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

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	

SIXTH ORDER ON RECONSIDERATION AND MEMORANDUM OPINION AND ORDER

Adopted: January 31, 2013 **Released: February 27, 2013**

By the Commission: Chairman Genachowski and Commissioners McDowell, Clyburn, and Rosenworcel issuing separate statements; Commissioner Pai approving in part, concurring in part, and issuing a statement.

I. INTRODUCTION

1. In the *USF/ICC Transformation Order*, the Commission comprehensively reformed universal service and intercarrier compensation, adopting fiscally responsible, incentive-based policies to preserve and advance voice- and broadband-capable networks while requiring accountability from companies receiving support and ensuring fairness for consumers who pay into the universal service fund.[1] Modernizing these systems, the Commission concluded, was critical to meet the universal service challenge of our time: ensuring consumers have access to high-speed Internet access as well as voice service.[2] As part of this undertaking, the Commission reformed legacy high-cost universal service support mechanisms for rate-of-return carriers. Rate-of-return carriers serve fewer than five percent of U.S. access lines, but operate in many of the country's most difficult areas to serve. Total universal service support for such carriers was approaching $2 billion annually—more than 40 percent of the Commission's $4.5 billion overall budget for the reformed high-cost program.[3] The Commission's reforms for rate-of-return carriers begin the transition toward a more incentive-based form of regulation to encourage efficient operation and to support the widest possible availability of broadband.

2. In this Order, we address several issues related to the changes made to high-cost universal service support for rate-of-return carriers in the *USF/ICC Transformation Order*. First, we address a number of issues raised in petitions for reconsideration or clarification of the benchmarking rule adopted

[1] *See Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform—Mobility Fund*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC 17663 (2011) (*USF/ICC Transformation Order and/or FNPRM*); *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011). *See also Connect America Fund et al.*, WC Docket 10-90 et al., Order on Reconsideration, 26 FCC Rcd 17633 (2011); Second Order on Reconsideration, 27 FCC Rcd 4648 (2012); Third Order on Reconsideration; 27 FCC Rcd 5622 (2012); Fourth Order on Reconsideration; 27 FCC Rcd 8814 (2012); Fifth Order on Reconsideration, 27 FCC Rcd 14549 (2012) (*Fifth Order on Reconsideration*).

[2] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17668, para. 5.

[3] *See id*. at 17674, para. 26.

in the *USF/ICC Transformation Order*.[4] That rule establishes reasonable limits on capital and operating expenditures eligible for high-cost universal service support for rate-of-return carriers, providing better incentives for carriers to invest prudently and operate efficiently than the prior support mechanism, while providing additional support for carriers below their caps to extend broadband to rural consumers. (Rate-of-return carriers previously faced no limits on their overall spending, and received 100 percent reimbursement of loop costs above a certain level, creating a "race-to-the-top" in spending). We reconsider one aspect of the benchmark rule, but decline to reconsider adoption of the rule in general.[5] We then consider a number of applications for review of the Wireline Competition Bureau's (Bureau's) *HCLS Benchmarks Implementation Order*, which implemented the benchmarking rule for purposes of calculating high-cost loop support (HCLS), and modify certain aspects of the Bureau's order.[6] In addition, we decline requests to reconsider the monthly per-line cap of $250 in total high-cost federal universal service support for all telephone companies, and we reaffirm the extension of the corporate operations expense cap to interstate common line support (ICLS).[7] Finally, we take the opportunity to address requests from certain rate-of-return carriers that the Commission slow our implementation of other aspects of the *USF/ICC Transformation Order*, emphasizing the importance of continuing with the implementation of reform, but reiterating our commitment to a data-driven process.

3. As we have previously noted, the *USF/ICC Transformation Order* represents a careful balancing of policy goals, equities, and budgetary constraints. This balance was required in order to advance the fundamental goals of universal service and intercarrier compensation reform within a defined budget, while simultaneously providing sufficient transitions for stakeholders to adapt. We observe that, under Commission rules, if a petition for reconsideration simply repeats arguments that were previously fully considered and rejected in the proceeding, it will not likely warrant reconsideration.[8] This standard informs our analysis below.

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[4] Petition for Reconsideration and Clarification of the National Exchange Carrier Assoc., Inc., Organization for the Promotion and Advancement of Small Telecommunications Companies, and Western Telecommunications Alliance, CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51; WC Docket Nos. 03-109, 05-337, 07-135, 10-90; WT Docket No. 10-208 (filed Dec. 29, 2011) (Rural Associations Petition); Accipiter Communications Inc., Petition for Reconsideration and Clarification, CC Docket No. 01-92; GN Docket No. 09-51; WC Docket Nos. 05-337, 07-135, 10-90 (filed Dec. 29, 2011) (Accipiter Petition).

[5] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17741-47, paras. 210-26. The benchmarking rule does not apply to the high-cost support rate-of-return carriers receive as part of the intercarrier compensation recovery mechanism.

[6] *Connect America Fund; High-Cost Universal Service Support*, WC Docket Nos. 10-90, 05-337, Order, 27 FCC Rcd 4235 (2012) (*HCLS Benchmarks Implementation Order*); National Exchange Carrier Association, Inc, National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, and Western Telecommunications Alliance, Application for Review, WC Docket Nos. 10-90, 05-337 (filed May 25, 2012) (Rural Associations AFR); East Ascension Telephone Company, LLC, Application for Review, WC Docket Nos. 10-90, 05-337 (filed May 25, 2012) (EATEL AFR); Silver Star Telephone Company, Inc., Application for Review, WC Dockets Nos. 10-90, 05-337 (filed May 25, 2012) (Silver Star AFR); Silver Star Telephone Company, Inc., Supplement to Application for Review, WC Docket Nos. 10-90, 05-337 (filed June 22, 2012) (Silver Star AFR Supplement); Blue Valley Telecommunications, Inc., Application for Review, WC Docket Nos. 10-90, 05-337 (filed June 22, 2012) (Blue Valley AFR); United States Telecom Association, Application for Review, WC Docket Nos. 10-90, 05-337 (filed June 22, 2012) (US Telecom AFR); Blooston Rural Broadband Carriers, Application for Review, WC Docket Nos. 10-90, 05-337 (filed May 25, 2012) (Blooston AFR); Accipiter Communications Inc., Application for Review, WC Docket Nos. 10-90, 05-337 (filed May 25, 2012) (Accipiter AFR); Central Texas Telephone Cooperative, Inc., Application for Review, WC Docket Nos. 10-90, 05-337 (filed May 25, 2012) (Central Texas AFR).

[7] Rural Associations Petition; Accipiter Petition.

[8] 47 C.F.R. § 1.429(l)(3).

II. BENCHMARKING RULE

A. Background

4. In the *USF/ICC Transformation Order*, the Commission reformed high-cost support for rate-of-return carriers by, among other things, adopting a benchmarking rule intended to moderate the expenses of rate-of-return carriers with very high costs compared to their similarly situated peers, while further encouraging other rate-of-return carriers to invest and advance broadband deployment to consumers in rural America.[9] The new rule responded to problematic incentives and inequitable distribution of high-cost loop support created by the prior rules under which some carriers with high costs could receive reimbursement for up to 100 percent of their marginal expenditures on loop costs from the federal universal service fund. Because prior to the *USF/ICC Transformation Order*, these carriers generally faced no overall limits on their expenditures, our rules gave carriers incentives to increase loop costs with little regard to efficiency, and without regard to whether a lesser expenditure would be sufficient to provide supported services to their customers.[10] Moreover, because HCLS overall is capped, carriers that did take measures to reduce costs to operate more efficiently lost support to their peers that increased costs. The Commission adopted the benchmarking rule to reverse these incentives and address these problems by, for the first time, placing reasonable overall limits on costs eligible for reimbursement through HCLS and redistributing freed-up HCLS to carriers that stay within these limits to encourage new broadband investment.

5. To implement the benchmarking rule, the Commission concluded that it should use regression analyses to limit reimbursable capital costs and operating expenses for purposes of determining high-cost support for rate-of-return carriers,[11] and it sought comment on a methodology that used quantile regression analyses and publicly available cost, geographic and demographic data to generate a set of limits for each rate-of-return cost company study area.[12] The Commission delegated to the Bureau the authority to adopt and implement a specific methodology within the parameters set forth by the Commission after receiving public input in response to the proposal.[13] Specifically, the Commission required the Bureau to compare companies' costs to those of similarly situated companies; concluded that statistical techniques should be used to determine which companies shall be deemed similarly situated; provided a non-exhaustive list of variables that the Bureau could consider for purposes of this analysis; and granted the Bureau discretion to determine whether other variables, such as soil type, would improve the regression analysis.[14]

6. On April 25, 2012, the Bureau adopted a specific methodology for establishing benchmarks for capital expenses (capex) and operating expenses (opex) that will be used in the formula that determines HCLS.[15] The methodology built on the proposal in the *USF/ICC Transformation FNPRM*, but included improvements based on further analysis by the Bureau and in response to the comments from two peer reviewers and interested parties. The methodology uses quantile regression analyses to generate a capex limit and an opex limit for each rate-of-return cost company study area. The

[9] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17741-47, paras. 210-26.

[10] *See id*. at 17742, 17744-45, paras. 211, 219.

[11] *See id*. at 17743-44, paras. 214, 217.

[12] *See id.* at 18059-62, 18285-94, paras. 1079-88, App. H.

[13] *See id.* at 17743-44, 17747, paras. 214, 217, 226. We note that the limitations on the Bureau's delegated authority in section 0.291 of the Commission's rules do not apply to the specific authority delegated to the Bureau in Commission orders. *See* 47 C.F.R. § 0.291; 47 U.S.C. § 155(c).

[14] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17744, para. 217.

[15] *See HCLS Benchmarks Implementation Order*, 27 FCC Rcd 4235.

geographic independent variables used in the regressions were rolled up to the study area level using Tele Atlas wire center boundaries, a widely-used commercially available comprehensive source for this information.[16] The capex and opex benchmarks were implemented as of July 1, 2012. Consistent with the Commission's commitment to a phased transition, the Bureau decided to phase in the financial impact of the benchmarks.[17] As implemented by the Bureau, carriers will not experience the full impact of benchmarks on support amounts – which will decrease support for some carriers but increase support for others – until January 1, 2014. In addition, the Bureau decided to use the same regression coefficients in 2013 as those calculated for 2012 during this transition period.[18]

7. *Applications for Review and Requests for Stay*. Several parties, including associations representing rural telephone companies as well as individual rural telephone companies, filed applications for review of the Bureau's order.[19] In addition, several of those parties filed requests for a stay of the order pending Commission action on their applications for review.[20] On June 26, 2012, the Bureau denied the stay requests.[21] The Bureau rejected claims that the benchmarks are unpredictable and inaccurate and found that petitioners failed to show they would likely prevail on the merits.[22] The Bureau also found that petitioners failed to show they would be irreparably harmed if a stay were not granted.[23] The Bureau also determined that a stay would harm other parties such as the companies (and their customers) that will receive additional redistributed support.[24] Finally, the Bureau found that a stay would not serve the public interest because "[s]taying implementation of this rule would perpetuate . . . problematic incentives and inequalities and delay reforms intended to benefit consumers."[25] The National Telecommunications Cooperative Association (NTCA) subsequently asked the United States Court of Appeals for the Tenth Circuit to stay implementation of the *HCLS Benchmarks Implementation Order*, or in the alternative to issue a writ of mandamus directing the Commission to rule on NTCA's application for review before implementing the new caps.[26] On August 13, 2012, the court denied the request.[27]

[16] TomTom Telecommunications Suite 2011.09 (formerly Tele Atlas North America), Wire Center Premium, for wire center boundary and central office location information.

[17] *See HCLS Benchmarks Implementation Order*, 27 FCC Rcd at 4236, 4251-52, paras. 5, 43-45.

[18] *Id*. at 4251-52, para. 45.

[19] *See supra* note 6.

