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

In the Matter of	)
	)
Connect America Fund	) WC Docket No. 10-90
	)
ETC Annual Reports and Certifications	) WC Docket No. 14-58
	)
Developing a Unified Intercarrier Compensation Regime	) CC Docket No. 01-92
	)

COMMENTS OF WTA – ADVOCATES FOR RURAL BROADBAND ON FURTHER NOTICE OF PROPOSED RULEMAKING

WTA – THE RURAL BROADBAND ADVOCATES

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Summary

WTA – Advocates for Rural Broadband ("WTA") seeks Commission policies and rules that are effective in attaining state-of-the-art and affordable broadband facilities and services in rural areas that are reasonably comparable to those available in urban areas. Whereas the efficient use of universal service resources is a very significant goal, their effectiveness in promoting increased broadband deployment and adoption is of paramount importance.

The Commission's rules have previously prohibited the inclusion of specific operating expenses in revenue requirements and high-cost support calculations. That is the appropriate approach, and any future additions to the Commission's list of impermissible operating expenses should be explicitly included in revised Commission rules, and disallowed only prospectively after such revised rules become effective.

In analyzing the list of operating expenses under review in this proceeding, WTA has found that the following expenses are effective in enhancing the marketing and adoption of regulated services, or in recruiting and retaining the administrative, customer service and technical employees necessary to provide high quality regulated services: (a) charitable contributions; (b) sponsorships; (c) scholarships; (d) dining facilities; (e) housing allowances; (f) company social events; (g) executive compensation; (h) Board compensation; (i) certain membership fees; (j) certain office furnishings; and (k) certain off-road vehicles. WTA recognizes that some of these operating expenses can be subject to reasonable limits, but that prohibiting them in whole or major part is likely to have adverse consequences on broadband adoption, revenues and expenses that may well result in increased high-cost support. It notes

that most of these operating expenses are already limited by the existing corporate operations expense caps and by the new operating expense limitation.

While greater clarity in cost allocation rules is useful, WTA warns that excessive allocation of joint and common costs from regulated voice and wholesale broadband transmission services to non-regulated retail broadband services can have major adverse impacts upon broadband adoption. Given that retail broadband service prices in many urban areas are already pushing the limits of reasonable comparability, increasing the costs allocated to and recovered from retail broadband service customers will result in price increases, service cut-backs and terminations by existing customers, and lost sales to new customers. To the extent that retail broadband adoption decreases, many of these joint and common costs will need to be re-allocated back to regulated services and recovered, *inter alia*, from increased high-cost support.

WTA finds the Commission's existing Section 32.27 affiliate transaction rule to be reasonable and effective. Whereas there may be some value in clarifying the components of fully distributed cost studies, it would make no sense to impose the rule upon transactions with non-affiliates or to require non-affiliates to conduct or provide fully distributed cost studies.

WTA understands that the statutory "deemed lawful" status of streamlined tariff transmittals under Section 204(a)(3) of the Act may be voided in cases of fraud or deliberate concealment by an issuing carrier. However, there is no discernable basis in the statute or its judicial interpretation for voiding or otherwise setting aside "deemed lawful" status in cases of errors or mistakes not involving fraud or deliberate deceit.

Although the National Exchange Carrier Association ("NECA") is a tough cop regarding the enforcement of Commission rules, WTA supports a continuing role for NECA in tariff administration and as a repository and analyst of data for the rural local exchange carrier ("RLEC") industry and the Commission.

Finally, WTA supports the Commission's efforts to simplify annual FCC Form 481 reporting and to eliminate unnecessary portions thereof. However, it does have concerns about the protection of the proprietary and confidential information in these reports, and requests that state commissions and Tribal governments that do not have legal authorization and procedures to safeguard proprietary and confidential data be required to execute appropriate protective orders in order to obtain access.

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COMMENTS OF
WTA – ADVOCATES FOR RURAL BROADBAND
ON
FURTHER NOTICE OF PROPOSED RULEMAKING

WTA-Advocates for Rural Broadband ("WTA") hereby submits its comments in response to the Commission's Further Notice of Proposed Rulemaking[1] ("*FNPRM*") in the referenced proceeding. These comments are filed in accordance with the schedule established in 81 *Fed. Reg.* 21511 (April 12, 2016).

