICIENT HAVE NOT MADE AN ADEQUATE DEMONSTRATION.

A. The lack of support for the proposition

NASUCA and Verizon have shown that currently, rural rates of non-rural carriers rates are reasonably comparable to non-rural carriers' urban rates.[17] The few exceptions will be addressed here.

Despite this, many of the non-rural carriers loudly and generally proclaim that their support is inadequate. For example, Qwest makes the statement that the support it receives is inadequate but does not even attempt to demonstrate how,[18] and, with the

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[16] NPRM, ¶ 7 (footnotes omitted; emphasis in original).

[17] Verizon Comments at 2; 5-7. If rates are reasonably comparable **with the current levels of support**, just as there should be no automatic assumption that more support is needed, there should also be no assumption that the non-rural high-cost fund can be phased out in its entirety (NJ DRC Comments at 6), as the example of Wyoming discussed here shows.

[18] Qwest Comments at 1; see also AT&T Comments at 6; ITTA Comments at 1-2. For the contrary position, see NASUCA NoI Reply Comments (June 8, 2009) at 7-8.

exception of Wyoming (discussed below) makes no showing that any of its rural rates are not reasonably comparable to its urban rates![19] This certainly provides no justification for the fund to be significantly increased in order to be "sufficient."[20]

This is especially true because the comments refer only to High Cost Model ("HCM") funding, and ignore the millions in dollars of Interstate Access Support ("IAS") and Interstate Common Line Support ("ICLS") that non-rural carriers receive.[21] These IAS and ICLS amounts were added to the federal high-cost universal service fund ("USF") as the result of reductions in interstate access charges, as part of the removal of so-called implicit support… but that implicit support was for **local service rates**, and thus must be included in any calculus of high-cost universal service support.[22]

Qwest says that high-cost support should be based on a price benchmark[23] but does not show that any of its rural prices are excessive, with the exception of Wyoming, discussed below. For example, as NASUCA previously showed how, in Colorado, where Qwest complains that its most rural exchanges receive no support, Qwest recently agreed to a statewide uniform rate.[24]

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[19] Qwest Comments at 16-17, 19; see also AT&T Comments at 15-16.

[20] Qwest Comments at 2. Qwest incorrectly assumes that the Commission's decision not to increase the fund drives the finding of sufficiency (id. at 6), rather than the decision not to increase the fund being the result of the finding of sufficiency.

[21] NASUCA ex parte 8/7/09 at 1-2; NASUCA NoI Reply Comments at 7-8.

[22] Thus the claims of Maine PUC, et al. (at 25) that IAS and ICLS "have no proximate effect on local rates" are off-base.

[23] Qwest Comments at 8.

[24] See NASUCA 8/7/09 ex parte at 2; see also NASUCA NoI Comments at 54-60.

Qwest also complains about the level of support provided to rural companies,[25] but that does not, of course, show that the support provided to **non-rural** companies is insufficient to meet the statutory purposes. NASUCA submits that it does not.

A summary response to these claims can be made by quoting previous NASUCA comments on this subject:

> The more fundamental question, however, is whether Qwest's wire-centric proposal is necessary to ensure that non-rural carriers' rural rates are reasonably comparable to their urban rates. **Neither Qwest nor any other carrier making a similar proposal has demonstrated such a necessity**.[26]

Or, equally forcefully,

> **It must be recognized that none of these carriers has provided a single shred of data to support their position. There is no demonstration that any non-rural carrier's rural rates have been increased (or even threatened to be increased) by the loss of this support, much less increased to the point where the rural rates are not reasonably comparable to urban rates.**[27]

Those who assert that there are these "rapidly disappearing implicit subsidies"[28] simply fail to assert or show the amounts of those lost subsidies; more importantly, they fail to indicate the impact that the loss has had on their basic service rates.

Indeed as the Wy PSC asserts, many states fail to file the required annual rate comparability certifications.[29] It is a fair presumption that states that have not filed have no basis to assert that they lack reasonably comparable rates. Of the 24 states that did

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[25] Qwest Comments at 8; see also AT&T Comments at 12.

[26] NASUCA 8/7/09 ex parte at 3 (emphasis in original).

[27] NASUCA NoI Reply Comments at 6 (emphasis in original).

