Before the
Federal Communications Commission
Washington, DC 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	)	CC Docket No. 01-92
Compensation Regime	)	

REPLY COMMENTS OF
NTCA–THE RURAL BROADBAND ASSOCIATION

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EXECUTIVE SUMMARY

As the Federal Communications Commission (the "Commission") considers changes to existing rules governing permissible expenses, affiliate transactions, and cost allocations, it should take stock of the fact that multiple system components – including overall caps on expenses, corporate operations expense caps, and review, oversight, and enforcement by a series of federal and state regulators and other entities – are already effective in helping to ensure that only reasonable and legitimate business expenses are recovered through universal service fund ("USF") support and/or regulated rates. To the extent that the comments of just a few state commissions are driven by just a few issues involving just a few companies, it is important to note that these few, isolated examples actually highlight the *successes*, rather than the *shortcomings*, of the current systems in capturing and resolving concerns. The Commission must therefore avoid injecting substantial administrative burdens and regulatory uncertainty into time-tested systems through subjective changes that will end up becoming a form of "Monday Morning Quarterbacking" with respect to carrier operations. Instead, the Commission should focus its efforts on providing targeted prospective clarity where needed under existing rules to achieve policy objectives, promote certainty, and ensure accountability.

Moreover, the record and legal analysis make clear that the Commission cannot create an open-ended general exception to the "deemed lawful" provisions of section 204 of the Communications Act of 1934, as amended (the "Act"), for any instance involving incorrect certification of company data. At most, as judicial precedent confirms, the Commission can explore an exception to "deemed lawful" treatment of a tariffed rate in the event of "individual carriers that have been found to have been willfully or deliberately misrepresented data" – that is, carriers that have *furtively* employed improper accounting techniques.

In addition, the Commission needs to consider and address the serious and thorny problem of a "regulatory black hole," pursuant to which carriers are required by rules to assign costs to certain accounts only to then be denied a reasonable opportunity to recover those costs contrary to the Act and the United States Constitution. While permitting carriers to assess new rate elements might be the *mechanical answer* for this problem, there is serious concern about the *practical and public policy implications* of such a solution – in particular, the effects on the Commission's statutory mandate to ensure "reasonable comparability" of rates paid by rural consumers for supported services.

NTCA continues to support the use of up to $25 million per year of outstanding Connect America Fund reserves to enable supplemental support that would boost investments and sustain operations on all Tribal lands, provided that the focus is on the consumer living on Tribal lands such that such support is available to any carrier serving a sizeable portion of Tribal lands.

Finally, the comments filed express overwhelming support for several proposals to streamline certain reporting requirements applicable to recipients of High-Cost USF support on Form 481. But the Commission should ensure that the benefits to be obtained in filing online are not undermined by requirements to still file paper copies with states and Tribes, and also ensure the confidentiality of information that may be shared with states and Tribes via any online system.

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REPLY COMMENTS OF NTCA–THE RURAL BROADBAND ASSOCIATION

NTCA–The Rural Broadband Association ("NTCA")[1] hereby submits these Reply Comments in response to comments filed on the Further Notice of Proposed Rulemaking released March 30, 2016 in the above-captioned proceedings.[2] The *FNPRM* sought comment on a variety of issues related to additional reforms of federal Universal Service Fund ("USF") mechanisms that support RLEC investments and operations in high-cost rural areas. As discussed herein, the comments filed reflect overwhelming, if not unanimous, sentiment that many of the proposals of the Federal Communications Commission (the "Commission") go too far, are unnecessary in light of the multiple layers of existing rules and safeguards, and would instead inject unbridled regulatory uncertainty into time-tested and effective systems.

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[1] NTCA is an industry association composed of nearly 900 rural local exchange carriers ("RLECs"). While these entities were traditional rate-of-return-regulated telecommunications companies and "rural telephone companies" as defined in the Communications Act of 1934, as amended (the "Act"), all of NTCA's members today provide a mix of advanced telecommunications and broadband services, and many also provide video or wireless services to the rural communities they serve.

[2] *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking (rel. March 30, 2016) (alternatively, "*Rate-of-Return Reform Order*" or "*FNPRM*," as applicable).

I. THE RECORD CONFIRMS THE EFFECTIVENESS OF CURRENT SYSTEMS IN HELPING TO ENSURE THAT ONLY REASONABLE BUSINESS EXPENSES "USED AND USEFUL" IN THE PROVISION OF REGULATED SERVICES ARE RECOVERABLE VIA HIGH-COST SUPPORT AND/OR INTERSTATE RATES; AT MOST, TARGETED PROSPECTIVE CLARITY OF CERTAIN RULES WOULD BE USEFUL IN DRAWING BRIGHTER LINES.

