Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Universal Service Contribution Methodology	)	**WC Docket No. 06-122**
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COMMENTS OF ITTA – THE VOICE OF AMERICA'S BROADBAND PROVIDERS

ITTA – The Voice of America's Broadband Providers (ITTA) hereby submits these comments in response to the Commission's *NPRM* seeking comment on establishing an annual cap on the Universal Service Fund's (USF) combined disbursements of its four distribution programs.[1] The *NPRM* also seeks comment on the appropriate way to reduce expenditures automatically in the event disbursements are projected to exceed the overall cap, and on directing the Universal Service Administrative Company (USAC) and Commission staff to make administrative changes to reduce the amount of funding available to the individual programs in an upcoming year if demand is projected to exceed the overall cap.

I. THE COMMISSION LONG HAS RECOGNIZED THE NEED FOR FISCAL RESPONSIBILITY IN THE UNIVERSAL SERVICE PROGRAM

ITTA appreciates the Commission's obligation to ensure USF funds "are spent prudently and in a consistent manner across all programs"[2] and its longstanding recognition of the value of promoting efficiency, fairness, accountability, and sustainability of the USF programs.[3] In adopting a budget for the Mobility Fund Phase II, the Commission was guided by "a

[1] *Universal Service Contribution Methodology*, Notice of Proposed Rulemaking, FCC 19-46 (May 31, 2019) (*NPRM*).

[2] *Id.* at 2, ¶ 3.

[3] *Id.* at 1, ¶ 1.

corresponding obligation to exercise fiscal responsibility by avoiding excessive subsidization and overburdening communications consumers" in light of the cost of universal service programs being "ultimately borne by the consumers and businesses that pay to fund these programs."[4] In proposing the sweeping reforms that ultimately resulted in the *USF/ICC Transformation Order*, the Commission reiterated its commitment to controlling the size of the USF, expecting the proposed reforms to "result in more efficient use of federal support."[5] And in addressing a remand by the United States Court of Appeals for the Tenth Circuit (Tenth Circuit) of how the Commission's rules regarding high-cost universal service support to non-rural carriers met the obligation under Section 254 of the Communications Act, as amended (Act),[6] to provide "sufficient" universal service support, the Commission explained that "the various objectives of section 254 impose practical limits on the fund as a whole. . . . With the contribution factor above 15 percent, the Commission has to balance the principles of section 254(b) to ensure that support is sufficient but does not impose an excessive burden on *all* ratepayers."[7]

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[4] *Connect America Fund; Universal Service Reform – Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 2152, 2161, ¶ 24 (2017); *see Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17682, ¶ 57 (2011) (*USF/ICC Transformation Order*), *aff'd sub nom.*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014) (seeking to balance the objective of "providing support that is sufficient but not excessive so as to not impose an excessive burden on consumers and businesses who ultimately pay to support" the USF).

[5] *Connect America Fund et al.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4680, ¶ 412 (2011) (*USF/ICC Transformation NPRM*).

[6] 47 U.S.C. § 254.

[7] *High Cost Universal Service Support; Federal-State Joint Board on Universal Service; Joint Petition of the Wyoming Public Service Commission and the Wyoming Office of Consumer Advocate for Supplemental Federal Universal Service Funds for Customers of Wyoming's Non-Rural Incumbent Local Exchange Carrier*, Order on Remand and Memorandum Opinion and Order, 25 FCC Rcd 4072, 4087, ¶ 28 (2010) (*Qwest II Remand*). *See id.* at ¶ 27 ("A fair assessment of whether the Commission has reasonably implemented the section 254 principles . . . must . . . encompass the entirety of universal service support programs" and "'the full extent of federal support for universal service'" (quoting *Qwest Corp. v. FCC*, 268 F.3d 1191, 1205 (10th Cir. 2011)); 47 U.S.C. § 254(b) (setting forth universal service principles).

With the USF contribution factor now bordering on 25 percent,[8] the need for such balancing is acute.

Perhaps most directly, nearly a decade ago the landmark National Broadband Plan recommended that the Commission "manage the total size of the USF . . . in order to minimize the burden of increasing universal service contributions on consumers."[9] The first concern the Commission expressed in support of this recommendation was that "[u]nrestrained growth of the USF, regardless of reason, could jeopardize public support for the goals of universal service."[10]

An overall USF budget cap may be a prudent way for the Commission to further its "obligation to safeguard the USF funds ultimately paid by ratepayers, and to ensure the funds are spent prudently."[11] However, as discussed below, ITTA has substantial concerns about the potential for an overall USF cap to trigger harmful diminutions in high-cost program disbursements.

