

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

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

**COMMENTS of the  
NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc. (NECA),  
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION (NTCA),  
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL  
TELECOMMUNICATIONS COMPANIES (OPASTCO),  
EASTERN RURAL TELECOM ASSOCIATION (ERTA), and  
WESTERN TELECOMMUNICATIONS ALLIANCE (WTA)**

The Commission’s April 8, 2009 *Notice of Inquiry* in the above-captioned matter<sup>1</sup> asks interested parties to refresh the record regarding high-cost universal service support for non-rural companies.

In these comments, the rural telephone associations listed above (the Associations)<sup>2</sup> urge the Commission to maintain its existing policy of recognizing critical differences between rural

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<sup>1</sup> *High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Inquiry, FCC 09-28 (rel. Apr. 8, 2009) (*NOI*).

<sup>2</sup> NECA is a non-stock, non-profit association formed in 1983 pursuant to the Commission’s Part 69 access charge rules. *See generally* 47 C.F.R. § 69.600 *et seq.* NECA is responsible for filing interstate access tariffs and administering associated revenue pools on behalf of approximately 1200 incumbent local exchange carriers (“ILECs”) that choose to participate in these arrangements. NTCA represents more than 580 rural rate-of-return regulated telecommunications providers. OPASTCO is a national trade association representing approximately 520 small ILECs serving rural areas of the United States. ERTA is a trade association representing approximately 68 rural telephone companies operating in states east of the Mississippi River. WTA is a trade association that represents over 250 rural telecommunications companies operating in the 24

telephone companies, as defined by the Telecommunications Act of 1996,<sup>3</sup> and non-rural carriers. Determinations made in this proceeding with respect to non-rural universal service mechanisms should not negatively impact support mechanisms for rural, rate of return-regulated (RoR) telephone companies.

## I. BACKGROUND

The Commission adopted rules governing the non-rural high-cost Universal Service support mechanism in 1999. This mechanism provided federal high-cost support to non-rural carriers in states where the statewide average forward-looking cost per line was above 135 percent of the nationwide cost per line.<sup>4</sup>

The United States Court of Appeals for the Tenth Circuit remanded the Commission's initial non-rural support rules back to the Commission in 2003, finding the Commission had failed to: define adequately the key statutory terms "reasonably comparable" and "sufficient;" adequately explain setting the funding benchmark at 135 percent of the national average cost per line; provide inducements for state universal service mechanisms; and explain how the non-rural funding mechanism will interact with other universal service programs.<sup>5</sup>

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states west of the Mississippi River. Most members serve fewer than 3000 access lines overall and fewer than 500 access lines per exchange.

<sup>3</sup> 47 U.S.C. § 153(37).

<sup>4</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432 (1999).

<sup>5</sup> *Qwest Corp. v. FCC*, 258 F.3d 1191 (10<sup>th</sup> Cir. 2003) (*Qwest I*).

The Commission promptly issued an *Order on Remand* adopting a modified national cost benchmark based on two standard deviations above the national average cost.<sup>6</sup> The Commission also set a national urban rate benchmark at two standard deviations above the average urban residential rate. It defined the statutory term “reasonably comparable” based on a rate benchmark, and defined the term “sufficient” as “enough federal support to enable states to achieve reasonable comparability of rural and urban rates in high-cost areas served by non-rural carriers.”<sup>7</sup>

In 2005, the court again invalidated the Commission’s non-rural high-cost universal service support rules, finding the Commission had still not adequately defined the terms “sufficient” and “reasonably comparable” in light of statutory requirements.<sup>8</sup> The Commission then issued a notice of proposed rulemaking seeking comment on non-rural support in light of the *Qwest II* decision.<sup>9</sup>

Since then, the Commission and Federal-State Joint Board on Universal Service (Joint Board) have sought comment on various proposals for comprehensive reform of all high-cost

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<sup>6</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, 18 FCC Rcd 22559 (2003) (*Order on Remand*).

<sup>7</sup> *Id.* at ¶¶ 30, 148.

<sup>8</sup> *Qwest Communications Int’l, Inc. v. FCC*, 398 F.3d. 1222, 1233 (10<sup>th</sup> Cir. 2005) (*Qwest II*).