The Commission has accurately concluded that "most rate-of-return carriers properly record their costs and seek support for the intended purposes."[3] The Commission has further acknowledged the need for clear and consistent standards to "describe those expenses that a carrier may appropriately include in its interstate rate base, interstate revenue requirement, and cost studies used to calculate high-cost support."[4] And, as Alexicon notes, the most recent review of oversight activities by the Universal Service Administrative Company ("USAC") through two rounds of audits that cost ratepayers $145 million to conduct ultimately identified only $171,924 in improper USF payments to carriers, "a generally high level of program compliance by beneficiaries," and "no instances of fraud."[5]

Such findings by the Commission and USAC, together with the comments submitted in response to the *FNPRM*, confirm that the current system of rules and oversight measures has been, and remains, largely effective in defining recoverable costs and then detecting the inclusion within cost studies of any expenses that should *not* be recovered through High-Cost USF support or regulated rates. Thus, rather than engaging in far-reaching revisions of existing rules and oversight

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[3] *FNPRM*, at ¶ 330; *see also 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, Public Notice, 30 FCC Rcd 11821 (2015), at Joint Statement of Commissioners Mignon Clyburn and Michael O'Rielly ("To be clear, the vast number of providers are good actors and would never take advantage of the system . . . .").

[4] *FNPRM*, at ¶ 339.

[5] Comments of Alexicon Telecommunications Consulting ("Alexicon") at 4-5 (quoting USAC Analysis of the Federal Communications Commission Office of Inspector General 2008 Reports on the Universal Service Fund (Feb. 12, 2009) at II).

measures that introduce substantial new burdens and regulatory uncertainty, the Commission's focus should be upon targeted areas where prospective clarity would improve the effectiveness of the current systems that the Commission itself has recognized already work well on the whole.

As NTCA and many other commenters noted, in addition to "a generally high level of program compliance by beneficiaries," existing cost recovery mechanisms benefit from multiple layers of rules and oversight.[6] Specifically, there is already in place today:

(1) an overall cap on each carrier's operating expenses intended to define "efficiency" in the eyes of the Commission when it comes to recovery through High-Cost USF;[7]

(2) a distinct corporate operations expense limit beneath the overall expense cap;[8]

(3) a compendium of time-tested rules governing cost allocations, transaction reviews, and the recoverability of specific kinds of expenses;[9]

(4) review and oversight by NECA of RLEC cost studies;[10]

(5) review, auditing, and oversight by USAC of expenses recovered through High-Cost USF;[11] and

(6) oversight and enforcement by the Commission itself, of course, and state regulators.

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6 *See, e.g.,* Comments of NTCA at 6-8, 13; Comments of the United States Telecom Association ("USTelecom") at 3; Comments of the National Exchange Carrier Association ("NECA") at 11-15; Comments of WTA-Advocates for Rural Broadband ("WTA") at 5; Comments of TCA at 5.

7 *Rate-of-Return Reform Order*, at ¶¶ 95-104.

8 *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8930 (1997), at ¶¶ 283-285; *Connect America Fund, et al.*, WC Docket No. 10-90, *et al*., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17748 (2011), at ¶ 232.

9 *See* 47 C.F.R. Parts 32, 36, 64, and 69 generally.

10 *See id.* at Part 69, Subpart G.

11 *See Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket No. 97-21, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400 (1997); *see also* 47 C.F.R. § 54.703 *et seq.*

This broad system of rules and oversight measures, taken as a coordinated whole, helps to ensure that RLECs include within regulated rates and/or recover through High-Cost USF only those expenses that are permissible by law, and this coordinated set of systems also works to identify and address isolated instances where expenses that should *not* be recovered through regulated rates or USF might have been included. Indeed, to the extent it appears that some of the proposals in the *FNPRM* – and the comments of a few state commissions that urge stringent but subjective review of expense categories[12] – are driven by just a few incidents involving just a few companies, it is important to note that such isolated examples actually highlight the *successes*, rather than the *shortcomings*, of the current systems. For example, even as the Kansas commission expresses vague concerns regarding the procurement of network plant for future use,[13] this Commission cites only to a case involving a single carrier as the basis for a potential rule change regarding excess capacity in the *FNPRM*.[14] Yet the actual history of that case is instructive – serving in an important functional role as the administrator of access tariffs and pools, NECA disallowed certain network capacity expenses because they were deemed in excess of what was

[12] Comments of the Kansas State Corporation Commission ("KSCC") at 1-2; Comments of the Public Utilities Commission of Nevada ("Nevada PUC") at 5.

