

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

<b>High-Cost Universal Service Support</b>	)	<b>WC Docket No. 05-337</b>
	)	
<b>Federal-State Joint Board on Universal Service</b>	)	<b>CC Docket No. 96-45</b>
	)	

**COMMENTS OF THE  
INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE**

To the Commission:

**I. INTRODUCTION**

The Independent Telephone & Telecommunications Alliance (ITTA) hereby submits comments on the *Further Notice of Proposal Rulemaking*<sup>1</sup> regarding the remand by the United States Court of Appeals for the Tenth Circuit in the above captioned-dockets. ITTA is an alliance of mid-sized local exchange carriers that collectively provide service to 24 million access lines in 44 states, offering subscribers a broad range of high-quality wireline and wireless voice, data, Internet, and video services. ITTA members include rural rate-of-return, rural price-cap, and non-rural price-cap carriers, all of whom obtain Universal Service Fund (USF) support through various mechanisms. Many areas served by ITTA members, however, do not receive sufficient USF support; a significant proportion of ITTA members are challenged by flaws in

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<sup>1</sup> *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service: Further Notice of Proposed Rulemaking*, WC Docket No. 05-337, CC Docket No. 96-45, FCC 09-112 (2009) (*FNPRM*).

mechanisms that have been ruled invalid by the United States Court of Appeals for the Tenth Circuit.<sup>2</sup> Proper resolution of the instant matter must fix these distribution problems so that the non-rural, high-cost USF mechanism is consistent with the Communications Act of 1934, as amended (the Act).

## II. DISCUSSION

### A. ITTA'S USF PROPOSAL ADDRESSES THE TENTH CIRCUIT CONCERNS AND CAN FORM THE BASIS OF BROADBAND-ORIENTED PROGRAMS

The current *FNPRM* is a disappointing response to multiple judicial remands and the good-faith resolution of a mandamus petition filed last year.<sup>3</sup> Citing the National Broadband Plan (NBP) proceeding and anticipated USF solutions that are to be part of the NBP, the Commission's tentative conclusion that it should not "attempt wholesale reform of the non-rural high-cost mechanism at this time"<sup>4</sup> seems aimed only at extending the Commission's apparent terminal inattention to non-rural USF support. ITTA recognizes the complexity of the tasks before the Commission, which include development of the NBP and an update to USF mechanisms. That complexity, however, supports ITTA's proposal to implement transitional measures that form the basis of policies that will foster greater broadband deployment while ensuring viable narrowband and broadband networks throughout the Nation. Indeed, the Commission specifically asked about "interim adjustments . . . to the non-rural mechanism that

<sup>2</sup> *Qwest Communications Int'l. Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005) (Tenth Circuit remand, or, *Qwest II*).

<sup>3</sup> *Qwest Corporation, Maine Public Service Commission, Vermont Public Service Board, and Wyoming Public Service Commission: Petition for a Writ of Mandamus*, United States Court of Appeals for the Tenth Circuit (Jan. 14, 2009).

<sup>4</sup> *FNPRM* at para. 1.

could be implemented quickly . . . .”<sup>5</sup> Accordingly, ITTA urges the Commission to adopt the core elements of the ITTA proposal filed more than one year ago,<sup>6</sup> which are the type of interim adjustments about which the Commission inquirers.

Bundling non-rural reform with the NBP and larger USF proceedings will simply lead to greater delay in bringing sufficient support to high-cost areas served by non-rural carriers. It would be naively confident to believe that the Commission’s first efforts to address the NBP and USF reform will be adopted and implemented without some manner of reconsideration or appeal; indeed, it is widely anticipated, and with good reason, that the Commission will follow its adoption of the NBP with a number of rulemaking proceedings to address numerous elements. The likelihood of consequent reconsideration proceedings and appeals must be anticipated, as well. Those processes augur further unreasonable delay in addressing support for non-rural carriers, and will lead the Commission (and, consequently, the industry) to the same damaging inactivity that prompted the petition for writ of mandamus last year.