[20] National Exchange Carrier Association, Inc., National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, and Western Telecommunications Alliance, Petition for Stay, WC Docket Nos. 10-90, 05-337 (filed May 25, 2012); East Ascension Telephone Company, LLC, Petition for Stay, WC Docket Nos. 10-90, 05-337 (filed May 25, 2012); Silver Star Telephone Company, Inc., Petition for Stay, WC Dockets Nos. 10-90, 05-337 (filed May 25, 2012); Blue Valley Telecommunications, Inc., Petition for Stay, WC Docket Nos. 10-90, 05-337 (filed June 22, 2012); *see also* Rural Associations AFR, EATEL AFR, Silver Star AFR, Blue Valley AFR.

[21] *Connect America Fund; High-Cost Universal Service Support*, WC Docket Nos. 10-90, 05-337, Order, 27 FCC Rcd 7158 (2012) (*HCLS Benchmarks Stay Denial Order*).

[22] *Id*. at 7162-64, paras. 12-15.

[23] *Id*. at 7160-62, paras. 7-11.

[24] *Id*. at 7164, para. 16.

[25] *Id*. at 7165, para. 18.

[26] Petitioner National Telecommunications Cooperative Association's Motion for Stay of Administrative Order, or in the Alternative, for a Writ of Mandamus, *In re: FCC 11-161*, No. 11-9900 (10th Cir. filed June 28, 2012); Opposition of Federal Communications Commission to Motion for Stay of Administrative Order or, in the Alternative, for a Writ of Mandamus, *In re: FCC 11-161*, No. 11-9900 (10th Cir. filed July 12, 2012).

[27] *In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Aug. 13, 2012).

B. Discussion

1. Petitions for Reconsideration

8. We begin by addressing petitions for reconsideration of the benchmarking rule. For the reasons set forth below, we reconsider the Commission's original rule insofar as it requires the Bureau to rerun the benchmark regression annually and direct the Bureau to consider whether running the regression analyses less frequently will better serve the purposes advanced by the benchmarking rule. We deny, however, petitions for reconsideration filed by the National Exchange Carrier Association, Inc. (NECA), Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), and Western Telecommunications Alliance (WTA), (jointly, the Rural Associations) and Accipiter Communications Inc. (Accipiter) to the extent they request that the Commission reconsider its benchmarking rule.[28] We also clarify how support will be redistributed under that rule.

a. Rural Associations' Petition

9. The Rural Associations ask the Commission to reconsider several aspects of its limitations on reimbursable capital and operating expenses. We address certain of these arguments here.

10. *First*, the Rural Associations argue that the Commission's decision to use regression analyses to limit reimbursable capital costs and operating expenses in the *USF/ICC Transformation Order* was "premature and improper," and that the Commission should instead have stated that it would "*examine* a regression analysis approach . . . subject to adequate notice and comment."[29] They claim that the Commission's decision to use regression analyses to develop the benchmarks "leaves no room to argue that other approaches might be used in whole or in part as a substitute to achieve the kinds of constraints sought by the Commission," such as limiting new investment based on depreciation of existing plant, as the Associations previously proposed.[30]

11. Contrary to the Rural Associations' allegations, the Commission provided ample opportunities for parties to comment "on specific methods to be utilized" to limit carriers expenses.[31] In its February 2011 Notice of Proposed Rulemaking, the Commission explained that under then-existing rules, rate-of-return carriers with high loop costs could have 100 percent of their marginal loop costs above a certain threshold reimbursed through the federal universal service fund while other carriers that took measures to control expenses could find themselves losing support to carriers that increased costs.[32] Those effects, the Commission explained, meant that the rules did not create appropriate incentives to control costs and invest rationally.[33] The Commission proposed to address these concerns by using regression analyses to estimate appropriate levels of capital and operating expenses, sought comment on this proposal, and adopted its benchmarking rule after considering the comments received, including those filed by the Rural Associations.[34] The Commission found that the approach it adopted is a

[28] *See* Rural Associations Petition at 9-13; Accipiter Petition at 10-18.

[29] Rural Associations Petition at 9-10.

[30] *Id*. at 9-10 & n.21.

[31] *Id*. at 9.

[32] *Connect America Fund et al.*, WC Docket No. 10-90 et al., Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4624-25, para. 202 (2011) (*USF/ICC Transformation NPRM*).

[33] *Id*.

[34] *See id.* at 4624-26, paras. 201-07; Comments of the National Exchange Carrier Assoc., Inc., National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, Western Telecommunications Alliance, and Concurring Associations, WC Docket No. 10-90 et al. (filed Apr. 18, 2011).

"reasonable way to place limits on recovery of loop costs" and specifically rejected the Rural Associations' proposed alternative because it "would do little to limit support for capital expenses if past investments for a particular company were high enough to be more than sufficient to provide supported services, and would do nothing to limit support for operating expenses, which are on average more than half of total loop costs."[35] The Associations raise no new arguments to change this conclusion, and therefore we reject their petition to reconsider the adoption of benchmarks or the regression approach generally.

12. *Second*, the Rural Associations ask the Commission to reconsider its decision to change the caps annually based on a "refreshed" run of the regression analyses, arguing that the Commission should instead leave any caps in place for at least seven years.[36] They argue that if the regressions are updated each year, carriers could be encouraged to invest less to avoid being affected by the caps because "it appears that a carrier could actually reduce or maintain existing investment and expense levels during a given year but still suffer unexpected reductions in its HCLS . . . if its 'peer group' has changed or if its existing peers have reduced their costs faster."[37]

13. Since filing their petition, the Rural Associations have modified this request for relief. They no longer request that the Commission freeze any regression-based caps for at least seven years. Pending further updating and analysis of the regression methodology, they urge the Commission to "hold the caps constant for a period of several years starting in 2014," and then analyze the regression methodology "to determine whether there are more optimal methods than such a default rule to address concerns with respect to predictability in the longer-term."[38]

14. We note, as an initial matter, that the Bureau chose to use the same regression coefficients in 2013 as those calculated for 2012 during the phase-in of the initial benchmarks (i.e., it "froze" the 2012 coefficients for 2013). Accordingly, carriers have been able to determine their benchmarks, and estimate their support, throughout the phase-in period.[39] In effect, during the phase-in, the Bureau's approach is consistent with the Rural Associations' request. In addition, as discussed in more detail below, we direct the Bureau to revise the benchmark methodology to generate a single cap for each study area; these updated benchmarks will apply beginning in 2014.[40] The issue before us now, therefore, is how frequently the new benchmarks should be updated beginning 2015.

15. As the Rural Associations recognize, the decision whether, and if so, how, to freeze the expense benchmarks involves a number of tradeoffs. On the one hand, as the Rural Associations point out, more frequent updates create the possibility of changes in carriers' support levels.[41] If carriers cannot estimate likely future support levels with a reasonable degree of certainty, frequent updates may deter

[35] *USF/ICC Transformation Order*, 26 FCC Rcd at 17745-46, para. 223.

[36] Rural Associations Petition at 10-11.

[37] *Id*. at 10.

[38] *See* Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC (dated Oct. 17, 2012) (*Oct. 17, 2012 Ex Parte*) (*ex parte* notice on behalf of NTCA, OPASTCO, WTA, and NECA). The Rural Associations jointly filing the petition for reconsideration of the *USF/ICC Transformation Order* are NECA, OPASTCO, and WTA. NTCA sought judicial review and did not join the others in seeking reconsideration. *See* Rural Associations Petition at 9 & n.20.

[39] *HCLS Benchmarks Implementation Order*, 27 FCC Rcd at 4251-52, para. 45. We note that, below, we combine the capex and opex benchmark caps for each study area on an interim basis, in 2013, starting the first full month after the effective date of this Order. *See infra* para. 29.

[40] *See infra* paras. 24-28.

[41] *See, e.g.*, *Oct. 17, 2012 Ex Parte* (arguing that freezing the caps on a study area basis would promote certainty).

even efficient investment.[42] On the other hand, in practice, annual updates may produce only small changes for all or nearly all carriers. In fact, a comparison of the 2012 benchmarks with 2013 benchmarks, calculated as if the Bureau had not frozen the 2012 coefficients,[43] shows that the ratio of an individual carrier's costs to its caps in 2012 is strongly predictive of whether the carrier would have been capped in 2013.[44] Moreover, if the benchmarks are updated less frequently, over time they may fail to reflect industry-wide cost trends and cap carrier spending at levels that are either too high or too low. And if the benchmarks are updated infrequently, each update could cause larger and more sudden changes in support levels, at least for a subset of carriers. Updating the benchmarks less frequently also risks treating similarly situated carriers differently based on the timing of their investments. For example, a study area that has higher costs due to investment would not have those investments reflected in its benchmark if its benchmark cap were frozen. A freeze could therefore also distort carriers' investment decisions by encouraging them to time their investments to maximize their benchmarks rather than to invest efficiently. In addition, while there are many potential means to limit the volatility of the benchmarks from year to year, each potential approach would have, necessarily, a different ultimate effect on each study area's benchmarks, and thus its own costs and benefits.[45]

16. In light of these considerations, we reconsider the Commission's decision to the extent it requires the Bureau to update the regressions annually. We direct the Bureau, as it updates the benchmarks for 2014, to consider whether these benchmarks should be held constant for multiple years, and, if so, which mechanism would best advance our objectives to preserve and advance the deployment of voice- and broadband-capable networks while providing better incentives for carriers to invest prudently and operate efficiently.[46] In doing so, the Bureau should carefully consider the extent to which annual updates are likely to cause significant year-over-year changes in support levels. We expect the Bureau to adopt an approach that will provide carriers sufficient certainty regarding future years'

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[42] We note that, while the benchmark limit for a given carrier depends both on changes in the carrier's own costs as well as the costs of other companies, this by itself does not imply that the benchmarks are unpredictable. Indeed, in this regard, the benchmark rule is no different from the historical operation of HCLS. That is, a carrier's HCLS has always been calculated (and still is calculated) by comparing the carrier's own costs to the national average cost per loop, a number determined by other carriers' costs.

[43] Cost company data for 2013 were filed by NECA on September 28, 2012, based on carriers' costs for 2011. National Exchange Carrier Association, Inc., Universal Service Fund Data: NECA Study Results, 2012 Report (filed Sept. 28, 2012), http://www.fcc.gov/wcb/iatd/neca.html. These data can be used to generate a comparison to measure the effects of changes that would have been caused by updating the regressions. Specifically, by re-running the regression analysis using 2013 data for the same carriers that had benchmarks in 2012— excluding those carriers that were newly converted from average schedule to cost as well as the effects of acquisitions—a simulated set of "unfrozen" coefficients can be generated.

[44] For example, of those carriers that were at or below the 90th percentile of their caps in both opex and capex in 2012, fewer than one percent would have exceeded the simulated caps for 2013. Comparing the 2012 benchmarks against the simulated 2013 benchmarks also indicates that updating the benchmarks would have resulted, on the whole, in only modest changes in support distributions for 2013.

[45] For example, as the rule was phased in, the Bureau determined that the 2013 HCLS benchmarks would use the coefficients developed for the 2012 HCLS benchmarks. Freezing the coefficients in this way enhanced carriers' ability to predict their 2013 HCLS benchmarks, but it also had the effect of capping more companies than would have been capped if the Bureau had generated new coefficients. Other potential approaches, such as freezing benchmarks on a study area basis, freezing them on a per-line basis, or permitting them to change during a multi-year period only in limited ways (e.g., to account for line loss or new investment) have different consequences. As discussed below, we conclude that it is appropriate for the Bureau to examine whether, and if so, how a freeze should be implemented in the first instance, as the Bureau will be best positioned to evaluate various options as they would apply to the new single cost benchmark it will develop.

[46] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17744-45, para. 219.

benchmarks to encourage efficient investment while maintaining the balance struck in the Commission's reforms to encourage efficient spending by HCLS recipients.