[13] KSCC at 5. For example, the Kansas commission arbitrarily asserts that the Commission should reduce the two-year requirement for future use of plant to one year, arguing that a carrier might begin a project only to find that "circumstances beyond its control (e.g., developer of a new housing complex files bankruptcy)" lead to the project failing to be completed. While this may seem to be a seemingly minor (and arbitrary) change, the broader implications behind such arguments are startling and contrary to sound public policy. Nothing would chill investment more in long-term broadband infrastructure than the uncertainty that projects that typically take five years to complete could have the "rug pulled out from under them" retroactively because a regulator subsequently determines that the additional capacity to be installed was no longer really necessary due to an unforeseen and uncontrollable delay.

[14] *FNPRM*, at ¶ 348.

permitted by the existing rule.[15] Ultimately, it was the Wireline Competition Bureau that determined a portion of the expenses that NECA denied should be recoverable.[16] If anything, this single cited instance demonstrates that *the current systems work* in identifying and resolving questions that arise regarding expenses.

Although it is important to review rules from time to time to discern whether they are still achieving their intended purposes: (1) the rules in place governing permitted expenses provide (for the most part) clear guidance on what costs are recoverable; (2) the multiple caps now in place provide significant incentives to manage costs efficiently; and (3) the detection of isolated incidents of concern only confirms that current systems are effective in helping to ensure the integrity of the USF and ratemaking cost recovery processes. In short, there is no evidence that the current systems are failing. It is also worth observing that *eligibility* of expenses for cost recovery via High-Cost USF and/or regulated rates does not translate *automatically* into recovery where it is shown that specific costs incurred, even if eligible, were neither reasonable nor used and useful.[17]

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[15] *Sandwich Isles Communications, Inc. Petition for Declaratory Ruling*, WC Docket No. 09-133, Declaratory Ruling, 25 FCC Rcd 13647, 13649-50 (Wireline Competition Bureau 2010) ("*Sandwich Isles Declaratory Ruling*"), at ¶¶ 6-8; *see also Safeguards to Improve the Administration of the Interstate Access Tariff and Revenue Distribution Process*, CC Docket No. 93-6, Report and Order and Order to Show Cause, 10 FCC Rcd 6243 (1995), at ¶ 40. Current rules enforce a two-year limitation on the inclusion of costs associated with "Property Held for Future Use. 47 C.F.R. § 32.2002.

[16] *Sandwich Isles Declaratory Ruling*, 25 FCC Rcd at 13650, ¶ 9.

[17] More specifically, as the Commission considers providing targeted prospective clarity with respect to categories of expense, it should also take stock of the reasonableness and materiality of such expenses. *See* Alexicon at 4-6; Comments of ITTA-The Voice of Mid-Size Communications Companies ("ITTA") at 3. If a business expense for a supported firm is of a level that would be expected of a non-supported firm of comparable size and coverage area, then it should be considered reasonable for purposes of cost recovery here. It is important, however, that such a standard be objective, rather than subjective, to avoid injecting uncertainty into the conduct of business, audits, and enforcement that would defeat the desired benefits of the reforms adopted in the *Rate-of-Return Reform Order*. Likewise, if a permitted expense is of such an immaterial level that it might cost more for a

In engaging in a more granular review through the current *FNPRM* of permitted expenses beneath this overlay of caps, rules, and oversight, the Commission should be careful which expenses it may determine as a categorical matter are not "used and useful" or "prudent." Targeted prospective clarity with respect to specific expenses could be useful in drawing brighter lines by which small carriers can manage. As the comments filed confirm, for example, there are several categories, such as personal travel or other personal expenses, political contributions, or penalties or fines for statutory or regulatory violations, for which it should be made clear – to the extent it is not already – that recovery is prohibited via regulated rates and/or High-Cost USF support.[18] In addition, as NTCA and others highlighted, there are other specific expense categories, such as charitable contributions and public relations activities, where the rules regarding cost recovery are unclear, and targeted prospective clarity with respect to those expenses would be useful.[19]

But the Commission must avoid injecting substantial administrative burdens and regulatory uncertainty into time-tested systems through subjective analyses that will end up becoming a form of "Monday Morning Quarterbacking" with respect to carrier operations. Carriers are already

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company to exclude from cost studies and USAC to examine, it would be contrary to the public interest to mandate removal of such an expenditure – especially given the existence again of two capping mechanisms that apply to operating expenses.