[28] See, e.g., AT&T Comments at 6; Maine PUC, et al. Comments at 19:

[29] Wy PSC Comments at 18-19, 28.

file, 22 certified reasonable comparability.[30] This is scarcely support for a massive overhaul of the non-rural high-cost support system.

Only two states that filed did not state that their rural rates were reasonably comparable to urban rates: Vermont and Wyoming. They are discussed in the next subsection.

B. The exceptions

Vermont, in its September 29, 2009 letter in 96-45 and 00-256, did not certify that its non-rural carrier's (FairPoint's) rural rates were reasonably comparable to the urban rate benchmark.[31] Rather, Vermont stated that it "conclude[d] that the rates of FairPoint customers [in Vermont] are not reasonably comparable to the urban rates of customers nationwide."[32] This appears to be due to two factors on the rate side: First, an inability to determine the rates that FairPoint Vermont customers pay, due to FairPoint's practice of charging for local service on a measured, rather than flat-rate, basis.[33] Second, there is customers' practice of subscribing to packages that include unlimited local and long-distance calling.[34] NASUCA would suggest that a state regulatory commission should be able to determine the average, mean or median usage of customers on local measured service if it wants federal support, and that expansive bundles do not require support.

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[30] Id. at 18. This includes three of the states joining in the Maine PSC, et al. comments: Maine, Montana and West Virginia.

[31] Vermont letter at 5.

[32] Id. Apparently, Vermont does not believe that it has any urban areas, and has maintained uniform rates statewide. Id. at 3.

[33] Id. at 3.

[34] Id. at 4.

Another significant factor appears to be Vermont's disagreement with the "urban average plus two standard deviations" comparability standard.[35] Vermont states that "a benchmark rate cannot satisfy the statute if it is higher than 125 percent of the national urban average rate."[36] Unfortunately, this overlooks the actual current range of urban rates.[37]

Thus, overall, it is not clear that Vermont, as one of the two states that did not certify rate comparability, has sufficient support for its claim. On the other hand, there is Wyoming.

Wyoming clearly demonstrates that its rural rates are not reasonably comparably to national urban rates – even after applying credits from the current federal and state high-cost programs.[38] This was the basis for the request of the Wy PSC and Wyoming Office of Consumer Advocate ("Wy OCA") for supplemental funding, filed in December 2004.[39] And this was the basis for NASUCA's support for the Wy PSC/Wy OCA's petition.[40] The response to this problem should be for the FCC to respond to Wyoming's petition, to address Wyoming's situation – which the FCC has avoided for more than five

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[35] Id. at 5.

[36] Id.

[37] See NASUCA NOI Comments at 13, discussed more fully below.

[38] Wy PSC Comments at 11.

[39] Id. at 9.

[40] See 96-45, NASUCA Comments (March 7, 2005). This was despite disagreements over the Wy PSC's decisions on which network costs should be attributed to basic service (a policy decision that should establish state responsibility for support ; see NASUCA NoI Reply Comments at n.88) and the Wy PSC's decision to eliminate implicit **intrastate** support (see Wy PSC Comments at 11, 21), a decision not required by federal law. *Qwest Communications Internat'l, Inc. v. FCC*, 398 F.3d 1222, 1232-1233 (10th Cir. 2005). The supposed requirement of the elimination of intrastate implicit support is one on which many carriers continue to focus. See AT&T Comments at 1.

years – rather than, as discussed in Section III., changing the fundamental mechanism so that Wyoming's needs can be met. An individualized approach would also be better approach for the other specific states that can show their support is insufficient.

III. OTHER ISSUES REGARDING THE SUPPORT MECHANISM

A. Statewide averaging is appropriate for non-rural carriers.

Many of the ILECs insist that statewide cost averaging is contrary to § 254.[41] As with the loss of implicit support, these comments are devoid of any showing of impact or company proposals to increase rural rates because of problems with USF statewide cost averaging. These comments also fail to recognize that the *Qwest I* court specifically rejected the "argument that the use of statewide and national averages is necessarily inconsistent with § 254."[42] Thus *Qwest II* did not condemn statewide averaging.[43] The reasons for retaining statewide cost averaging are solid.[44]

B. The lack of a state USF program does not mean that the federal program is required to pick up the slack.

Qwest indicates that where there is no state USF program, it is the obligation of the federal government to provide all needed high-cost support.[45] Admittedly, there is a

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[41] See, e.g., Qwest Comments at 18; AT&T Comments at 2; ITTA Comments at 6; US Telecom Comments at 3-4.