17. *Finally*, the Rural Associations ask the Commission to reconsider its decision regarding the reductions resulting from the HCLS benchmarks and "find instead that the entirety of those reductions will be redistributed to other [rural carriers] – including those impacted by new caps – within the overall capped HCLS mechanism."[47] They argue that not redistributing reductions to capped carriers results in a "double cap" on HCLS.[48]

18. We decline to reconsider the Commission's decision to redistribute HCLS only to those carriers whose loop costs are not capped by the benchmarks. We find that providing additional support to carriers with the highest costs relative to their peers is contrary to the purposes of the benchmarking rule.[49] Moreover, by providing redistributed support only to carriers that are below their benchmarks, the rule provides an additional incentive for carriers to operate efficiently and keep costs below their caps. In addition, we note that the Rural Associations appear to assume that by allowing carriers capped by the benchmarks to receive redistributed support, they would have the chance to recover "more *but still not all*" of their high loop costs.[50] To the contrary, the Rural Associations' proposal could permit some carriers limited by the benchmarks to receive more in redistributed support than they would lose through the benchmark reductions.[51]

19. While we disagree with the Rural Associations' proposal to redistribute HCLS to carriers whose support is capped by the benchmarks, we take this opportunity to clarify that there is no "double cap" on HCLS. That is, we clarify that all HCLS reductions will be redistributed, though only to carriers whose loop costs are not limited by the benchmarks. In discussing the proposed methodology for creating benchmarks the Commission estimated that only approximately half of the HCLS reductions experienced by carriers limited by the benchmarks would be redistributed.[52] Other language in the *USF/ICC Transformation Order* made clear, however, that the Commission was not mandating partial redistribution. Specifically, the Commission said "we will place limits on the HCLS provided to carriers whose costs are significantly higher than other companies that are similarly situated, *and support will be redistributed to those carriers whose unseparated loop cost is not limited by operation of the benchmark methodology*."[53] We note that under the phase-in adopted by the Bureau, all HCLS reductions were

[47] Rural Associations Petition at 13.

[48] *Id*. at 12.

[49] We also note that the Rural Associations were concerned that a carrier could be capped in a single cost category or two, but otherwise be substantially below the benchmarks in other cost categories. *Id.* at 12-13. The proposed methodology in the *USF/ICC Transformation FNPRM* created caps in eleven separate categories, but the methodology adopted by the Bureau creates only two, *i.e.*, separate capital expense and operating expense caps, which to a large extent addressed this concern.

[50] Rural Associations Petition at 13.

[51] This could occur because the redistributed support is based on a lower national average cost per loop.

[52] Specifically, under the benchmark methodology proposed in Appendix H of the *USF/ICC Transformation Order and FNPRM*, the Commission estimated that support would be reduced for approximately 280 rural rate-of-return cost study areas by $110 million, with approximately $55 million redistributed to study areas not limited by the benchmarks, using one possible redistribution method. *See USF/ICC Transformation FNPRM*, 26 FCC Rcd at 18061, 18285-94, para. 1084, App. H.

[53] *USF/ICC Transformation Order*, 26 FCC Rcd at 17745, para. 220 (emphasis added).

redistributed in 2012.[54] And now we clarify that all reductions will be redistributed in future years as well.

b. Accipiter Petition

20. Accipiter argues that the Commission's decision to adopt cost benchmarks is flawed because such benchmarks cannot distinguish between carriers that "may legitimately be outliers due to particular considerations, including population density, terrain, and operating environment," and carriers that "are outliers due to waste, fraud or abuse, or other inefficiencies."[55] Accipiter claims the failure to make this distinction is "irrational" and reflects a failure to consider the specific challenges facing Accipiter and other carriers.[56]

21. We disagree. The Commission's benchmarking approach is designed precisely to compare each individual carrier's costs to those of similarly situated carriers, accounting for the most significant drivers of cost such as "density, terrain, and operating environment."[57] It is reasonable for the Commission to adopt a general rule to identify carriers with costs that are significantly higher than most of their similarly situated peers instead of relying on more costly and administratively burdensome alternatives such as audits.[58] Carriers that believe that the benchmarks do not adequately address unique circumstances that they face can seek a waiver of the Commission's rules. Accipiter's petition for reconsideration reads more like a petition for waiver, and in fact, Accipiter sought, and the Bureau granted, a temporary waiver of the benchmarking rule and other new rules that would limit its support.[59]

22. In its petition for reconsideration, Accipiter makes a variety of other arguments that relate not to the Commission's rule as adopted, but rather to the benchmarking methodology proposed in the *USF/ICC Transformation FNPRM*. But those complaints are not relevant to our reconsideration of the Commission's benchmarking rule. The Commission delegated to the Bureau the authority to adopt and implement a final methodology, which the Bureau did in its April 2012 *HCLS Benchmarks Implementation Order*.[60] Several parties, including Accipiter, filed separate applications for review of the Bureau's *HCLS Benchmarks Implementation Order*. We turn to that order now.

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[54] *HCLS Benchmarks Implementation Order*, 27 FCC Rcd at 4239, para. 10 n.29.

[55] Accipiter Petition at 11.

[56] *Id*.

[57] Both the methodology proposed by the Commission and the methodology adopted by the Bureau included density variables, and the Bureau included additional demographic and geographic variables to further capture the particular circumstances faced by similarly situated carriers. *See HCLS Benchmarks Implementation Order*, 27 FCC Rcd at 4243-45, paras. 20-23.

[58] *See Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620-21 (*Alenco*) (5th Cir. 2000) ("The agency's broad discretion to provide sufficient universal service funding includes the decision to impose cost controls to avoid excessive expenditures that will detract from universal service. . . . [G]iven its legitimate cost concerns, the agency was well within its discretion to impose a cap rather than to undertake the more costly alternative of intensive auditing.").

[59] *See Connect America Fund*; *Accipiter Communications, Inc. Petition for Temporary Waiver of Certain High-Cost Universal Service Rules*, WC Docket No. 10-90, Order, DA 13-105 (Wireline Comp. Bur. rel. Jan. 30, 2013) (*Accipiter Waiver Order*) (granting limited, temporary waiver of the requested rules through December 31, 2014).

[60] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17743-44, 17747, paras. 214, 217, 226; *HCLS Benchmarks Implementation Order*.

2. Applications for Review

23. We next address a number of arguments raised in the context of applications for review of the Bureau's *HCLS Benchmarks Implementation Order*, and we modify the Bureau's order in three respects. Specifically, (1) we direct the Bureau to develop a regression methodology that will generate a single total loop cost cap for each study area beginning in 2014; (2) as an interim measure toward a single cost cap, for purposes of calculating HCLS support in 2013, we sum capex and opex caps generated by the Bureau's current methodology; and (3) we modify the phase-in of the benchmarks for 2013. We do not otherwise modify the Bureau's *HCLS Benchmarks Implementation Order* at this time. In taking these actions, we address certain of the arguments raised in the applications for review,[61] and we defer consideration of the other issues raised in those applications for review.

24. *Single Total Cost Cap*. Consistent with the Commission's direction, the Bureau's *HCLS Benchmarks Implementation Order* generated limits on reimbursable capital expenses and operating expenses for purposes of determining HCLS; compared companies' costs to those of similarly situated companies; and used statistical techniques to determine which companies shall be deemed similarly situated.[62] Consistent with the Commission's delegation of authority, the Bureau also considered and tested additional variables and made further improvements to the methodology based on the comments from two peer reviewers and interested parties, and its own analysis.[63] The most significant change in the methodology that the Bureau made was using two regressions to generate only two caps for each company – a capex limit and an opex limit – rather than generating eleven caps as originally proposed in Appendix H of the *USF/ICC Transformation FNPRM*.[64]

25. We agree with the Bureau's decision to use fewer regressions than proposed in the *USF/ICC Transformation FNPRM*. The Bureau explained that doing so "enables carriers to account for the needs of individual networks and recognizes the fact that carriers may have higher costs in one category that may be offset by lower costs in others."[65] The Bureau adopted two regressions even though "[u]sing a greater number of regressions makes it possible to identify outliers at a granular level."[66]

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[61] *See* Central Texas AFR at 7 (requesting that the Commission modify the Bureau's rules to reflect certain trade-offs between capital costs and operating expenses made by carriers when making investment decisions); Rural Associations AFR at 3, 6, 23 (arguing that the Bureau's order should be set aside); EATEL AFR at 2, 10 (similar); Silver Star AFR at 3, 10 (arguing that implementation should be delayed); Silver Star AFR Supplement at 3 (similar); Blue Valley AFR at 3, 10 (similar); Blooston AFR at 2, 10 (similar); Central Texas AFR at 2, 10 (similar); Accipiter AFR at 9 (similar); US Telecom AFR at 2, 11 (arguing that the Bureau's order should be briefly postponed); Central Texas AFR at 10 (arguing that the Bureau's benchmark methodology results in support amounts that are unpredictable); Accipiter AFR at 2 (arguing that the results are unpredictable and deter investment); US Telecom AFR at 4-5 (arguing that the "perception of significant inaccuracy and unpredictability. . . whether correct or not," is affecting investment decisions); Rural Associations AFR at i-ii (claiming that the "Bureau's methodology does not rely on statistical analysis of 'similarly situated' companies, as the Commission's *USF/ICC Transformation Order* directed"); Blooston AFR at 10 (arguing that "a regression model should be used only to trigger a harder look to determine whether a carrier's costs were truly 'inefficient'"); Blue Valley AFR at 10 (similar); Silver Star AFR Supplement at 3 (similar).

[62] *USF/ICC Transformation Order*, 26 FCC Rcd at 17744, para. 217.

[63] *See* Letter from Patrick Halley, FCC, to Marlene Dortch, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, 03-109, at Apps. B & C (filed Mar. 9, 2012) (Sanyal Peer Review and Waldon Peer Review, respectively).

[64] *USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 18285-94, App. H.

[65] *HCLS Benchmarks Implementation Order*, 27 FCC Rcd at 4241, para. 14. Even parties arguing that the Bureau's order should be set aside concede that "the Bureau's formulas appear to be an improvement over the formulas as originally proposed." Rural Associations AFR at 3.

[66] *HCLS Benchmarks Implementation Order*, 27 FCC Rcd at 4241, para. 14.

Although one peer reviewer and some commenters recommended using a single regression to limit total cost, the Bureau decided that approach "would provide fewer safeguards against overspending."[67] Because "[c]apital and operating expenditures reflect fundamentally different measures of business performance," the Bureau reasoned that "[u]sing two regressions instead of one provides carriers flexibility to manage their operations, while still enabling the Commission to identify more instances where carriers spend markedly more in either category than their similarly-situated peers."[68]

26. We agree with commenters that the Bureau's methodology was an improvement over the proposed methodology that used eleven regressions, and we recognize that there are trade-offs in choosing the number of regressions. On balance, we conclude that going forward, it would be better to use one regression to generate a single cap on total loop costs for each study area. A single cap will provide carriers with greater flexibility to account for the specific needs of their locales and networks. This approach recognizes that carriers often consider the trade-offs between capital costs and operating expenses when making investment decisions. For example, in its Application for Review, Central Texas argues that it "balanced the costs of using aerial cables against the costs of burying cable and determined that it costs less overall to bury cable, rather than constantly maintain and replace aerial cable in the windy, tough, varmint-ridden Texas terrain. By keeping its cable maintenance costs low, Central Texas receives no credit from the regression model for doing so even though it has much lower operational expenditures."[69]

27. The record before the Bureau when it adopted two regressions instead of eleven regressions also contained support for using a single regression. For example, as noted above, one of the peer reviewers of the benchmark methodology, Paroma Sanyal, stated that "individual cost capping [i.e. capping individual types of costs rather than total costs] ignores any complementar[it]y or substitutability between the various cost components," which may discourage overall cost-minimization and fails to recognize that carriers face different trade-offs between types of expenses.[70] Sanyal suggested that "[a] more flexible approach may be to estimate the 90th percentile over the total cost," which "would be more in line with theoretical cost-minimization approaches where . . . expenditure caps can enhance efficiency under a rate-of-return regulation."[71] Similarly, Roger Koenker, one of the economists who developed quantile regression analysis, opined that his "primary criticism of the proposed FCC methodology [in Appendix H] lies in the way that cost estimates for individual cost components are aggregated. . . . A preferable, and simpler, approach would be to develop one conditional quantile model for aggregate costs."[72] Koenker concluded that the proposed aggregation of cost categories "yields cost limits that may be unduly stringent in some cases, and unduly lenient in others."[73]

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[67] *Id*. at 4241, para. 15.