<sup>9</sup> *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *High-Cost Universal Service Support*, WC Docket No. 05-337, Notice of Proposed Rulemaking, 20 FCC Rcd 19731 (2005) (*2005 NPRM*). Several associations filed comments in this proceeding. *See e.g.*, Comments of the Western Telecommunications Alliance, CC Docket No. 96-45 (Mar. 27, 2006); Comments of OPASTCO, CC Docket No. 96-45 (Mar. 26, 2006); Reply Comments of NTCA, CC Docket No. 96-45 (May 26, 2006).

support mechanisms.<sup>10</sup> Several parties have also filed proposals relating to specific issues raised by the Tenth Circuit in *Qwest II*, as well as comprehensive high-cost reform.<sup>11</sup>

The current NOI was issued in response to a Petition for Mandamus filed before the Tenth Circuit.<sup>12</sup> While the Commission requests parties to refresh the record on the high-cost universal service support mechanism for non-rural carriers, it also seeks comment on proposals by the Vermont Public Service Board, Vermont Department of Public Service, and the Maine Public Utilities Commission (herein, the New England PUCs), CostQuest, Qwest, and Embarq that to some extent purport to apply more broadly.<sup>13</sup> The NOI also asks for comment on how a decision in this remand proceeding “should relate to more comprehensive high-cost reform and the Commission’s initiatives regarding broadband deployment.”<sup>14</sup>

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<sup>10</sup> See e.g., *High Cost Universal Service Support*, WC Docket No. 05-337, *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking, 22 FCC Rcd 9705 (2007); *Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, 23 FCC Rcd 1531 (2008) (*Joint Board Comprehensive Reform NPRM*); *Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, 23 FCC Rcd 1467 (2008) (*Identical Support Rule NPRM*); *Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, 23 FCC Rcd 1495 (2008) (*Reverse Auctions NPRM*).

<sup>11</sup> *NOI* at ¶¶ 7-13.

<sup>12</sup> *Petition for Writ of Mandamus* filed by Qwest, the Maine Public Utilities Commission, the Vermont Public Service Board, and the Wyoming Public Service Commission, No. 09-9502 (10<sup>th</sup> Cir., Jan. 14, 2009).

<sup>13</sup> See *NOI* at ¶¶ 7-13.

<sup>14</sup> *Id.* at ¶ 1.

## II. DISCUSSION

### A. The Commission Should Refrain From Considering Issues Relating to Rural Support Mechanisms in this Non-Rural Proceeding

Although the NOI asks for comment on general high-cost reform topics, the clear focus of this proceeding is on high-cost support for *non-rural* carriers. Given the need for the Commission to respond promptly to the court's *Qwest II* remand, such focus is essential. The Associations accordingly suggest the Commission continue its practice of considering issues relating to high-cost support for non-rural carriers separately from issues relating to high-cost support for rural carriers, and refrain from making any decisions or recommendations in this proceeding that might negatively impact high-cost support for rural RoR-regulated (RoR) telephone companies.<sup>15</sup>

Separate consideration of rural high-cost support mechanisms is well-supported by the record in this proceeding and related proceedings.<sup>16</sup> The Commission and the Joint Board have consistently recognized that rural LECs “face diverse circumstances and that ‘one-size-does-not-fit-all’ in considering universal service support mechanisms that are appropriate for rural

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<sup>15</sup> The Associations continue to support the separate consideration of rural and non-rural high-cost support mechanisms. *See e.g.*, NTCA Reply Comments, CC Docket No. 96-45 (May 26, 2006), at 2-3; Comments of the Western Telecommunications Alliance, CC Docket No. 96-45 (Mar. 27, 2006); Comments of OPASTCO, CC Docket No. 96-45 (Mar. 26, 2006).