[42] *Qwest I*, 58 F.3d at n.9.

[43] Although AT&T's proposal (AT&T Comments at 6) to identify "rural" areas consistent with Census Bureau definitions is consistent with NASUCA's proposals (see NASUCA NoI Comments, Appendix E), for NASUCA this is only necessary for rural and urban rate comparisons, and is not needed or required as a result of eliminating statewide averaging.

[44] See Wy PSC Comments at 30; Comcast Comments at 4; NJ DRC Comments at 9-10; see also NASUCA NoI Comments at 46-49; NASUCA NoI Reply Comments at 5-6.

[45] Qwest Comments at 19-20.

federal-state partnership on meeting the goals of § 254. But although *Qwest II* approved of the FCC's program to induce state action,[46] it in no way implied that the federal program must pick up all the slack where the state has chosen not to act. As NASUCA previously stated,

> As *Qwest I* shows, this is a shared federal and state responsibility. And the Commission (together with consumers in other states) has no obligation to take on the full burden of ensuring comparability if a state is not willing to meet its responsibilities. Only if the state is unable – because of high costs – to meet the obligation on its own, should the federal system take on additional responsibility.[47]

Much less take on the **full** responsibility, as Qwest implies.

C. There is no need for significant increases in the non-rural high-cost fund.

Those who advocate for additional support typically do not attempt to quantify the amount of support they claim would be needed to meet the statutory goals and requirements. One of the exceptions is Qwest, which asserts that its plan would increase the fund by $1.3 billion.[48] Showing the conflict among the industry, AT&T identifies such an increase as "significant,"[49] but US Telecom calls it a "small increase."[50] As shown here and in NASUCA's other comments, there is certainly no justification for increases of such magnitude, if any.

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[46] *Qwest II*, 398 F.3d at 1238.

[47] NASUCA NoI Reply Comments at 16, citing *Qwest I*, 258 F.3d at 1204.

[48] Qwest Comments at 20. It is interesting to note the apparent conflict between Qwest's earlier positions. See NASUCA 8/7/09 ex parte at 3.

[49] AT&T Comments at 11.

[50] US Telecom Comments at 5.

D. The size of the fund is important.

Those who claim that how large the fund is has no bearing on the statutory purposes are clearly wrong.[51] The courts have recognized that the burden of the fund on the payors is as much a factor that needs to be considered as the benefit to the payees.[52]

IV. THE VARIOUS RATE/COST COMPARABILITY BENCHMARK PROPOSALS

Maine PUC, et al. suggest a cost benchmark of 125% of the cost of service in Washington D.C. as a surrogate for national urban costs.[53] That is a very low standard for supporting rural rates, and will provide support to some rural rates when equivalent urban rates are not supported. This is in part because the range of urban rates has in fact widened (on the high end[54]). Indeed, this increase in the range of urban rates is the real reason behind most of Maine PUC, et al.'s criticism of the standard deviation standard.[55]

Maine PUC, et al.'s other criticism of the current standard is that it is just too high, and "is likely to conclude that the overwhelming majority of rates are

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[51] See, e.g., Wyoming PSC Comments at 6;Qwest Comments at 7.

[52] See, e.g., Mass DTC Comments at 15, citing *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1102 ("DC Cir., 2009), see also AT&T Comments at 7 (also citing *Alenco Communications v. FCC*, 201 F.3d 608, 620 (5th Cir., 2000); NCTA Comments at 2; Verizon Comments at 3-4.

[53] Maine PUC, et al. Comments at 6. It would seem that using the costs in the District of Columbia as a surrogate for nationwide average urban costs would create a definite understatement of costs, much like using the lowest urban rate as the benchmark for the rate comparison. Maine PUC, et al. also refer to the "measured cost of service" in Washington D.C.; it is not clear whether this is intended to refer to the "cost of measured service," or something else. If it refers to measured service, it is unclear what level of usage is intended to be used for comparison. Further, the vast majority of residential customers throughout the country continue to subscribe to flat rate (unlimited usage) local service.

[54] See NASUCA NoI Comments at 13.