The history of USF high-cost support for non-rural carriers is instructive. Non-rural mechanisms, included in the Telecommunications Act of 1996, were addressed in the *Ninth Report and Order*, which issued in 1999.<sup>7</sup> The *Ninth Report and Order* was appealed promptly,

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<sup>5</sup> *FNPRM* at para. 27.

<sup>6</sup> *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service Support: Ex Parte of Independent Telephone & Telecommunications Alliance*, Docket No. 05-337, Docket No. 96-45 (Oct. 10, 2008).

<sup>7</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) (*Ninth Report and Order*), remanded, *Qwest Corp. v. FCC*, 258 F.3d 1191 (Tenth Cir. 2003) (*Qwest I*), *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*), remanded, *Qwest II* (*supra* n.2).

and remanded by the Tenth Circuit in 2003. The Commission responded that year to the remand by issuing the *Order on Remand* which, like its predecessor, was appealed. Two years later, in 2005, the Tenth Circuit remanded that *Order on Remand*, finding that the Commission had again failed to define the statutory terms “sufficient” and “reasonably comparable.” The court ordered the Commission to ensure that the definition of “sufficient” contemplate the collective principles of Section 254 of the Act, and to define “reasonably comparable” in a manner that would preserve and advance universal service.<sup>8</sup> Notably, as well, the court ruled the existing non-rural mechanism invalid, because it relied upon determinations that the court rejected.<sup>9</sup> In December 2005, the Commission issued the *Remand NPRM*.

In January 2009, Qwest Corporation, the Maine Public Service Commission, the Vermont Public Service Board, and the Wyoming Public Service Commission (collectively, petitioners), filed a petition for writ of mandamus in the Tenth Circuit, asking the court to order the Commission to issue within 90 days final rules addressing reform of non-rural, high-cost USF mechanisms. On March 6, 2009, the Commission informed the court that it had negotiated an agreement with the petitioners that included a timeline for action on the outstanding *Remand NPRM*. Specifically, the parties agreed that the Commission would issue a Notice of Inquiry no later than April 8, 2009; issue a new Notice of Proposed Rulemaking no later than December 15, 2009; and, issue final rules responding to the court’s remand no later than April 16, 2010. Although the instant *FNPRM* may satisfy the chronological aspects of that agreement, it hardly seems poised to respond qualitatively to the court’s remand.

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<sup>8</sup> *Qwest II*, 398 F.3d at 1237.

<sup>9</sup> *Qwest II*, 398 F.3d at 1237.

The Commission need not fall into the trap of losing several years of support and increased broadband deployment because it starts afresh. Instead, it can readily adopt several transitional measures from the ITTA proposal, which addresses USF reform for price-cap carriers in a manner that also responds to the Tenth Circuit remand. The USF-oriented measures of the ITTA approach target high-cost loop support to high cost wire centers where it is needed most, and calls for supporting all eligible telecommunications carriers (ETCs) according to their own costs rather than using the costs of the incumbent ETC; this elimination of the “identical support rule”<sup>10</sup> would also result in the elimination of access-replacement support for wireless carriers.

In brief, the ITTA proposal would combine all of the price-cap study areas in a new mechanism that replaces the non-rural mechanism, and consolidate all rate-of-return study areas, including non-rural rate-of-return study areas, in the current Rural Loop mechanism, where high-cost support will operate as it does today. The price-cap mechanism would be funded with \$1 billion, which is the sum of current loop/model support to price-cap areas and access replacement support currently paid to wireless carriers (this is consistent with the *Identical Support NPRM*, which recommends stopping the provision of access replacement support to CETCs).<sup>11</sup> These steps would begin the process of ensuring sufficient support to non-rural carriers without occasioning increases in the size of the USF, avoiding the Commission’s concerns regarding “significant additional high-cost support” that might be result from increases

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<sup>10</sup> 47 C.F.R. § 54.307.

