<u>CASE- 13-C-0197</u> – Tariff filing by Verizon New York Inc. to introduce language under which Verizon could discontinue its current wireline service offerings in a specified area and instead offer a wireless service as its sole service offering in the area.

Dear Secretary Cohen:

<u>Please include this this letter among the interested parties commenting on the important issues raised by the introduction of Verizon's Voice Link on Fire Island, now before the NYS PSC as CASE- 13-C-0197 – Tariff filing by Verizon New York Inc. to introduce language under which Verizon could discontinue its current wireline service offerings in a specified area and instead offer a wireless service as its sole service offering in the area.</u>

If approved by the NYS PSC, Verizon's tariff would allow it to offer a hybrid wire line wireless service known as Voice Link in situations such as western Fire Island's, where a substantial portion of its outside plant facilities have been destroyed, rendered unusable, or beyond reasonable repair. Verizon also proposes to offer Voice Link under other broader circumstances, when it can demonstrate, for example, that the use of Voice Link is reasonable in light of geographic situations or the availability of competitive alternatives or competitive facilities.

While this letter is from an individual resident from the community of Dunewood on Fire Island, the letter also represents the sentiments of many of the residents in our community -- The Dunewood Property Owners' Association, ("DPOA") -- a membership corporation, organized under the laws of the State of New York, representing and governing the affairs of one hundred (100) families who own residential improved properties in the community of Dunewood, Fire Island, Town of Islip, New York.

<u>The NYS PSC's investigation is essential for many reasons, among which are the following:</u>

- Voice Link creates numerous new threats to public safety, which, in turn, would hamper Fire Island municipalities' ability to protect their communities.
- Voice Link creates an incentive for Verizon to allow its copper network to deteriorate and for it to abandon its copper outside plant prematurely on Fire Island. When outside plant is inadequately maintained, consumers' safety is jeopardized because their dial tones may not function when they need to reach emergency services.
- Voice Link does not support broadband access to the Internet to residents and businesses on Fire Island , and, therefore, Verizon's new service undermines Fire Island municipalities' efforts to spur economic development.
- Voice Link does not support point-of-sale transactions for Fire Island businesses, and, therefore, would harm small businesses and municipalities' economy on the barrier island.
- Voice Link does not support LifeAlert or other monitoring services used by Fire Island residents, potentially endangering members of the public who rely on these services.
- Voice Link is not available to Lifeline telephone service customers on Fire Island. Affordable traditional telephone service would become unavailable in any area served only by Voice Link.
- Voice Link service is not as reliable as telephone service delivered over a properly-maintained copper or fiber-optic network, since wireless signal is often weak, spotty, or overburdened by other network traffic.

Finally, while I welcome Verizon's efforts to enhance its wireless capabilities on Fire Island and throughout New York, I do have several concerns with Verizon's seeming attempt to force consumers to migrate to wireless broadband offerings. First, the NYS PSC does not oversee the rates for wireless Internet access services, yet the industry is highly concentrated, meaning that municipalities cannot rely on market forces to yield affordable rates. Wireless alternatives are more expensive than wireline services, and there is negligible competitive pressure to cause Verizon Wireless to offer reasonable rates for wireless service. Second, unlike DSL, FiOS, and cable-based broadband alternatives, the usage for

wireless broadband service is metered, and when consumers exceed a usage cap, they must pay high rates for the above-cap usage (and this is in addition to monthly rates that are already high). Where Verizon exits the wireline broadband market, residents and business of Fire Island will have no wireline broadband option – since there is no cable company offering. Our residents and businesses should not be subjected to monopoly pricing and service quality for w broadband service. For the residents of Fire Island, there is no cable company offering broadband through a cable modem– and DSL historically has been the only reliable broadband service, making our residents and businesses especially dependent on the traditional telephone network.

Cutting the copper, as Verizon's CEO put it in a recent investor conference call, may make economic sense for Verizon's shareholders because it reduces labor costs and by terminating the DSL service, Verizon can then "up sell" more expensive broadband services. But satisfying a corporation's economic objectives is not the role or mandate of a state regulator, such as the NYS PSC. Serving the public interest, while at the same time balancing the needs for corporate profit to spur innovation, is the core mission of the NYS PSC.

The NYS PSC said precisely that in 2006 when it provided the FCC Comments of the New York State Department of Public Service in the Matter of Consumer Protection in the Broadband Era; WC Docket No. 05-271 (January 18, 2006):

> On October 17, 2005, the Commission issued a Public Notice in the above-entitled proceeding inviting comments on whether consumer protection regulations adopted pursuant to the Commission's authority under Title I of the Communications Act of 1934 ("the Act") should apply to broadband Internet access service, **regardless of the underlying technology utilized to offer that service**. The New York State Department of Public Service ("NYDPS") submits these comments in response to the aforementioned Public Notice.
>
> The Commission asks, among other things, how state and federal efforts can be harmonized in the area of broadband consumer protections, and seems to suggest that the States should only enforce federal rules.(*Consumer Protection in the Broadband Era*, WC Docket No. 05-271, Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 158 ("NPRM")). The Commission also inquires whether there are areas of consumer protection which should be subject to consumer protection regulation, beyond those specific areas listed in the NPRM. In sum, States should not be limited to a role of merely enforcing federal rules, but instead should continue their longstanding practice of providing state-specific consumer protections to subscribers of communications services, by applying their dedicated front-line resources and expertise to protecting the interests of broadband consumers. Areas of particular concern to the New York Public Service Commission ("NYPSC") include supervision of service quality and network reliability.

Accordingly, I ask that the NYC PSC reject Verizon's exemption request, for the reasons cited above, and mandate Verizon replace and return traditional copper line services to the residents and businesses of Fire Island.

• * * *

A well-established State and Federal regulatory principle is that consumers in all regions of the nation, including rural, insular, and high-cost areas, should have access to telecommunications and information services at rates that are "reasonably comparable to those services and charges provided in urban areas.

Bringing robust, affordable broadband to all Americans is the great infrastructure challenge of our time. The private sector argues it is taking the lead in meeting this challenge, but in areas of the country where it is not economically viable to deploy and/or operate certain lower-cost broadband networks, such as Fire Island, the private sector is coming up woefully short.

The principle that all Americans should have access to communications services, a concept referred to as universal service, has been at the core of the Federal Communications Commission's (FCC) mandate since its founding. Congress created this Commission in 1934 for the purpose of making "available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."(47 U.S.C. § 151.)

In the decades since, federal and state policymakers developed a complex system of public-private partnerships that supports deployment and adoption of telephone service in costly-to-serve areas. A combination of payments from long distance to local phone companies (ICC) and explicit support from a Universal Service Fund (USF) has helped local phone companies serve nearly all Americans.

But networks that provide only voice service are no longer adequate for the country's communication needs. And when a provider transitions from a copper network, service standards should be established to ensure that consumers in hard to serve, economically disadvantaged or rural communities do not suffer poor service quality because they are left with deteriorating copper while providers invest more profitable broadband in other more economically beneficial areas of the state.

Wireless Services Cannot Fully Substitute for Wireline Services

The NYS PSC Department staff has recognized that the degree of substitutability between wireline and wireless service is not complete, citing "dropped calls, uneven reception, and the lack of a dependable E-911 capability" as reasons to report that "wireless is not yet a full substitute for basic wired telephone service."(*Unbundled Access to Network Elements*, WC Docket No. 04-313, Comments of the New York State Department of Public Service, at 16 (filed Oct. 4, 2004) ("*PSC UNE Comments*"). *See also PSC UNE Comments*, Appendix A at iv.) Other significant differences between wireline and wireless service include the fact that wireless phone batteries must be charged periodically and wireless service is generally offered through a long-term contract with substantial early termination fees.

For example, in New York's Universal Service Fund proceeding, it was noted that: "The record evidence ... leads to the inescapable conclusion that so many factors can affect the availability of wireless at any particular location at any particular time that the coverage maps themselves--on which the assessment of availability relies --must be deemed insufficiently credible to serve as a basis for a finding that service can truly be considered available at that location." (Case 09-M-0527, Proceeding to Examine Issues Related to a Universal Service Fund, Notice and Recommended Decision (issued January 4, 2012), p. 34.