<sup>16</sup> Separate consideration of rural high-cost issues may also be required by section 4 of the Administrative Procedure Act (“APA”), 5 U.S.C. §553. That provision requires the Commission to provide notice “adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process.” *Florida Power & Light Co. v. U. S.*, 846 F.2d 765, 771 (D.C. Cir. 1988). Rural ILECs have participated extensively in earlier Commission proceedings specifically relating to rural mechanisms, and are not likely to marshal their limited resources to assemble all responsive data and arguments relating to rural high-cost support mechanisms again in this non-rural proceeding. Because this proceeding appears chiefly intended to deal with issues surrounding high-cost support for non-rural carriers, the Commission should exercise caution and limit the scope of this proceeding to the non-rural carrier issues that were before the court and specifically remanded to the Commission for further explanation.

carriers.”<sup>17</sup> The Rural Task Force (RTF) made a comprehensive study of market and operational differences between rural and non-rural carriers in 2000, which made a strong case for separate consideration of rural and non-rural support mechanisms.<sup>18</sup>

The facts have not much changed since the RTF White Paper was issued. Most ILECs that are statutorily defined as rural telephone companies are much smaller than the typical non-rural carrier and serve territory that is almost exclusively rural. Their service territories generally do not include large, low-cost urban centers that continue to permit larger carriers a relatively greater opportunity to spread expenses and amortization across larger bases. Unlike the Regional Bell Operating Companies (RBOCs) and other large non-rural ILECs, rural telephone companies typically have few options for access to capital and are often limited to the Rural Utilities Service, the Rural Telecommunications Finance Cooperative, and the Cooperative Bank. These limited capital sources will dry up without sufficient and predictable assurances that rural ILECs will be able to recover their investment and operating costs. Thus, due to the very different characteristics of rural ILECs, what may be “sufficient” for non-rural carriers may not be sufficient for rural telephone companies to provide their customers with access to reasonably comparable services at affordable and reasonably comparable rates.

The existing rural high-cost support mechanism has been highly successful in enabling rural RoR ILECs to offer services, including advanced services, reasonably comparable to those

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<sup>17</sup> *Id.*, *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 (2001), at ¶ 4. (*RTF Order*).

<sup>18</sup> *See generally*, Rural Task Force White Paper #2: *The Rural Difference*, ([http://www.wutc.wa.gov/rtf/old/RTFPub\\_Backup20051020.nsf/e1b9e65978d9348b882567d2008318d3/4951d0c8d59b2d4d8825687000826423!OpenDocument](http://www.wutc.wa.gov/rtf/old/RTFPub_Backup20051020.nsf/e1b9e65978d9348b882567d2008318d3/4951d0c8d59b2d4d8825687000826423!OpenDocument)) (*White Paper # 2*).

offered in urban areas and at affordable and reasonably comparable rates. Were the Commission to apply to rural ILECs the definition of “sufficient” it may adopt in this proceeding for non-rural carriers, it is highly likely that it would threaten rural carriers’ ability to continue investing in network infrastructure and place upward pressure on rates. As a result, the services and rates offered by rural carriers would no longer remain “reasonable comparable” to those offered in urban areas.

In addition, the Commission should refrain from mandating the use of forward-looking cost models to determine rural RoR ILEC support. Unlike non-rural carriers, rural RoR telephone companies have no ability to “average out” errors contained in forward-looking cost models. This concern was one of the primary reasons that led the RTF to conclude that the cost proxy model could not apply to the rural carriers.<sup>19</sup> The same concerns remain valid today.<sup>20</sup>

Similarly, the calculation of support based on statewide average costs would be extremely detrimental to rural service areas, denying rural ILECs sufficient support to provide

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<sup>19</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Rural Task Force Recommendation to the Federal-State Joint Board on Universal Service 16 FCC Rcd 6165, 6181 (2000). *See also*, *A Review of the FCC’s Non-Rural Universal Service Fund Method and the Synthesis Model for Rural Telephone Companies*, Rural Task Force White Paper # 4 (Sept. 2000), at 8. ([http://www.wutc.wa.gov/rtf/old/RTFPub\\_Backup20051020.nsf/43e458610b70dda8882567d00074c6cd/7e7e6b591c8b6bf38825696800730b2b/\\$FILE/Rtftp4.pdf](http://www.wutc.wa.gov/rtf/old/RTFPub_Backup20051020.nsf/43e458610b70dda8882567d00074c6cd/7e7e6b591c8b6bf38825696800730b2b/$FILE/Rtftp4.pdf))