[18] USTelecom at 2; NECA at 3.

[19] NTCA at 12-13; WTA at 6-8; NECA at 3-4. The Commission should also consider distinguishing between recovery of costs via USF and regulated interstate rates as it reviews such matters further. Specifically, although the Commission may ultimately find a specific policy justification for precluding recovery of certain kinds of costs from High-Cost USF, such a rationale may not necessarily extend to denying a carrier the ability also to recover costs via regulated rates paid by its customers. Although one party contends that denying cost recovery for both High-Cost USF and ratemaking purposes would eliminate a burden for carriers to maintain separate books, this is not at all the case – if certain categories are denied High-Cost USF recovery, the accounting to treat those same expense categories as recoverable for purposes of ratemaking is hardly complex. *Contra* ITTA at 3-4.

subject to significant reporting and cost tracking obligations, without the need to require legal, financial, and other professional review of even the most seemingly ordinary of transactions or cost incurrences. The Commission must be careful also to avoid precluding recovery of expenses that are actually part and parcel of providing regulated services in high-cost areas. For example, the Commission should decline the puzzling suggestion of the Nevada PUC to preclude regulated cost recovery for "Marketing," "Product Management and Sales," "Product Advertising," "customer services," and "general and administrative services."[20] Such activities and the costs arising out of them are quite clearly related to the provision of services to consumers and, as importantly, the adoption of those services. Moreover, even if there were no obvious direct connection between a particular expense and the provision of supported/regulated services (and, to be clear, there *is* an obvious connection in the case of the categories identified by the Nevada PUC), indirect expenses may be "used and useful" and "prudent" as a matter of law.[21] Examples cited by commenters include compensation and other items identified as reasonable and allowable business expenses for tax purposes,[22] childcare for employees working in rural areas (where options for such services are often limited),[23] or kitchen facilities/appliances, food, or housing reimbursements for employees in fulfillment of their company obligations in rural areas.[24] Thus, while targeted prospective clarity regarding the recoverability of certain categories of expense

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20 Nevada PUC at 4-5.

21 *See, e.g., American Tel. and Tel. Co.,* Phase II Final Decision and Order, 64 FCC 2d 1, 38 (1977), at ¶¶ 111-113; *1990 AT&T Tariff Revisions Order*, 5 FCC Rcd at 5695, at ¶ 17.

22 Alexicon at 8.

23 Alexicon at 7; Comments of the Montana Telecommunications Association, at 8-9.

24 USTelecom at 2-3; WTA at 9-10.

could be useful, the Commission should avoid overly sweeping or subjective categorical exclusion of expenses that, within the eyes of the courts and the Commission's own precedent, are in fact "prudent" and useful in furtherance of delivering supported services.

The same logic holds true with respect to potential changes to the current affiliate transaction and cost allocation rules. As with the discussion of permissible expenses, the Commission's examination appears motivated by a few alleged "bad apple" instances of questionable allocations and/or intercompany arrangements. But making far-reaching changes to current rules that are effective in the vast majority of cases based upon just a few documented incidents of concern would represent poor public policy indeed.[25] Moreover, while (just) two state commissions suggest they have witnessed similar concerns in proceedings before them,[26] scant details are provided in their comments. If anything, as in the discussion above regarding permitted expenses and as others observe as well,[27] it is noteworthy that the few cases in which an RLEC might have engaged in questionable allocation practices and/or affiliate transactions were actually detected and subjected to review.

As with the discussion regarding permissible expenses, reasonable and efficient procedures and objective, bright-line rules regarding allocation of costs and review of certain transactions can provide greater business certainty and avoid needless confusion, disputes, and even litigation. But far-ranging expansion and/or extension of affiliate transaction and cost allocation rules in the absence of any clear showing that such extension or expansion is warranted will only create costly,

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[25] *See, e.g., Prometheus Radio Project v. F.C.C.*, 373 F.3d 372 (3rd Cir. 2004); *Alliance for Community Media v. F.C.C.*, 10 F.3d 812 (C.A.D.C., 1993) (questioning over-reliance on anecdotal evidence in agency determinations).

[26] KSCC at 6-8; Nevada PUC at 3-5.