And potential safety concerns may arise if wireless service providers are the only reliable Lifeline providers in an area, because of concerns relating to the reliability of wireless service. Given these reliability questions, customers may not have adequate access to emergency services. In a 2010 Verizon New York Inc. service quality order, the NYPSC concluded that "the unsatisfactory reliability of wireless signals in certain areas of the state and the infirmities of wireless 911 emergency service. .. render the service as still not an adequate substitute for wireline service for all customers at this time."(Case 10-C-0202, Verizon Service Quality Improvement Plan, Order Adopting Verizon New York Inc.'s Revised Service Quality Improvement Plan with Modifications (issued December 17, 2010), p. 15.).

Finally, under Verizon's tariff exemption proposal, Lifeline customers may not have another option for affordable telephone service; and discontinuance of regulated Lifeline service offerings may adversely affect their access to telecommunications services and to emergency services. This is so, because, in New York, Lifeline service is tariffed and broadband carriers are not certified as Lifeline providers subject to the NYPSC's tariff requirements under Public Service Law §92. In New York, Lifeline is a tariffed service and broadband carriers are not currently subject to the NYPSC's tariffing requirements under Public Service Law §92. Verizon's proposal does not serve the public interest and, therefore, fails the second and third prongs of the FCC's forbearance test.

VoIP Is Not a Full Substitute for Wireline Service Today

There are significant differences between wireline and cable telephony and between wireline and VoIP that probably limit customers' willingness to consider those services a substitute for wireline. Eight years ago, NYS regulators and the FCC already saw that Verizon was backing away from DSL service. ""[T]aking into account Verizon's professed goal of retargeting its capital expenditures away from copper plant construction, maintenance and repair, promoting "naked DSL" as a way to spur competition would result in inter-modal competitors' products being carried on lines that will be neglected by Verizon – hardly a healthy competitive prospect." (Case 05-C-0237, Joint Petition of Verizon Communications Inc., and MCI, Inc. for a Declaratory Ruling Disclaiming Jurisdiction Over or in the Alternative for Approval of Agreement and Plan of Merger, Comments of Assemblyman Richard L. Brodsky, Chair, New York State Assembly Standing Committee on Corporations, Authorities and Commissions, at 7-8 (filed Aug. 5, 2005) ("Assemblyman Brodsky White Paper Comments")).

CONSUMER PROTECTIONS REMAIN APPROPRIATE AND NECESSARY

As a general matter, consumer protection is most effectively provided and ensured when consumers have a choice among different service providers and each provider fully discloses all relevant terms and conditions to consumers, to ensure consumers can make an educated choice among services to find that which best fits his or her needs and preferences. Two means of ensuring that consumers in non-competitive markets enjoy the same benefits as those in fully competitive markets is to require the incumbent 1) to maintain nondiscriminatory rates in all of its service areas, and 2) to offer the same level of service quality in non-competitive areas as is provided in competitive areas. In the merger proceeding between Verizon and MCI, the NYS PSC Staff suggested that "to ensure that Verizon continues to focus on maintaining good service quality in New York, especially in areas where adequate competition does not yet exist, a potential remedy might be that before Verizon is permitted to exercise any potential pricing flexibility in those areas in the future, it must show that it is maintaining good service quality performance according to the Commission standards." (*Staff White Paper* at 6.) In Case 05-C-0237, *Joint Petition of Verizon Communications Inc., and MCI, Inc. for a Declaratory Ruling Disclaiming Jurisdiction Over or in the Alternative for Approval of Agreement and Plan of Merger*, comments of the Communications Workers of America, AFL-CIO, at 13 stated: "[I]t should be noted that Verizon's Out of Service performance has been substandard in areas with the most potential competition including Westchester, Nassau, Queens and Suffolk counties."

Real competition and consumer protections has dual benefits of preventing predatory practices aimed at eliminating nascent competition and of spreading the benefits of competition to every part of the market, even where choices are unavailable to otherwise discipline the conduct of the incumbent. For example, Verizon's dominance in the retail market also supports continuation of the pricing restraints currently imposed on Verizon's services. These FCC-imposed restraints ensure that Verizon cannot engage in retail price predation to eliminate competitors in more competitive market segments to the detriment of consumers. (*See* 16 NYCRR §§ 720.2-3, 720.2-4.)

NYS PSC's Challenge

On May 22, 1996, in response to the passage of the 1996 Federal Telecommunications Act, the NYS PSC stated:

> "We are embarking on the transition to…(a) market environment. ... While limited competitive alternatives exist …, how fast it will spread remains uncertain…We must monitor the development of competition during this transition period. This information will provide valuable evidence of the success or failure of our policies and provide a guide as to those markets where regulatory attention is most likely required or where regulation can be relaxed.

Such is the challenge before the NYS PSC today as it decides whether to approve or disapprove the tariff filing by Verizon New York Inc. to introduce language under which Verizon could discontinue its current

wireline service offerings in a specified area and instead offer a wireless service as its sole service offering in the area.

DSL as Telecommunications

- **Two-Way Retail Internet Access Services Plainly Constitute "Telecommunications" Under Title II**

The provision of a two-way transmission path over which end users receive and send communications is, beyond a doubt, telecommunications. Opponents of the Federal Communication Commission's (FCC) six proposed Open Internet principles argued not that broadband Internet access services fail the definition of "telecommunications," but rather that the Notice of Proposed Rulemaking did not articulate adequately the statutory basis on which adoption of the principles would rest. *E.g*., GN Docket No. 09-191, Comments of AT&T Inc. at 214-222 (Jan. 14, 2010); Comments of Comcast Corporation at 22-26 (Jan. 10, 2010). Others argued that the Open Internet principles violate the First Amendment. *E.g*., GN Docket No. 09-191, Comments of Verizon and Verizon Wireless at 111-118 (Jan. 14, 2010); Comments of the National Cable & Television Association at 49-64 (Jan. 14, 2010). Months later, NCTA, Verizon, and others argued that "Internet Access [H]as [N]ever [B]een [S]ubject to Title II [R]egulation" but did not deny that the transmission of data to and from the Internet via a broadband connection constitutes telecommunications. GN Docket No. 09-191, Letter from NCTA, Verizon, USTA, CTIA, TIA, ITTA, AT&T Inc. and Time Warner Cable to Chairman Julius Genachowski, FCC, at 3 (Apr. 29, 2010). This letter came to be known as the "Industry Letter" but is referenced herein as the "IAP Industry Letter," wherein IAP refers to Internet Access Providers.

Ample FCC precedent supports this conclusion.

- **The FCC has long recognized Internet transmission paths as telecommunications.**

Well-settled precedent dictates that retail broadband Internet access service is telecommunications. The Commission's treatment of wireline broadband Internet transmission services provides the most germane examples of this precedent. (Title II already applies to CMRS by virtue of Section 332(c) of the Act). In 1998, the Commission considered how best to regulate so-called "advanced services," or the "[p]acket-switched transmission of digitized information" in order to ensure that "all Americans… have meaningful access" to them.(*Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147 *et al*., Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24,012, 24,016 ¶¶ 7-8 (1998) ("*1998 Advanced Services Order*"). Advanced services, for purposes of the *1998 Advanced Services Order*, principally included Digital Subscriber Line ("DSL") services which incumbent local exchange carriers ("ILECs") had recently tariffed as new telecommunications services. The Commission found that DSL "allows transmission of data over the copper loop at vastly higher speeds than those used for voice telephony," and "at the same time" enables a consumer to "make ordinary voice calls over the public switched telephone network."(*Id*. at 24,026-27 ¶ 29.) The FCC thus concluded that advanced services, particularly DSL, "provide members of the public with a transparent, unenhanced, transmission path" and as such "are telecommunications services."(*Id*. at 24,030 ¶ 36.) It noted that not one party, not even the ILECs who sought "a deregulated environment" for DSL, disagreed with that conclusion.(Bell Atlantic, US West, and Ameritech each had filed petitions seeking the Commission's forbearance from applying certain Title II provisions, including Sections 251 and 271, from their DSL services. *1998 Advanced Services Order*, 13 FCC Rcd. at 24,023-25 ¶¶ 23, 25; and *Id*. at 24,030 ¶ 36.)

