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05-337	In the Matter of Federal -State Joint Board on Universal Service High-Cost Universal Service Support. ...
RM-11584	Reducing Universal Service Support

### Contact Info

**Name of Filer:** Rural ILEC Associations  
**Attorney/Author Name:** Benjamin H. Dickens, Jr.  
**Lawfirm Name (required if represented by counsel):** Blooston, Mordkofsky, Dickens, Duffy, & Prendergast, LLP

### Address

**Address For:** Law Firm  
**Address Line 1:** 2120 L Street NW  
**Address Line 2:** Suite 300  
**City:** Washington  
**State:** DISTRICT OF COLUMBIA  
**Zip:** 20037

### Details

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
National Cable and Telecommunications	)	RM-11584
Association, Reducing Universal Service	)	
Support in Geographic Areas that are	)	
Experiencing Unsupported Facilities-Based	)	
Competition	)	

TO: The Commission

**COMMENTS AND OPPOSITION OF THE RURAL ILEC ASSOCIATIONS**

Benjamin H. Dickens, Jr.  
Mary J. Sisak

Blooston, Mordkofsky, Dickens,  
Duffy & Prendergast, LLP  
2120 L Street, NW  
Suite 300  
Washington, DC 20037  
Tel: 202-659-0830  
Fax: 202-828-5568

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## Executive Summary

The Rural ILEC Associations respectfully submit that the Commission should deny the petition filed by the National Cable & Telecommunications Association (NCTA), in which NCTA proposes a two-step process to reduce or eliminate federal universal service support for incumbent local exchange carriers. High Cost universal service support is critically important to allow rural carriers to continue to provide excellent communications and broadband services to their customers at rates comparable to urban areas. Indeed, as discussed herein, NCTA's proposal would result in a degradation or total elimination of telecommunications services to rural customers and communities.

First and foremost, NCTA's two-step process and the standards it establishes should be rejected because it does not meet the requirements of Section 254 of the Act. Section 254 demands that rural areas should have access to telecommunications services at rates reasonably comparable to urban areas. Yet, if the only voice offering is a cable VoIP service, which the Commission has found is not a telecommunications service, subject to the obligations of telecommunications service providers, the requirements of the Act cannot be met.

Similarly, NCTA's first-step criteria for determining which areas meet the threshold for reducing or eliminating high cost support fail to meet the standard of the Act and should be rejected. First, as the Act requires service to all consumers, not just 50% or even 75%. Second, a state-made finding that an ILEC's rates no longer need to be regulated does not equate to a finding that consumers will continue to have access to telecommunications services reasonably comparable to those in urban areas and at reasonably comparable rates, or that the state has found effective competition.

The second step of NCTA's proposal for actually eliminating funds ignores the fundamental realities of ILEC networks, the fundamental differences between ILEC networks and those of competitive providers, and the cost of the ILECs' carrier of last resort (COLR) obligations. For one, the service areas of the ILEC and competitive voice provider are not identical and, therefore, the cost structure of the ILEC and the competitive voice provider are very different. Most ILECs have COLR obligations imposed by the states. Furthermore, NCTA's suggestion that only costs associated with the provision of service in non-competitive areas should be included in universal service funding is inconsistent with the reality of ILEC networks and incorrectly assumes that the costs associated with the various aspects of an ILEC network can be neatly split between "competitive" and "non-competitive" areas.

The core assumption underlying NCTA's Petition, that rural ILECs are responsible for bloating the high cost fund, and that such high cost support should be 'retargeted,' is likewise flawed. The latest Federal-State Joint Board to study the issue of high cost growth relied upon another recent Joint Board finding that just the opposite situation existed, *i.e.*, that competitive ETC demands on the fund had caused an annual growth rate of over 100 percent between 2001 through 2006; support to incumbent ILECs had been flat, or even declined. Even the audit data that NCTA relies has recently been contradicted as well, with the most recent Semiannual Report to Congress of the FCC OIG indicating the previous overpayment findings were likely overstated.

Finally, the Rural ILEC Associations submit that the cable industry is a poor substitute for the provision of rural telecommunications. While the vast majority of rural ILECs are COLRs, a role for which they have been commended by the Joint Board, cable industry telephony is largely unregulated. The Commission's own data, in the form of the Report on

Cable Industry Pricing and the Annual Report on competition in the video programming market, shows that the likelihood that the cable industry will cover 100% of rural High Cost areas is low.