II. IF THE COMMISSION ADOPTS AN OVERALL CAP, IT MUST IMMUNIZE HIGH-COST PROGRAM DISBURSEMENTS FROM REDUCTION IN THE EVENT THE CAP IS EXCEEDED

As the *NPRM* recounts, in recent years actual USF disbursements in the three USF distribution programs other than the high-cost program have often fallen far short of the caps or authorized budget levels attendant to those programs.[12] If this trend were to continue, and if the

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[8] *See Proposed Third Quarter 2019 Universal Service Contribution Factor*, Public Notice, DA 19-559 (OMD June 12, 2019) (third quarter 2019 contribution factor of 24.4%).

[9] Federal Communications Commission, *Connecting America: The National Broadband Plan* (rel. Mar. 16, 2010), at 149, Recommendation 8.12 (National Broadband Plan).

[10] *Id*. (citing *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, Recommended Decision, 22 FCC Rcd 20477, 20484, ¶ 25 (Fed.-State Univ. Serv. Jt. Brd. 2007)).

[11] *NPRM* at 2, ¶ 3

[12] *See id.* at 3-4, ¶¶ 6-8; *see also, e.g., Wireline Competition Bureau Directs USAC to Fully Fund Eligible Category One and Category Two E-rate Requests*, Public Notice, DA 19-669 (WCB

(continued…)

Commission were to initially set the overall cap at the sum of the authorized budgets for the four USF distribution programs at 2018 levels and then further adjust them for inflation over time,[13] it might be some time before the cap was in jeopardy of being exceeded.

However, as the *NPRM* acknowledges, an overall USF cap could be exceeded due, for instance, to a program's rising demand or a future Commission decision to increase funding for a program.[14] ITTA has numerous concerns about its potential application to the high-cost program, insofar as, in operation, that is the distribution program that could be most in jeopardy of being compromised from funding reductions. This is an outcome which, as discussed below, would be particularly harmful as, pragmatically, the high-cost program is the base around which the other three programs revolve. In the final analysis, should the Commission implement an overall USF cap, it must render high-cost support immune from reductions when the cap is exceeded.[15]

Although the other three USF distribution programs already are operating under program-specific caps[16] or budgets,[17] as discussed above, those three programs also tend to have disbursements well below their caps or budget. Unlike with the other three programs, reductions in high-cost program disbursements can throw off-kilter the very tight and delicately-balanced

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July 17, 2019) (For E-rate funding year 2019, funding cap is $4.15 billion, but estimated total demand is $2.896 billion).

[13] *See NPRM* at 4-6, ¶¶ 9-11.

[14] *See id*. at 7, ¶ 17.

[15] *See id*. (seeking comment on ideas to reduce expenditures as needed, and what criteria should be used in prioritizing reductions of one program against reduction in another); *see also id*. at 8, ¶ 19 (seeking comment on prioritizing the funding among the four universal service programs where total disbursements of the four programs will exceed the overall cap, and on prioritizing funding based on the types of services to be funded).

[16] *See id*. at 7, ¶ 17 n.35 (E-rate and Rural Health Care programs currently operate under self-enforcing caps).

[17] *See id*. at 4, ¶ 8 (Lifeline program subject to $2.25 billion annual budget adjusted for inflation).

budgets of the numerous high-cost program distribution mechanisms which, if anything, could produce greater public interest benefits with increased funding.[18] The high-cost program has multiple distribution mechanisms, each of which has been carefully crafted to foster broadband deployment goals[19] while promoting efficient use of USF funds. Therefore, paradoxically, application of an overall USF cap in a manner that reduces high-cost support mechanisms from their current levels would thwart the Commission's longstanding goals of promoting efficiency of the USF programs and ensuring that the universal service programs are funded appropriately.[20]

The necessity of exempting the high-cost program and its individual distribution mechanisms from reductions in disbursements as a result of a breach of an overall USF cap is not merely a matter of reflecting upon how the high-cost program contrasts operationally with the other universal service distribution programs. It is essential insofar as the high-cost program is

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[18] *See, e.g.,* Commissioner Michael O'Rielly, FCC, *Federal Broadband Infrastructure Spending: Potential Pitfalls* (Feb. 1, 2017) (Commissioner O'Rielly Feb. 1, 2017 Blog), https://www.fcc.gov/news-events/blog/2017/02/01/federal-broadband-infrastructure-spending-potential-pitfalls ("the FCC's high-cost program is oversubscribed compared to its budget . . . meaning that there is room to add additional funding that would lead to further deployment gains").