The Current Situation on Fire Island

New York State deregulated wireless service in 1997 and the Commission does not exert any regulatory authority over wireless service. Traditional telephone service, in contrast, is regulated. Verizon must meet requirements including making timely repairs on out-of-service lines, static and signal quality, and call center holding times. Wireless service, in contrast, is often unreliable. Dropped calls, static and other

problems are common. As wireless technology develops, service quality may improve. At this time, wireless service quality is inferior to properly maintained landline telephone service.(See Comments of the New York State Department of Public Service in the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338. October 4, 2004 .)

But the NYS PSC's concern for too much deregulation and delegation of State regulatory authority to the FCC was most recently made explicit in Comments of the New York Public Service Commission on the filings made in response to the FCC's National Broadband Plan- Public Notice #25, FCC Dockets GN 09-47,09-5 1 and 09-1 37, on the proper policy framework for the transition from a circuit switched (PSTN) to an internet protocol (IP) - based communications network (January 27, 2010.)

> "The Telecom Act of 1996 set the guidelines for transition to competition and clearly identified those areas which were best served by state oversight. There is merit in the FCC setting certain national policy that provides for uniformity, reliability, viability, and accessibility of networks. On the other hand, states are in a better position to provide oversight, remediate problems, and enforce regulations at the local level. States will remain interested in issues such as carrier of last resort obligations, carrier interconnection, intercarrier compensation, network reliability, and interoperability, just to name a few."

AT&T, in a 2009 filing, seized on the collapsing regulatory categories to call for the end of effective regulation: "[W]ith each passing day, more and more communications services migrate to broadband and IP-based services, leaving the public switched telephone network ('PSTN') and plain-old telephone service ('POTS') as relics of a by-gone era." Comments of AT&T in Transition from Circuit-Switched Network to All-IP Network, filed December 21,2009, at 1 (available at http://fjallfoss.fcc.gov/ecfs/document/view?id=7020354036).

This is essentially the argument being made by Verizon today regarding Fire Island before the NYS PSC.

The question, of course, made in this argument for replacing the plain-old telephone service ('POTS') is to offer customers a product that offers comparable services as the POTS – which VoiceLink does not.

One cannot fax using Voice Link, home and business security systems can not operate using Voice Link, and there is no data services delivery through VoiceLink, as you can through a POTS, using copper wires, through its attendant DSL service, which runs data on the same copper.

While the same technology that Verizon is offering to Fire Island residents through Voice Link is the same as AT&T's wireless product (The AT&T Wireless Home Phone), it is worth pointing out that ATT literature **includes** the following customer disclaimer.

> **"*The AT&T Wireless Home Phone device is designed to provide service that is consistent with other AT&T wireless devices, but AT&T does not represent that the Wireless Home Phone service will be equivalent to landline phone service.***

Here is the AT&T press release, dated March 20, 2013, announcing its new product (http://www.att.com/gen/press-room?pid=23932&cdvn=news&newsarticleid=36185)

> "The AT&T Wireless Home Phone device is designed to provide service that is consistent with other AT&T wireless devices, **but AT&T does not represent that the Wireless Home Phone service will be equivalent to landline phone service**. To keep your prepaid service active, you must have enough money in your Wireless Home Phone Prepaid account to renew your rate plan every 30 days. If your account balance is not enough to renew your rate plan, you will be unable to use your rate plan services. 911 calls are routed based on the wireless network's automatic location technology, but you

may have to provide your home address to emergency responders. AT&T recommends that you always have an alternative means of accessing 911 service from your home phone or business during a power or network outage. Corded or cordless landline home phone equipment is not included. AT&T Wireless Home Phone Not compatible with services requiring data including but not limited to home security systems, medical monitoring systems, credit card machines, IP/PBX Phone systems, or dial-up internet service. ***DSL customers should contact their provider before transferring a phone number to ensure uninterrupted DSL internet service.*** Other terms and conditions apply."

Verizon, unlike AT&T, is unwilling to admit this fact to the NYS PSC or to Fire Island residents as regards Voice Link service. Instead they are trying to sell Voice Link as an equivalent to a landline—which it is not.

Verizon is effectively arguing that legacy state legal requirements are an obstacle to universal broadband access, and that incumbent LECs (Local Exchange carriers) historically provided service pursuant to an exclusive franchise that was coupled with extensive carrier of last resort" ("COLR") and other legacy requirements that imposed an obligation to serve all customers, at regulated rates, within a particular area. They argue that the exclusive franchise portion of that regulatory compact has long since vanished, but ILECs (Incumbent Local Exchange Carriers) in many cases remain obliged to provide basic voice service throughout their service areas, including in rural and high-cost areas, often at rates significantly below cost. And they argue that because these state requirements are not generally imposed on cable companies or competitive providers of voice and data service, they permit competitive providers to focus on the customers who are easiest to serve, while leaving ILECs bound by COLR rules to serve the highest-cost and most difficult-to-serve customers. Finally, they argue that under these circumstances, ILECs may have little incentive to upgrade their networks or invest in broadband in high-cost areas, and that this investment will continue to lag as long as ILECs are forced to keep providing legacy services at below-cost rates.

Equally important, Verizon argues, to the extent these requirements require the continued availability of POTS service, they may serve as a legal obstacle to the retirement of the PSTN and, thus, as an impediment to the transition to broadband.

Verizon, in short, is arguing that legacy COLR and related obligations conflict with the federal policy objective of universal broadband deployment and whether such obligations could reasonably coexist with a phase-out of POTS and the PSTN. In Verizon's view, the transition away from the PSTN to broadband and IP-based services cannot occur successfully without transitioning away from the legacy state regulatory requirements that force continued investment in and maintenance of the PSTN – and that that transition will require the elimination not only of all legacy state requirements that mandate the continued provision of POTS, but also any such requirements that hinder the retirement of physical network assets used to provide POTS.

A regulated monopolist has a unique incentive to defeat regulation by using the denial of an essential facility to exact in a downstream market the monopoly rent regulation forbids in the upstream market.

A telephone company is not like the unregulated monopolist exacting a monopoly rent in the monopoly market. Because the telephone company's rate of return in the regulated market is capped by the FCC, it can profit more by parlaying the fact that it owns the only local telephone network in town into a competitive advantage in another market that depends upon using that network.

That parlaying defeats the purpose of the regulatory cap itself because it allows the company to improve its apparent position to regulators in the regulated market by cross-subsidizing through monopoly profits from potentially competitive, but entry blocked areas of downstream activity.

Antitrust law “recognize[s] that a special problem is posed by a monopolist, regulated at only one level, who seeks to dominate a second, unregulated level, in order to earn at that second level the very profits that regulation forbids at the first.”(Concord v. Boston Edison Co., 915 F.2d 17, 29 (1st Cir. 1990) (opinion by now-Justice Breyer), cert.denied , 499 U.S. 931 (1991). See also 3A ANTITRUST LAW.2d ¶787 at 296-98; James B. Speta, Tying, Essential Facilities, and Network Externalities: A Comment on Piraino, 93 NW. U. L. REV. 1277, 1280 (1999) (“monopoly leveraging has rightly been a concern where natural monopoly prevails, principally because the monopolists have been rate-regulated”.)

The US Supreme Court, in Jefferson Parish Hosp. Dist. v. Hyde, 466 U.S. *2 (1984) at 36 n.4*, noted that in a regulated industry a firm with market power may be unable to extract a super competitive profit because it lacks control over the prices it charges for regulated products or services. Tying may then be used to extract that profit from sale of the unregulated, tied products or services.(citing Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 513 (1969) (White, J., dissenting.)

That is precisely what Verizon is doing by terminating its less profitable copper DSL service for the far more expensive wireless broadband service.