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	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
National Cable and Telecommunications Association, Reducing Universal Service Support in Geographic Areas that are Experiencing Unsupported Facilities-Based Competition	)	RM-11584

TO: The Commission

**COMMENTS AND OPPOSITION OF THE RURAL ILEC ASSOCIATIONS**

The South Dakota Telecommunications Association (SDTA), Iowa Telecommunications Association (ITA) and North Dakota Association of Telecommunications Cooperatives (NDATC), and the Minnesota Telecom Alliance (MTA)<sup>1</sup> (hereinafter jointly referred to as the Rural ILEC Associations), by their attorneys, hereby comment and oppose the Petition for Rulemaking (Petition) filed by the National Cable & Telecommunications Association (NCTA), in which NCTA proposes a two-step process to reduce or eliminate federal universal service support for incumbent local exchange carriers (ILECs). NCTA’s proposal is nothing more than an attempt by large companies to arbitrarily gut the high cost fund, which is critically important to the ability of rural ILECs to provide high quality telecommunications and broadband services

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<sup>1</sup> SDTA represents 25 rural ILECs in South Dakota. ITA represents 143 rural ILECs in Iowa. NDATC represents 19 rural ILECs in North Dakota. MTA represents 77 rural ILECs in Minnesota.

to their customers at reasonable rates, without even attempting to meet the requirements of Section 254 of the Communications Act of 1934, as amended (the Act). The result would be a degradation or elimination of telecommunications services to rural consumers and communities. Accordingly, the Petition should be denied.

### **I. Introduction**

The Rural ILEC Associations are the state-wide associations of ILECs operating in rural, sparsely populated parts of Iowa, North Dakota and South Dakota. All of the ILEC members of the Rural ILEC Associations are Eligible Telecommunications Carriers (ETCs) and recipients of federal high cost universal service support. All of the ILECs provide high quality telecommunications service on a common carrier basis and access to interexchange service throughout their service territories. Most of the ILECs also provide broadband service throughout a large part, if not the entirety, of their established service territories.

The rural ILECs have a long history of building and maintaining high quality telecommunications networks and providing essential and advanced telecommunications services throughout their service areas. The long standing federal high cost support mechanisms have been especially critical to these efforts. It is not unusual for these ILECs to receive over 20% of their revenues from the federal high cost fund. Accordingly, any changes in the federal high cost fund would have a profound impact on the ability of the rural ILECs to continue providing high quality telecommunications services that are reasonably comparable to the services made available to consumers in urban areas and to charge rates for the services that are reasonably comparable.

## **II. NCTA's Proposal Does Not Meet the Requirements of the Act**

In the Petition, NCTA argues that the Commission can substantially reduce the amount of high cost support and, possibly, eliminate it entirely in some areas because state deregulatory actions and unsubsidized marketplace entrants demonstrate that support at current levels is no longer needed. According to NCTA, cable operators are providing voice service to substantial portions of rural areas without federal subsidies. In addition, a number of states have deregulated ILEC rates. Both demonstrate that current levels of high cost support are not needed to ensure that affordable voice service is available to consumers. NCTA, therefore, proposes that an ILEC's high cost support should be reevaluated if 1) a petitioner can demonstrate that service from a competitive wireline voice service provider that does not receive high cost support is available to at least 75% of the households in the study area or at least 50% of the households in the study area and the portion of the study area with no wireline competition has cost characteristics that are comparable to the covered portion or 2) a state has made a finding that an ILEC's rates no longer need to be regulated.

First and foremost, NCTA's two-step process and the standards it establishes should be rejected because it does not meet the requirements of Section 254 of the Act.<sup>2</sup> Section 254 requires the Commission to base policies for universal service on a number of principles, including the principle that consumers in "rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that

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<sup>2</sup> 47 USC 254

are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.”<sup>3</sup> (Emphasis added). NCTA’s petition does not demonstrate, or even allege, that this principle could be met under its proposal. On the contrary, the wireline cable voice service championed by NCTA as a substitute for the services provided by incumbent LECs, which for the most part is Voice over Internet Protocol (VoIP) service, does not meet this standard because the Commission has not found it to be telecommunications service. The standard demanded by the Act is not whether the presence of an unsubsidized wireline competitor ensures that consumers will have access to reasonably priced service, as stated by NCTA.<sup>4</sup> Rather, the standard that must be met is whether consumers will have access to reasonably comparable telecommunications services, in service and price. If the only voice offering is a cable VoIP service, the answer, at this time, is no.

Of course, if NCTA is proposing that the Commission find that cable VoIP services are telecommunications services, with all of the obligations and duties of a common carrier attaching to cable companies offering such services (such as the duty to provide service to all comers), this argument could be reexamined. However, even if cable VoIP services are classified as telecommunications services, it is not clear that they are reasonably comparable to the telecommunications services offered by ILECs. For example, although NCTA contends that some cable operators allow consumers to purchase stand alone voice services, it appears that not all cable operators offer this option. In addition, it is not clear that cable networks provide service “reasonably

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<sup>3</sup> Id.