[27] *See, e.g.,* USTelecom at 2-4; Alexicon at 3-4.

needless, and inefficient administrative processes that foster regulatory uncertainty and undermine, rather than further, the objective of universal service. For example, overly broad proposals such as that from the Nevada commission urging a "high level of scrutiny" wherever there is any cross-participation on a board[28] or the Kansas commission's notion to "consider whether non-affiliate transactions should be scrutinized, especially when the owner of the non-affiliated company is related to an owner, employee, or Board of Director member of the telecommunications carrier"[29] risk turning every every-day transaction in small-town rural America into a *post hoc* reviewable event. Yet the Commission's current definition of "affiliated companies" is already quite broad, including any entities that "directly or indirectly through one or more intermediaries, control or are controlled by, or are under common control with" the RLEC; "control," in turn, means:

> possession directly or indirectly, of the power to direct or cause the direction of the management and policies of a company, whether such power is exercised through one or more intermediary companies, or alone, or in conjunction with, or pursuant to an agreement with, one or more other companies, and whether such power is established through a majority or minority ownership or voting of securities, common directors, officers, or stockholders, voting trusts, holding trusts, affiliated companies, contract, or any other direct or indirect means.[30]

This expansive set of definitions makes clear that *any* arrangement that confers the ability to direct or cause the management of a company to take or refrain some certain action translates to "control." Thus, a mere familial relationship "somewhere" on both sides of a transaction should not be enough to give rise to the need for an affiliate transaction review; rather, consistent with the Commission's long-standing rules, such review should be triggered only where "control" as

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28 Nevada PUC at 3.

29 KSCC at 8.

30 47 C.F.R. § 32.9000.

already broadly defined actually exists – where, for example, the shared relationship includes an individual within the regulated company with "power to direct or cause the direction of the management and policies" of that company.

Indeed, it would be particularly troubling and remarkably inefficient as a matter of process to apply the affiliate transaction standard broadly "to goods and services acquired from non-affiliated entities."[31] This would once again put USAC and/or the Commission in the "Monday Morning Quarterback" position of potentially reviewing (or second-guessing) *every* transaction involving a RLEC to confirm compliance with the standard. Such a regulatory outcome would ironically and unfortunately increase both uncertainty and administrative burden in the form of regulated company reliance on experts at a time when the Commission has professed its express belief that its reforms will provide *greater* regulatory certainty and reduce burdens in the form of *fewer* accountants, consultants, and lawyers.

For the foregoing reasons, the Commission should decline to engage in far-reaching changes to existing rules or apply new subjective standards of review to processes that govern permitted expenses, affiliate transactions, and cost allocations. The record demonstrates that the current systems – the caps and limits, the compendium of rules governing cost recovery and transaction accounting, and review, auditing, and oversight by USAC, NECA, and the Commission itself – are effective in helping to ensure that RLECs recover only reasonable expenses via regulated mechanisms. To the extent changes are necessary, targeted prospective clarity should be provided where specific, detailed evidence indicates that a given rule is unclear in current form or has been ineffective in ensuring proper and reasonable cost recovery by the industry as a whole.

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[31] *FNPRM*, at ¶ 351.

II. THE RECORD CONFIRMS THAT THE COMMISSION MAY, AT MOST, DEVELOP AN EXCEPTION TO THE "DEEMED LAWFUL" PROVISION OF SECTION 204 IN THE EVENT OF WILLFUL CONCEEALMENT OF IMPROPER ACCOUNTING PRACTICES.

The Commission has asked whether it should create an exception to the "deemed lawful" provision of section 204 of the Act where a carrier is found to have violated investment, expense, or cost allocation rules.[32] Under section 204(a)(3), any tariff filing by a local exchange carrier "*shall be* deemed lawful . . . unless the Commission takes action" to reject or suspend the tariff within a specified period of time.[33] There is no ambiguity or obvious exception on the face of the statute. Even in the event of a subsequent finding that the rates or terms in question were in fact unlawful, reviewing courts and the Commission have consistently found that the remedy is prospective revision of the tariff rather than refunds or some other retroactive form of relief.[34]

Although the Commission has suggested a 2002 court decision might enable a general exception to the "deemed lawful" provision,[35] as NTCA explained in its prior comments,[36] that decision expressly rejected several Commission arguments for such an exception as "mystifying" and instead reaffirmed prior interpretations of section 204 that precluded the Commission from "impos[ing] refund liability for covered rates."[37] In dicta, the court went on to observe that its ruling did not "address the case of a carrier that *furtively* employs improper accounting techniques

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[32] *Id*. at ¶¶ 361-362.