[68] *Id*.

[69] Central Texas AFR at 7-8 ("Central Texas requests relief in the form of the Commission directing the Bureau to raise the capex threshold for carriers that make a justifiable engineering decision to bury cable in order to keep opex costs low. In the alternative, the Commission should direct the Bureau to allow carriers with considerable room under the opex threshold to offset the amount from the capex threshold.").

[70] Sanyal Peer Review at 2 ("This may discourage a company from overall cost-minimization if that means that after minimization, one of the cost categories will fall above the 90th percentile threshold, even though the total costs are lower. Additionally, each carrier may have different tradeoffs amongst its cost components, and the current methodology is akin to a one-size fits all approach.").

[71] *Id*.

[72] National Exchange Carrier Association et al. Comments, WC Docket No. 10-90 et al., at App. E, 1 (filed Jan. 18, 2012) (Roger Koenker, "Assessment of Quantile Regression Methods for Estimation of Reimbursable Cost Limits") (Rural Association Comments).

[73] *Id*.

28. For these reasons, we are persuaded that using a single total loop cost benchmark would be preferable to using separate capex and opex caps. Accordingly, we direct the Bureau to develop a regression methodology that will generate a single cap for each study area. We note that the Bureau also will be incorporating into its analysis revised study area boundaries, which will be obtained through an upcoming data collection.[74] We direct the Bureau to analyze the impact of various approaches prior to adopting its new methodology, which we anticipate will be implemented for distribution of HCLS beginning in 2014.

29. *Summing Capex and Opex Caps for 2013*. We recognize that the Bureau needs time to develop and seek comment on a new methodology, and therefore, absent some interim measure, carriers would continue to operate under two separate caps until 2014. We therefore conclude it is appropriate to combine or "sum" the existing caps as an interim measure. As a result, for purposes of providing HCLS, starting the first full month after the effective date of this Order and for the rest of 2013,[75] we will account for the trade-offs carriers make between capital expenditures and operating expenses by summing the capex and opex caps as an interim measure. That is, we will add each study area's capex and opex benchmarks together to establish a new limit on total unseparated loop costs for purposes of determining HCLS. In the short term, summing the capex and opex benchmarks together will provide an administratively feasible means to recognize the trade-offs between capital and operating expenses that carriers have made over time, while the Bureau works to develop a new single-equation regression.[76] We note that external parties and one peer reviewer have expressed concern about summing benchmarks based on quantiles.[77] As a matter of statistics, the sum of the quantiles is not the quantile of the sums, which is to say that summing two 90th percentile benchmark caps does not produce the same result as would setting a cap based on the 90th percentile of total costs. Although summing is imperfect as an estimate of the 90th percentile of overall costs, we find that as an interim measure it provides a reasonable way to recognize that there are tradeoffs between capital and operating expenditures. For example, to the extent a carrier's costs are over the capex benchmark but under the opex benchmark because it has made large investments to lower its operating costs and overall costs, summing the benchmarks will provide additional allowances for these expenditures.[78]

30. *Phase-In*. We also slightly modify the phase-in of the HCLS benchmarks adopted by the Bureau. Applications for review of the *HCLS Benchmarks Implementation Order* ask us to either set it aside or delay the implementation of the HCLS benchmarks until the Commission addresses various

[74] *Connect America Fund, High-Cost Universal Service Support*, WC Docket Nos. 10-90, 05-337, Report and Order, 27 FCC Rcd 13528 (Wireline Comp. Bur. 2012).

[75] The Order will become effective upon publication of its summary in the Federal Register; the modified methodology we adopt here will control support for the first full month following this effective date. *See infra* para. 54. Given that support is calculated on a monthly basis, providing that the new methodology will govern support beginning with the first full month after the effective date of the Order will minimize any administrative burdens associated with implementation.

[76] The Rural Associations support summing the two caps for 2013. *See, e.g.*, *Oct. 17, 2012 Ex Parte*; Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC (dated Nov. 9, 2012) (*Nov. 9, 2012 Ex Parte*) (*ex parte* notice on behalf of NTCA, OPASTCO, and WTA).

[77] *See* Sanyal Peer Review at 1-2, Rural Association Comments at App. E, 1. *But see Oct. 17, 2012 Ex Parte* (advocating for a single regression model "in the longer-term," but noting that "a reasonable interim step would be to help recognize the various 'business trade-offs' of operating a telecommunications network pending such further testing and recalculation by combining now the existing capital expense and operating expense caps into a single cap").

[78] *See*, *e.g.,* Central Texas AFR at 7 ("[T]he Commission should direct the Bureau to allow carriers with considerable room under the opex threshold to offset the amount from the capex threshold").

concerns.[79] Although we deny requests to delay the implementation, we modify the phase-in to limit the amount by which any one carrier's support may be reduced in 2013. In 2012, HCLS was reduced by twenty-five percent of the difference between the support calculated using the study area's reported cost per loop and the support as limited by the benchmarks, unless that reduction would exceed ten percent of the study area's support as otherwise would be calculated based on NECA cost data.[80] The Bureau's phase-in for 2013, as adopted in *HCLS Benchmarks Implementation Order,* will reduce support by fifty percent of the difference between the support calculated using the study area's reported cost per loop and the support as limited by the benchmarks in effect for 2013, but remove the limit on the total impact on individual carriers.[81] We maintain the Bureau's fifty percent phase-in for 2013. However, starting the first full month after the effective date of this Order and for the rest of 2013, we will limit the amount of the reduction to no more than fifteen percent of the study area's support as otherwise would be calculated based on NECA cost data, absent implementation of the benchmark rule.[82] We conclude that this strikes a reasonable balance between continuing the phase-in of the benchmark rule, while giving those carriers most heavily impacted additional time to adjust, particularly as the Bureau updates the benchmarks for 2014.

31. *Other Issues.* In this section we address a number of other issues raised in the applications for review; we defer consideration of the remaining issues to a future order.

32. *Predictability*. Several parties argue that the Bureau's benchmark methodology results in support amounts that are unpredictable in violation of section 254(b)(5) of the Communications Act of 1934, as amended (the Act).[83] Central Texas, for example, claims that the dynamic, annually changing nature of the regression caps does not allow carriers to predict future HCLS based on current and near-future expenditures.[84] And Accipiter argues that the results are so unpredictable that the Bureau's methodology "effectively prohibits companies from making reasonable and rational investment decisions."[85] We disagree.

33. As the United States Court of Appeals for the Fifth Circuit explained in *Alenco*, the Commission can satisfy the statute by adopting predictable *rules* that govern distribution of subsidies; its rules need not provide precisely predictable *funding amounts*.[86] Yet what these parties seek is precisely the predictable funding amounts the statute does not require. In any event, as noted above, the Bureau provided that same regression coefficients would be used in 2013 as those calculated for 2012 in order to ensure that carriers would be able to calculate their benchmark caps for the phase-in period well in advance. Accordingly, at least with respect 2012 and 2013, the carriers were, in fact, provided with the

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[79] *See* Rural Associations AFR at 3, 6, 23; EATEL AFR at 2, 10; Silver Star AFR at 3, 10; Blue Valley AFR at 3, 10; Blooston AFR at 2, 10; Central Texas AFR at 2, 10; Accipiter AFR at 9; US Telecom AFR at 2, 11.

[80] *HCLS Benchmarks Implementation Order*, 27 FCC Rcd at 4236, 4251, paras. 5, 43.

[81] *Id*.

[82] *See supra* note 75.

[83] 47 U.S.C. § 254(b).

[84] *See* Central Texas AFR at 10. Central Texas requests that the Commission direct the Bureau to develop a more static model. We note that above, the Commission has reconsidered the decision to require the Bureau to rerun the regressions annually, giving the Bureau the discretion to do so if it determines that this approach better serves the purposes advanced by the benchmarking rule and is sufficiently predictable. *See supra* para. 16.

[85] Accipiter AFR at 2; *see also* US Telecom AFR at 4-5 (arguing that the "perception of significant inaccuracy and unpredictability . . . whether correct or not, is causing widespread fear in the cost-company rate-of-return community which is having a chilling effect on broadband investment plans").

[86] *Alenco*, 201 F.3d at 623 ("[T]he Commission reasonably construed the predictability principle to require only predictable *rules* that govern distribution of the subsidies, and not to require predictable *funding amounts*").

certainty they request.[87] And, as discussed above, for 2014 and beyond, we direct the Bureau to revise its methodology to set a single total cost benchmark for each study area and to consider how frequently that regression should be updated. We do so with the expectation that the Bureau will adopt an approach that will provide carriers sufficient certainty regarding future years' benchmarks to encourage efficient investment while maintaining the balance struck in the Commission's reforms to encourage efficient spending by HCLS recipients. For these reasons, we reject the claim that the Bureau's order violates the Act because it provides insufficient predictability.

34. *Similarly-Situated Companies*. We also disagree with the Rural Associations' claim that the "Bureau's methodology does not rely on statistical analysis of 'similarly situated' companies, as the Commission's *USF/ICC Transformation Order* directed. In fact, the actual formulas do not establish *any* comparator groups."[88] They argue that the benchmark "formulas impose limitations on companies *without regard to* whether their per-unit costs are excessive or relatively high compared to 'peers.'"[89] On the contrary, we find that the Bureau's regression analysis was consistent with Commission's direction. We note that the Rural Associations never explain how they would propose to define "similarly situated" companies. We conclude that the Bureau took a reasonable approach, taking into account all the significant variables in determining the caps, in effect comparing each company to all other companies to the degree to which the companies are similar in regard to the variables found to be significant (i.e., the degree to which they are similarly situated).[90]

35. *Trigger*. We also reject the argument made by several parties in their applications for review that "a regression model should be used only to trigger a harder look to determine whether a carrier's costs were truly 'inefficient.'"[91] The Commission did not provide the Bureau with the discretion to use the regression methodology in that manner. Moreover, as explained above in the context of the petitions for reconsideration, we conclude that it was reasonable for the Commission to adopt a general rule to identify carriers with costs that are significantly higher than their peers instead of relying on more costly and burdensome approaches like audits, as would be required if the regression methodology were used merely as a trigger.[92]

36. Finally, while we have, in this Order, addressed a number of significant issues raised in the applications for review, we recognize that a number of issues remain pending. We otherwise defer consideration of issues not addressed herein.

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[87] Moreover, as discussed above, analysis of 2013 cost data indicates that the benchmarking rule, as initially implemented, would in fact have provided carriers with a significant degree of certainty regarding future support even if the regression coefficients had not been frozen. For example, as explained above, comparing 2012 to 2013 cost data revealed that the ratio of an individual carrier's costs to its caps in 2012 is strongly predictive of whether the carrier would have been capped in 2013. *See supra* paragraph 15.

[88] Rural Associations AFR at i-ii.

[89] *Id*. at 4-5.

[90] *See USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 18285, App. H n.1 ("The term 'similarly-situated peers' means that, based on data from all the carriers in the analysis, if there were (hypothetically) 100 study areas with independent variable values that were nearly the same as those with the study area in question, 90 of them would be expected to have values equal to or less than the 90th percentile prediction. It does not mean the carriers with the most similar number of loops (or values of the other variables).").

[91] *See* Blooston AFR at 10, Blue Valley AFR at 10, Silver Star AFR Supplement at 3.

[92] *See supra* para. 21. The Commission's benchmarking rule uses statistical techniques to compare each carrier's costs to those of similarly situated carriers. Carriers that believe that the benchmarks do not adequately address unique circumstances that they face can seek a waiver of the Commission's rules.