<sup>11</sup> *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service Support: Notice of Proposed Rulemaking*, Docket No. 05-337, Docket No. 96-45, FCC 08-4, at para. 23 (Jan. 29, 2008) (*Identical Support NPRM*).

in non-rural disbursements.<sup>12</sup> The new price-cap support would be distributed in fixed sums to the lowest-density wire centers, using HCPM loop output as a proxy and re-evaluating every 5 years, consistent with the Commission's recognition that the creating of a new cost model could take years.<sup>13</sup> Finally, the ITTA proposal would address rates by maintaining basic rates within the range bounded by the highest and lowest sampled rates on a Commission-created table of sampled urban rates.

Targeting is necessary because statewide averaging deprives carriers serving a mix of urban and rural areas the opportunity to obtain the appropriate amount of necessary support in their high-cost areas. In many areas, competitors focus customer acquisition efforts in densely populated urban areas, but ignore, because they are not subject to carrier of last resort (COLR) obligations, the lightly populated surrounding rural areas. As a result, COLRs that previously could integrate revenues from dense urban areas to offset un-recovered costs in sparsely populated rural areas can no longer rely upon the revenue contribution from customers in urban areas because burgeoning competition has depleted the urban sources that would have been available. Accordingly, as competition, a goal of the Act, is realized, universal service, another goal of the Act, suffers. Targeting, which under the ITTA proposal would not increase the size of the USF, addresses this phenomenon equitably by distributing support to wire-centers on an objective population density basis. This new approach to distribution advances universal service by bringing fuller benefits of universal service to areas that had received lesser levels under the current formulae.

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<sup>12</sup> *FNPRM* at para. 13.

<sup>13</sup> *FNPRM* at para. 24.

Under the ITTA proposal, support for competitive ETCs (CETCs) would continue, albeit within parameters that enable more rational distribution of support than is realized under current mechanisms. The ITTA proposal would select a single CETC if it makes the same commitment as the ILEC recipient, specifically, to serve the entire wire center within five years using only its own facilities. In that instance, the CETC and the ILEC would divide equally the support allocated to the wire center. If more than one CETC applied for support, then the CETC recipient is to be chosen by the ETC designating body (*e.g.*, state commission), perhaps using auctions or an RFP. Moreover, the cessation of access replacement support to wireless carriers would correct a puzzling result that has accrued in USF mechanisms: there is no rational basis for providing access replacement support to wireless CETCs, since those carriers never received, nor have been in a position to receive, access revenues. The ITTA approach would meet the Act's mandate regarding USF support for competitive carriers,<sup>14</sup> but would restrain USF size by limiting the number of ETCs eligible for support in a single area; limiting the amount of support available to both carriers; and, placing clear and enforceable obligations on all ETCs.

These steps can be transitioned to ultimate programs that support broadband deployment in high-cost areas. First, targeting will remain a more rational method of distribution than averaging, since population density (which is a readily identifiable metric) is linked directly to the costs of deployment; as noted by the Government Accountability Office (GAO), “[t]he most frequently cited cost factor affecting broadband deployment was the population density of a market,” and that “the cost of building a broadband infrastructure in areas where people live farther apart is much higher than building infrastructure to serve the same number of people in a

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<sup>14</sup> See 47 U.S.C. §§ 214(e), 254(e).

more urban setting.”<sup>15</sup> Second, limitations on the number of eligible recipients will introduce necessary rationale into the process of leveraging support mechanisms to support deployment where normal economic forces are not sufficient. Reason is defied when limited funds are used to support multiple providers in areas that cannot sustain a single one absent support.