[55] Maine PUC, et al. Comments at 14-15.

comparable."[56] Somehow, that makes the standard not "objective." Yet as NASUCA's comprehensive rate survey showed, it is a fact that most rural rates of non-rural carriers are reasonably comparable to most urban rates.[57]

Maine PUC, et al. assert that the Court "has already found [the two standard deviation standard] to be illogical and in violation of common sense."[58] Not exactly a strictly accurate characterization, but regardless, it must be recalled that both *Qwest I* and *Qwest II* faulted the Commission for failure to analyze the data before it, which need not be a problem here. Maine PUC, et al. do not provide an estimate of how much additional expense their proposal will impose upon the fund nationwide.[59]

RCA supports the Maine/Vermont proposal, and argues that a 125% standard would lower rates.[60] This might be true, if the states applied the support as a direct credit to customers' bills, as is done in Vermont and Wyoming,[61] but does not make the 125% any less arbitrary. RCA says that if combined with other measures, there should be no significant increase in the size of the fund.[62] RCA does not propose a schedule for adopting these "other measures." But it is unlikely that these other measures can be undertaken in this remand.

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[56] Id. at 14.

[57] NASUCA NoI Comments at 13-18.

[58] Maine PUC, et al. Comments at 12.

[59] Maine PUC, et al. also provide a wide range of other changes to the fund (id. at 7-9, 15-17, 36-43), some of which are discussed below.

[60] RCA Comments at 6-7.

[61] As discussed below, RCA also emphasizes full portability of support. Id. at i.

[62] Id. at 7.

Wy PSC proposes a standard of 125% of average cost with a key limitation to states with fewer than 10 persons per square mile.[63] Wy PSC admits that only Wyoming and Montana will receive additional assistance under its proposal.[64] It would seem that (as noted above) the better solution for Wyoming would be for the Commission to belatedly address Wyoming's specific petition for supplemental assistance.[65]

Qwest proposes a comparability test of 25% of statewide urban average rates.[66] As previously stated by NASUCA,

> Qwest's proposal would deem its rural rates in Utah to be reasonably comparable at $28.39 (125% of the $21.29 rate in Logan), while in Wisconsin a rate reasonably comparable to AT&T's rate in Milwaukee could be $51.44 (125% of $38.59). This makes little sense.[67]

In addition, under this test, Qwest should require no support in Colorado, because of its uniform statewide rates.[68] But Qwest would also target support to wire centers where costs exceed 125% of the urban average cost.[69] That proposal, of course, was the one that increased the non-rural high-cost fund by $1.2 billion.

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[63] Wy PSC at 4-5. It should be noted that the Wy PSC proposal requires removal of the identical support rule.

[64] Id. at 17.

[65] See Section II.B., supra. It is also not clear that the addition of $4.87 per line per month resulting from its proposal (Wy PSC Comments at 17, Table 3) will solve Wyoming's comparability problems.

[66] Qwest Comments at 12.

[67] NASUCA NoI Reply Comments at 9.

[68] NASUCA 8/7/09 ex parte at 2.

[69] Qwest Comments at 18.

AT&T proposes a combination of an "urban rate"[70] with a comparability factor, which AT&T says could be 1.2.[71] The vagueness of AT&T's proposal is explicitly intended to give the Commission broad discretion. It does not seem that this would meet the Tenth Circuit's insistence on an "empirical" connection between rates and costs.

Qwest asserts as its basis for asserting that rural and urban rates are not reasonably comparable that the gap between Commission's comparability benchmark and the lowest urban rate has widened.[72] This is highly misleading. There is no basis for using the lowest urban rate as any kind of benchmark. Congress required the USF to ensure that rural rates generally be reasonably comparable to urban rates generally, not to any specific urban rate, much less the lowest urban rate. The requirement should, therefore, be that no rural rate should be more than is reasonably comparable to the range of urban rates.[73]

NASUCA's data, **not contradicted by anyone since,** showed:

> The most recent result of the Commission's urban rates survey (rates as of October 15, 2007) shows a weighted average monthly urban residential charge of $25.62, with a low of $16.70 and a high of $38.59. In the Remand NPRM comments, NASUCA reported that the same average as of October 15, 2004 showed a weighted average monthly urban residential charge of $24.31, with a low of $16.05 and a high of $34.47. The current numbers thus represent a 5.4% increase in the weighted average, a 4% increase in the lowest rate and a 12% increase in the highest rate. This indicates that the range of urban rates is broadening, particularly on the high end.[74]

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[70] AT&T Comments at 7. This could be the national average urban rate, median urban rate, or some average above the urban rate. Id., n.19.