The NYS PSC observed that: “In lieu of making repairs to wired facilities, Verizon is enhancing the wireless capability on Fire Island, from which residents and visitors to Fire Island will no doubt benefit, including use of wireless broadband in place of DSL.”

In essence, the regulated monopolist that denies an essential facility is rewriting the deal. A company like the telephone company did not receive control over the telephone network solely, or even particularly, for its own benefit. It received control over the network for the public’s benefit with a limited right to use it to provide other, non-regulated services. To use the essential facility to prevent or to eliminate downstream competition is taking the benefit of the public largesse of the network without paying the price for it.

Ubiquitous broadband infrastructure has become crucial to our nation’s economic development and civic life.(See generally Federal Communications Commission, Connecting America: The National Broadband Plan (rel.Mar. 16, 2010), at xi (National Broadband Plan). Businesses need broadband to start and grow; adults need broadband to find jobs; children need broadband to learn. Broadband enables people with disabilities to participate more fully in society and provides opportunity to Americans of all income levels. Broadband also helps lower the costs and improve the quality of health care. As important as these benefits are in America’s cities— where more than two-thirds of residents have come to rely on broadband (*See* Industry Analysis and Technology Division, Wireline Competition Bureau Internet Access Services: Status as of December 31, 2009, *a*t chart 19 (Dec. 2010) (Dec. 2010 Internet Access Services Report —the distance-conquering benefits of broadband can be even more important in America’s more remote small towns, rural and insular areas, and Tribal lands. Furthermore, the benefits of broadband grow when all areas of the country are connected. More users online means more information flowing, larger markets for goods and services, and more rapid innovation. Congress recognized as much in 1996 when it directed the Commission to examine regularly whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely manner,(47 U.S.C. § 1302(a) and more recently in February 2009 when it tasked the Commission with developing a National Broadband Plan “to ensure that all people of the United States have access to broadband capability,” and a “strategy for achieving affordability of such service and maximum utilization of broadband infrastructure.” American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(D), 123 Stat. 115, 516 (Recovery Act)).

Title II of the FCC’s Regulatory Regime must be applied to the situation on Fire Island -- specifically, the sections in Title II that would be applied to broadband internet services which are the core powers to be asserted by the FCC enumerated in Sections 201, 202 and 208. These include price, service and nondiscrimination regulation. 47 U.S.C. § 201 treats service providers as common carriers, requires them to provide service, requires interconnection, requires that all "charges ... be just and reasonable", and authorizes the FCC to write "rules and regulations as may be necessary in the public interest". 47 U.S.C. § 202 provides, in part, that "It shall be unlawful for any common carrier to make any unjust or

unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. § 208 provides that anyone may file a complaint against a common carrier, and that the FCC has adjudicatory authority with respect to that complaint. 47 U.S.C. § 254 provides for FCC administered universal service tax and subsidy programs. And 47 U.S.C. § 255 pertains to access by persons with disabilities.

In the Telecommunications Act of 1996, Congress enacted section 254, which provides that consumers in all regions of the nation, including rural, insular, and high-cost areas, should have access to telecommunications and information services at rates that are “reasonably comparable“ to those services and charges provided in urban areas. (47 U.S.C. § 254(b)(3))

Section 254 of the 1996 Telecommunications Act

The principle of universal service had never been statutorily codified until the passage of the 1996 Act. Section 254 requires the FCC to compose a Federal-State Joint Board (Joint Board) to recommend changes to the legislation, define the telecommunications services to be supported by federal universal service support mechanisms, and create a timetable for the implementation of its recommendations.24 Furthermore, section 254 dictates that the FCC and the Joint Board base their decisions concerning universal service on the following principles:

> (1) Quality services should be available at just, reasonable, and affordable rates;
> (2) Access to advanced telecommunications and information services should be provided in all regions of the Nation;
> (3) Consumers in all regions of the Nation, including low-income consumers and those in rural, information services that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas;
> (4) All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service;
> (5) There should be specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service; and
> (6) Elementary and secondary schools and classrooms, healthcare providers, and libraries should have access to advanced telecommunications services.(*§* 254(b)(l)-(7)).

The Joint Board's Recommendations and the FCC's Report and Order

On November 7, 1996, the Federal-State Joint Board issued its recommendations to the FCC. In addition to the principles enumerated in the1996 Act, the Joint Board recommended basing the policies by which universal service should operate on the principle of competitive neutrality. The essence of this principle, envisioned by the Joint Board, is that universal service support should not be biased toward any "recipient and contributor to the universal service support mechanisms," nor "toward any particular technologies."(Universal Serv. Recommended Decision, 12 FCC Rcd. 87, 5 Comm. Reg. (P & F) 1 (1996), amended and adopted by Report and Order, 7 Comm. Reg. (P & F) 109 (1997). para. 23.)) Additionally, the Joint Board highlighted the fact that no one principle should outweigh the primary goal of providing all U.S. residents with quality telecommunications services at reasonable rates.(Id. para. 22.))

On May 8, 1997, the FCC released a *Report and Order* regarding the Joint Board's recommendations on universal service. In the *Report and Order,* the FCC concurred with the Joint Board's adoption of the principles for universal service that Congress set forth in the 1996 Act, as well as the additional principle of competitive neutrality. (Federal-State Joint Bd. on Universal Serv., Report and Order, 7 Comm. Reg. (P & F) 109 (1997) [hereinafter Universal Serv. Report and Order]. para. 43.))

Even AT&T agrees that the FCC may rely on its section 254 authority "to support broadband deployment."(GN Docket No. 09-191, Letter from Jonathan E. Neuchterlein, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC (Apr. 14, 2010). On February 2, 2010, AT&T filed a white paper on the Federal Communications Commission's authority to refocus its existing universal service programs to support broadband infrastructure and services. AT&T's paper suggested the FCC has authority under 47 U.S.C. § 254 and Title I of the Communications Act, 47 U.S.C. § 151 et seq., to fund broadband Internet access deployment and subscribership using universal service.(FCC Authority To Fund Universal Broadband Service Initiatives). And on April 13, 2010, AT&T wrote the Federal Communications Commission that the decision in a recent court case (the D.C. Circuit's decision in Comcast v. FCC) in no way diminishes, and, if anything, bolsters, the FCC's statutory authority to support broadband deployment and subscribership through the federal universal service program. The decision in no way suggests, AT&T stated, that the FCC must reclassify broadband Internet access services as telecommunications services in order to shift federal universal service support to broadband.(Comcast Case Does Not Jeopardize Using USF for Broadband: AT&T and AT&T: Broadband Plan Achievable Without Title II Classification (AT&T)).

In the words of Gary L. Phillips, Associate General Counsel at AT&T to the FCC:

> "I am writing to explain why nothing in the D.C. Circuit's recent decision in *Comcast v. FCC*, No. 08-1291 (Apr. 6, 2010) in any way undermines that authority or suggests that the Commission must reclassify broadband Internet access services as telecommunications services in order to provide universal service funding for broadband. Indeed, if anything, the *Comcast* decision confirms that the Commission properly could exercise its ancillary authority under Title I to the extent necessary to fulfill its statutory obligation under section 254 to promote deployment of broadband, without having to reclassify broadband Internet access service as a telecommunications service or adopt regulations that alter the way in which such services are offered today."

Congress's mandate in section 254 could not be clearer: the statute requires the Commission to ensure that "[a]ccess to advanced telecommunications and information services" is provided "in all regions of the Nation."(47 U.S.C. § 254(b)(2). Indeed, this mandate applies to broadband Internet access service regardless of how it is classified, because it expressly includes "information services."(Id.) As such, the Commission has an extremely sound basis for employing section 254, and the USF, as a means to support broadband deployment.