<sup>4</sup> Petition at 5.

comparable” to ILEC service. For example, cable VoIP service is a shared service and not a dedicated service like ILEC service and, it is the understanding of the Rural ILEC Associations, that at least one nationwide cable provider routinely takes down its entire network for periods of time from 10 minutes to hours for scheduled maintenance. In other words, dedicated access to service, including emergency services, is not available continuously on a 24 hour, seven day a week, basis. While some consumers may agree to this substandard quality of service, others, like police and fire departments and other emergency service providers, surely would not. In light of these and possibly other service differences, arguably, consumers in rural areas who have access only to cable VoIP service would not have access to reasonably comparable telecommunications services as those in non-rural areas.

Similarly, NCTA’s specific criteria for determining which areas meet the threshold for reducing or eliminating high cost support fail to meet the standard of the Act and should be rejected. NCTA argues that where service from a competitive wireline voice service provider that does not receive high-cost support is available to at least 75% of the households in the study area or at least 50% of the households in the study area and the portion of the study area with no wireline competition has cost characteristics that are comparable to the covered portion, the level of high cost support should be reassessed. The Act, however, requires that all consumers have access to telecommunications services, not 75% or 50% of consumers. This is clear from section 214(e)(4) of the Act, which states that before an ETC can be permitted to relinquish its ETC designation, the State commission “shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be

served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier.”<sup>5</sup> (Emphasis added). Clearly, if a cable operator only serves 75% or 50% of the ILEC’s customers, the standard would not be met.

Further, there is no evidence to support NCTA’s argument that the fact that cable operators have built facilities in some areas of an ILEC’s service territory is proof that all consumers would continue to have access to service even if an ILEC’s high cost support is reduced. On the contrary, the fact that cable operators choose to forego classification as a telecommunications carrier and almost universally shun ETC status proves that they have no interest in assuming a requirement to provide service to all consumers.

Even where a cable operator seeks designation as a telecommunications carrier, there can be no general assumption that the cable operator will serve all consumers. This is demonstrated by the example of the cable operator in Brookings, South Dakota who applied for a certificate of public convenience and necessity but limited its application to serve areas where its existing cable facilities are located. It was clear from the application that the cable company’s existing facilities did not and do not provide service to all areas of the city or to all consumers in the city. Further, the existing facilities are not capable of providing service to new areas being developed in the city. Thus, even though the company was seeking to serve only the city of Brookings, it specifically designed its request so that it would not have to expand its facilities to serve all existing or new consumers in the city. This specific example, as opposed to NCTA’s studies of

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<sup>5</sup> 47 USC 214(e)(4)

general cable statistics, provides far better evidence that cable companies will not serve all consumers served by the ILEC without being subject to some obligation to do so.

NCTA's second criteria for determining which areas meet the threshold for reducing or eliminating high cost support (i.e., a state has made a finding that an ILEC's rates no longer need to be regulated) also should be rejected. Even if such action was taken because the state found sufficient competition to deregulate rates, as posited by NCTA, it does not equate to a finding that consumers will continue to have access to telecommunications services reasonably comparable to those in urban areas and at reasonably comparable rates.

Moreover, rate deregulation by the state does not necessarily indicate that the state has found effective competition. For example, both large and small LECs in Iowa are now considered "rate-deregulated," but for very different reasons. Mutual telephone companies, cooperatives, municipally-owned utilities and all companies with fewer than 15,000 access lines have been exempted from rate regulation based on a policy decision by the Iowa Legislature that locally-owned and operated LECs were subject to sufficient internal and external forces (such as local accountability to customers who are also owners or shareholders of the company), thereby eliminating the need for rate regulation. A consideration of "effective competition" was not part of the decision. This is distinct from the decision of the Iowa Utilities Board in 2007 to rate-deregulate the remaining exchanges in Iowa served by larger LECs (who are not recipients of high cost funding) based on a finding that these LECs were subject to effective competition.

Other states may have their own particular reasons for not regulating the rates of certain carriers who may be recipients of high cost funding.