A. WTA – Advocates for Rural Broadband

WTA is a national trade association representing more than 300 rural telecommunications providers ("RLECs") offering voice, broadband and video services in rural America. WTA members are generally small local exchange carriers that serve some of the most remote, sparsely populated and expensive-to-reach areas in the country and that are providers of last resort to those service areas. The typical WTA member has 10-to-20 full-time employees, and

[1] *In the Matter of Connect America Fund et al.*, Report and Order, Order and Order on Reconsideration, Further Notice of Proposed Rulemaking, WC Docket Nos. 10-90 and 14-58 and CC Docket No. 01-92, FCC 16-33, released March 30, 2016.

serves fewer than 3,500 access lines in the aggregate, and fewer than 500 access lines per exchange.

B. Introduction

As its name indicates, WTA and its members are advocates for the deployment and adoption of high quality and affordable broadband facilities and services throughout Rural America in a manner that provides broadband services and rates that are reasonably comparable to those available in urban areas. WTA looks at this and other rulemakings in terms of their effectiveness in promoting and achieving increased rural broadband deployment and adoption. Although efficient use of both RLEC and Universal Service Fund ("USF") resources is a very important goal, effective extension of access by rural residents to the broadband services and speeds they need and growth of rural broadband adoption remain the paramount objectives.

Hence, while some types of expenses are clearly impermissible, WTA's analysis of many of the expenses listed in the *FNPRM* indicates that they are effective in promoting broadband service, in making the contacts necessary to stay abreast of local service demands, and in retaining the stable and trained customer service and technical staffs necessary to provide the quality service necessary to keep existing customers and attract new ones. WTA notes that the Commission already has in place devices like the existing corporate operations expense caps and the new operating expenses limitation to promote efficiency. It further stresses that any new rules prohibiting the inclusion of specified expenses in revenue requirement or high-cost support calculations should be prospective only.

Similar considerations of effectiveness and efficiency apply to the *FNPRM's* review of the rule and procedures for allocating costs between regulated telecommunications services and

non-regulated retail broadband services. Whereas greater clarity regarding such allocations is a worthy goal, there are substantial dangers that over-allocation of joint and common costs to retail broadband services could impair or decrease their adoption, and ultimately reverse any initial high-cost support reductions.

Finally, WTA: (a) supports retention of the existing affiliate transaction rules, but opposes their extension to transactions with unrelated third parties; (b) opposes nullification of statutory "deemed lawful" status in situations where no fraud or deliberate concealment was present; (c) supports continued tariff administration and data collection roles for the National Exchange Carrier Association ("NECA"); (d) supports elimination of duplicative and unnecessary reporting obligations; and (e) supports a single filing of the annual FCC Form 481 report with the Universal Service Administrative Company ("USAC"), but requests that the proprietary and confidential information in such reports not be shared without an effective Protective Order that can be entered into by state commissions and Tribal governments that lack the statutory authority, capabilities and procedures to protect such information.

C. Permitted Expenses

WTA members operate voice and data telecommunications businesses of their own, and are very familiar with the types of expenditures that are necessary to attract and retain customers, increase revenues, provide first-rate customer service, maintain high employee morale, minimize staff turnover, and otherwise sustain an effective and efficient business and service environment. Contrary to the misimpressions of some, the vast majority of WTA members and other RLECs are small companies with minimal access to capital markets that do not have the financial

resources to waste on non-essential matters (even if they are reimbursed, in whole or part, a year or so later by the NECA pools or the Commission's high-cost support mechanisms).

WTA supports reasonable rules regarding permissible expenses for local exchange carriers. However, WTA urges that the *FNPRM's* review be conducted in a careful and flexible manner focused upon effective broadband deployment and adoption, and that it not over-emphasize potential short-term expense reductions at the cost of long-term service and revenue growth (which can reduce high-cost support needs).

1. Prospective Effect Only

As an initial matter, WTA urges the Commission to clarify that, except for costs that previously have been clearly and explicitly disallowed by its rules, the determinations made as a result of its review during this further rulemaking will be prospective only. Unfortunately, both the Commission's *October 19, 2015 Public Notice*[2] and paragraph 340 of the *FNPRM* state that certain enumerated expenses "may not be recovered," thereby possibly implying that listed expenses that have long been considered permissible by many carriers, auditors and regulators and that have not previously been addressed or prohibited in the Commission's rules may be retroactively disallowed during pending and future audits.[3] WTA requests that the Commission's ultimate order in this proceeding state clearly that any expenses determined therein to be impermissible will not be disallowed for revenue requirement or high-cost support purposes unless they were incurred after the effective date of the Order and rules resolving the present *FNPRM.*

[2] *Public Notice* (All Universal Service High-Cost Support Recipients Are Reminded That Support Must Be Used For Its Intended Purpose), WC Docket Nos. 10-90 and 14-58, FCC 15-133, released October 19, 2015.