[33] 47 U.S.C. § 204(a)(3) (emphasis added).

[34] *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, Report and Order, 12 FCC Rcd 2170, 2175-2183 (1997), at ¶¶ 8-20 (citations omitted).

[35] *FNPRM*, at ¶ 362 (citing *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 413 (D.C. Cir. 2002)).

[36] NTCA at 23-27.

[37] *ACS*, 290 F.3d at 410-411.

in a tariff filing, thereby concealing potential rate of return violations."[38] The Commission's proposal in the *FNPRM* does not, however, capture the specific sense of that dicta, instead using the dicta as a springboard for what the *ACS* court said the Commission could *not* do in creating a general exception. As several commenters observe in concurring with NTCA's legal analysis, if the Commission wishes to explore creation of an exception to "deemed lawful" treatment of a tariffed rate in the event of "individual carriers that have been found to have been willfully or deliberately misrepresented data"[39] – that is, carriers that have *furtively* employed improper accounting techniques, in the words of the *ACS* court – that may be a proposition worthy of consideration via a more developed proposal and record. But the record and legal analysis make clear that the Commission cannot create an open-ended general exception to the "deemed lawful" provisions of section 204 for any instance involving incorrect certification of company data.

III. WHERE COMMISSION RULES AND POLICIES RESULT IN USF SUPPORT BEING REDUCED OR ELIMINATED – AND WHERE SUCH RULES AND POLICIES "STRAND" REGULATED COSTS – THE COMMMISSION MUST BY LAW ADDRESS HOW THOSE COSTS CAN BE RECOVERED OTHERWISE; IT MUST ALSO CONFRONT THE PRACTICAL AND PUBLIC POLICY IMPLICATIONS OF "PUSHING COSTS TO THE RURAL CONSUMER."

Although the *FNPRM* seeks comment on how carriers should be permitted to recover regulated costs that are disallowed from High-Cost USF recovery due to the presence of "competitive overlap" in a specific geography,[40] NTCA highlighted in its initial comments the broader implications of this issue that warrant more comprehensive review and action.[41]

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[38] *Id*. at 413 (emphasis added)

[39] NECA at 7-8; *see also* WTA at 18.

[40] *FNPRM*, at ¶¶ 364-368.

[41] NTCA at 28-29.

Specifically, in addition to competitive overlap policies, the new budget control adopted in the *Rate-of-Return Reform Order*,[42] the corporate operations expense cap,[43] and the newly adopted operating expense limit[44] all could have similar adverse impacts by denying a carrier the opportunity to recover its interstate revenue requirement via USF while also failing to allow for recovery of such costs via consumer rates or some other mechanism. As NTCA explained, each of these measures creates the prospect of a "regulatory black hole," in which carriers are required by Commission rules to assign costs to certain accounts only to then be denied a reasonable opportunity to recover those costs contrary to the Act and the United States Constitution.

It is therefore important that the Commission address this "black hole" immediately. Like NTCA, NECA suggests that the Commission could permit carriers to assess regulated rates on a detariffed basis or through increased tariff charges to enable recovery of costs for which USF support has been denied.[45] But as NTCA observed in its comments, even if this might be the *mechanical answer* for such a problem, there is serious concern about the *practical and public policy implications* of such a solution.[46] Put another way, although it is necessary as a matter of law to allow RLECs to assess new regulated rates upon consumers to make up for the "black hole" of USF cost recovery caused by the new rules, the Commission is compelled by law as well to assess what denying such cost recovery via USF actually means for rural consumers – and in

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42 *Rate-of-Return Reform Order*, at ¶¶ 146-155.

43 *Connect America Fund, et al.*, WC Docket No. 10-90, *et al*., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17747-48 (2011), at ¶¶ 227-233.

44 *Rate-of-Return Reform Order*, at ¶¶ 95-104.

45 NECA at 8-9.

46 NTCA at 31-34.

particular, the effects on the Commission's statutory mandate to ensure "reasonable comparability" of rates paid by rural consumers for supported services. NTCA will not reiterate here all of the evidence and analysis from its initial comments and its recently filed Petition for Reconsideration,[47] but the record of this proceeding indicates that few consumers in high-cost areas served by RLECs will be able to obtain access to standalone broadband services at reasonably comparable rates given the structure of the new support mechanism adopted in the *Rate-of-Return Reform Order* and the practical effects of the budget control and other constraints that have the effect of "pushing more cost recovery to the rural consumer." Thus, while in the near term carriers must be given a reasonable opportunity to recover their regulated costs via some new regulated rate element where those costs are denied High-Cost USF support, the ultimate solution for this broader and more-far-reaching dilemma about consumer rates is to tackle more directly concerns about the structural impacts of the recent reforms and, as the Commission has seen fit to do recently for other USF programs, to address the sufficiency of the High-Cost USF budget.[48]

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[47] Petition for Reconsideration and/or Clarification of NTCA, WC Docket Nos. 10-90 and 14-58, CC Docket No. 01-92 (filed May 25, 2016) ("Petition"), at 2-12.