[71] Id. at 7.

[72] Qwest Comments at 12-13.

[73] NASUCA NoI Comments at 17.

[74] Id. at 13 (footnotes omitted).

Further,

> The data showed that there was not that much difference between rural rates and urban rates. The rural minimum rate was 23% greater than the urban minimum rate, but the average rural rate was only 7% greater than the average urban rate. **Most importantly, the highest rural rate was only 7% higher than the highest urban rate**. Further, there were only about 245 wire centers that had current rates greater than two standard deviations above the urban average. Most of these were rural, but some were, in fact, urban. On the other hand, there were fifteen jurisdictions where no non-rural carrier rate was greater than one standard deviation from the urban average.[75]

As NASUCA also stated,

> Looked at from another direction, the highest urban rate in NASUCA's non-rural carrier rate census was 151% of the urban average and was only 8.7% higher than a rate two standard deviations above the average ($27.27). Thus it seems clear that the Tenth Circuit's view of reasonable comparability was overly constricted -- due to the Commission's failure to have assessed a complete record -- especially because following such a view would require support for rural rates that are below the highest urban rate.[76]

NASUCA has previously explained the difficulty – if not impossibility – of showing an empirical relationship between costs and rates, given the vagaries of state ratemaking policies, including the various forms of deregulation.[77] This explanation should be enough to satisfy the Tenth Circuit. But if the Commission seeks to address the Tenth Circuit's concentration on "advancing" universal service under the non-rural high-cost universal service fund, the determination could be to reduce the benchmark from two standard deviations to 1.75 standard deviations and then to 1.5 standard

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[75] Id at 15-16 (emphasis added).

[76] Id. at 27.

[77] Id. at 21-24; NASUCA Comments at 9-10.

deviations over the course of four years. Then the Commission could assess the impact on rates – as it unfortunately has not done for the current mechanism.

V. INCLUSION OF BUNDLES AND OTHER NON-SUPPORTED SERVICES IS PROBLEMATIC

A number of commenters are in accord with the Commission's tentative conclusion that it should begin to collect comparability data for bundles of services, whether that be bundles of local and long distance calling, or only bundles of local services.[78] But these commenters overlook the fact that these bundles have not yet been determined to be supported services.[79] Thus, as AT&T states, unless the Commission is prepared to begin supporting these service, data collection and comparability review are irrelevant at this time.[80]

VI. CERTAIN ACTIONS CAN BE TAKEN NOW.

Maine PUC, et al. have three very concrete actions that they say the Commission should do "immediately." These include

1. Using current switched access line counts in the model.[81] NASUCA fully agrees.

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[78] E.g., Maine PUC, et al. Comments at 7-8; Qwest Comments at 11-12; Mass DTC Comments at 5-6, 8-9; NCTA Comments at 3-5; RCA Comments at 21.

[79] NASUCA Comments at 9-10; see also Wy PSC Comments at 29.

[80] AT&T Comments at 15.

[81] Maine PUC, et al. Comments at 35.

2. Using urban costs, rather than national average costs.[82] NASUCA agrees, but does not agree that the costs in Washington D.C. should be used as a surrogate for national average urban costs. This will produce an abnormally low cost, given the compact nature of the District. The Commission should instead use the urban areas as found in NASUCA's rate survey,[83] or at the very least, could use the costs in the 95 cities that make up the FCC's current rate survey.

3. Establishing the national cost benchmark at 125% of urban cost.[84] NASUCA does not agree that 125% is necessarily any more appropriate than the current "plus two standard deviations" benchmark. Given the first two improvements just recommended, a better course would be to continue the current benchmark, but also run the model at the 125% recommended by Maine PUC, et al. A comparison of the two results would allow the Commission to exercise judgment about whether the 125% proposal should be accepted or whether some intermediate point would serve to "advance" universal service in the non-rural high-cost mechanism. This proposal is made in the context of both the results of NASUCA's rate survey and of the fact that non-rural carriers receive IAS and ICLS in addition to the support received under the high-cost model.

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[82] Id. at 36.

[83] NASUCA NoI Comments, Appendix E.

[84] Maine PUC, et al. Comments at 35.