<sup>20</sup> Whatever merits forward-looking cost modeling approaches may have for non-rural companies, the Commission should not consider adoption of these mechanisms for rural RoR companies without extremely careful analysis of actual model impacts. In urging adoption of models that supposedly provide support amounts mimicking competitive conditions, proponents of forward-looking cost models fail to recognize the extent to which rural carriers serve as “carriers of last resort” in their service territories. They also significantly underestimate the extent to which such models must rely on estimates and assumptions which, if wrong, can result in wildly wrong payments to smaller companies. It also remains unclear how proposals to replace payments based on hard accounting data with payments based on mathematical constructs will serve the public interest in an era where the Commission has substantially increased its oversight of USF disbursements based on actual historical data.

high-quality service at affordable rates to their customers. Indeed, the Joint Board, in a previous Recommended Decision, recognized that statewide averaging “may not be appropriate for the high-cost mechanism providing support to rural carriers” due to the fact that “many rural carriers lack the economies of scale and scope of the generally larger non-rural carriers....”<sup>21</sup>

**B. Reform of the Non-rural Support Mechanism Must Not Adversely Impact Funding Available Under Rural Support Mechanisms.**

As the Commission is aware, high-cost loop support (HCLS) amounts for rural ILECs is already capped, causing some to receive far less support than they otherwise would be entitled to based on reported cost data. This has created challenges for these carriers to make the network investments necessary to offer “reasonably comparable” services to all consumers in their service territories.

While the Associations express no position on Embarq’s proposal at this time, it is important to note that rural price cap carriers receive HCLS under the same indexed cap as rural RoR ILECs. Thus, if the Commission decides that rural price cap carriers need additional support, that support should be entirely outside the existing cap on the rural ILEC HCLS mechanism. It makes no sense to disadvantage customers served by rural RoR ILECs in the process of providing additional support to carriers serving different territories. Better yet, the Commission should consider removing, or at least re-basing, the cap on HCLS, as the Associations have suggested in filings made in related proceedings.<sup>22</sup>

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<sup>21</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 17 FCC Rcd 20716 (2002), at ¶ 28.

<sup>22</sup> See e.g., NECA Comments, CC Docket No. 96-45 (Feb. 26, 2001), at 6; Comments of OPASTCO, WC Docket No. 05-337 (May 31, 2007), at 17-18, 23; Comments of OPASTCO, WC Docket No. 05-337 (Apr. 17, 2008), at 23; Comments of OPASTCO and WTA, CC Docket No. 01-92; WC Docket No. 05-337 and CC Docket No. 96-45 (Oct. 10, 2008), at 6; Comments of NTCA, CC Docket Nos. 96-45, 96-98, 01-92, 99-68, and 99-200 (Nov. 26, 2008), at 29-30.



**C. Separate Consideration of Rural Telephone Company Characteristics is Especially Important in Coordinating High-Cost Support Reform and National Broadband Deployment Plans.**

Finally, the Commission seeks comment on the relationship of any modifications to the non-rural support mechanism to its broadband policies.<sup>23</sup> In order to further the Commission's broadband policies in rural service areas, it is critical that modifications to the non-rural mechanism do not in any way negatively impact high-cost universal service support received by rural RoR telephone companies, either individually or collectively.

The FCC's NOI on the development of a national broadband plan states that "our goal must be for every American citizen and every American business to have access to robust broadband services."<sup>24</sup> Existing high-cost support mechanisms for rural RoR ILECs have been critical in enabling these carriers to deploy multi-use, broadband-capable facilities in their service territories and to offer broadband services to a significant percentage of customers. Yet, rural carriers are facing increasing risks to existing revenue streams. For example, intercarrier compensation, which rural ILECs have traditionally relied upon for approximately 30 percent of their revenues, on average, has become increasingly unstable in recent years due to factors such as phantom traffic and various forms of "access avoidance" (i.e., refusals to pay access charges by entities that terminate increasing amounts of interexchange traffic on rural networks).<sup>25</sup>

As revenue sources become less certain, much more needs to be done to achieve the Commission's broadband deployment goals. There are still portions of rural service areas that

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<sup>23</sup> *NOI* at ¶ 28.

<sup>24</sup> *National Broadband Plan for Our Future*, GN Docket No. 09-51, Notice of Inquiry, FCC 09-31 (rel. Apr. 8, 2009), at ¶ 5.