III. LIMITS ON TOTAL PER-LINE HIGH-COST SUPPORT

A. Background

37. In the *USF/ICC Transformation Order*, the Commission adopted a $250 monthly per-line cap on total high-cost federal universal service support for all incumbent telephone companies,[93] and codified this in rule 54.302.[94] The Rural Associations and Accipiter filed petitions for reconsideration claiming that the cap "fails to take into account the economic realities confronted by an expanding carrier"[95] and "will have limited benefit but devastating impacts on affected small companies."[96] The Rural Associations request that the Commission "set aside monthly per-line caps" until the Commission can assess the impact of its other universal service reforms,[97] while Accipiter asks the Commission to delay the implementation of the cap for "just a few years."[98] In the alternative, Accipiter and the Rural Associations urge the Commission to apply the $250 cap "on a prospective basis only."[99]

B. Discussion

38. We deny both petitions for reconsideration. In the *USF/ICC Transformation Order*, the Commission concluded that a $250 cap would be reasonable after finding that "support drawn from limited public funds in excess of $250 per-line monthly . . . should not be provided without further justification."[100] The Commission also noted that "virtually all (99 percent) of incumbent LEC study areas currently receiving [universal service] support are under the $250 per-line monthly limit."[101] Even so, to provide affected carriers a measured transition, the Commission delayed the implementation of the $250 cap for six months to "provide an opportunity for companies to make operational changes, engage in discussions with their current lenders, and bring any unique circumstances to the Commission's attention through the waiver process."[102] Moreover, after the six-month delay, the Commission phased-in the $250 cap "to ease the potential impact of this transition."[103] As a result, effective July 1, 2012, carriers subject to the $250 cap received support of no more than $250 per-line plus two-thirds the difference between their uncapped per-line amount and $250, and effective July 1, 2013, carriers will receive no more than $250 per-line plus one-third the difference between their uncapped per-line amount and $250 through June 30, 2014.[104]

39. Petitioners have not presented any new evidence or arguments that persuade us to reconsider adoption of the $250 per-line per month cap. And, we disagree with the Rural Associations' claims that the Commission failed to adequately explain the basis for adopting the $250 cap.[105] The

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[93] *USF/ICC Transformation Order*, 26 FCC Rcd at 17764-66, paras. 272-79.

[94] 47 C.F.R. § 54.302.

[95] Accipiter Petition at 18.

[96] Rural Associations Petition at 16.

[97] *Id.* at 18.

[98] Accipiter Petition at 18.

[99] Rural Associations Petition at 18. *See also* Accipiter Petition at 18-19.

[100] *USF/ICC Transformation Order*, 26 FCC Rcd at 17765, paras. 273-74

[101] *Id.* at 17766, para. 277

[102] *Id.* at 17766, para. 279.

[103] *Id.* at 17765, para. 275.

[104] *Id.*

[105] Rural Associations Petition at 17-18. In particular, the Rural Associations claim that the Commission did not conclude that costs in excess of $250 per-line per month were "irresponsible," "not used, useful or lawful," nor find

(continued...)

Commission provided a thorough, reasoned analysis of the basis for adopting the $250 cap.[106] By phasing-in the $250 cap, the Commission also provided carriers time to adjust, while promoting the Commission's goal of fiscal responsibility. Moreover, the *USF/ICC Transformation Order* acknowledged that if there are unique circumstances, carriers should utilize the waiver process.[107] We recently modified and clarified the Commission's guidance for the waiver process in our *Fifth Order on Reconsideration*.[108]

40. We note that, in 2011, there were 26 incumbent study areas that received $250 per month or more in per-line support.[109] Of those 26 study areas, the Commission has received nine waiver petitions arguing that waiver of the cap is necessary for the company to continue to serve its community; one of those petitions subsequently was withdrawn.[110] That the carriers serving the remaining study areas have not filed for waivers suggests that the measured transition adopted by the Commission provides an appropriate amount of time for affected companies to adjust their operations without disrupting service to consumers.

41. We deny the requests of Accipiter and the Rural Associations that the Commission apply the $250 cap "on a prospective basis only."[111] The Commission decided, after fully considering the record, that the immediate adoption of the $250 cap would advance its goal of imposing responsible fiscal limits on universal service support.[112] Accipiter claims that applying the cap "to previously-incurred expenses is in no way consistent with the Congressional directive that support be 'predictable,' and would punish carriers for reasonable investment decisions that cannot be reversed to account for the

(Continued from previous page)
that carriers that exceed such cap "plac[e] significant strains on the high-cost USF program." *Id.* Accipiter similarly claims that "[i]n applying its rules to 2010 expenses and loops, the Commission 'entirely failed to consider an important aspect of the problem,' failed to provide a reasonable explanation connecting the 'facts found and the choice made.'" Accipiter Petition at 18-19 (citing *Motor Vehicle Manufrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

[106] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17765-66, paras. 273, 277-79.

[107] *Id.* at 17766, para. 278 (acknowledging that "there may be legitimate reasons why certain companies have extremely high support amounts per-line"). *See also id.* at 17839-42, paras. 539-44; 47 C.F.R. § 1.3. Several parties suggested that Accipiter's carrier-specific claims regarding the $250 cap were better addressed through the waiver process. *See* Comments on Requests for Reconsiderations by the Nat'l Assoc. of State Util. Consumer Advocates and the N. J. Div. of Rate Counsel, WC Docket 10-90 *et al.*, at 21 (filed Feb. 9, 2012); Reply of Cox Communications, Inc., WC Docket No. 10-90 *et al.*, at 3 (filed Feb. 21, 2012). As noted above, Accipiter subsequently filed a petition to waive certain rules adopted in the *USF/ICC Transformation Order*, including the $250 cap. *See supra* para. 21. On January 30, 2013, The Bureau granted Accipiter limited, temporary relief through December 31, 2014. *See Accipiter Waiver Order*.

[108] *See Fifth Order on Reconsideration*, 27 FCC Rcd at 14556-60, paras. 18-32.

[109] Federal Communications Commission Response to United States House of Representatives Committee on Energy and Commerce Universal Service Fund Data Request of July 9, 2012, Request 6, Study Areas that Received $250 Per Month or More in Per-Line High-Cost Support in 2011 (submitted Sept. 28, 2012), http://democrats.energycommerce.house.gov/index.php?q=news/committee-leaders-release-fcc-responses-on-universal-service-fund. *See also* Letter from Michael Jacobs, FCC, to Marlene Dortch, FCC, WC Docket No. 10-90 (filed Jan. 16, 2013) (adding this Commission Response to the record in WC Docket No. 10-90).

[110] The Bureau granted a three-year waiver of the $250 monthly per-line cap for Allband Communications Cooperative. *Allband Communications Cooperative Petition for Waiver of Certain High-Cost Universal Service Rules*, WC Docket No. 10-90, Order, 27 FCC Rcd 8310 (Wireline Comp. Bur. 2012). As noted above, the Bureau also granted Accipiter a waiver of the $250 monthly per-line cap (among other rules) through December 31, 2014. *See supra* para. 21.

[111] Rural Associations Petition at 18. *See also* Accipiter Petition at 18-19.

[112] *USF/ICC Transformation Order*, 26 FCC Rcd at 17765, para. 274.

Commission's new rules."[113] The Commission fully considered and rejected such arguments in the *USF/ICC Transformation Order*, explaining that section 254 of the Act "does not create any entitlement or expectation that ETCs will receive any particular level of support or even any support at all."[114] In fact, "there is no statutory provision or Commission rule that provides companies with a vested right to continued receipt of support at current levels, and [the Commission is] not aware of any other, independent source of law that gives particular companies an entitlement to ongoing USF support."[115] In addition, the Commission upheld the principle that universal service mechanisms be predictable by adopting a measured transition to the implementation of the $250 cap for all carriers that made clear how much support carriers could expect to receive as the cap was phased in.[116] As discussed above, rather than "punish" carriers for previously incurred expenses, the Commission made efforts to "ease the potential impact" of the transition on all carriers by delaying the implementation of the cap for six months, phasing in the cap over a period of three years, and providing a waiver process for those carriers that face unique circumstances.[117]

IV. ICLS CORPORATE OPERATIONS EXPENSE CAP

A. Background

42. Accipiter and the Rural Associations also request that the Commission reconsider the decision to extend the corporate operations expense cap to ICLS.[118] Prior to the *USF/ICC Transformation Order*, the Commission capped the recovery of corporate operations expenses through HCLS,[119] but had permitted unlimited recovery of corporate operations expenses through ICLS. In the *USF/ICC Transformation Order*, the Commission modified the formula for calculating the corporate operations expense cap to include a growth factor and extended its application to ICLS.[120] As the Commission explained when it originally adopted the HCLS corporate operations cap, whereas expenses incurred for maintaining facilities and equipment are largely fixed, corporate operations expenses (e.g., travel

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[113] Accipiter Petition at 19.

[114] *USF/ICC Transformation Order*, 26 FCC Rcd at 17745, para. 221 (citing *Rural Cellular Assoc. v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) (quoting *Alenco*, 201 F.3d at 621)) ("Section 254 does not mandate the receipt of support by any particular carrier. Rather, as the Commission has indicated and the courts have agreed, the 'purpose of universal service is to benefit the customer, not the carrier.'").

[115] *USF/ICC Transformation Order*, 26 FCC Rcd at 17771, para. 293. *See also Members of the Peanut Quota Holders Assoc. v. United States*, 421 F.3d 1323, 1335 (Fed. Cir. 2005) ("The government is free to create programs that convey benefits in the form of property, but, unless the statute itself or surrounding circumstances indicate that such conveyances are intended to be irrevocable, the government does not forfeit its right to withdraw those benefits or qualify them as it chooses.").

[116] 47 U.S.C. § 254(b)(5); *see also supra* paras. 33, 38.

[117] *See supra* paras. 38-39.

[118] Accipiter Petition at 19-20; Rural Associations Petition at 11.

[119] 47 C.F.R. § 36.621(a)(4).

[120] *USF/ICC Transformation Order*, 26 FCC Rcd at 17748, 18244-46, paras. 231-32, Appendix C. The reimbursement is based on the number of working loops there are in the applicable study area. For study areas with 6,000 or fewer total working loops, carriers can recover monthly per loop either: (a) $42.337-(.00328 x number of total working loops), or (b) $63,000/number of total working loops, whichever is greater; for study areas with more than 6,000, but fewer than 17,887 total working loops, carriers can recover monthly per loop: $3.007 + (117,990/number of total working loops); and for study areas with 17,887 or more total working loops, the monthly amount per loop shall be $9.56. *Id.* at 17748, para. 232. As of January 1, 2013, the monthly per-loop limit is adjusted each year to reflect the annual percentage change in the Gross Domestic Product and Consumer Price Index. *Id.*

expenses, legal services, public relations costs) are often discretionary.[121] Thus, in the absence of a cap on the recovery of these corporate operations expenses, there is little incentive for carriers to control such spending.[122] In the *USF/ICC Transformation Order*, the Commission concluded that extending the corporate operations expense cap to ICLS would similarly motivate carriers to use their resources efficiently because carriers will only be reimbursed a certain amount per loop for their corporate operations expenses.[123]

B. Discussion

43. Accipiter and the Rural Associations provide no new evidence and introduce no new arguments that persuade us to reverse or otherwise modify this approach, and therefore we deny these petitions for reconsideration. Accipiter claims that any immediate extension of the corporate operations expense cap to ICLS will have "devastating financial implications" on carriers that are in the process of growing their operations to serve rural areas.[124] Accipiter notes that "[c]orporate operations expenses must be incurred before a carrier can add its first line," while acknowledging that "per-line corporate operations costs are quickly averaged down as new subscribers are added."[125] But the Commission has already made accommodations for carriers with limited subscribership. The Commission retained the rule that permits carriers with 6,000 or fewer working loops to recover a minimum amount per working loop if they would receive less than that minimum under the application of the ICLS corporate operations expense cap formula (i.e., $42.337 - (.00328 x number of total working loops)).[126] Specifically, such carriers can recover monthly for each working loop: $63,000 divided by their total number of working loops.[127] Moreover, if carriers believe that due to their unique characteristics, they need to recover more corporate operations expenses through ICLS than allowed for under the cap, they remain free to petition for a waiver of the cap pursuant to the Commission's waiver process.[128]

44. The Rural Associations request that the Commission delay the implementation of the ICLS corporate operations expense cap "until no sooner than January 1, 2013."[129] They argue that the Commission should not implement the corporate operations expense cap before carriers "have adequate opportunity to adjust their operations for compliance" with the new operating expense caps that the Commission proposed to develop through regression analysis in the *FNPRM*.[130] The Rural Associations

[121] *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 91-213, 94-1, 95-72, 96-45, 96-262, Fourth Order on Reconsideration and Report and Order, 13 FCC Rcd 5318, 5374, para. 92 (1997) (*HCLS Cap Recon. Order*).