[3] To the extent that such audits may go back multiple prior years and seek repayment by small companies with limited financial resources of alleged "improper payments" that were expended long ago, they can have a substantial adverse impact upon existing and future investment, operations and service quality.

2. Existing Operating Expense Limitations

WTA notes that the new Operating Expense ("OPEX") Limitation of Section 54.303(a) of the Rules is likely to resolve many of the operating expense matters that the Commission seeks to address in the *FNPRM*. Whereas the Rule's 1.5 standard deviation criterion will affect only a limited number of carriers each year, its actual workings are likely to affect many more. Specifically, as the mechanism is implemented, not only the immediately affected carriers but also those that were close to being affected are likely to take steps to reduce costs that can no longer be recovered or that are in danger of being excluded from cost recovery in the near future. When the regression mechanism is run again, these changes are likely to mean that the upper limit of cost recovery per location for operating expenses will be reduced, and that at least some different carriers will be affected or be placed in danger of being affected. This downward trend in OPEX cost recovery per location is likely to continue for some time, and to affect or threaten to affect an increasing number of RLECs if and when the mechanism is re-run.[4]

WTA notes also that the corporate operations expense caps of Rule Sections 54.1308(a)(4) (for High Cost Loop Support) and 54.901(c) (for Interstate Common Line Support) also effectively limit for many companies a portion (in some cases, a substantial portion) of the operating expenses under review.

3. Impermissible Expenses

WTA supports appropriate exclusion and disallowance of expenses for: (a) personal travel not required by employment duties; (b) personal expenses unrelated to employment travel or duties; (c) vehicles for personal use; (d) political contributions; (e) penalties or fines for

[4] The March 30, 2016, order is not clear how and when the OPEX model will be updated and re-run. WTA and other rural associations have proposed that any and all such updates should employ an inflation adjustment so as not to penalize RLECs that have elected or been forced to remain on the Rate of Return Path if their operating expenses increase due to national or regional inflation.

statutory or regulatory violations; and (f) penalties or fees for any late payments on debt, loans, or other payments.

4. Permissible Expenses

Whereas one might assume that WTA members and other RLECs can pay for various community and employee activities from their profits, this is not the case in today's RLEC industry. Rather, these small companies are caught in a squeeze among, *inter alia*: (a) the increasing broadband capacity needs of their rural customers, (b) both regulatory build-out requirements and customer demands that require substantial additional investments, (c) a slow economic recovery that has limited the availability of investment capital and reduced the ability to increase customer rates and revenues, and (d) limited high-cost support. The result is that most RLECs cannot afford to engage in various community and employee activities unless they can ultimately recover the costs thereof. If the Commission rules that the expenses of various activities can no longer be recovered from revenue requirements and high-cost support, many such activities will be discontinued.

Charitable contributions. In its 1987 Order adopting rate base rules, the Commission rejected proposals for the removal of charitable contributions from interstate revenue requirements, stating:

> This Commission continues to believe that reasonable charitable contributions are very much an obligation of a business enterprise to the community it serves and upon which it is dependent for its revenues. We consider reasonable charitable contributions part of the cost of doing business and there is nothing in the record to suggest that they have become unreasonable or excessive. We also consider it appropriate for any company, whether regulated or unregulated, to support the services of the community in which it operates.[5]

[5] *Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers*, CC Docket 86-497, Report and Order, 2 FCC Rcd. 269 (1987) ¶ 77 (*Rate Base Order*).

However, whereas Section 65.450(d) of the Rules appears to allow "reasonable charitable deductions" to be included in net income calculations, Section 32.7300(h)(2) indicates that "contributions for charitable, social, or community welfare purposes" are non-operating expenses typically given special regulatory scrutiny and are normally excluded from rate and universal service calculations unless special justification is given.

WTA believes that the Commission got it right in its 1987 *Rate Base Order*. Reasonable charitable contributions constitute an essential part of serving a community. At the same time, they create goodwill and positive name recognition that enhance the ability of an RLEC to sell its services to both long-standing and new residents and businesses within its service area. Put another way, an appropriate donation to a local non-profit organization generally has a more effective marketing impact than thousands of dollars of paid advertising. In the long run, the resulting larger customer base normally means increased customer revenues and reduced need for high-cost support.