VII. THINGS THAT NEED NOT BE DONE NOW

As NASUCA stated in response to the NOI,

> The immediate task before the Commission is to respond to the *Qwest II* remand of the non-rural high-cost fund. … The Commission need not and should not address issues of broader consequence and significance, which will complicate the decision process and make meeting the Commission's commitment to the Court more difficult.[85]

There are also other actions that need not be undertaken to address the Tenth Circuit's concerns.

A. Some actions should be undertaken later as part of fundamental reform.

- Make further updates to the high-cost model[86]
- Consider all revenues earned by a line in determining whether support is needed for the basic service provided over that line[87]
- Increase data submission requirements[88]
- Consider service quality for supported services[89]
- Improve aspects of the rate comparability methodology[90]
- Eliminate the identical support rule. Contrary to the arguments of some,[91] competitive neutrality and portability of support do not mean that competitive carriers should receive support based on the costs of the incumbent.[92]

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[85] NASUCA NOI Comments at 3.

[86] See Maine PUC, et al. Comments at 36-38, 41; Comcast Comments at 3-4; RCA Comments at 5-6; NASUCA NoI Reply Comments at 19.

[87] See, e.g., NCTA Comments at 5.

[88] See, e.g., Mass DTC Comments at 9-15.

[89] Maine PUC, et al. Comments at 7.

[90] Id. at 10, 14, 15; see also Wy PSC Comments at 18 (state failures to file comparability certifications).

[91] CTIA Comments at ii; RCA Comments at 8.

[92] Indeed, there are serious questions about whether any support in necessary for wireless carries in many areas, given the presence of unsupported wireless carriers in those areas. In this instance, the presence of

- Address disincentives for investment arising from the current mechanism[93]
- Eliminate unnecessary support[94]

And of course the Commission should consider how it will support the deployment of broadband. But, again, contrary to the arguments of some,[95] this need not be done here and now. Support of broadband, reform of intercarrier compensation, and the rural support mechanism[96] were not part of the Tenth Circuit concerns.

B. Some proposals should not be considered at all

US Telecom has a list of "fundamental reforms of the high-cost mechanisms.[97] Certainly these need not be considered prior to the Commission's required order for this NPRM; but some can be considered in the longer run. One idea that should be rejected out-of-hand is the proposal to allow price cap carriers (presumably those that mix rural and non-rural carriers, or that are entirely rural) to make an election to have all of their support under the HCM.[98] Given that rural carrier support tends at this point to be greater than non-rural support (as discussed above, a bone of contention for some non-rural

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unsupported wireless-to-wireless competition is a different case than the existence of unsupported wireline (i.e., cable) providers in a supported incumbent's territory, because the cable providers neither have a carrier-of-last-resort obligation nor typically offer stand-alone basic service as the incumbents do.

[93] Maine PUC, et al. Comments at 42.

[94] See, e.g., Qwest Comments at 10. It is ironic for this request to come from Qwest, given its insistence on huge increases in support that have not been shown to be necessary.

[95] See, e.g., CenturyLink, et al. Comments; CTIA Comments at ii. This is equally true for "transitional" measures. See, e.g., AT&T Comments at 3, 13-14; ITTA Comment at 2, 5 (the "transitional" measures include reforming intercarrier compensation and combining the rural and non-rural mechanisms).

[96] See GCI; GVNW Comments.

[97] US Telecom Comments at 2

[98] Id. at 4, 6-8.

carriers) the only carriers that would make this "election" would be those that would see an increase under the HCM.[99] Carriers should not get the independent ability to increase their support in this fashion.

Another proposal that should be rejected is to make "high-cost" determinations based solely on population density within the study area (or whatever unit is being considered).[100] Although density is a major determinator of cost, using only density would mask factors such as terrain and access to highways, which can have strong influence on cost.[101]

AT&T suggests that receipt of high-cost support should be conditioned on reductions in intrastate access charges.[102] This goes so far beyond the directives of § 254 that it should not be taken seriously.

Finally, a number of commenters propose, once again, moving from a revenues-based to a numbers-based or connections-based contribution mechanism for the USF.[103] This has little or nothing to do with meeting the concerns raised by the Tenth Circuit regarding the non-rural high-cost fund.[104]

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[99] For example, Iowa Telecommunications Services, Inc., which has a petition pending before the Commission to this effect.

[100] AT&T Comments at 7-8; ITTA Comments at 7.

[101] See NASUCA NoI Reply Comments at 20-21.