The fact that NCTA's criteria are only step one in a two-step process to reduce an ILEC's support does not save its ill-conceived proposal. Under NCTA's proposal, any party could submit a petition requesting that the Commission reduce the amount of support made available to an ETC. Once the petitioner demonstrated that either or both of the criteria discussed above is met, then the burden is shifted to the ILEC to demonstrate the level of support, if any, that is necessary to continue to provide universal service to consumers in areas not served by a competing facilities-based wireline provider. Because the two criteria in the first step of the process are so lax and would require no significant effort to allege, and because anyone can file a petition, this rule would no doubt lead to hundreds of petitions being filed, which would force rural ILECs to expend large sums of money and time justifying their support levels.

Accordingly, NCTA's two-step process and the standards it establishes are not sufficient to ensure that the requirements of the Act are met and, therefore, NCTA's Petition should be rejected.

**III. The Second Step of NCTA's Proposal does not Recognize  
The Need to Support Networks  
and the Unique Characteristics of Rural Networks**

In the second step of NCTA's two-step process, once the Commission finds that one or both of the "triggers" are satisfied, the Commission would proceed to identify "the limited subset of ILEC costs that (1) would not be incurred but for the provision of service to customers that do not have a competitive option and (2) cannot be recovered through rates for the services (regulated and unregulated) provided over the network in the portion of the study area with no competition."<sup>6</sup> NCTA contends that by focusing on

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<sup>6</sup> Petition at 17.

costs that cannot be recovered from services provided in the non-competitive portion of the study area, the Commission should be able to completely eliminate certain categories of costs that currently are subsidized and to reduce many other categories. This idea ignores the fundamental realities of ILEC networks, the fundamental differences between ILEC networks and those of competitive providers, and the cost of the ILECs' carrier of last resort (COLR) obligations.

The NCTA proposal assumes that if there is a competitive voice provider in part of an ILEC's service territory, then the ILEC can recover its cost of serving that area from its customers just like the competitive voice provider does. There is no basis for this assumption, however, and, in fact, it is not correct. One fatal flaw in NCTA's reasoning is that the service areas of the ILEC and competitive voice provider are not identical and, therefore, the cost structure of the ILEC and the competitive voice provider are very different. For example, a cable company may provide service on a regional-type basis, with switch, maintenance personnel, and back office functions all handled for its services provided over multiple ILEC service areas. Accordingly, the cable company may be able to achieve economies of scale and scope that are not available to the rural ILEC.

The same holds true in connection with NCTA's argument that funding should be reduced, if not eliminated entirely, for certain costs incurred in connection with services provided in non-competitive areas. For example, NCTA argues switching costs should be reduced substantially or eliminated because the deployment of a competing switching facility by an unsubsidized competitor demonstrates the economic feasibility of operating

a switch without support.<sup>7</sup> The cable company in Brookings, South Dakota, however, did not deploy a switch in connection with its service. Rather, it uses the regional switch deployed by Sprint for its traffic and which Sprint, apparently, makes available to any cable voice provider in South Dakota and possibly beyond.

Another significant cost difference between an ILEC and a cable VoIP provider is the cost associated with COLR obligations. Most ILECs have COLR obligations imposed by the states. Moreover, ETCs are subject to a similar obligation pursuant to section 214(e)(1) of the Act, and all common carriers are potentially subject to such an obligation pursuant to Section 214(e)(3) of the Act.<sup>8</sup>

Moreover, NCTA's suggestion that only costs associated with the provision of service in non-competitive areas should be included in universal service funding is inconsistent with the reality of ILEC networks and incorrectly assumes that the costs associated with the various aspects of an ILEC network can be neatly split between "competitive" and "non-competitive" areas. This is simply not so. The ILEC network architecture is based on the entire service territory and the ability to provide service to all consumers in that service territory. A network designed to serve only part of the service territory most likely would look very different and the costs associated with that hypothetical network would be very different. The Commission rejected the use of a model based on a hypothetical network for determining universal service support for rural

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<sup>7</sup> Petition at 18.

<sup>8</sup> Section 214(e)(3) states. "If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof...."

carriers in the Universal Service Order<sup>9</sup> and it should reject NCTA's back-door attempt to introduce this methodology now.

On the other hand, by injecting a high degree of unpredictability into whether any particular rural ILEC would continue to receive high cost support or whether high cost support would be drastically reduced or curtailed for parts of the ILEC's service area, NCTA's proposal would cripple the ability of ILECs to secure financing for the construction and upgrading of their facilities, including facilities used for broadband services.<sup>10</sup> It could also impact the ability of ILECs to repay loans already obtained. The current high cost mechanism has, to date, allowed the placement of high quality advanced facilities network facilities in the difficult-to-serve rural areas. The Federal-State Joint Board found as much in its 2007 Recommended Decision in which the Joint Board examined the existing USF mechanism and found that, “[u]nder existing support mechanisms, RLECs have done a commendable job of providing voice and broadband services to their subscribers.”<sup>11</sup> (Emphasis supplied) Further, the Joint Board found that “[a] significant portion of the High Cost Loop Fund supports the capital costs of providing broadband-capable loop facilities for rural carriers. Under this system, rural LECs (RLECs) have done a commendable job of providing broadband to nearly all of their customers. While this program may need adjustments, we recognize its effectiveness in maintaining an essential network for POLRs [Providers of Last Resort]

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<sup>9</sup> In the Matter of Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776 (1997).