Over the years, WTA has emphasized the important role that RLECs play in the life and welfare of their rural service areas. The Commission should encourage them to continue in this role, and not to cut back by reducing their charitable donations, sponsorships and similar forms of community participation.

WTA proposes that reasonable charitable donations[6] be allowed to be recovered via revenue requirements and high-cost support. Over and above the public welfare impacts, the Commission can justify this treatment by the positive marketing impacts of charitable donations

[6] WTA recognizes that "reasonable" expenditures must be limited, and believes that limits set on a per-customer basis, or as a percentage of regulated revenues, are most likely to be fair and equitable to both the public and RLECs of various sizes. WTA will work with the Wireline Competition Bureau and other rural associations to develop appropriate limitations for various permitted expenses.

and related community participation, and by the resulting reduction of high-cost support needs as customer revenues increase.

Sponsorships of conferences or community events. Reasonable expenditures for sponsorships have virtually the same social, goodwill and marketing impacts as charitable donations, and should be permitted to be recovered via revenue requirements and high-cost support for the same reasons.

Scholarships. Company scholarships that help local residents cover some of their tuition costs to attend colleges, community colleges and trade schools have many of the same social, goodwill and marketing impacts as charitable donations and sponsorships. In addition, they encourage bright young people to remain in or return to their rural communities, and initiate relationships which can help the carrier later to recruit the scholarship recipients and their families as customers and employees.

Likewise, many RLECs reimburse their employees for the tuition costs of courses or degrees taken to expand or upgrade their work skills. These programs not only help to retain existing employees, but also improve the quality of the service provided by the participating employees.

As with charitable donations and sponsorships, the amount of a carrier's recoverable annual expenditures for scholarships can be limited to a reasonable maximum,[7] but the goodwill, marketing and recruiting benefits of scholarships support their continued inclusion in cost recovery from rates and high-cost support.

Childcare, cafeterias and dining facilities. The vast majority of WTA members and other RLECs are too small to afford childcare or cafeterias, and do not provide them. The dining

[7] We are not talking here of expenditures of $50,000 or more a year to give local students free rides through Ivy League universities. Rather, a typical RLEC scholarship is $1,000 to $5,000 a year to help defray some of the student's tuition expenses.

facilities they furnish generally consist of a few tables and chairs, some dishes and utensils, a microwave to heat food, a refrigerator to cool food and beverages, a coffee maker, and a sink to clean up. The annual costs of these facilities are insignificant and immaterial. The principal costs are likely to be electricity and water, which normally are not separately metered for the room set aside for dining. Meanwhile, the appliances and furnishings are relatively inexpensive, and last for years. Even if the costs of in-office dining facilities were significant, they would be more than offset by the increased efficiencies and reduced disruptions and costs of minimizing the time lost by employees in order to leave the premises to find lunch elsewhere.

Housing allowances or other forms of mortgage or rent assistance for employees. WTA agrees that housing allowances are not a normal or common operating expenditure. However, in some instances, a housing allowance may be necessary to induce a desired new manager or technical employee and his or her family to relocate to the remote rural area served by the company. In other cases, the desired new manager or employee may not be able to sell his current home or move his or her family during the school year, and may not take the job or start immediately without a housing allowance to enable the maintenance of both households for the necessary period. In yet a third example, a carrier may need to send an employee to a remote part of its service area for several weeks or months, and to provide an allowance for temporary housing during the assignment. In all three examples, the housing allowance would have a substantial and effective business purpose – to obtain and retain a critical employee, or to allow an employee to complete a task efficiently without spending hours travelling to and from the work site. And in all three cases, the housing allowance would constitute the less expensive alternative for the carrier (it could pay the new manager a bonus or higher starting salary, or allow a commuting employee much more time to complete the remote task), and would reduce

the amount of operating expenses that the carrier would need to recover from revenue requirements and high-cost support.

Entertainment, alcohol and food, including but not limited to meals to celebrate personal events such as weddings, births and retirements. Company parties and picnics help to build morale and team spirit that improve service quality and reduce employee turnover. In the areas served by RLECs, these points are very significant. First, in a rural area, most people know each other; therefore, a company with good morale and effective employees will have a much easier time selling its services, and attracting and retaining customers. Second, in a rural area with a limited pool of potential employees, it is very efficient to minimize turnover, and to keep trained and experienced employees for decades. These factors contribute significantly to increased revenues and reduced expenses, and therefore can have positive impacts on high-cost support.

Company parties and picnics are not frequent events for most RLECs – often a summer picnic and a holiday party. WTA does not believe that they constitute a material or perceptible portion of high-cost disbursements. WTA proposes that a company be permitted to recover a reasonably limited amount per year of expenses for employee celebrations of this nature.