[19] *See* 47 U.S.C. §§ 254(b)(2),(3) (universal service principles that access to advanced telecommunications and information services should be provided to consumers in all regions of the Nation), 1302(a) ("The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans").

[20] *Contra, e.g., NPRM* at 1,2, ¶¶ 1, 3; *Connect America Fund; ETC Annual Reports and Certifications; Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks*, Report and Order, 29 FCC Rcd 15644, 15649-50, ¶ 17 (2014) (*December 2014 CAF Order*) ("Our objective with high-cost support is to extend broadband-capable infrastructure to as many high-cost locations as efficiently as possible, and at the same time ensure that we are best utilizing the funds that consumers and businesses pay into the universal service system."); *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4680, ¶ 412 (Commission expectation that proposed reforms that led to *USF/ICC Transformation Order* would "result in more efficient use of federal support").

the foundational program from which the other distribution programs pivot.[21] The deployment of broadband to unserved and underserved areas, fostered by high-cost support, is fundamental to the Commission's ability to leverage its other universal service programs to connect schools and libraries and rural health care facilities, and to make affordable broadband available to low-income Americans living in high-cost areas. As such, in order for all four USF programs to realize the benefits they are designed for, it is absolutely critical that the Commission maintain adequate high-cost support to promote deployment of broadband to unserved and underserved rural and Tribal areas, and not potentially subject such support to reductions based on demand surges in other programs. Funding the extension of high-speed networks through high-cost support is a predicate to the fulfillment of other universal service goals, such as closure of the "homework gap," so reducing high-cost support as a result of traversal of an overall USF cap would be self-defeating.

Although the various high-cost distribution mechanisms are subject to stringent budgets and adhere to them, at the same time, the nature of that program is such that there is a particular need to maintain budgetary nimbleness to adapt to new or emergency circumstances or initiatives. Some examples have included the Rural Broadband Experiments, the creation of the $20.4 billion Rural Digital Opportunity Fund,[22] and emergency funding to restore hurricane-ravaged communications networks in Puerto Rico and the U.S. Virgin Islands, followed by

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[21] *See, e.g.*, *Qwest II Remand*, 25 FCC Rcd at 4087, ¶ 27 ("[W]hile the basic purpose of high-cost support is to ensure that telephone service is not prohibitively expensive for consumers in rural, insular, and high-cost areas, some consumers in those areas will still need additional assistance due to their low household income. Low-income support, provided through the Lifeline and Link-up programs, supplements high-cost support in those circumstances to remove the additional affordability barriers . . . .").

[22] *See* Press Release, FCC, FCC Chairman Pai Announces Major Initiatives to Promote U.S. Leadership on 5G and Connect Rural Americans to High-Speed Internet at White House Event (Apr. 12, 2019), https://www.fcc.gov/document/chairman-pai-remarks-5g-white-house-event.

establishment of the Uniendo a Puerto Rico Fund and the Connect USVI Fund.[23] There are relatively few pilot programs or new funding mechanisms that develop with the other distribution programs.

While budgetary flexibility would be critical for the high-cost program to accommodate new or emergency circumstances or initiatives, the opposite would be the case were the high-cost program subject to potential funding reductions in the event of exceeding an overall USF cap. Simply put, an overall USF cap must not be implemented in a manner that would reduce high-cost program funding already accepted by providers and relied upon in deployment that already has occurred, or that has been planned in the course of the careful network design and engineering that is occurring with high-cost distribution mechanisms that fund deployment over several years in return for defined deployment obligations.

Any such reduction would, of course, fundamentally contravene notions of fairness, as well as providers' reliance interests in commencing network buildout and upgrades meeting the Commission's requirements with the expectancy of receipt of already-committed USF subsidies.[24] It would compromise providers' fulfillment of broadband deployment obligations that they undertook pursuant to relevant high-cost distribution mechanisms, ultimately redounding to the detriment of the consumers who were finally going to have long-awaited availability of advanced telecommunications services and thwarting the Commission's broadband deployment objectives. Further, even more so where the high-cost distribution

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[23] *See, e.g., Connect America Fund*, Order, 32 FCC Rcd 7981 (2017).