<sup>10</sup> See Letter from Lawrence Zawalick, Vice President, Rural Telephone Finance Cooperative, to Kevin Martin et al., Commissioners, FCC, CC Dockets 01-92; 96-45, (filed October 27, 2008).

<sup>11</sup> High-Cost Universal Service Support; Federal-State Joint Board on Universal Service, WC Docket No. 05-337, CC Docket No. 96-45, Recommended Decision, 22 FCC Rcd 20477 at ¶39 (November 2007)(“2007 Joint Board Decision”).

and in deploying broadband”<sup>12</sup> (emphasis supplied). The Commission should reject NCTA’s ill-conceived proposal which would adversely impact the ability of ILECs to continue the placement of high quality, advanced network facilities in difficult-to-serve rural areas.

#### **IV. NCTA’s Assumption that ILECs Unfairly Burden the High Cost Fund is Patently Flawed**

In addition to the flaws exposed in NCTA’s specific proposals, the core assumption underlying NCTA’s Petition, that rural ILECs are responsible for bloating the high cost fund, and that such high cost support should be ‘retargeted,’ is flawed.<sup>13</sup> Concerns about universal service impacts are downplayed because this function will be supplied by the cable companies.<sup>14</sup>

As demonstrated below, NCTA’s core assumptions – that the high cost fund is bloated by rural ILECs, and that the cable industry can be trusted to pick up the “slack” in universal service terms – are flatly contradicted by reality and a bad bet for rural America. These points are discussed in order.

The following passage reflects NCTA’s thesis that ILECs unfairly burden the high cost fund:

Even as millions of Americans take service from facilities-based wireline competitors, and millions more decide they no longer need wireline voice services at all, [fn. omitted] the Commission continues to provide billions of dollars of support for wireline voice services provided by ILECs. And because of structural flaws in the USF program, new entry by facility-based competitors often has the perverse effect of increasing the subsidy a geographic area receives. [fn omitted] As a result, the total size of the USF program and the resulting burden on

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<sup>12</sup> Id. at ¶30.

<sup>13</sup> Petition at pp 3-4.

<sup>14</sup> Id. at 5; Attachment B, at 13-27 (“Eisnach paper”).

consumers, contrives to escalate at a staggering rate [fn. omitted] (emphasis in original).<sup>15</sup>

The Petition goes on to argue that high cost funding should be “substantially reduced, if not eliminated completely” in areas where facilities-based competition is “extensive” (defined to be at least one other unsubsidized wireline competitor), and that one or more of such competitors “should be sufficient” to ensure reasonable access to reasonably priced service.<sup>16</sup>

There are few reasons to rely upon the cable industry – essentially unregulated at the present – to serve high cost rural areas at reasonable rates. This topic is discussed in more detail later. As a threshold matter, though, NCTA’s assumption that something is broken as far as ILEC high cost funding goes is fundamentally flawed and contradicted by the facts.

In this respect, the latest Federal-State Joint Board to study the issue of high cost growth relied upon another recent Joint Board finding that just the opposite situation existed, *i.e.*, that competitive ETC demands on the fund had caused an annual growth rate of over 100 percent between 2001 through 2006. Moreover, during the same period, “...support to incumbent LECs had been flat or even declined...”<sup>17</sup>

The Joint Board accordingly recommended elimination of the identical support rule, finding that it had “little or no relationship” to amounts actually invested by competitors in high cost areas:

The Joint Board recognizes that the identical support rule has resulted in the subsidization of multiple voice networks in numerous areas and greatly increased the size of the high-cost fund. High-cost support has been rapidly increasing in

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<sup>15</sup> Petition at 3.

<sup>16</sup> Petition at 4-5.