Executive compensation. WTA believes that there are too many variables affecting executive compensation for the Commission to effectively regulate it or to determine further how much should be allowed to be recovered from revenue requirements and high-cost support. Executive compensation is influenced by a variety of factors including the size of a company, its location, its profitability and cash reserves, its competitive situation, and its growth potential. WTA knows of no criteria or standards that the Commission could employ to set limits on executive compensation that would be equitable and effective across the diverse range of rural telephone companies and service areas. Rather, the shareholders, cooperative members and

Boards of Directors of individual companies have sufficiently adverse interests and expertise to set the compensation of their own executives. Whereas the Commission may point to a couple examples of apparently excessive compensation, the vast majority of RLECs have kept their executive compensation at levels that are both reasonable and effective in obtaining and retaining the executives they need. Moreover, the workings of the Commission's existing corporate operations expense caps and newly adopted OPEX limitation restrict the amount of corporate expenses, including executive compensation, that can be recovered from high-cost support mechanisms.

Board compensation. RLECs have two different types of boards: (a) Boards of Directors of cooperatives that are generally elected by geographical district by the cooperative members living in that district; and (b) Boards of Directors of commercial companies that are generally major shareholders or representatives elected or appointed by shareholders. Each of these types of Boards has somewhat different duties and entails different types of expenses. For example, cooperative board members are somewhat like elected legislators who continuously interface with their fellow members/constituents, and who are expected to keep the cooperative management aware of the needs and problems of those they represent. In contrast, if they are not officers or managers of the company, commercial company board members are likely to have minimal contact with the company between Board meetings and are likely to focus primarily upon reviewing periodic management reports, and voting upon budgets, major policies and substantial investments. Whereas cooperative board members are local residents who generally drive to and from meetings (although such drives may be long), commercial company board members may have to fly to and from meetings and be furnished lodging for a night or two. And whereas commercial company directors can be reasonably compensated via per-meeting fees,

such per-meeting fees are not likely to adequately compensate cooperative board members for all of the time outside meetings that they spend listening to the suggestions, complaints and problems of their constituents.

In light of these differences, it does not appear feasible to establish a general rule or limit for Board compensation that will be equitable for both cooperatives and commercial companies. Moreover, with respect to both types of Boards, the cooperative members and shareholders have an adverse interest (*i.e.*, to maximize their own patronage dividends or profit distributions) and lack any significant incentive to over-compensate their directors. To date, WTA is aware of no allegations of Board compensation abuses among its members or among other RLECs. Moreover, if any abuses were to occur, most would be insulated from impacting high-cost support by the existing corporate operations expense caps and by the new OPEX limitation.

Membership fees in clubs and organizations. WTA finds this category to be overly inclusive. For example, membership in national and state trade associations is a very cost-effective way for small companies to learn about, understand and comply with the details and nuances of new and changing statutory and regulatory requirements, and to stay abreast of the opportunities, trends and problems affecting the telecommunications industry. Likewise, membership in Chambers of Commerce and other regional and local business organizations is necessary to keep in touch with the changing telecommunications and business needs of the carrier's service area, and to make contacts that improve the marketing and increase the adoption of the carrier's services. In both cases, the predominant motivation and effect is to advance the business interests of the RLEC in a manner that will ultimately reduce its reliance upon high-cost support by either increasing its revenues or decreasing its expenses. Therefore, membership fees to these and similar business-oriented organizations should be permissible and recoverable.

In contrast, memberships to country clubs, health clubs, golf courses, tennis clubs and swimming pools have significant personal and social benefits as well as helping to make business contacts. Unless a carrier can show that the predominant purpose and benefit of membership in a club of this nature was to advance its telecommunications business interests, membership fees in clubs of this nature should not be permissible expenses.

Artwork and other objects which possess aesthetic value. In order to operationalize this category, the Commission needs to decide what has "aesthetic value," and how much additional expense is permissible and recoverable with respect to the furnishing of a carrier's offices. Such offices need to be pleasant and inviting places for employees to work and for customers and potential customers to visit. They do not need original Picassos or Van Goghs on their walls, but they cannot be drab and shoddy environments that employees and customers want to leave as soon as possible. A rule of reason is necessary, although these should apply equitably to diverse companies geographically across the nation. One possibility would be to require artwork and similar aesthetic objects to be expenses in the year of acquisition or amortized over a maximum period of years, and to limit the permissible and recoverable amount of such annual expense to a specified percentage of the carrier's revenues or operating expenses.