<sup>25</sup> *See* Letter from Joe. A. Douglas, NECA, to Marlene H. Dortch, FCC, CC Docket No. 01-92 (Oct. 16, 2007). *See also*, Letter from Joe. A. Douglas, NECA, to Marlene H. Dortch, FCC, WC Docket No. 04-36, CC Docket No. 01-92 (May 23, 2008), and Letter from Joe. A. Douglas, NECA, to Marlene H. Dortch, FCC, CC Docket No. 01-92 (May 2, 2007).

are so prohibitively expensive to serve that broadband deployment will simply not be feasible without adequate high-cost support. Even after broadband services become available ubiquitously in rural areas, support will continue to be necessary for ongoing maintenance and upgrades of those networks. Products, services and applications that ride over the broadband infrastructure are becoming increasingly bandwidth-intensive, requiring ever-higher data speeds. In order for consumers and businesses in rural service areas to be able to utilize everything the Internet has to offer, rural ILECs will need to continue investing in their broadband networks.

A diminished rural ILEC high-cost program will not accomplish these important goals. To accomplish policymakers' broadband goals, it is essential that decisions made in this proceeding with respect to non-rural high-cost support do not negatively impact the size and sufficiency of high-cost mechanisms utilized by rural RoR ILECs.

### **III. CONCLUSION**

The Commission should focus its attention in this proceeding on non-rural high-cost support mechanisms and avoid making determinations with respect to high-cost support mechanisms utilized by rural RoR carriers. As discussed above, significant differences continue to exist between rural telephone companies and non-rural ILECs, warranting separate consideration of high-cost USF support reform issues. The Commission should be especially careful to avoid making determinations in this proceeding with respect to non-rural support mechanisms that might adversely impact support levels for rural RoR ILECs. Existing programs have done a good job of assisting rural RoR carriers to deploy broadband widely throughout their service territories. In its efforts to develop adequate high-cost support funding mechanisms for non-rural companies, the Commission must not jeopardize existing broadband deployment accomplishments by rural ILECs, but should instead consider ways to expand rural

high-cost mechanisms to enable continued deployment and ongoing investment in advanced services in areas served by rural carriers.

Respectfully submitted,

NATIONAL EXCHANGE CARRIER  
ASSOCIATION, INC.



By:

Richard A. Askoff  
Its Attorney  
80 South Jefferson Road  
Whippany, NJ 07981  
(973) 884-8000

NATIONAL TELECOMMUNICATIONS  
COOPERATIVE ASSOCIATION

By: /s/ Daniel Mitchell  
Daniel Mitchell  
Karlen Reed  
Regulatory Counsel  
4121 Wilson Boulevard, 10th Floor  
Arlington, VA 22203  
(703) 351-2000

ORGANIZATION FOR THE  
PROMOTION AND ADVANCEMENT OF  
SMALL TELECOMMUNICATIONS  
COMPANIES

By: /s/ Stuart Polikoff  
Stuart Polikoff  
Director of Government Relations  
21 Dupont Circle NW, Suite 700  
Washington, DC 20036  
(202) 659-5990

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EASTERN RURAL TELECOM  
ASSOCIATION

By: /s/ Jerry Weikle  
Jerry Weikle  
Regulatory Consultant  
5910 Clyde Rhyne Drive  
Sanford, NC 27330  
(919) 708-7404

WESTERN TELECOMMUNICATIONS  
ALLIANCE

By: /s/ Derrick Owens  
Derrick Owens  
Director of Government Affairs  
317 Massachusetts Ave. N.E.,  
Suite 300 C  
Washington, DC 20002  
(202) 548-0202

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Associations' Comments was served this 8<sup>th</sup> day of May, 2009 by electronic filing and email to the persons listed below.

By: /s/ Shawn O'Brien  
Shawn O'Brien

The following parties were served:

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, DC 20554  
(via ECFS)

Antoinette Stevens  
Telecommunications Access Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, DC 20554  
[Antoinette.Stevens@fcc.gov](mailto:Antoinette.Stevens@fcc.gov)

Best Copy and Printing, Inc.  
Room CY-B402  
445 12<sup>th</sup> Street SW  
Washington, DC 20554  
[fcc@bcpiweb.com](mailto:fcc@bcpiweb.com)