With regard to section 254 contribution requirements, Internet-based and Internetrelated services already must pay into the USF. Retail DSL service, which was deemed "interstate telecommunication" in 1998, (1998 Advanced Services Order, 13 FCC Rcd. at 24,030 ¶ 36.) has been subject to funding requirements for more than a decade, and interconnected VoIP service has paid into USF since 2006.(Universal Service Contribution Methodology, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518 (2006), aff'd in part, vacated in part, Vonage Holdings Corp. v. FCC, 489 F.3d 1232 (D.C. Cir. 2007), clarified WC Docket No. 06-122, Declaratory Order, 23 FCC Rcd. 1411 (2008). Extending the requirement generally to retail broadband Internet access services is not only a logical step, but it is technologically neutral. Further, ample precedent, particularly the D.C. Circuit opinion in *Vonage*, will protect any Commission decision to impose USF contribution requirements on services that may not strictly qualify as "telecommunications services." (The D.C. Circuit accepted the Commission's reliance on section 254(d), which states that "[a]ny other provider of interstate telecommunications may be required to contribute" to USF, as a reasonable exercise of permissive authority even despite the Commission's failure to classify VoIP service as "telecommunications service." Vonage, 489 F.3d at 1238.)

Definition of Universal Service

The Telecommunications Act of 1996 (the 1996 Act) was the most comprehensive rewrite of telecommunications law since the Communications Act of 1934. The 1996 is evidence of a national

commitment to bring competition and its benefits, which include lower prices, higher quality, and more rapid deployment of new services, to all telecommunications markets. To ensure that the social goal of universal telephone service would not be ignored in a competitive environment, the 1996 Act contains an explicit commitment to preserving and expanding universal telephone service, and makes it clear that both state and federal regulators have significant responsibilities in ensuring that universal service goals are met.

Two arguments are generally advanced to support universal telephone service as a social goal. First is the existence of network externalities; second is the need for all citizens to be able to access emergency services and other government entities. In addition, an efficient and ubiquitous telephone network is part of the infrastructure or social capital that allows for economic growth and development.

State public service commissions have taken a variety of approaches to support universal service. This indicates that there is not one uniquely "best" set of policies. Instead, each commission is designing and implementing policies that reflect the individual circumstances and needs of its state. This variety of approaches is consistent with the concept of federalism, which allows (and even encourages) states to devise policies to meet their individual needs. The policies of New York State as regards universal service are defined by Governor Cuomo and the New York State Universal Broadband Office (http://nysbroadband.ny.gov/).The Office's most recent annual report stated: "The New York State Broadband Program Office**,** established in 2008, serves as the single point of contact for New York State broadband development and deployment efforts. The Program Office performs a variety of functions to advance Governor Cuomo's New York State Broadband Initiative. The mission of the Broadband Program Office is to ensure every New Yorker has access to affordable, high-speed Internet service. Each year, the Broadband Program Office reports the status and progress of broadband service in New York State to the Governor and Legislature. (http://nysbroadband.ny.gov/assets/documents/2011-2012BroadbandAnnualReport.pdf)

The 1996 Act identified the following four factors for the Joint Board to consider in deciding what services should be funded by universal service support mechanisms: (1) the necessity of services to "education, public health, or public safety;" (2) the popularity of services among residential consumers; (3) the availability of services provided by telecommunications carriers in public telecommunications networks; and (4) services which "are consistent with the public interest, convenience and necessity."(Telecommunications Act of 1996, sec. 101(a), § 254(c)(1)(A)-(D), 47 U.S.C.A. §254(c)(1)(A)-(D) (West Supp. 1997)).

Affordability

One of the most significant charges of the 1996 Act, and a new concept with respect to universal service, is that telecommunications services should be affordable. The Joint Board recommended that an evaluation of affordability include factors "such as local calling area size, income levels, cost of living, population density," and subscribership levels in addition to rates. As a result of the need to examine socioeconomic factors in narrow geographic locales, the Joint Board concluded that the states should monitor rates to ensure affordability. Nonetheless, the 1996 Act requires that the FCC retain some control over ensuring affordable rates. Thus, the Joint Board recommended that in areas of decreased subscribership, the FCC work with the state to resolve the problem.(Universal Serv. Recommended Decision, 12 FCC Rcd. 87, para. 126, 5 Comm. Reg. (P&F) 1. para.32.)) The Commission agreed with the Joint Board recommendations and ordered that states "by virtue of their local ratemaking authority, should exercise primary responsibility for determining the affordability of rates. (Universal Serv. Report and Order, 7 Comm. Reg. (P & F) 109, para. 108.)) Furthermore, the Commission concurred with the Joint Board's recommended partnership between the FCC and states with respect to areas where subscribership levels are particularly low. (Id.)

High-Cost Support

One of the most fundamental and traditional goals of universal service has been the subsidization of services for consumers whose rates are higher because of where they live, namely rural, insular, and high-cost areas. The Joint Board recognized that calculation of the amount of support provided to telecommunications carriers who serve these consumers is based on the number of consumers supported in a given high-cost area, the cost of providing services to those consumers, and the portion of those costs that the carrier must recoup from sources other than federal support mechanisms. In consideration of these factors, the Joint Board recommended that the FCC work with state commissions to develop a proxy cost model for calculating the future costs of serving a particular geographic area.(Universal Serv. Recommended Decision*,* 12 FCC Rcd. 87, para. 183, 5 Comm. Reg. (P & F) 1. para. 184.)) Based upon such a model, a benchmark amount of support which must be recovered from other sources can be subtracted to determine the amount of support a carrier would receive from universal support mechanisms. (Universal Serv. Recommended Decision, 12 FCC Rcd. 87, para. 183, 5 Comm. Reg. (P & F) 1. para. 185.)) A carrier would be eligible for such support only when the costs of providing the supported services, as measured by a proxy model, exceeded the benchmark. ((Universal Serv. Recommended Decision*,* 12 FCC Rcd. 87, para. 183, 5 Comm. Reg. (P & F) 1. para. 309.))

Most recently, in the American Recovery and Reinvestment Act of 2009 ("Recovery Act"), Congress directed the Federal Communications Commission (FCC) to create a national broadband plan by February 17, 2010, that seeks to "ensure that all people of the United States have access to broadband capability and ... establish[es] benchmarks for meeting that goal." "American Recovery and Reinvestment Act of 2009, Pub. L. No. 111 5, 123 Stat. 115 § 6001(k)(2) (2009).

Among other things, the FCC is to provide "an analysis of the most effective and efficient mechanism for ensuring broadband access by all people of the United States" Id. at § 6001(k)(2)(A) and "a detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public."

Broadband itself is a leading indicator of the major transitions in communications technology and services provided by incumbents and new entrants into virtually every segment of the communications industry. No longer is broadband simply another service— it is a growing platform over which the consumer accesses a multitude of services, including voice, data, and video in an integrated way across applications and providers.

Driven by technology and market forces, this evolution of communications services to broadband creates many opportunities for our country, but it also has a significant impact on the circuit switched Public Switched Telephone Network (PSTN), a system that has provided, and continues to provide, essential services to the country. Our country has been through other communications transitions, such as the transition from analog mobile service to digital mobile service or the transition from analog broadcast television to digital broadcast television. While each transition is different, policy has played an important role in ensuring consumers were protected from loss of essential services and were informed of the choices presented by the transition. Policy also has played a role in providing a glide path for all industry players, enabling more efficient planning and adjustment over the course of the transition.

This analysis is codified by the the Federal Communications Commission's (FCC) long-standing universal service policy and led to changes in the high-cost fund that existed at the time. In particular, section 254(b) directs, among other things, that there should be "specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service," and access to advanced telecommunications and information services should be provided in all regions of the nation. (47 U.S.C. § 251(b)(5).)

The FCC initially implemented the provisions of section 254 in 1997, and preserved the universal service programs that pre-dated the 1996 Act, while concluding that the level of universal service support should be determined based on forward-looking economic costs. The FCC subsequently developed a forward-looking cost model to determine support amounts for the provision of voice service by the largest

incumbent telephone companies, primarily the Bell Operating Companies. These carriers continue to receive support determined by this model today.