<sup>17</sup> 2007 Joint Board Decision at ¶ 9, n.11.

recent years due to increased support provided to competitive ETCs. These carriers receive high-cost support based on the per-line support that the incumbent LECs receive rather than the competitive ETCs' own costs. Support for competitive ETCs has risen to almost \$ 1 billion. [fn. omitted] We believe it is no longer in the public interest to use federal universal service support to subsidize competition and build duplicate networks in high-cost areas. Consistent with the Joint Board Public Notice released in September 2007, [fn. omitted] we recommend that the Commission eliminate the identical support rule. The rule bears little or no relationship to the amount of money competitive ETCs have invested in rural and other high-cost areas of the country.<sup>18</sup>

Tellingly, these critical, but inconvenient, findings are completely unacknowledged by NCTA, much less analyzed.

NCTA's suggestion that rural ILECs are inefficient and over compensated in USF terms<sup>19</sup> is likewise an argument in search of a record, and flatly contradicted by the Federal-State Joint Board's findings. Reference to the cited Eisenach paper, for instance, contains no factual examples of these claimed shortcomings and hardly provides a basis for radical public policy change. A flawed finding of a 23% error rate reported by a former Inspector General is all that is relied upon in this regard, but it is not reliable.<sup>20</sup>

One hopes that by the time these Comments are submitted, that NCTA will have at least supplemented its Petition with information released December 28, 2009, which indicated that a similar OIG audit (for the 2006/2007 period) likely had materially overstated that initial erroneous payment rate. In the most recent semi-annual report to Congress, the new Acting Inspector General noted that the overpayment found by the

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<sup>18</sup> Id. at ¶35.

<sup>19</sup> Eisenach paper, p 13.

<sup>20</sup> See Eisenach paper, at p 10, fn. 21 (citing the report for the conclusion that the "HCF" program "has contributed to both administrative laxity and waste.")

prior Inspector General (of 16.56%) was “too high at a significantly statistical level.”<sup>21</sup>

The Acting OIG further noted that its role should be reformed and that the prior IPIA attestation examinations (audits) did not adequately serve their intended goals.<sup>22</sup> And, while the Eisnach paper references the audit for the year after the audit referenced by the Acting Inspector General, the Commission would do well to treat the 2008 results relied upon by Eisnach, which were based on the same methodology and methods as the 2006/2007 audit criticized by the Acting OIG, with a healthy dose of skepticism.

In any event, NCTA’s factually bereft argument (accusing ILECs of waste and inefficiency) runs headlong into more findings of the Federal-State Joint Board. In the course of considering changes to the existing mechanism (including its major recommendation to eliminate the identical support rule), the Joint Board recommended the creation of a Provider of Last Resort (“POLR”) fund as a component of the overall USF mechanism. The Joint Board discussed this recommendation as follows:

Support to most if not all ILECs has been flat or even declined since 2003 [fn omitted]. Under existing support mechanisms, RLECs have done a commendable job of providing voice and broadband services to their subscribers. Therefore, the Joint Board believes it is in the public interest to maintain, for the present, the existing RLEC support mechanisms, distributed through the POLR Fund. Funding for the RLECs will continue to be based, for the present, on the provider’s embedded costs as supported by modeling, but may be subject to a competitive bid approach at a later date.<sup>23</sup> [Emphasis added]

Of particular interest regarding NCTA’s argument that apparently significant waste and inefficiency is visited upon the USF mechanism by rural ILECs (also referred to as RLECs by the Joint Board), is the Joint Board’s recognition that rural ILECs may be

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<sup>21</sup> Semiannual Report to Congress of the Federal Communications Commission Office of the Inspector General, April 1, 2009 through September 30, 2009, released December 28, 2009 at pp. 19-20.

<sup>22</sup> Id. at pp. 24-26.

<sup>23</sup> 2007 Joint Board Decision at ¶39.

short-changed by the mechanism. In this respect it identifies a) the absence of transport costs which are especially harmful when rural carriers must purchase special access facilities to connect customers; b) the tendency of competitive carriers to focus primarily on more densely populated areas having lower costs, undercutting rural ILEC's ability to support reasonable rates in low density areas; and c) the elimination of loop support over time, by virtue of a cap on the fund, combined with a growing universe of loops.<sup>24</sup>

In sum, NCTA's argument that rural ILECs have bloated the high cost fund with inefficiency is meritless. NCTA's Petition and its own witness offer nothing to support this proposition, other than factually unsupported generalities and a flawed audit report. On the other hand, the most recent Federal-State Joint Board tasked with studying USF reform has made findings that directly undercut these doctrinaire conclusions.

Unlike NCTA, the state and federal regulators comprising the Joint Board had no financial stake in the matter, and NCTA's factless allegations are hardly reason to question the Joint-Board's conclusions. And even if NCTA's Petition were to somehow rise to the level of presenting a legitimate issue as to rural ILEC high cost funding, these Commenters respectfully submit that this alone cannot trump the Joint-Board's carefully considered conclusions. At most, NCTA's suggestion should be referred to the very body equipped to deal with these issues as a matter of first instance – the Federal-State Joint Board.