**B. DEFERAL OF A NON-RURAL SOLUTION TO THE NATIONAL BROADBAND PLAN OR COMPREHENSIVE USF REFORM WILL RESULT IN FURTHER UNACCEPTABLE DELAY**

The Commission should not invoke intended USF and broadband reform in order to delay addressing the Tenth Circuit remand in a meaningful manner. Those efforts may take years to craft and, if history provides a lesson, be subject to litigation that will delay even further the proper and lawful distribution of support to high-cost areas throughout the Nation. The steps proposed by ITTA are not “stop-gap” measures that would be implemented for the short-term and subsequently abandoned, but are instead policies that can be transitioned to an NBP framework to ensure a robust National broadband future. The Commission acknowledges the tension between the demands of the court’s remand and its pending obligation to deliver the NBP. The Commission explains,

In response to the mandamus petition in the Tenth Circuit, the Commission has committed to issue an order responding to the court’s remand by April 16, 2010. We believe that we will have insufficient time, between release of the National Broadband Plan in February and our deadline for responding to the court in April, to implement reforms to the high-cost universal service mechanisms consistent with the overall mechanisms in the National Broadband Plan.<sup>16</sup>

<sup>15</sup> GAO, *Broadband Deployment Is Extensive throughout the United States, But it is Difficult to Assess the Extent of Deployment Gaps in Rural Areas*, at 19 (May 2006).

<sup>16</sup> *FNPRM* at para. 12. The timing difficulties are exacerbated by the Commission’s subsequent request to Congress for a one-month extension of time for submission of the National Broadband Plan. See, Letter from Julius Genachowski, Chairman, Federal Communications Commission, to Hon. John D. Rockefeller, Chairman, Committee on Commerce, Science, and Transportation, United States Senate (Jan. 7, 2010).

Despite these conflicts arising out of Commission delay, ITTA is sympathetic to the Commission's need to ensure that it does not embark upon fundamental policy shifts on one aspect of USF while it formulates comprehensive broadband and USF policies. But, those concerns buttress the approach that ITTA proposes, specifically, to implement corrective measures in USF that can be carried over to an ultimate high-cost broadband and/or voice framework. The ITTA measures are stand-alone steps, each of which is consistent with long-term NBP policies, and each of which can be implemented without risking either current or future networks. These steps include: targeting of support; elimination of the identical support rule; and, limitation on the number of supported ETCs. And, at a minimum, any result of the *FNPRM* should also permit an initial, one-time election of rural price-cap companies to transition to the non-rural mechanism, including grant of any pending petitions for rural price-cap carriers to receive high-cost support through the non-rural mechanism.

After a decade of delay, the Commission should not defer Tenth Circuit reform in deference to the NBP. The solutions proposed by the Commission in the *FNPRM* are insufficient, and they do not fulfill the agreement that avoided a possible writ of mandamus. The needs of narrowband networks must not be abandoned while the Commission directs long-term sights toward a broadband future, and ITTA's recommendations enable the Commission to implement an orderly transition. The NBP to be provided to Congress is not expected to include rules that will enable an instantly implemented transition to a National broadband framework. By contrast, the ITTA proposal offers components that can be implemented as a prelude to comprehensive reform and transitioned subsequently to ultimate USF and/or broadband high-cost programs. These measures address broad policy objectives that are aimed at the efficient

distribution of support to the areas that need it most, and are easily transferable across programs intended to support current or future high-cost networks. Therefore, implementation of these measures is not dependent upon the completion of either comprehensive USF reform or an NBP.

### III. CONCLUSION

The ITTA proposal described above relieves many of the challenges the Commission might face in regard to establishing a new funding mechanism because it does not rely upon “new” funding. Rather, it draws from support already delivered to price-cap carriers, and re-directs access-replacement support to the new price-cap support mechanism. Accordingly, the ITTA proposal increases the Commission’s flexibility to achieve reform in other areas since the ITTA proposal does not invoke financial commitments that could act as constraints to achieving reform in other aspects. As such, the ITTA proposal can serve as the initial phase of a larger transition, and should be adopted.

Respectfully submitted,



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DATED: January 28, 2010