[102] See AT&T Comments at 10.

[103] See, e.g. Qwest Comments at 10; AT&T Comments at 13.

[104] Whether in the context of longer-range structural changes to the high-cost fund, or in the context of reforms proposed as part of the National Broadband Plan, it seems that those changes should be allowed to go into effect before a decision is made to radically alter the contribution mechanism. Otherwise, the impacts of the changes in support may be masked by the disruptions resulting from the changes in the contribution mechanism.

VIII. THE RANGE OF STATUTORY PRINCIPLES

Clearly, a crucial part (if not **the** crucial part) of the Tenth Circuit's findings was that the Commission had not considered the full range of principles in § 254(b) of the Act in supporting. NASUCA has explained in detail how some of those principles are not relevant to the non-rural high-cost mechanism – arguments that the FCC apparently failed to make before the Tenth Circuit – and others are in fact met by the current mechanism.[105] AT&T, among others, says the FCC is only considering only two principles, but does not explain which are not considered.[106] In the end, it seems that AT&T is just disagreeing with the Commission's failure to adopt AT&T's self-interested interpretations of those principles.[107]

As another example of self-interested reliance on selected principles, RCA says the Commission should give the most weight to the principle of competitive neutrality.[108] It should be recalled that this principle was the one created by the Commission, and does not actually appear in the statute. It is hard to see how this principle could take primacy over those explicitly set forth by Congress.

Finally, NASUCA must express disagreement with the assertion of the Mass DTC that the only focus of the non-rural high-cost fund should be on increasing subscribership, not transferring "wealth" from low-cost to high-cost regions.[109] This ignores the explicit

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[105] See NASUCA NoI Comments at 34-43; NASUCA Comments at 6-8. See also Verizon Comments at 4-5.

[106] AT&T Comments at 16-17.

[107] See id. at 16, citing AT&T's NoI Comments at 8-17.

[108] RCA Comments at 13.

[109] Mass DTC Comments at 16.

statutory directive about making rates and services in high-cost rural regions reasonably comparable to those in urban areas.[110] This requires low-cost regions to support high-cost regions, although, as NASUCA has consistently argued, the support must be limited to that necessary to meet the statutory directive, and not more.

IX. WOULD ADOPTION OF THE PROPOSALS SOLVE THE PROBLEM?

Especially given the data on rates presented by NASUCA and by Verizon cited above, it does not appear that any of the proposals made in comments would necessarily bring us closer to the a non-rural high-cost fund that meets the statutory requirements. In that context, the FCC's decision to continue the current program pending major realignments in the National Broadband Plan makes sense.

As noted in Section V., the limited changes discussed there would represent movement toward compliance with the statute, especially with regard to "advancing" universal service. With the range of explanations provided by NASUCA, these changes should be sufficient to meet the requirements of the Tenth Circuit.

X. WHAT WOULD BE THE CONSEQUENCES OF THE COMMISSION'S FAILURE TO ADDRESS THE TENTH CIRCUIT'S ISSUES?

None of the commenters have discussed the consequences if the Tenth Circuit is dissatisfied with the Commission's ruling in response to the NoI and the NPRM. AT&T parenthetically refers to the possibility that "the Tenth Circuit vacates the Commission's

[110] 47 U.S.C. § 254(b)(3).

rules out of frustration…."[111] It does not appear that there is any precedent for the Court to impose a specific mechanism. Thus the most likely outcome will be further appeals. This is unfortunate, but given the vast sums at issue here, the varying interests involved, and the changes in the marketplace since the Act came into effect, perhaps inevitable.

XI. CONCLUSION

The Commission should affirm its tentative conclusion to retain the current non-rural high-cost mechanism while it considers broader issues as part of the National Broadband Plan. As noted herein, the current non-rural high-cost mechanism is consistent with the requirements of § 254; the Commission can provide an adequate explanation of that consistency to the Tenth Circuit. The one area where the mechanism needs to be improved for the interim is in ensuring that the mechanism "advances" universal service. NASUCA's proposals set forth in Section V. herein would allow the mechanism to meet this statutory requirement.

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[111] AT&T Comments at 12. It should be clear that NASUCA disputes AT&T's premise that non-rural carriers have been "receiving inadequate support under the existing mechanism for more than a decade…." Id. Clearly, the Tenth Circuit made no such finding, and the data shows this to be untrue.

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