[48] *See Rate-of-Return Reform Order*, at ¶ 148 (noting that the decision of the United States Court of Appeals for the Tenth Circuit with respect to the Commission's USF budget for RLECs was premised in significant part upon the Commission "conducting a budget review by the end of six years") (quoting *In Re: FCC 11-161*, 753 F.3d 1015, 1055-1060 (10th Cir. 2014)); *see also Schools and Libraries Universal Service Support Mechanism,* CC Docket No. 02-6, *A National Broadband Plan for our Future,* GN Docket No. 09-51, Order, 25 FCC Rcd 18762,18780-83 (2010), at ¶¶ 35-40 (applying the same inflationary factor to the E-Rate program that is "used in other contexts to estimate carrier costs," including "for classifying carrier categories for various accounting and reporting purposes and to calculate adjustments to the annual funding cap for the high-cost loop support mechanism"); *Lifeline and Link Up Reform and Modernization*, *et al*., WC Docket Nos. 11-42, 09-197, and 10-90, Third Report and Order, Further Report and Order, and Order on Reconsideration (rel. April 27, 2016), at ¶¶ 402-403 (concluding without any further explanation, after increasing the Lifeline program budget target to provide "ample room for new households to enroll in the program," that the Lifeline budget target should also "be indexed to inflation in accordance with the Consumer Price Index for all items from the Department of Labor, Bureau of Labor Statistics").

IV. THE COMMISSION SHOULD USE A PORTION OF CONNECT AMERICA FUND RESERVES TO ENABLE SUPPLEMENTAL SUPPORT FOR ALL RLECs SERVING CONSUMERS ON TRIBAL LANDS.

NTCA previously expressed support for the use of up to $25 million per year of outstanding Connect America Fund ("CAF") reserves to enable supplemental support that would boost investments and sustain operations on all Tribal lands. Numerous commenters echo NTCA's endorsement of such a concept, including specifically a "Tribal Broadband Factor" that could fit atop now-reformed USF mechanisms and potential relief from operating expense caps that are not reflective of the unique challenges faced by providers operating on Tribal lands.[49] Indeed, NTTA and GRTI both provide a vivid, thorough, and accurate depiction of the many additional obstacles to deployment and operation on Tribal lands that increase the costs of serving consumers located in those areas.[50] For example, NTCA members serving consumers on Tribal lands have faced similar experiences in attempting to obtain rights-of-way from the Bureau of Indian Affairs or secure Tribal cultural clearances,[51] and the confounding challenges of securing permission for deployment from private owners of allotted lands reported by NTTA and GRTI – with dozens or even hundreds of owners holding undivided interests in a single small allotment – are consistent with the reported experiences of other NTCA members.[52] Such "facts on the ground" more than justify a CAF reserve-funded "Tribal Broadband Factor" and potential relief from operating expense caps. But, as NTCA noted in its initial comments, given that the focus of reform should

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[49] Comments of the National Tribal Telecommunications Association ("NTTA") at 15-26; Comments of Gila River Telecommunications, Inc. ("GRTI") at 10-11; Comments of Sacred Wind Communications, Inc. at 4-10; Alexicon at 11-12.

[50] NTTA at 3-14; GRTI at 6-10.

[51] GRTI at 7-8.

[52] NTTA at 10-11; GRTI at 8.

be on the consumer living on Tribal lands, any such reforms should be equally available, on an optional basis, to all companies that serve a sizeable portion of Tribal lands regardless of whether they also happen to serve other kinds of consumers as well.[53] NTCA remains committed to working with the Commission and other stakeholders to develop and implement mechanisms that look to deploy and sustain broadband for *every* resident of Tribal lands.

V. THE RECORD SUPPORTS PROPOSALS TO FURTHER STREAMLINE FORM 481 TO LIMIT UNNECESSARY REPORTING BURDENS ON ELIGIBLE TELECOMMUNICATIONS CARRIERS.