In a rule published November 29, 2011, the Federal Communications Commission (Commission) comprehensively reformed and modernized the universal service and intercarrier compensation systems to ensure that robust, affordable voice and broadband service, both fixed and mobile, are available to Americans throughout the nation. The Commission adopted fiscally responsible, accountable, incentive-based policies to transition these outdated systems to the Connect America Fund, ensuring fairness for consumers and addressing the communications infrastructure challenges of today and tomorrow. In November 2010, the Federal-State Joint Board on Universal Service (Joint Board) had recommended that the Commission "specifically find that universal service support should be directed where possible to networks that provide advanced services, as well as voice services," and adopt such a principle pursuant to its 47 U.S.C. 254(b)(7) authority. The Joint Board believes that this principle is consistent with 47 U.S.C. 254(b)(3) and would serve the public interest. The Commission agreed, citing 47 U.S.C. 254(b)(3) which provides that consumers in rural, insular and high-cost areas should have access to "advanced telecommunications and information services * * * that are reasonably comparable to those services provided in urban areas." 47 U.S.C. 254(b)(2) likewise provides that "Access to advanced telecommunications and information services should be provided in all regions of the Nation." Providing support for broadband networks will further all of these goals.

ROLE OF INTERCARRIER COMPENSATION AND UNIVERSAL SERVICE PROGRAMS

Intercarrier compensation and universal service have long been intertwined. Historically, both universal service policies and intercarrier compensation policies worked in tandem to enable companies to provide affordable local phone service to residential consumers – which in some areas of the country requires recovery of network costs from sources other than those residential end-user customers.

Pre-AT&T Divestiture.

A primary policy objective of regulators during the 20th century was to promote universal service through affordable local telephone rates for residential customers. To accomplish this objective, regulators created a patchwork of implicit subsidies. Thus, for example, regulators permitted higher rates to business customers so that residential rates could be lower, and they frequently required similar rates for urban and rural customers, even though the cost of serving rural customers was higher. Similarly, AT&T was permitted to charge artificially high long-distance toll rates, and then shared a portion of these interstate revenues with independent telephone companies and AT&T's Bell Operating Companies (BOCs). These high long-distance rates enabled regulators to promote universal service through lower residential rates for the BOCs and independent local telephone companies.

Access Charges and Universal Service.

Following the divestiture of AT&T, the Commission created access charges to provide intercarrier payments from long distance companies to local companies. (MTS and WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 683, para. 2 (1983).) [In 1974, the Department of Justice filed an antitrust lawsuit against AT&T, which ultimately led to AT&T's divestiture under the Modification of Final Judgment (MFJ). *See* United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983). The 1982 consent decree, as entered by the court, was called the Modification of Final Judgment because it modified a 1956 Final Judgment against AT&T stemming from a 1949 antitrust lawsuit.]

In conjunction with access charges, the Commission introduced flat-rated, per-line monthly charges for end users, known as the subscriber line charge or SLC, to enable carriers to recover some of the costs of their network.(See 3 See 1983 Access Charge Order, 93 FCC 2d).

Access charges require a long distance carrier to pay both the originating local carrier and the terminating local carrier a per-minute rate to originate and terminate the call (*e.g.*, when a consumer in Philadelphia places a call to Miami, the consumer's long distance carrier pays access charges to both the originating carrier in Philadelphia and the terminating carrier in Miami). The access charge rules enabled local carriers to recover their historical costs, including common network costs and overhead, from long distance carriers. (See 47 C.F.R. §§ 69.301–.502; see also Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6787, para. 1 (1990) (LEC Price Cap Order). The rate-of return regulations are set forth in Part 69 of the FCC rules. *See generally* 47 C.F.R. §§ 69.1–701.) These intercarrier payments were one means by which local telephone companies were able to keep residential rates low by recovering some of their network costs from other carriers rather than the telephone companies' own customers.

Also in the 1980s, the Commission created what was then known as the Universal Service Fund, or high-cost assistance fund, using its Title I authority to promote and preserve universal service.(47 U.S.C. §§ 151, 152(a), 154(i)). Historically, through the separations process, incumbent telephone companies have been required to separate their costs and revenues between the intrastate and interstate jurisdictions.(*See*, e.g., 47 C.F.R. Part 36. In the 1980's, the Commission adopted a rule allocating a fixed amount—25%—of loop cost to the interstate jurisdiction. (*See* 47 C.F.R. § 36.154(c)). The Universal Service Fund effectively shifted cost recovery for a portion of loop costs from the intrastate jurisdiction to the interstate jurisdiction. In addition, the Commission provided support for switching costs for smaller carriers, enabling those companies to assign a greater portion of local switching costs from the intrastate jurisdiction to the interstate jurisdiction. And, in the early 1990s, the Commission began moving away from traditional rate-of-return regulation of the interstate switched and special access rates——of the Bell Operating Companies and GTE, moving to a form of incentive regulation, known as price caps, that was designed to replicate some of the efficiency incentives found in competitive markets.(Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6818-20, paras. 257-79 (1990).

LEGAL AUTHORITY TO SUPPORT BROADBAND

The FCC has proposed to adopt a new principle for universal service policies, recommended by the Federal-State Joint Board on Universal Service (Joint Board), "that universal service support should be directed where possible to networks that provide advanced services, as well as voice services." Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Lifeline and Link Up, WC Docket No. 03-109, Recommended Decision, 25 FCC Rcd 15598, 15625, para. 75 (Joint Board 2010) (Joint Board 2010 Recommended Decision)

Section 254 of the 1996 Telecommunications Act expands the concept of universal service and requires the Federal Communications Commission (FCC) to establish a panel of Federal and State regulators (the Federal-State Joint Board) to develop recommendations on defining and funding universal service. 47 U.S.C. sec. 254 imposes a heavy regulatory tax on consumers and businesses to subsidize universal service. Section 254 of the Act governs administration of universal service programs. Section 254(b) requires the FCC to "base policies for the preservation and advancement of universal service" on six enumerated principles.(47 U.S.C. § 254(b)(1)-(6).)Two key principles provide that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation," (Id. § 254(b)(2)) and that "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high-cost areas, should have access to telecommunications and information services, including . . . advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas."(Id. § 254(b)(2)).

In section 706 of the Telecommunications Act of 1996,(Pub. L. No. 104-104, 110 Stat. 56, § 706, codified at 47 U.S.C. § 1302) Congress likewise directed the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."(47 U.S.C. § 1302(a). Section 706 defines "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability." (Id. § 1302(d)(1); see also National Broadband Plan for our Future,

Notice of Inquiry, 24 FCC Rcd 4342, 4309, App. para. 13 (2009) (“advanced telecommunications capability” includes broadband Internet access); Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans in a Reasonable and Timely Fashion, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2400, para. 1 (1999) (Section 706 addresses “the deployment of broadband capability”), 2406, para. 20 (same).

Although the FCC Act does not define “advanced telecommunications and information services,” the Commission has observed that the phrase is similar to the term “advanced telecommunications capability” in Section 706. (See Rural Health Care Support Mechanism, WC Docket No. 02-60, Order, 21 FCC Rcd 11111, 11113 n.9 (2006)).

Section 254(b) further provides that “[q]uality services should be available at just, reasonable, and affordable rates,”(47 U.S.C. § 254(b)(1)) and that universal service mechanisms “should be specific [and] predictable.” Id. § 254(b)(5)).Section 254(b) is not merely aspirational—it directs that universal service “shall” be based on these principles. “This language indicates a mandatory duty on the FCC,”(Qwest Corp. v. FCC, 258 F.3d 1191, 1200 (10th Cir. 2001) (Qwest I), and reflects “congressional intent to delegate difficult policy choices to the Commission’s discretion.”(Alenco Communications, Inc. v. FCC, 201 F.3d 608, 615 (5th Cir. 2000) (Alenco). The FCC and state Public Service Commissions, such as the NYS PSC, may balance these principles to achieve statutory objectives, but may not depart from them altogether to achieve some other goal. (Rural Cellular Ass’n v. FCC, 588 F.3d 1095, 1102-03 (D.C. Cir. 2009) (Rural Cellular); Qwest I, 258 F.3d at 1199-1200.)