[24] High-cost support not only funds the deployment itself, it also subsidizes ongoing network costs. *See, e.g., Connect America Fund; ETC Annual Reports and Certifications; Developing a Unified Intercarrier Compensation Regime*, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3111, ¶ 59 (2016) (*Rate-of-Return Reform Order*) ("A-CAM estimates the average monthly forward-looking economic cost of operating and maintaining an efficient, modern network").

mechanism involves a government *commitment* of a set funding amount,[25] it would fly in the face of the Act's universal service principle of specific and predictable support mechanisms,[26] as well as Commission and other legal precedent concerning unlawful retroactivity.[27] And for legacy carriers already operating under the cloud of a possible trigger of the budget control mechanism, the prospect of further unpredictable reductions in support due to circumstances completely out of their control would add injury to insult.

Finally, recent experience with the Rural Health Care Program demonstrates that concerns over potential across-the-board reductions in high-cost support as a result of the overall USF cap are not illusory. There, funding requests had outpaced the program's funding cap, and rural health care providers faced imminent financial hardship in funding year 2017 due to the significant, automatic proration of these funding requests pursuant to program rules.[28] According to the Commission, "the impact of this proration can be severe . . . for providers and the communities they serve, and that severity increases as the margin between Program demand

[25] *See Rate-of-Return Reform Order*, 31 FCC Rcd at 3097, ¶ 22 ("Carriers electing [A-CAM support] will have the certainty of receiving specific and predictable monthly support amounts over the 10 year[term]. Predictable support will enhance the ability of these carriers to deploy broadband throughout the term."); *Connect America Fund; ETC Annual Reports and Certifications; Rural Broadband Experiments*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 5949, 5990, ¶ 120 (2016) (requiring Connect America Fund Phase II (Phase II) auction winners to secure letters of credit is "an effective means for accomplishing our role as stewards of the public's funds by securing our financial commitment to provide Connect America support in the auction context"); *Connect America Fund Phase II Auction Scheduled for July 24, 2018; Notice and Filing Requirements and Other Procedures for Auction 903,* Public Notice, 33 FCC Rcd 1428, 1450, ¶ 58 (2018) ("For Phase II model-based support, we offered a set support amount to each price cap carrier in exchange for fulfilling specific voice and broadband service obligations within its existing area").

[26] *See* 47 U.S.C. § 254(b)(5).

[27] *See December 2014 CAF Order*, 29 FCC Rcd at 15683, ¶ 111 ("a rule operates retroactively if it 'takes away or impairs vested rights . . . or attaches a new disability in respect to transactions or considerations already past'") (citing, *inter alia, Marrie v. SEC*, 374 F.3d 1196, 1207 (D.C. Cir. 2004)).

[28] *See Promoting Telehealth in Rural America*, Report and Order, 33 FCC Rcd 6574, 6574-75, ¶ 2 (2018)

and the funding cap grows."[29] The Commission further recognized that these funding reductions could impede the ability of providers to furnish "essential . . . services in their rural communities or require them to scale back service offerings or quality. . ."[30]

Although the Commission did ameliorate the situation by increasing the program cap by almost 45 percent six months after it teed up the issue in a notice of proposed rulemaking, there is no guarantee that high-cost program participants suffering a reduction in support by operation of an overall USF cap would enjoy the same outcome within a comparable time frame.[31] In fact, whereas part of the Commission's rationale for its swift and dramatic increase in the program cap was based on the fact that the cap had remained the same for the over two decades since the program's inception, high-cost distribution mechanisms, such as the Phase II auction and A-CAM, have had their budgets established or enhanced within the past year. Combined with the Commission's avowed intent to vigorously debate any proposed budget increase after the overall USF cap has been exceeded, it appears to ITTA that a repeat of the swift action to widely open the coffers, as occurred with the Rural Health Care program, would not be likely to repeat itself if the Commission adopts an overall USF cap.

[29] *Id*. at 6577, ¶ 7.

[30] *Id*. at ¶ 8.

[31] *See NPRM* at 2, 4, ¶¶ 3, 9 ("Although the creation of a topline budget will not eliminate the Commission's ability to increase funding for a particular program, a cap would require us to expressly consider the consequences and tradeoffs of spending decisions for the overall fund" which the Commission seeks to take the form of "a robust debate on the relative effectiveness of the programs").

III. CONCLUSION

There is much to appreciate about the Commission's avowed goals in proposing an overall USF cap. If, however, the Commission is to adopt it, it must immunize high-cost program disbursements from reduction in the event the cap is exceeded.

Respectfully submitted,

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