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<sup>24</sup> Id. at ¶¶21-22

**V. The Cable Industry’s Track Record  
Suggests That the NCTA Proposals  
Would Harm and Not Help Universal Service**

As discussed below, NCTA’s proposal constitutes a transparent attempt to weaken the only providers of last resort in rural areas, who also happen to be challenging the cable industry in many rural cable markets. The notion that many cable companies are willing to take up the slack in universal service provisioning, in case rural ILECs stumble with less high cost funding, runs throughout NCTA’s Petition. The general facts, however, relating to how the cable industry is offering voice services, together with the industry’s history as it relates to universal service obligations, provide cold comfort that NCTA’s proposed experiment would amount to good public policy.

As previously discussed, the vast majority of rural ILECs function as POLRs (sometimes also referred to as Carriers of Last Resort (“COLRs”)). Given rural ILECs’ performance in this role, the Joint Board found it in the public interest to continue current RLEC support mechanisms, to be distributed through a separate, proposed POLR fund.<sup>25</sup> These POLR/COLR obligations arise principally from state laws<sup>26</sup> and section 214(e) of the Communications Act of 1934, as amended, which imposes its own specific service obligations,<sup>27</sup> and apply to the vast majority of rural ILECs as ETCs.

In contrast, the cable industry telephony is largely unregulated. Its principal voice platform is Voice over Internet Protocol (“VOIP”), and the states have been preempted

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<sup>25</sup> 2007 Joint Board Decision ¶39.

<sup>26</sup> See e.g., SDCL §§ 49-31-1.1, 49-31-3.1, 49-31-11, 49-31-12.2, 49-31-12.3, 49-31-73, 49-31-78; Iowa Code §476.29(5).

<sup>27</sup> 47 U.S.C. § 214(e).

by this Commission from imposing regulatory requirements upon VOIP providers.<sup>28</sup> Moreover, very few cable companies have either sought or been designated as Eligible Telecommunications Carriers (“ETCs”) under section 214 of the Communications Act (USF payments to rural cable operators in 2008 characterized as “trivial” by Dr. Eismach<sup>29</sup>).

The premise of NCTA’s proposal, although not clearly articulated, is that there is no serious risk to the public interest in depriving rural ILECs of high cost USF support, where the proposed coverage “triggers” are concerned. These are defined to require competitive wireline voice service from a carrier that does not receive high cost support to at least 75% of households in a rural ILEC’s study area. This geographic coverage from a wireline competitor may amount to as little as 50% under some circumstances.<sup>30</sup>

If rural ILECs were to be deprived of USF support under this sort of mechanism, the result would be a diminution of construction programs, maintenance, service quality and rates. The Joint Board has already directly linked the rural ILECs’ commendable success in bringing universal service to rural American to this very program.

The question that demands to be answered then, is what is the likelihood that the cable industry would be willing to cover 100% of high cost rural areas with their services and also be willing to make their services available to these areas at rates that would be viewed as affordable, where USF has been stripped away and rural ILECs are unable to meet their universal service obligations? The Commenters respectfully suggest that the

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<sup>28</sup> In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211, 19 FCC Rcd 22404 (FCC 2004), aff’d sub nom., Minn. Pub. Utils. Comm’n v. FCC, 483 F.3d 570 (8th Cir. 2007).

<sup>29</sup> Eismach paper at p 2 & n.1.

<sup>30</sup> Petition at pp 12-13.

data gathered by this Commission is better evidence than the many self-serving statements included in NCTA's Petition and in its attached consultant study.

The results of such an examination are not encouraging. The latest Report on Cable Industry Pricing contains an exhaustive examination of cable industry pricing.<sup>31</sup> The report, not surprisingly, shows higher pricing by companies unrestrained by effective competition,<sup>32</sup> the possibility of market power to raise such prices,<sup>33</sup> and price increases (on a weighted average of cable services) which have outpaced the Consumer Price Index by a factor of four.<sup>34</sup> A recurring theme running throughout the Report on Pricing is that wireline cable competition has been necessary to restrain incumbent cable company pricing.<sup>35</sup>

The Commission's Thirteenth Annual Report on competition in the video programming market,<sup>36</sup> which examined broad aspects of the industry, contains similar findings. It noted that in some markets without effective competition prices have been as much as 20% higher. Likewise, it found that relatively few consumers have a second wireline alternative.<sup>37</sup> It further found that network savings of cable companies arising from "clustering" have not been passed down to consumers,<sup>38</sup> that traditional cable

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<sup>31</sup> In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, MM Docket No. 92-266, Report on Cable Industry Prices, 24 FCC Rcd 259 (2009) ("Report on Pricing").