Corporate aircraft, watercraft and off-road motor vehicles. In the large and rugged service areas of many RLECs, particularly in portions of the rural West, aircraft, watercraft or off-road motor vehicles are often the fastest, safest, most reliable, most efficient and least expensive ways for technicians to reach remote areas to install, inspect or repair facilities. Likewise, in Rural America, a corporate aircraft (plane or helicopter) may be the fastest, most efficient and least expensive way to get executives, employees, and contractors to and from the closest airport (which may be hundreds of miles away) for business travel. In some instances,

insurance contracts limit the use of these vehicles entirely to business purposes. Where they are occasionally used for personal or recreational purposes, their capital and operating expenses can be allocated, and only the expenses for regulated business use recovered from revenue requirements and high-cost support. Whereas the Commission and its auditors have long been able to scrutinize corporate aircraft, watercraft and off-road motor vehicle usage, the business uses thereof are so substantial that it would be very disruptive to classify their operating expenses generally as impermissible or non-recoverable, rather than looking to their actual, relative usage.

Conclusion. Whereas some categories of expenses (personal, political contributions, and fines and penalties) should be categorically excluded from revenue requirements and high-cost support, most of the *FNPRM's* listed expense categories have significant business components or subsets that are effective in increasing RLEC regulated revenues or decreasing RLEC regulated expenses so as to reduce regulated RLEC rates or needed high-cost support. Rather than being listed as prohibited or impermissible, these expense categories need to be addressed more flexibly by various classifications, allocations and limitations that ensure they remain reasonable.

D. Cost Allocation Issues

The *FNPRM* proposes to revisit the Commission's existing cost allocation rules in order to provide greater clarity to rate-of-return carriers regarding how to determine the relative allocation of costs between regulated and non-regulated activities. It points to the example of marketing costs, which it claims may be recorded solely as regulated expenses even though a carrier's marketing activities are designed to increase subscribership of its non-regulated retail

broadband services.[8] The *FNPRM* asserts that there are incentives to interpret existing allocation rules to allocate as many costs as possible to regulated activities in order to justify higher interstate revenue requirements and to receive additional high-cost support.[9]

WTA supports greater clarity in the Commission's cost allocation rules. It believes that the existing rules that generally require direct assignment of costs to regulated and non-regulated activities where possible are reasonable and equitable, and should be retained. It recognizes that joint and common costs pose the greatest challenge, and that their allocation is further complicated by the trade-off between reductions in regulated rates and high-cost support versus broadband adoption and associated affordable retail broadband rates.

Specifically, it appears that the *FNPRM's* proposed re-examination is focused upon requiring RLECs to allocate more of their joint and common costs away from their regulated voice and wholesale broadband transmission services to the non-regulated retail broadband Internet access services of their Internet Service Provider ("ISP") affiliates (or, in some cases, their own ISP divisions). This will reduce regulated revenue requirements and high-cost support during the applicable distribution years. However, increases in the allocation of joint and common costs to non-regulated broadband services are going to require the ISP affiliates or divisions to recover the additional costs by increasing their retail broadband rates.

The problem here is that retail broadband rates are already high in many rural areas, and that higher and higher rates violate the principles of affordable broadband service that is reasonably comparable to that available in urban areas, as well as discouraging and impairing broadband adoption. Given the recently adopted $42 benchmark for wholesale broadband transmission services, plus the need to recover middle mile, provisioning (customer and technical

[8] Order at para. 353.
[9] Id.

service) and other costs, retail broadband rates in many RLEC service areas are already likely to exceed the Commission's existing reasonable comparability broadband benchmarks ($69.14 to $75.20) for 10/1 services.[10] Allocating additional joint and common costs to be recovered by these retail broadband services further exacerbates the problem by rendering the service more and more expensive.

At some point, perhaps already exceeded in some areas, increasing retail broadband rates will subvert the goals of Commission programs, including its Universal Service Fund programs, to increase broadband adoption in high-cost areas and among low-income households by causing existing customers to cut-back or terminate their service, and by discouraging potential new customers from taking service. To the extent that this occurs, initial reductions of regulated rates and high-cost support may only be temporary, as more joint and common costs will need to be re-allocated to regulated services as non-regulated services, revenues, lines and/or customers decline.