[122] *Id.*

[123] *USF/ICC Transformation Order*, 26 FCC Rcd at 17748, para. 231.

[124] Accipiter Petition at 19.

[125] *Id.*

[126] 47 C.F.R. § 36.621(a)(4)(iii); *USF/ICC Transformation Order*, 26 FCC Rcd at 18245, App. C, para. 6 n.4. *See also supra* note 120.

[127] *USF/ICC Transformation Order*, 26 FCC Rcd at 18245, App. C, para. 6, n.4.

[128] *Id.* at 17839-42, paras. 539-44; 47 C.F.R. § 1.3. *See also Fifth Order on Reconsideration*, 27 FCC Rcd at 14556-60, paras. 18-32 (modifying and clarifying the Commission's guidance on the waiver process).

[129] Rural Associations Petition at 12 n.25; *see also* Opposition and Comments of the Gila River Indian Cmty. and Gila River Telecomms, Inc. to Petitions for Reconsideration, WC Docket No. 10-90 et al., at 17 (filed Feb. 9, 2012) (GRIC and GRTI Opposition) (stating that the Commission "acted prematurely in . . . extending the corporate operations expense cap to ICLS").

[130] Rural Associations Petition at 11-12 n.25. *See USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 18059-62, paras. 1079-88.

have not provided any evidence, however, demonstrating why extending the HCLS corporate operations expense limit to ICLS was inappropriate or why it would be necessary to delay a critical reform that advances the Commission's goals of improving fiscal discipline and accountability.[131]

45. We also deny Accipiter's claim that the Commission violated 47 U.S.C. § 254(b)(5) by applying the ICLS corporate operations expense cap to support for 2012, which is determined with reference to 2010 expenses.[132] The company argues that it "reasonably and rationally made decisions about 2010 investments and expenses based on the rules that were in place in 2010."[133] But as we discussed above and addressed repeatedly in the *USF/ICC Transformation Order*, section 254 does not entitle carriers to recover USF support simply because they expected to receive that support.[134] Accipiter does not cite any additional legal authority that persuades us otherwise.

46. Finally, we are not persuaded by Accipiter's argument that a "one size fits all rule,"—i.e., using a nationwide formula to cap ICLS—is "inappropriate and inflexible" due to the variability in corporate operations expenses between different regions in the country.[135] Accipiter has not provided any evidence to explain why a nationwide formula is unreasonable. Indeed, the Commission has used a nationwide formula to limit the recovery of corporate operations expenses for HCLS ever since it adopted that corporate operations expense cap in 1997.[136] Accipiter has failed to explain how ICLS differs from HCLS in such a way that it would be unreasonable for the Commission to extend the HCLS nationwide formula to ICLS.

V. IMPLEMENTATION OF FURTHER REFORMS FOR RATE-OF-RETURN CARRIERS

47. Finally, we take this opportunity to address some general arguments made by a number of rate-of-return carrier associations that the Commission should undertake "a careful data-driven process that takes measure of . . . reforms just now being implemented," including those reforms described above, "in lieu of racing forward with additional changes."[137] Although we disagree with these carriers insofar as they suggest we stop our implementation of the Commission's *USF/ICC Transformation Order*, we agree that a careful data-driven process is consistent with – and indeed critical to – that implementation. We emphasize our continued commitment to such a process, and we direct the Bureau, as it implements the modifications described above and proceeds with other reforms adopted in the *USF/ICC Transformation*

[131] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17738, para. 194 (identifying as Commission goals for universal service reform: "ensuring fiscal responsibility in all USF expenditures, increasing the accountability for Fund recipients, and extending modern broadband-capable networks"); *id.* at 17747, para. 229 (noting that "[e]xtending the limit on the recovery of corporate operations expenses to ICLS . . . furthers [the Commission's] goal of fiscal responsibility and accountability").

[132] Accipiter Petition at 20.

[133] *Id.*

[134] *See supra* notes 114-115 and accompanying text.

[135] Accipiter Petition at 20. *See also* GRIC and GRTI Opposition at 17-19 (claiming that corporate expenses are higher for Tribally-owned carriers, and thus application of the cap to these carriers is "arbitrary and capricious"); Comments of Mescalero Apache Telecom, Inc., WC Docket No. 10-90 et al., at 4-5 (filed Jan. 18, 2012) (expressing concern about the extension of the corporate operations expense cap to ICLS, along with implementation of the proposed operating and expense caps, to Tribally-owned carriers).

[136] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8930-32, paras. 283-85 (1997) (subsequent history omitted). *See also HCLS Cap Recon. Order*, 13 FCC Rcd at 5374-85, paras. 92-109. The Commission has held that "individual companies that are required to incur unusually high corporate operations expenses . . . have the right to apply for a waiver with the Commission to demonstrate the necessity of these expenses for the provision of the supported services." *Id.* at 5376, para. 93.

[137] *Nov. 9, 2012 Ex Parte*.

Order, to continue taking all appropriate steps to seek input from affected stakeholders, and gather relevant data on the effect of reforms as they proceed.[138] As an additional measure, we direct the Bureau to report to the Commission, within two years of release of the *USF/ICC Transformation Order*, i.e., November 18, 2013, on the progress of implementation, and on the impact of reforms based on relevant, available data at that time.

VI. PROCEDURAL MATTERS

A. Paperwork Reduction Act

48. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

B. Final Regulatory Flexibility Act Certification

49. The Regulatory Flexibility Act ("RFA")[139] requires that agencies prepare a regulatory flexibility analysis for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not have a significant economic impact on a substantial number of small entities."[140] The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[141] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[142] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of

[138] We note that the Bureau has taken numerous steps to date to promote transparency and access to data in its decision-making to date. For example, in implementing the HCLS benchmarks, the Bureau posted on the Commission's web page all dependent and independent variables for all cost company study areas, all computer code for running the regressions, a detailed description of how the Bureau created all GIS variables used in the regression and a map showing all study area boundaries. *See* http://transition.fcc.gov/wcb/iatd/neca.html. Since posting this information, the Bureau has expeditiously processed five requests it has received for correction of individual carriers' data. *See Connect America, High-Cost Universal Fund Support,* WC Docket Nos. 10-90, 05-337, Order, DA 12-1907 (rel. Nov. 28, 2012) (granting a waiver to Arctic Slope Telephone Association Cooperative, Inc.); *Connect America, High-Cost Universal Fund Support,* WC Docket Nos. 10-90, 05-337, Order, 27 FCC Rcd 12106 (2012) (granting a waiver to Border to Border Communications, Inc.); *Connect America, High-Cost Universal Fund Support,* WC Docket Nos. 10-90, 05-337, Order, 27 FCC Rcd 11075 (2012) (granting a waiver to Wauneta Telephone Company); *Connect America, High-Cost Universal Fund Support,* WC Docket Nos. 10-90, 05-337, Order, 27 FCC Rcd 7147 (2012) (granting waivers to West River Cooperative Telephone Company and Kennebec Telephone Companies).

[139] *See* 5 U.S.C. § 601 *et seq*. The RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857.

[140] 5 U.S.C. § 605(b).

[141] 5 U.S.C. § 601(6).

[142] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. S § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[143]

50. This document modifies and clarifies the benchmarking rule adopted by the Commission in *USF/ICC Transformation Order*,[144] and modifies the Wireline Competition Bureau's implementation of that rule.[145] These modifications and clarifications do not create any burdens, benefits, or requirements that were not addressed by the Final Regulatory Flexibility Analysis attached to *USF/ICC Transformation Order*.[146] The Commission will send a copy of the Order including a copy of this final certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Order and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register. *See* 5 U.S.C. § 605(b).

C. Congressional Review Act

51. The Commission will send a copy of this Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[147]

D. Effective Date

52. We conclude that good cause exists to make this Order effective immediately upon publication in the Federal Register, pursuant to section 553(d)(3) of the Administrative Procedure Act.[148] Agencies determining whether there is good cause to make a rule revision take effect less than 30 days after Federal Register publication must balance the necessity for immediate implementation against principles of fundamental fairness that require that all affected persons be afforded a reasonable time to prepare for the effective date of a new rule.[149] As we note above, summing the capex and opex benchmarks together is an important interim step to recognize the trade-offs that carriers have made in investment, and will therefore mitigate or eliminate the effect of the existing benchmarks cap mechanism on carriers that are capped under one or the other benchmark but not both. It will also reduce the amount of support redistributed to uncapped carriers by a corresponding amount. Because many more carriers receive redistributed support than are capped under the existing mechanism, the effect of summing the caps on any carrier receiving redistributed support will generally be much less significant than the effect on those carriers that are currently capped. Moreover, we note that high-cost loop support is generally subject to true-ups over time. Carriers, accordingly, generally have no certain expectation of the precise amount of support they will receive. We conclude under these circumstances that the public interest is best served by immediate implementation of our new interim rule, and that, on balance, carriers that will experience a minor reduction in redistributed support do not require additional time to prepare for implementation of a rule change that affects them only modestly.

53. In addition, we modified the phase-in of the HCLS benchmarks to limit the amount of reduction of support to no more than fifteen percent of the study area's support absent implementation of

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[143] Small Business Act, § 15 U.S.C. S 632.

[144] *See USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 17742-47, paras. 210-26.

[145] *See HCLS Benchmarks Implementation Order*, 27 FCC Rcd 4235

[146] *See USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 18324-63, App. O.

[147] *See* 5 U.S.C. 801(a)(1)(A).

[148] 5 U.S.C. 553(d)(3).

[149] *Omnipoint Corporation v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996), citing United States v. Gavrilovic, 551 F.2d 1099, 1105 (8th Cir. 1977).

the benchmark rule to give carriers that are heavily impacted by the benchmarks more time to adjust. We find that implementing the modification to the phase-in as expeditiously as possible furthers the Commission's objective of ensuring that carriers experience a more gradual implementation of the benchmarks overall which obviates the necessity of providing carriers additional 30 day notice before implementation.

VII. ORDERING CLAUSES

54. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 2, 4(i), 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, and 403 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151, 152, 154(i), 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, 403, 1302, and sections 1.1 and 1.429 of the Commission's rules, 47 C.F.R. §§ 1.1, 1.429, that this Sixth Order on Reconsideration IS ADOPTED, effective upon publication of the text or summary thereof in the Federal Register.

55. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405 and sections 0.291 and 1.429 of the Commission's rules, 47 C.F.R. § 0.291 and 47 C.F.R. § 1.429, that the Petition for Reconsideration filed by the National Exchange Carrier Association, Inc., Organization for the Promotion and Advancement of Small Telecommunications Companies, and Western Telecommunications Alliance on December 29, 2011 IS GRANTED IN PART to the extent described herein, and IS DENIED IN PART to the extent described herein.

56. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405 and sections 0.291 and 1.429 of the Commission's rules, 47 C.F.R. § 0.291 and 47 C.F.R. § 1.429, that the Petition for Reconsideration filed by Accipiter Communications Inc. on December 29, 2011 IS DENIED IN PART to the extent described herein.

57. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c) and sections 0.291 and 1.115 of the Commission's rules, 47 C.F.R. § 0.291 and 47 C.F.R. § 1.115, that the Application for Review filed by Central Texas Telephone Cooperative, Inc. on May, 25, 2012 IS GRANTED IN PART to the extent described herein, and IS DENIED IN PART to the extent described herein.

58. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c) and sections 0.291 and 1.115 of the Commission's rules, 47 C.F.R. § 0.291 and 47 C.F.R. § 1.115, that the Application for Review filed by the National Exchange Carrier Association, Inc., National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, and Western Telecommunications Alliance on May 25, 2012 IS DENIED IN PART to the extent described herein.

59. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c) and sections 0.291 and 1.115 of the Commission's rules, 47 C.F.R. § 0.291 and 47 C.F.R. § 1.115, that the Application for Review filed by East Ascension Telephone Company, LLC on May 25, 2012 IS DENIED IN PART to the extent described herein.

60. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c) and sections 0.291 and 1.115 of the Commission's rules, 47 C.F.R. § 0.291 and 47 C.F.R. § 1.115, that the Application for Review filed by

Silver Star Telephone Company, Inc. on May, 25, 2012 IS GRANTED IN PART to the extent described herein, and IS DENIED IN PART to the extent described herein.

61. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c) and sections 0.291 and 1.115 of the Commission's rules, 47 C.F.R. § 0.291 and 47 C.F.R. § 1.115, that the Supplement to Application for Review filed by Silver Star Telephone Company, Inc. on June 22, 2012 IS GRANTED IN PART to the extent described herein, and IS DENIED IN PART to the extent described herein.

62. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c) and sections 0.291 and 1.115 of the Commission's rules, 47 C.F.R. § 0.291 and 47 C.F.R. § 1.115, that the Application for Review filed by Blue Valley Telephone Telecommunications, Inc. on June 22, 2012 IS GRANTED IN PART to the extent described herein, and IS DENIED IN PART to the extent described herein.

63. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c) and sections 0.291 and 1.115 of the Commission's rules, 47 C.F.R. § 0.291 and 47 C.F.R. § 1.115, that the Application for Review filed by Blooston Rural Broadband Carriers on May, 25, 2012 IS GRANTED IN PART to the extent described herein, and IS DENIED IN PART to the extent described herein.

64. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c) and sections 0.291 and 1.115 of the Commission's rules, 47 C.F.R. § 0.291 and 47 C.F.R. § 1.115, that the Application for Review filed by Accipiter Communications Inc. on May, 25, 2012 IS GRANTED IN PART to the extent described herein, and IS DENIED IN PART to the extent described herein.

65. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c) and sections 0.291 and 1.115 of the Commission's rules, 47 C.F.R. § 0.291 and 47 C.F.R. § 1.115, that the Application for Review filed by United States Telecom Association on June 22, 2012 IS GRANTED IN PART to the extent described herein, and IS DENIED IN PART to the extent described herein.

66. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

67. IT IS FURTHER ORDERED, that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI

Re: *Connect America Fund*, WC Docket No. 10-90, *High-Cost Universal Service Support*, WC Docket No. 05-337.

Under the old Universal Service Fund rules, smaller, rate-of-return carriers faced no overall limits on their spending. Even within HCLS, a part of USF that is capped overall, carriers that invested prudently lost out more and more every year — while those that spent the most controlled their own funding spigot, and could keep turning up the flow of USF dollars without limit. This created a perverse race to the top in spending. The Commission's unanimous, once-in-a-generation overhaul of the Universal Service Fund finally put an end to this practice, establishing a framework for reasonable limits on reimbursement for individual carriers' expenses as part of our overall push toward greater accountability, fiscal responsibility, and a market- and incentive-based framework. Following a careful, data-driven process involving dozens of stakeholder conversations, thorough statistical analysis, and peer review, the Wireline Bureau implemented a specific set of spending benchmarks.

Today we reject calls to reconsider our decision to set spending limits, or our decision to put in place a number of other important cost controls for rate-of-return carriers, while making some modest adjustments. These adjustments simplify the spending caps and give the Bureau greater flexibility to consider proposals to maintain certainty regarding year-to-year funding levels in 2015 and beyond, while protecting incentives for efficient spending.

Fiscal responsibility is hard work, and is requiring real adjustments for carriers and other stakeholders that had gotten used to a laxer system. That's why we phased in changes and provided a fact-intensive waiver process. But it would have been irresponsible to go back on measures like the overall spending caps, or tougher limits on "corporate operations" expenses, as some have suggested. These measures are moving us toward an incentive-based system and finally helping protect the consumers and businesses that pay into the Fund. I thank the Bureau for their hard, ongoing, and excellent work implementing these controls and other parts of the *USF/ICC Transformation Order*. They and we will continue to work with all stakeholders as we move forward.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re: *Connect America Fund*, WC Docket No. 10-90, *High-Cost Universal Service Support*, WC Docket No. 05-337.

The 2011 USF/ICC Transformation Order was a bipartisan, historic feat that many said could not be accomplished. It was a reform effort to flatten the curve of an entitlement while emphasizing the need to expand broadband access to American consumers who are currently unserved. Nevertheless, as I have said since the order was approved, this will be an iterative process. As such, I have been open to learning whether the Commission needs to make a course correction to any parts of our reforms. Today's order does that in a thoughtful way, while not discarding our commitment to fiscal responsibility. Therefore, I support this order.

As we move forward, I am committed to working with all stakeholders and my colleagues to ensure that our reforms continue to promote efficiency in the program through market-based incentives while expanding broadband availability throughout America.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Connect America Fund*, WC Docket No. 10-90, *High-Cost Universal Service Support*, WC Docket No. 05-337.

The *USF/ICC Transformation Order* was an historic overhaul of the high-cost Universal Service Fund (the "Fund"). The main purpose for this bold reorientation of the Fund was to bring robust broadband networks to consumers living in high-cost geographic areas, where the private sector business case has yet to support such service. In addition, the unanimously approved bipartisan effort determined that certain reforms were needed to ensure that carriers were incentivized not only to invest in broadband networks, but to do so efficiently and effectively. The FCC's determination to modify the high-cost loop support mechanism for rate-of-return carriers was an important step, and I fully supported the benchmarking rule that was adopted and implemented by the Wireline Competition Bureau.

As we explained in the *USF/ICC Transformation Order* and again in today's *Sixth Reconsideration Order*, the lack of the right incentives under the Commission's old rule was problematic and unsustainable. The essential modifications we make today to the benchmarks not only will provide more flexibility, but will continue to operate as a moderating tool—a checks and balances, if you will—which will encourage efficient investment and operational expenses by rate-of-return carriers as intended by the *USF/ICC Transformation Order*. Our focus has been providing the appropriate financial incentives for carriers to invest in broadband networks, balanced with the overall impact on our objective to reach as many consumers as possible with our limited high-cost budget. In doing so, the issue of predictability has been raised, and while our initial analysis indicates that carriers could predict their funding under the current benchmarks, we are directing the Bureau's implementation of limited adjustments to ensure that predictability continues. I support the Commission's efforts to modify reforms as needed, while staying true to our overall objectives in the *USF/ICC Transformation Order*—to ensure that the Fund is being used to deploy broadband in the most efficient and effective manner, reaching as many consumers as possible, in order to provide truly universal voice and broadband service.

STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL

Re: *Connect America Fund*, WC Docket No. 10-90, *High-Cost Universal Service Support*, WC Docket No. 05-337.

A little over a year ago, the Commission took historic steps to update its high-cost universal service fund and intercarrier compensation system. I commend my colleagues for this effort. They refocused the fund from last century's technology on to the broadband and wireless communications challenges of this century; they put it on a budget; they increased accountability throughout.

But as I have said before, I worry that our reforms to the high-cost universal service system are extremely complex. I fear that this complexity can deny carriers dependent on them the certainty they need to confidently invest in their network infrastructure. So when opportunities arise to simplify our rules in a manner that is fiscally sound, good for consumers and bound to inspire investment—we should seize them.

Today, we have done just that. This order makes some adjustments to the universal service reforms for rural carriers that I recommended some time ago. Specifically, this order combines the two separate capital and operating expense benchmarks into one benchmark to simplify the regression analysis and provide carriers with flexibility to meet our new limits. We also direct the Wireline Competition Bureau to take a hard look at keeping these benchmarks in place for a longer period of time, instead of resetting them annually. I think these kind of adjustments will help ensure a more "predictable" and "sufficient" system—one that provides carriers with more confidence to invest in broadband infrastructure. So I commend the Chairman and my colleagues for approving this order and putting these changes in place.

Today's decision will help promote confidence in broadband investment for carriers serving rural communities. Going forward, I believe we need to do more of the same by distributing incremental support from the first phase of the Connect America Fund—as soon as possible.

STATEMENT OF
COMMISSIONER AJIT PAI
APPROVING IN PART AND CONCURRING IN PART

Re: *Connect America Fund*, WC Docket No. 10-90, *High-Cost Universal Service Support*, WC Docket No. 05-337.

In the *Universal Service Transformation Order*, the Commission adopted benchmarks for the High-Cost Loop Support (HCLS) component of the Universal Service Fund to create "structural incentives for rate-of-return companies to operate more efficiently and make prudent expenditures."[1] The Commission proposed benchmarks based on a quantile regression analysis (QRA) of the correlation between the characteristics of various rate-of-return carriers and their historical capital and operating expenses but left the details to be decided by the Wireline Competition Bureau. Five months later, the Bureau adopted the *Benchmarks Order*, which established separate QRA benchmarks for each rural carrier's capital expenses and operating expenses and phased in those benchmarks over 18 months.[2]

Like my colleagues, I believe that establishing limits on the universal service support a carrier can receive is a good thing. In this era of fiscal restraint, no one can expect the government to continue to fund their expenses without question. And with respect to HCLS, the Commission instituted such limits almost twenty years ago when it capped the program at the recommendation of the Federal-State Joint Board.[3] It is important to recognize that the limits established in the *Benchmarks Order* and that we address here do not reduce the size of the HCLS program.[4] They instead determine *how* universal service funding will be distributed among rural carriers, not *how much* will be spent overall.

With that background, I turn to today's order. I join it to the extent that it mitigates the harm of the QRA benchmarks and provides short-term relief for rural carriers. But I am disappointed that we do not go further to reform these benchmarks. As I have said before, universal service support should be stable and predictable and distributed consistent with the law and common sense.[5] I am not so sure that the QRA benchmarks that we reaffirm today pass that test.

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[1] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform—Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17742, para. 210 (2011) (*Universal Service Transformation Order*).

[2] *Connect America Fund; High-Cost Universal Service Support*, WC Docket Nos. 10-90, 05-337, Order, 27 FCC Rcd 4235, 4259, para. 70 (Wireline Comp. Bur. 2012) (*Benchmarks Order*).

[3] *See Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 80-286, Report and Order, 9 FCC Rcd 303, 304, para. 11 (1993); *see also Federal-State Joint Board on Universal Service; Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket Nos. 96-45, 00-256, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice Of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244, 11259–68, paras. 31–53 (2001) (reviewing the history of the HCLS cap and modifying it).

[4] *Sixth Order on Reconsideration*, para. 19.

[5] Remarks of FCC Commissioner Ajit Pai, "Unlocking Investment and Innovation in the Digital Age: The Path to a 21st-Century FCC" (July 18, 2012), *available at* http://go.usa.gov/4QJG; Opening Remarks of Commissioner Ajit Pai at the Rural Broadband Roundtable in Oswego, Kansas (Sept. 6, 2012), *available at* http://go.usa.gov/4QJz.

First, the QRA benchmarks are unpredictable. As it stands, the Bureau is scheduled to recalculate the QRA benchmarks each year to reflect the investment and operating decisions of not just each individual rural carrier but its 737 brethren as well. Because this determination is relative, a carrier has little ability to predict what its benchmarks will be in one, three, or five years unless it somehow guesses what the entire rural industry will do in the future.

The order suggests that QRA benchmarks in one year may be "strongly predictive" of benchmarks the next.[6] But this suggestion is based on 2010 and 2011 cost data, the two years *before* the QRA benchmarks were adopted and implemented. As a stockbroker might say: Past performance does not necessarily indicate future results. That's especially true here, when the whole point of the QRA benchmarks is to induce rural carriers to reduce their spending, which *will* necessarily feedback into QRA benchmarks for future years.[7] Moreover, just this month the U.S. Department of Agriculture asked the Commission for "confidential access to the regression model to assist [the Department] in managing its lending program,"[8] presumably because the Department, like rural carriers, thinks that predictability is a weakness—not a strength—of the QRA benchmarks. Indeed, as a recent six-month study of the QRA benchmarks found, "the QRA is a complicated statistical analysis that cannot be predicted—at least at the present—with any degree of confidence."[9]

This unpredictability does not promote certainty. And it appears the investment environment has cooled as a result, impeding the deployment of next-generation technologies and broadband services to rural Americans.[10] Indeed, the Department of Agriculture recently told the Commission that demand for Rural Utility Service loans for broadband build-out has plummeted this year due in part to the uncertainty created by the QRA benchmarks.[11] Communications infrastructure requires not a one- or two-year investment, but a ten- or twenty-year commitment. If a rural carrier does not know whether or how much universal service funding will be available, it will not invest in the higher-cost regions of America. Indeed, it may not even have the choice, as banks and investors are unlikely to lend to rural carriers with uncertain funding.