<sup>32</sup> Id. at ¶ 55.

<sup>33</sup> Id. at 54.

<sup>34</sup> Id. at 28.

<sup>35</sup> Id. at ¶14.

<sup>36</sup> In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 06-189, Thirteenth Annual Report, 24 FCC Rcd 542 (2004) ("13<sup>th</sup> Annual Report").

<sup>37</sup> Id. at ¶ 9.

<sup>38</sup> Id. at 180.

networks have been constructed with little or no competition,<sup>39</sup> and that the local franchising process has constituted an unreasonable barrier to entry for would-be competitors.<sup>40</sup> Indeed, while NCTA's Petition complains about the arbitration process with rural ILECs, such as TDS,<sup>41</sup> the FCC has conditioned merger approval for the largest of the cable industry to prevent anticompetitive refusals to provide programming to competitors.<sup>42</sup>

Against this background, serious doubt arises about the cable industry's incentive and ability to extend universal service in rural areas. Is this track record the basis for a public interest finding that cable's unregulated voice offerings are the new universal service offering for America's high cost rural areas? Aside from the fact that NCTA's 'waste and excess' predicate is badly mistaken, the answer clearly is no. As stated earlier, the answers to the public policy issues raised by NCTA are already in the Commission's precedent and in matters of public record.

### **Conclusion**

Based on the foregoing, the Rural ILEC Associations respectfully submit that NCTA's Petition and related allegations are completely without merit. If the Commission has any doubts about these "new" facts raised by NCTA, it should refer the

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<sup>39</sup> Id. at ¶135

<sup>40</sup> Id. at ¶171-172.

<sup>41</sup> Petition, at p 7, n.18

<sup>42</sup> See Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation, Assignors, to Time Warner Cable, Inc Assignees; Adelphia Communications Corporation, Assignors and Transferors, to Comcast Corporation, Assignees and Transferees; Comcast Corporation, Transferor, to Time Tome Warner, Inc., Transferee; Time Warner, Inc., Transferor, to Comcast Corporation, Transferee, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203 at ¶189 (2006).

matter to a specialized Joint Board. The better alternative, we submit, is simply to reject the requested rulemaking.

Respectfully submitted,

**IOWA TELECOMMUNICATIONS  
ASSOCIATION  
MINNESOTA TELECOM  
ALLIANCE  
NORTH DAKOTA ASSOCIATION OF  
TELECOMMUNICATIONS  
COOPERATIVES  
SOUTH DAKOTA  
TELECOMMUNICATIONS  
ASSOCIATION**

By: /s/ Benjamin H. Dickens, Jr.  
Benjamin H. Dickens, Jr.  
Mary J. Sisak

Blooston, Mordkofsky, Dickens,  
Duffy & Prendergast, LLP  
2120 L Street, NW  
Suite 300  
Washington, DC 20037  
Tel: 202-659-0830  
Fax: 202-828-5568

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of January, 2010, a copy of the **Comments and Opposition of the Rural ILEC Associations** was served via electronic mail to the following:

Best Copy and Printing, Inc.  
445 12th Street, S.W.  
Room CY-B402  
Washington, D.C. 20554  
[fcc@bcpiweb.com](mailto:fcc@bcpiweb.com)

Gary Seigel  
Telecommunications Access Policy Division  
Wireline Competition Bureau  
445 12<sup>th</sup> Street, S.W.  
Room 5-C408, Washington, D.C. 20554  
[Gary.Seigel@fcc.gov](mailto:Gary.Seigel@fcc.gov);

Katie King  
Telecommunications Access Policy Division  
Wireline Competition Bureau  
445 12<sup>th</sup> Street, S.W.  
Room 5-B544  
Washington, D.C. 20554  
[Katie.King@fcc.gov](mailto:Katie.King@fcc.gov)

Theodore Burmeister  
Telecommunications Access Policy Division  
Wireline Competition Bureau  
445 12th Street, S.W.  
Room 5-B438  
Washington, D.C. 20554  
[Theodore.Burmeister@fcc.gov](mailto:Theodore.Burmeister@fcc.gov)

By: /s/ Salvatore Taillefer, Jr.  
Salvatore Taillefer, Jr.  
Blooston, Mordkofsky,  
Dickens,  
Duffy, & Prendergast, LLP  
2120 L Street NW , Suite 300  
Washington, DC 200037