WTA emphasizes that it does not oppose the re-examination of the Commission's cost allocation rules in principle, but rather is very concerned that, under existing circumstances, substantial reallocations of joint and common costs to retail broadband services can have substantial adverse consequences upon retail broadband service rates, affordability and adoption in rural areas. To the extent the Commission determines to move forward with its proposed re-examination, WTA urges it to carefully consider and monitor its allocation changes not only in light of its traditional Part 64 principles but also with respect to their potential impacts upon broadband rates, affordability and adoption.

[10] *Public Notice* (Wireline Competition Bureau Announces Results of 2016 Urban Rate Survey for Fixed Voice and Broadband Services, Posting of Survey Data and Explanatory Notes, and Required Minimum Usage Allowance for ETCs Subject to Broadband Public Interest Obligations), DA 16-362, released April 5, 2016.

E. Affiliated Transactions

Section 32.27 of the Rules established a reasonable and equitable floor price (the higher of fair market value or fully distributed cost) for services sold or transferred by a carrier to its affiliate, and a ceiling price (the lower of fair market value or fully distributed cost) for services sold or transferred from an affiliate to a carrier.

The *FNPRM's* principal concern with this rule appears to be that it may allow carriers too much discretion in performing fully distributed cost studies, and that such discretion allows carriers to exclude expenses associated with providing shared functions to their non-regulated affiliates, especially those affiliates that sell retail broadband services to end users on an unregulated basis.[11]

The vast majority of WTA members provide wholesale broadband transmission services to their ISP affiliates as special access services via the NECA tariff or via their own interstate access tariffs. These arrangements are not subject to the affiliate transaction rules.

To the extent that WTA members engage in other service transactions with their ISP affiliates, they comply with Section 32.27 where applicable. WTA does not believe that this situation is common. To the extent that the Commission believes that it needs to adopt more detailed rules regarding the costs that should be included in a fully distributed cost study, WTA would be more than willing to discuss the matter with the Commission's staff.

However, WTA opposes the application of existing or revised affiliate transaction rules or standards to goods and services acquired from non-affiliated entities.[12] With respect to a non-affiliated entity, each and every transaction is at arms' length, and the valuation thereof is reasonably and accurately measured by the price charged by the third party or negotiated with it.

[11] Order, para. 356.
[12] Order, para. 351

Moreover, no unaffiliated seller is going to agree to prepare and provide a fully distributed cost study that discloses its costs to the carrier-buyer and others. Rather, unaffiliated sellers will refuse to do business under such circumstances.

To the extent that the Commission is concerned that the purchase may not have been prudent or used and useful, that is a wholly separate matter entailing permissibility or disallowance rather than valuation.

F. "Deemed Lawful" Status

Section 204(a)(3) of the Communications Act clearly and explicitly deems interstate access tariff transmittals filed on a streamlined basis to be lawful unless the Commission takes appropriate action within the applicable 7-day or 15-day period. As indicated by the D.C. Circuit in *ACS v. FCC*[13], the "deemed lawful" language is unambiguous, and is controlling except in cases of willful misconduct where the filing carrier "furtively employs improper accounting techniques" or similar devices to deliberately or willfully conceal fraud or other wrongdoing from the Commission.

WTA does not believe that Section 204(a)(3) can reasonably or accurately be read to allow the Commission to void a tariff transmittal's "deemed lawful" status because the issuing carrier incorrectly or inadvertently certified that its revenue requirements were compliant with applicable standards. Particularly at a time when unfamiliar and complex new rules and procedures are being interpreted and implemented, a mistaken certification falls far short of fraud or willful concealment. It is one thing if the Commission can show that the carrier knowingly and willfully filed a false certification, but an inadvertent error or honest misinterpretation is not sufficient to override the express statutory grant of "deemed lawful" status.

[13] ACS v. FCC, 290 F.3d 403, 413 (D.C. Cir. 2002).

G. Role of NECA

Various WTA members have learned over the years that NECA is a very tough cop when it comes to enforcing the rules regarding the costs that can be recovered from the pools it administers. If NECA does not agree with a particular cost or accounting treatment, its typical response is to refuse to accept, include or allow it unless and until the carrier gets a waiver or other favorable order or letter from the Commission.

NECA provides extremely valuable and cost effective functions including (but not limited to) gathering and evaluating revenue and cost data, calculating rates and rate bands, preparing annual and other required tariff transmittals, revising rates and tariffs to comply with Commission orders and rules, and administering and interpreting tariffs. Most of the small companies comprising the RLEC industry could not perform the tasks undertaken by NECA at anything close to comparable quality or cost.