Unpredictability also undermines the stated purpose of the QRA benchmarks, which is to incentivize efficient and prudent decision-making by rate-of-return carriers. The HCLS mechanism is a backward-looking mechanism within the Universal Service Fund, meaning that support received today is based on—and is payment for—historical, two-year-old expenditures. Thus, the 2012 QRA benchmarks

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[6] *Sixth Order on Reconsideration*, para. 15 & note 89.

[7] *See, e.g.*, Vincent H. Wiemer & Michael J. Balhoff, CFA, White Paper: Lessons from Rebuilding the FCC's Quantile Regression Analysis at 28 (Feb. 2013) (*Rebuilding QRA White Paper*), *available at* http://go.usa.gov/4he4 ("[T]he effect of the use of the model . . . is to create a much higher degree of unpredictability and to incent very conservative levels of spending by an individual carrier so that it does not risk shortfalls in recovery on its high-cost spending. Then, if most carriers take this approach each year as would be rational, each subsequent year becomes more conservative and there is a potential 'race to the bottom.'").

[8] *See* Letter from John Charles Padalino, Acting Administrator, Rural Utility Service, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, at 2 (Feb. 15, 2013) (Dep't of Agriculture *Ex Parte* Letter).

[9] *Rebuilding QRA White Paper* at 28; *see id*. at 68 ("The new QRA is duck hunting when the winds are high, the distance is farther, and, for sport, there is no light.").

[10] *See* US Telecom Application for Review at 4–5 (arguing that the "perception of significant inaccuracy and unpredictability . . . whether correct or not, is causing widespread fear in the cost-company rate-of-return community which is having a chilling effect on broadband investment plans").

[11] *See* Dep't of Agriculture *Ex Parte* Letter at 1–2 (reporting on a meeting between Secretary Vilsack and Chairman Julius Genachowski and noting that "demand for [Rural Utility Service] loan funds dropped to roughly 37% of the total amount of loan funds appropriated by Congress in [fiscal year] 2012").

were based on 2010 expenses, and this year's 2013 QRA benchmarks are based on data the National Exchange Carrier Association collected last July about calendar year 2011 costs.[12] In other words, a rural carrier seeking to adjust its operating expenses today needs to know what the QRA benchmarks will be two years from now—in 2015—because those are the benchmarks that will apply to today's spending. And because the costs of capital investment are generally spread over several years, not just one, a rural carrier making investments this year would likely need to know the QRA benchmarks for 2015, 2019, and even thereafter. Yet a rural carrier cannot even guess its 2015 QRA benchmarks because they will be based on an entirely new model and may or may not (today's order leaves that to the Bureau's discretion) bear some relation to the 2014 benchmarks.[13]

Unpredictability also unnecessarily imperils the financial situation of rural carriers. Consider a small business whose expenditures are just above the 2013 QRA benchmark. Because the support it receives in 2013 reimburses money already spent, the unexpected decrease in support may force the carrier to cut its current costs dramatically—not because doing so is efficient but because it may be the only way to make payroll and keep the lights on. If the carrier then falls below the 2014 QRA benchmark, it may suddenly feel flush with cash . . . only to see another large drop in 2015. This whip-saw effect is itself an impediment to long-term financial planning and efficient investment, and the unpredictability of the QRA benchmarks from one year to the next exacerbates this problem.

This is not just a matter of good policy. Promoting predictability is a congressional command: Alongside the basic universal service principle of serving consumers "in all regions of the Nation," section 254 requires that the Commission run the Universal Service Fund on the principles that there be "specific, predictable and sufficient . . . mechanisms to preserve and advance universal service."[14] To be sure, this predictability principle can yield to countervailing statutory principles,[15] but none of the latter pertain here. And though this principle certainly does not require that we promise a particular carrier a particular amount,[16] surely Congress intended that we give carriers at least some guidance—at least enough so that the QRA benchmarks can serve the purpose we set for them.

Second, although the 2013 QRA benchmarks make more sense as a result of today's order (more on that later), I still have my doubts about their utility. The 2013 QRA benchmarks do not, for example, incentivize efficient investment since they apply to expenses incurred in calendar year 2011—and the *Universal Service Transformation Order* was not released until November of that year. They do not plausibly redirect support from low-cost areas to high-cost areas because, even after today's order, carriers like Copper Valley Telephone and Arctic Slope Telephone will have lower caps merely because they serve Alaska.[17] They do not target inefficient carriers (only "outliers"), nor do they encourage broadband deployment.[18] In short, I am concerned that the 2013 QRA benchmarks may just end up arbitrarily redistributing support from one group of carriers to another.

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[12] *See* 47 C.F.R. § 36.611.

[13] *Sixth Order on Reconsideration*, para. 16 ("We direct the Bureau, as it updates the benchmarks for 2014, to consider whether these benchmarks should be held constant for multiple years.").

[14] 47 U.S.C. § 254(b)(2), (3), (5).

[15] *See Alenco Communications v. FCC*, 201 F.3d 608, 621 (5th Cir. 2000).

[16] *Id.* at 623.

[17] Indeed, several studies have shown that costs of infrastructure deployment in Alaska are significantly *higher* than costs in the lower 48 states. *See Rebuilding QRA White Paper* at 21.

[18] Despite post-adoption language in today's order suggesting that the QRA benchmarks "provid[e] additional support for carriers below their caps to extend broadband to rural consumers," *Sixth Order on Reconsideration*, para. 2, there is no connection between the additional support given to rural carriers below their caps and broadband

(continued...)

Moreover, the data underlying the benchmarks are themselves flawed.[19] The *Benchmarks Order* forthrightly admitted that the Commission does not keep data on carrier study area boundaries.[20] Instead, the *Benchmarks Order* relied on a commercial database for 2012 and 2013 while it put in place an 18-month process to correct errors and address inaccuracies in that database's study area boundary information.[21] The new boundary information hopefully will benefit those subject to the 2014 QRA benchmarks. But the 2013 QRA benchmarks are tainted by the inaccuracies and errors inherent in the admittedly flawed mapping data. And the only comprehensive study of the benchmarks conducted to date found significant problems with *fourteen of the sixteen* variables used to produce them.[22]

I nevertheless approve today's order in part because it provides some short-term relief for rural carriers that will be (and have been) affected by the 2013 QRA benchmarks. For example, one problem with the *Benchmarks Order* was that it analyzed the capital expenditures (capex) and operating expenses (opex) of carriers separately. So if a small carrier like Council Grove Telephone in Kansas exceeded its capex limit by $13, it would be capped even though its opex was more than $300 below par. The same is true for Hemingford Cooperative in Nebraska, whose capex exceeded its limit by $6 but had operating expenses $40 below the benchmark. The *Benchmarks Order* established these separate limits even though that item recognized that carriers *should* trade off capital investments and operating expenses to minimize the total cost of the network.[23]

Today's order recognizes that problem[24] and corrects it by summing the separate QRA benchmarks for the remainder of 2013.[25] This salutary measure alone should reduce the number of capped rural carriers from 159 to 70, sparing small carriers like Council Grove and Hemingford Cooperative.

One other positive step merits attention. For capped carriers, the order adds a 15 percent backstop to limit the total amount of support a rural carrier can lose in 2013 based on the QRA benchmarks.[26] With this step, rural carriers will have a slightly easier time managing their cash flow in 2013 and, hopefully, keeping their doors open.

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build-out. Indeed, if a rural carrier now below the cap chooses to reinvest that support in broadband, it risks pushing itself over the cap in future years, thus mitigating any benefits it may have received. This, in part, may be why there has been almost no support in rural America for the current QRA benchmarks.

[19] This concern was recently reinforced by both the Department of Agriculture, which has asked the Commission to "correct the structural and data integrity concerns of the rural carriers," Dep't of Agriculture *Ex Parte* Letter at 2, and an independent six-month study of the QRA benchmarks, *see Rebuilding QRA White Paper* at 17–19, 21.

[20] *Benchmarks Order*, 27 FCC Rcd at 4245, para. 25 (relying on Tele Atlas study area boundary data instead).

[21] *Id.* at 4246, paras. 27–28.

[22] *See Rebuilding QRA White Paper* at 17.

[23] *See, e.g.*, *Benchmarks Order*, 27 FCC Rcd at 4265, para. 96 (Appendix A) (hypothesizing that "in locations where trenching is unusually expensive, an efficient carrier may install aerial plant (use poles rather than trench) . . . [which] would involve lower capital costs than trenching, but higher future operations costs").

[24] *Sixth Order on Reconsideration*, para. 26 (noting that "carriers often consider the trade-offs between capital costs and operating expenses when making investment decisions" and recognizing that the *Benchmarks Order* gave no credit to companies that did so to minimize costs).

[25] *Id.*, para. 29.

[26] *Id.*, para. 30.

But even with these modifications, many carriers will still feel the arbitrary impact of the 2013 QRA benchmarks. For example, more than 70 percent of the carriers that will be capped in 2013 will face *lower* QRA benchmarks than they did in 2012.[27] And while the QRA benchmarks went down, costs per loop went up as line loss continued throughout rural America.[28] This double whammy means that a carrier like Bridgewater Telephone in Minnesota, which was not capped in 2012, will be capped in 2013 even though it cut more than $125,000 in operating expenses and $135,000 in capital expenditures from one year to the next.

Going forward, I remain hopeful that we will address the unpredictability of the caps that will apply in the years to come. Two thoughts come to mind on that front: *For one*, we should consider holding the QRA benchmarks constant for several years with annual adjustments for line loss.[29] Had we done that this year, the 70 carriers now capped would have dropped to 54, and almost 80 percent of the capped carriers would have had higher 2013 QRA benchmarks than they will after today's order. Moreover, holding the benchmarks constant for a series of years will allow rural carriers to make longer term investments and adjust their operations because they will be able to actually predict the benchmarks that will apply to them in the future.

For another, we should consider phasing in new, reduced QRA benchmarks over the course of a year to ease the financial impact that unexpected changes may cause to rural operations. Such a phase-in would be easily administrable if, for example, the Commission simply averaged the old and the new benchmarks whenever recalculation caused the new benchmarks to fall.[30] That simple step should address the unpredictability of the QRA benchmarks and the order's observation that if the QRA "benchmarks are updated infrequently, each update could cause larger and more sudden changes in support levels, at least for a subset of carriers."[31] And phasing in the QRA benchmarks for 2014 is especially important since they will be based on an entirely new set of data and an entirely new model.

It is my sincere hope that the Commission will, in the coming weeks, seek to address those concerns. I stand ready to work with my colleagues to help make that happen.

[27] In other words, of the 70 carriers that will be capped in 2013, 50 carriers had lower capex-plus-opex limits in 2013 than in 2012.

[28] The rural growth factor, tied in our rules to the annual growth or contraction of supported rural loops, is -2.5527 percent for 2013. *See* USAC, Federal Universal Service Support Mechanisms Fund Size Projections for Second Quarter 2013 at 12.

[29] To illustrate, consider Bridgewater Telephone, whose 2013 QRA benchmark will be $796.02 after today's order. Under this proposal, Bridgewater's 2013 QRA benchmark would be last year's benchmark ($814.20) times 1.1666 (5,834/5,001) to reflect the loss of 833 lines from one year to the next, for a total of $949.82. Because Bridgewater's uncapped costs per line were $896.79, it will be capped after today's order but would not have been under this proposal.

[30] To illustrate, again consider Bridgewater Telephone. Because the recalculated benchmark for 2013 ($796.02) was lower than the benchmark for 2012 ($814.20), under this proposal the 2013 benchmark would be the average of the two ($805.11).

[31] *Sixth Order on Reconsideration*, para. 15.