Section 254(c) defines “universal service” as “an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services.”(47 U.S.C. § 254(c)(1).)The Federal-State Joint Board on Universal Service (in CC Docket No. 96-45) may “recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms,”(Id. § 254(c)(2)), and has recommended that broadband “should be eligible for support under Section 254.”(High- Cost Universal Service, WC Docket No. 05-337, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Recommended Decision, 22 FCC Rcd 20477, 20492, para. 62 (Joint Board 2007) (Joint Board 2007 Recommended Decision).

Section 254(e) provides that “only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support,”(47 U.S.C. § 254(e); see also id. § 214(e)(1) (“a common carrier designated as an eligible telecommunications carrier . . . shall be eligible to receive universal service support in accordance with section 254”). Section 214(e) governs designation of ETCs. Id. § 214(e)(2)-(3), (6), and also states that universal service support “should be explicit and sufficient.”(Id. § 254(e).) Section 254 provides no particular methodology for determining the amount of universal service support or for distributing support.

Additional Section 254(b) Principle

In November 2010, the Joint Board recommended adoption of a principle “that universal service support should be directed where possible to networks that provide advanced services, as well as voice services.”(Joint Board 2010 Recommended Decision, 25 FCC Rcd at 15625, para. 75.) The Joint Board found that “[s]uch a principle is consistent with section 254(b)(3) of the Communications Act” and would serve the public interest.

This principle strikes a reasonable balance between the goal of preserving and advancing universal service as currently supported and the goal of increasing access to advanced telecommunications and information services, Section 254(b) requires the Commission to promote access to “advanced telecommunications and information services,” which requires supporting broadband networks. (FCC, GN Docket Nos.09-51, 09-47, 09-137, WC Docket Nos. 05-337, 03-109, attachment at 1-5 (Jan. 29, 2010) (AT&T USF White Paper at 3.)

Although section 254(c)(1) defines “universal service” as “an evolving level of telecommunications services,” Congress expressly contemplated that the definition will evolve over time based on “advances in telecommunications and information technologies and services.” (Id.; 47 U.S.C. § 254(c)(1)). Section 254(c)(2), which authorizes the Joint Board to “recommend to the Commission modifications in the definition of the services that are supported,”(Id. § 254(c)(2)) does not explicitly limit the Joint Board to telecommunications services.

The Joint Board in 2007 recommended that broadband be eligible for support, and in 2010 recommended that the FCC adopt a new principle that universal service support be “directed where possible to networks that provide advanced services as well as voice services.”(Joint Board 2007 Recommended Decision, 22 FCC Rcd at 20492, para. 62; Joint Board 2010 Recommended Decision, 25 FCC Rcd at 15625, para. 75; AT&T USF White Paper at 3-4; see also supra note 64 and accompanying text.)

The principles that are directly relevant to the operation and size of the high-cost program are found in section 254(b)(1)-(3) and (b)(5).115 Section 254(b)(1) specifies that services “be available at just, reasonable, and affordable rates.”(47 U.S.C. § 254(b)(1).Section 254(b)(2) specifies that “[a]ccess to advanced telecommunications services and information services should be provided in all regions of the Nation.” Section 254(b)(3) specifies that “[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, that are reasonably comparable to those services provided in urban areas” and“at rates that are reasonably comparable to rates charged for similar services in urban areas.”(47 U.S.C. § 254(b)(3)). And finally, section 254(b)(5) specifies that federal and state mechanisms “should be specific, predictable and sufficient . . . to preserve and advance universal service.”(47 U.S.C. § 254(b)(5)).

Service providers commonly pass through universal service contribution costs to their customers, and providing support for broadband may therefore implicate the principle in section 254(b)(1) that services should be affordable. (See Qwest Communications Int’l Inc. v. FCC, 398 F.3d 1222, 1234 (10th Cir. 2005) (Qwest II) (“excessive subsidization arguably may affect the affordability of telecommunications services”); Alenco, 201 F.3d at 620 (“excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market”). But it is worth noting that federal courts have held that the Commission has broad discretion in balancing the principles in section 254(b),(See Rural Cellular, 588 F.3d at 1103 (“The Commission enjoys broad discretion when conducting exactly this type of balancing.”); TOPUC, 183 F.3d at 434 (noting the Commission’s “considerable amount of discretion” in balancing “the competing concerns set forth in § 254(b)”), and have specifically upheld prior Commission decisions adopting cost control mechanisms. (See Rural Cellular, 588 F.3d at 1108; Alenco, 201 F.3d at 620-21.)

Encouraging State Action To Advance Universal Service

In section 254(f), Congress expressly permitted states to take action to preserve and advance universal service, so long as not inconsistent with the FCC’s universal service rules.(47 U.S.C. § 254(k)).

Federal law recognizes that individual states and territories play an important role in accomplishing universal service goals. (See 47 U.S.C. § 1301(4) (“The Federal Government should also recognize and encourage complementary State efforts to improve the quality and usefulness of broadband data and should encourage and support the partnership of the public and private sectors in the continued growth of broadband services and information technology for the residents and businesses of the Nation.”). Federal law charges states with the designation of carriers as Eligible Telecommunications Carriers (ETCs) and it authorizes states to maintain their own universal service funds. Additionally, section 706 of the 1996 Act directs “[t]he Commission and each State commission with regulatory jurisdiction over telecommunications services” to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”(47 U.S.C. § 1302.). The Commission has understood section 706(a) to authorize the Commission and state commissions to take actions, within their subject matter jurisdiction and not inconsistent with other provisions of law, that encourage the

deployment of advanced telecommunications capability by any of the means listed in the provision. (47 U.S.C. § 1302(a); Deployment of Wireline Servs. Offering Advanced Telecomms. Capability et al., Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24046, para. 74 (1998). (Advanced Services Order); Preserving the Open Internet Order, FCC 10-201, paras. 117-123.) The Commission also has recognized the important role of the states.(Federal-State Joint Board on Universal Service, Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, 18 FCC Rcd 22559, 22568 para. 17 (2003) ("The Act makes clear that preserving and advancing universal service is a shared federal and state responsibility."). Courts have also previously said that the Act "plainly contemplates a partnership between the federal and state governments to support universal service,"(Qwest I, 258 F.3d at 1203; Qwest II, 398 F.3d at 1232), and that "it is appropriate—even necessary—for the FCC to rely on state action." Qwest I, at 1203.)

In its 2007 Recommended Decision, the Federal-State Joint Board on Universal Service highlighted the roles and responsibilities of states. The Joint Board, among other things, recommended that "the Commission adopt policies that encourage states to provide matching funds" for a proposed Broadband Fund and Mobility Fund. (Joint Board 2007 Recommended Decision, 22 FCC Rcd at 20489, paras. 50-52) Many states have state universal service funds to support voice service, while some states, such as California and New York, have established broadband grant programs.(On December 20, 2007, the New York State Office of the Chief Information Officer and Office of Technology adopted a comprehensive approach to providing affordable universal broadband access to its residents and businesses. Universal Broadband Access Grant Program, 2007-08 Request for Proposals, RFP CIO/OFT 001-2007 (CIO/OFT rel. December 20, 2007).

Public Interest Obligations of Fund Recipients .

Universal service support is a public-private partnership that is made to preserve and advance access to modern communications networks. Providers that benefit from public investment in their networks should be subject to clearly defined obligations associated with the use of such funding. This ensures that providers know how they are expected to use the funding and that the public will receive specific benefits from its investment.