As the Commission became well aware during the meetings and discussions that led up to the March 30, 2016 *Order*, NECA is an indispensible source of data and studies regarding the RLEC industry. No other entity could have provided so many of the detailed and comprehensive studies and projections needed by the Commission and the RLEC industry to evaluate various regulatory options under consideration, and to have done so rapidly and accurately under frequent and substantial time constraints.

H. Streamlining ETC Annual Reporting Requirements

WTA supports the *FNPRM's* proposal to modify or eliminate ETC annual reporting requirements regarding outage reports, unfulfilled service requests, consumer complaints, voice

and broadband pricing, and service quality standards. These requirements have largely been superseded by the new rules and obligations adopted in the *Order*, and can be eliminated.

WTA has long urged the Commission to minimize reporting requirements and costs to allow RLECs faced with substantial broadband capacity demands and limited financial resources to devote as many of their funds as possible to deploying and maintaining their broadband services.[14] Whereas the Commission has a need for information to monitor the use of high-cost support, WTA has offered to work with the Commission to make sure that the agency gets the information that it needs and uses in an efficient and economical manner, and that information requirements that are not used and useful can be eliminated.

Finally, WTA generally supports the *FNPRM* proposal that the annual FCC Form 481 report be filed only with the Universal Service Administrative Company ("USAC"), and that USAC share the data with the Commission, state commissions and Tribal governments. WTA's only caveat regards the handling of access to the proprietary and confidential information contained in those reports. Whereas USAC can protect and maintain the confidentiality of the data and the Commission can do so pursuant to Freedom of Information Act standards, it is not clear that all state commissions and Tribal governments have the legal authority and capability to protect confidential information.

Where a state commission or Tribal government can certify that it has the legal authority and capability to protect data marked as proprietary and confidential, there is no problem and the entity and its staff should be allowed the same access as the Commission to the proposed USAC online tool. Where a state commission or Tribal government cannot provide such certification, the individuals comprising it and its staff should be allowed access if they execute and file

[14] See, e.g., Letter from Gerard J. Duffy, WTA Regulatory Counsel, to Marlene H. Dortch, Secretary, WC Docket No. 10-90 (March 31, 2016) (regarding meeting with Diane Cornell to discuss reform and reduction of reporting characteristics for RLECs).

personal certifications under a protective order similar to those issued in other Commission proceedings involving confidential data.

I. Conclusion

WTA recognizes that the efficient use of universal service resources is a very important goal, but emphasizes that effectiveness in promoting increased broadband deployment and adoption is crucial.

WTA believes that any and all operating expenses that the Commission's rules have not previously and explicitly prohibited may not, and should not, be disallowed unless and until they are explicitly included in revised Commission rules, and then disallowed only prospectively after such revised rules become effective. It has analyzed the list of operating expenses under review in this proceeding, and found many categories, or portions of categories, to be effective in enhancing the marketing and adoption of regulated services, or in recruiting and retaining the administrative, customer service and technical employees necessary to provide high quality regulated services. WTA recognizes that some of these operating expenses can be subject to reasonable limits, but that prohibiting them in whole or major part is likely to have adverse consequences on broadband adoption, revenues and expenses that may well result in increased high-cost support. It notes that most of these operating expenses are already limited by the existing corporate operations expense caps and by the new operating expense limitation.

While greater clarity in cost allocation rules is useful, WTA warns that excessive allocation of joint and common costs from regulated voice and wholesale broadband transmission services to non-regulated retail broadband services can have major adverse impacts upon broadband adoption.

WTA finds the Commission's existing Section 32.27 affiliate transaction rule to be reasonable and effective. Whereas there may be some value in clarifying the components of fully distributed cost studies, it would make no sense to impose the rule upon transactions with non-affiliates or to require non-affiliates to conduct or provide fully distributed cost studies.

WTA understands that the statutory "deemed lawful" status of streamlined tariff transmittals under Section 204(a)(3) of the Act may be voided in cases of fraud or deliberate concealment by an issuing carrier, but not in cases of errors or mistakes not involving fraud or deliberate deceit.

WTA supports a continuing role for NECA in tariff administration and as a repository and analyst of data for the RLEC industry and the Commission.

Finally, WTA supports the Commission's efforts to simplify annual FCC Form 481 reporting and to eliminate unnecessary portions thereof. However, it does have concerns about the protection of the proprietary and confidential information in these reports, and requests that state commissions and Tribal governments that do not have legal authorization and procedures to safeguard proprietary and confidential data be required to execute appropriate protective orders in order to obtain access.

Respectfully submitted,

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