The comments filed express overwhelming support for several proposals in the *FNPRM* to streamline certain reporting requirements applicable to eligible telecommunications carrier ("ETC") recipients of High-Cost USF support on Form 481.[54] The comments confirm that the Commission's proposals reflect the right balance of accountability with the need to avoid unnecessary burdens that divert resources away from the mission of advancing universal service. A few specific issues, however, warrant further discussion to the extent the Commission proceeds to modify Form 481.

First, the Public Service Commission of Missouri (the "Missouri PSC") explains how its receipt and review of the information on Form 481 is essential in fulfilling its role of certifying ETCs.[55] The Missouri PSC, however, recommends that this Commission reject the tentative conclusion to have ETCs only submit an electronic copy of Form 481 to USAC, because Missouri uses this form together with other information submitted directly by carriers to the PSC in

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53 NTCA at 36.

54 *See FNPRM*, at ¶¶ 387-393; *see also, e.g.*, USTelecom at 5-8; ITTA at 5; WTA at 19-20; TCA at 9-10; Alexicon at 12-13.

55 Missouri PSC at 2-6. This of course highlights yet again how, under the current system, multiple layers of review and oversight are in place to help ensure proper cost recovery in the context of RLEC operations.

reviewing ETC designations. According to the Missouri PSC, it is hard "to see how only filing Form 481 with USAC is beneficial to states because an ETC's annual filings in Missouri will be split between two locations."[56] While the Missouri PSC claims "it is easy for an ETC to file a copy of the report with a state commission,"[57] the same could be said of the fact that it is easy for the Missouri PSC to log onto the USAC website and review the report. In fact, NTCA submits it is far easier for a state commission to do just that than it is for ETCs – especially smaller companies with only a handful of employees – to absorb the costs of printing, copying, collating, and paying postage/shipping for what can be voluminous Form 481 filings. This is particularly true for ETCs that may happen to operate in more than one state.

Second, even as it streamlines the reporting requirements and migrates toward online filing, it is important that the Commission maintain the confidentiality of data included within Form 481 filings and retain such information in a protected repository. Several parties express a shared concern in this regard,[58] and NTCA recently submitted its Petition seeking, among other things, clarification with respect to what data may be shared with states and Tribes via an online portal.[59] NTCA is concerned, however, that suggestions by several of these parties, even if well-intentioned, may not sufficiently ensure the protection of confidential data as submitted electronically and then shared with other entities. For example, WTA suggests that confidential information should be made available to a state or Tribe if that entity "can certify that it has the legal authority and capability to protect data marked as proprietary and confidential," and that if a state or Tribe cannot

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56 *Id*. at 5.

57 *Id*. at 6.

58 USTelecom 8-9; WTA at 20-21.

59 Petition at 24.

do so, that entity and its staff be required to execute certifications with respect to protection of the data.[60] But as NTCA's Petition noted, the Form 481 may contain commercially sensitive information that goes beyond anything within a state or Tribe's jurisdiction, and as such given that there is no clear and specific case for use of that information by the regulating entity, it is not at all clear why such information should need to be made available even if sufficient protections are in place.[61] Moreover, even if a state or Tribe *does* provide certification that it has procedures to protect confidential information, the Commission will need to be very specific in the certification form as to what those procedures must be (*i.e.*, at least as stringent as those typically contained within a standard protective order) and what use may be made of such information if obtained (*i.e.*, only for the specific purpose of performing ETC designation functions as indicated by the Act).

Similarly, USTelecom identifies the need to ensure confidential information obtains a consistent and adequate level of protection, but then suggests that the extraction of three discrete categories of information from Form 481 could suffice to resolve confidentiality concerns.[62] NTCA supports the concept suggested by USTelecom, but is concerned that the removal of these three categories alone will not in fact render the Form 481 "public" and non-proprietary in nature. For example, Form 481 calls for the submission of significant amounts of financial data, including but not limited to balance sheets, income statements, and statements of cash flows – all of which depending upon a given firm's corporate and ownership structure and the current state of its operations could be "public" or commercially sensitive data. Thus, NTCA submits there is a greater need for evaluation of what may constitute confidential information prior to assuming that

[60] WTA at 20-21.

[61] Petition at 24.

[62] USTelecom at 8.

the removal of certain categories of data might be sufficient to consider the remaining portions of Form 481 as no longer meriting protection.

VI. CONCLUSION

For the foregoing reasons, NTCA respectfully requests that the Commission act consistent with the recommendations set forth herein.

Respectfully submitted,

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