Current high-cost funding recipients are subject to certain statutory public interest obligations because they are ETCs. (Specifically, ETCs are required to provide supported services throughout the service area and advertise the availability of such services. 47 U.S.C. § 214(e)(1). In addition, states and the Commission have authority to impose (and have imposed) additional obligations on the ETCs they designate.156 Incumbent carrier ETCs also typically are required to comply with state-mandated carrier of last resort obligations, which may include a duty to serve all customers in the geographic region, to extend lines upon request, to provide service until the state grants permission to exit the market, and other obligations. (Carrier of last resort obligations for incumbent LECs are a matter of state law and vary from state to state. State COLR obligations derive from state statutes, state regulations, certificates of public convenience and necessity, and administrative practice. See generally Peter Bluhm and Phyllis Bernt, Carriers of Last Resort: Updating a Traditional Doctrine, at 9 (NRRI July 2009), available at http://www.nrri.org/pubs/telecommunications/COLR_july09-10.pdf)

Characteristics of Voice Service

Section 214(e) of the Act requires an Eligible Telecommunications Carriers (ETCs) to offer and advertise the services that are supported by federal universal service support using its own facilities or a combination of its own facilities and resale of another carrier's services throughout its designated service area. 47 U.S.C. § 214(e)). In 1997, the Commission defined the services to be supported in functional terms as: voice grade access to the public switched network; local usage; dual tone multi-frequency (DTMF) signaling or its functional equivalent; single-party service or its functional equivalent; access to emergency services; access to operator services; access to interexchange service; access to directory assistance; and toll limitation to qualifying low income consumers. (47 C.F.R. § 54.101(a)(1)-(9); see also Federal-State Joint Board on Universal Service, 12 FCC Rcd at 8810, para. 61 (defining supported

services)). The Commission chose to define the supported services in functional terms, rather than as tariffed services, in order to promote competitive neutrality and provide greater flexibility.

Affordable and Reasonably Comparable Rates

Recipients must offer voice and broadband (individually and together) in rural areas at rates that are affordable and reasonably comparable to rates in urban areas. As noted above, section 254(b) directs that universal service policies be designed to make services available at "just, reasonable, and affordable" rates,(47 U.S.C. § 254(b)(1),) and to make services in rural areas available at rates that are "reasonably comparable" to rates in urban areas.(47 U.S.C. § 254(b)(3).)Additionally, the National Broadband Plan recommended that "subsidized providers should be subject to specific service quality and reporting requirements, including obligations to report on service availability and pricing. Recipients of funding should offer service at rates reasonably comparable to urban rates."(The National Broadband Plan at 145-46; see also, e.g., AT&T Comments in re NBP PN #19, App. A at 19 (filed Dec. 7, 2009) (arguing that recipients should provide supported services at rates, terms and conditions reasonably comparable to those offered in urban areas); Qwest Comments in re NBP PN #19, at 4 (filed Dec. 7, 2009) (arguing that winning bidders of subsidies to deploy broadband to unserved areas should be limited to charging no more than 125% of the state-wide average for comparable broadband service); OPASTCO Comments in re NBP PN #19, at 21 (filed Dec. 7, 2009) (arguing that ETCs should be required to serve all customers at minimum broadband speeds and maximum rates). The NBP also directs that universal service policies be designed to make services available at "affordable" rates.(Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership, WC Docket No. 07-38, Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering, WC Docket No. 08-190, Review of Wireline Competition Bureau Data Practices, WC Docket No. 10-132, Notice of Proposed Rulemaking, FCC 11-14, at paras. 66-76 (rel. Feb. 8, 2011) (Broadband Data NPRM) (seeking comment on whether and how the Commission should collect price data. Section V.A (National Goals and Priorities for Universal Service).

Reasonably Comparable

When the Commission initially implemented the 1996 Act, it noted that a variety of factors may affect affordability, including non-rate factors such as income levels, cost of living, population density, and the size of the customer's local calling area. (Universal Service First Report & Order, 12 FCC Rcd at 8840-42, paras. 114-117. The Commission concluded that states, by virtue of their local ratemaking authority, should exercise primary responsibility for determining affordability of rates.)Moreover, in its most recent recommended decision, the Joint Board highlighted several issues related to extending Lifeline universal service support to include broadband. (Joint Board 2010 Recommended Decision, 24 FCC Rcd at 15625-26, para. 77).

The question, in sum, is should the NYS PSC require recipients to offer a basic tier of broadband service at an affordable rate?

Section 254(b) directs that universal service policies be designed to make services in rural areas available at rates that are "reasonably comparable" to rates in urban areas.. For this purpose, the NYS PSC should look at rates for voice and broadband individually, or combined. For the purposes of high-cost support for non-rural carriers, the FCC has defined "reasonably comparable" in terms of a national rate benchmark.(Qwest II Remand Order, 25 FCC Rcd at 4076, para. 8; see 47 C.F.R. §54.316(b); Order on Remand, 18 FCC Rcd at 22582-89, 22607-10, paras. 38-48, 80-82.) The national rate benchmark for voice service is currently set at two standard deviations above the average urban rate as reported in the most recent annual rate survey published by the Wireline Competition Bureau. (Qwest II Remand Order, 25 FCC Rcd at 4076, para. 8; see 47 C.F.R. §54.316(b); 2008 Reference Book of Rates.) Rates in rural areas that fall within the national rate benchmark are presumed to be reasonably comparable to rates in urban areas.(Qwest II Remand Order, 25 FCC Rcd at 4076, para. 8.).

I conclude with the following observations:

Verizon seeks to offer its new wireless Voice Link service in lieu of its traditional landline service not only on Fire Island, but also more broadly throughout the State, where, in Verizon's view, conditions so warrant. The outcome of the Commission's investigation of Voice Link directly and significantly affects municipalities throughout the urban, suburban, and rural areas of New York State.

The Commission must reject Verizon's tariff exemption request.

Article I of the United States Constitution expressly gives Congress the exclusive power to levy and collect taxes.(U.S. CONST. art. I, § 8, cl.1.) On February 8, 1996, President Clinton signed into law the Telecommunications Act of 1996 (Act or 1996 Act), of which section 254 delegates this authority to the Federal Communications Commission (FCC or Commission) and state regulators with respect to universal service. (Telecommunications Act of 1996, sec. 101(a) § 254, 47 U.S.C.A. § 254 (West Supp. 1997). Universal service, the subject of section 254, is one of the foremost goals of the 1996 Act. Through this section, Congress has given the FCC and state regulators the discretion to define the basic telecommunications services necessary to consumers, thus determining the boundaries of universal service.(47 U.S.C.A. § 254(a)(2)). Congress has placed a high priority on ensuring that everyone in the nation has "quality services.., at just, reasonable, and affordable rates."(*Id. §* 254(b)(1)). The implications of this charge are that consumers in rural and high cost areas should receive the same services at the same rates as urban consumers, and that low-income consumers should receive discounted rates so that they can afford telecommunications services. Moreover, for the first time in the history of universal service, Congress has decided that another goal of universal service is ensuring that our nation's future is not plagued with "technology haves and have-nots." (Federal-State Joint Board on Universal Serv., *Recommended Decision,* 12 FCC Rcd. 87, 542, 5 Comm. Reg. (P & F) 1, 217 (1996) [hereinafter Universal Serv. Recommended Decision] (statement of FCC Chairman Reed Hundt), amended and adopted by Report and Order, 7 Comm. Reg. (P & F) 109 (1997).

The 1996 Act states that "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service."'(47 U.S.C.A. *§* 254(b)(4)). In practice, this means that all such providers must contribute to a fund, the universal service fund, based on their revenues from telecommunications services. It also means that these expenses will be passed on to consumers, either in the form of higher long-distance rates or a flat service charge in order to recoup the providers' costs of contributing to the universal service fund.

In sum, Congress has given the FCC and state regulators the power to decide the boundaries of universal service and the authority to require the majority of telecommunications consumers to foot the bill for these services on behalf of others who, because of geographic confines would be charged higher rates, or because of poverty could not afford these services. This power, delegated by Congress to federal and state regulators, is the power to tax because it entails determining what is best for the general welfare of the United States and then spreading the costs among its citizens.

Fire Island residents should not have to have to forgo the benefits of Universal Service, as provided under the law, but still have to pay its taxing provisions. The NYS PSC has an opportunity and an obligation to make certain that Verizon is not granted an exemption from the law when applied to Fire Island residents, while at the same time it benefits from the taxing provisions of Section 254 under the 1996 Telecommunications Act.

Thank you for your consideration on this important matter to Fire Island residents and businesses, and to residential and business telecommunications customers throughout New York State and the Nation.

Sincerely,

Jim Rosenthal