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

In the Matters of	)	
	)	
International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act	)	GN Docket No. 09-47
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act	)	GN Docket No. 09-137

COMMENTS OF TIME WARNER CABLE INC. – NBP NOTICE # 19

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COMMENTS OF TIME WARNER CABLE INC. – NBP NOTICE # 19

Time Warner Cable Inc. ("TWC") hereby submits these comments in response to NBP Notice # 19, released by the Commission on November 13, 2009. In the Notice, the Commission seeks comment on a variety of issues relating to its universal service and intercarrier compensation policies, and how those policies should be modified to further the goal of making broadband universally available to all people of the United States.[1]

I. INTRODUCTION AND SUMMARY

The issues raised in the Notice with respect to the universal service fund ("USF") and intercarrier compensation are among the most significant challenges facing the Commission. As TWC has explained in prior rounds of comment on these issues, the Commission should take a measured approach that: (i) avoids increasing the already-bloated high-cost subsidy mechanisms;

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[1] Notice at 1.

and (ii) ensures competitively and technologically neutral funding without distorting competition or undermining economic efficiency.[2]

TWC supports proposals to expand the Lifeline and Link Up programs to cover broadband services and equipment in a manner consistent with these overarching principles. Indeed, these programs should be the focus of USF support with respect to broadband, because challenges related to broadband *adoption* have proven more significant and persistent than challenges related to broadband *availability*.

TWC also supports proposals to transition high-cost USF support from traditional voice services to broadband services. To ensure consistency with the core principles identified above, any high-cost support for broadband services should be: (i) funded through phased reductions in existing high-cost mechanisms; (ii) targeted to unserved areas; (iii) focused on grants for construction costs rather than support for continuing operations; and (iv) awarded on a competitively neutral basis, either through reverse auctions or through a new mechanism that does not depend on eligible telecommunications carrier ("ETC") status. TWC believes that, as long as middle-mile transport is available and construction costs receive adequate support in currently unserved areas, permanent subsidy flows for broadband access providers should not be required to close the digital divide. Indeed, the implementation of a more efficient and sustainable USF program demands that the Commission avoid creating guaranteed revenue streams for particular providers.

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2 *See, e.g.*, Comments of Time Warner Cable, WC Docket No. 05-337 (May 31, 2007); Comments of Time Warner Cable, CC Docket No. 01-92, at 21-28 (Oct. 25, 2006); Comments of Time Warner Cable Inc., WC Docket No. 05-337 (Nov. 26, 2008); Comments of Time Warner Cable Inc., GN Docket No. 09-40 (Apr. 13, 2009).

II. BACKGROUND

TWC is the second-largest cable operator in the United States, with operations in 28 states and more than 14 million customers. TWC offers video, voice, and broadband data services, as well as "double play" and "triple play" bundles, and faces vigorous competition within each category.

Despite its extensive service footprint and operations in many high-cost areas, TWC receives no universal service support or intercarrier compensation revenue. At the same time, the incumbent local exchange carriers ("ILECs") with which TWC competes in many areas receive substantial subsidy flows from USF and above-cost intercarrier compensation rates. Despite this disparity, TWC has successfully deployed high-quality services that offer significant value to consumers in urban and rural areas alike.

III. DISCUSSION

A. Size of the Universal Service Fund

In the Notice, the Commission seeks comment as to whether the relative size of funding for each USF support mechanism is appropriate to achieve the universalization of broadband.[3] As TWC has explained in previous comments, the bloated nature of existing support mechanisms—including in particular high-cost support—imposes significant and unwarranted burdens on consumers.[4]

This sentiment has been echoed by the Commission, as well as by the courts and other federal agencies. For example, the Commission and the Joint Board have recognized that the

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3 Notice at ¶ 1.

4 *See, e.g.,* Reply Comments of Time Warner Cable Inc., WC Docket No. 05-337, CC Docket No. 96-45, at 4-5 (May 16, 2008); Comments of Time Warner Cable, WC Docket No. 05-337, at 4-6 (May 31, 2007); Comments of Time Warner Cable, CC Docket No. 01-92, at 21-28 (Oct. 25, 2006).

USF program has been plagued by "explosive growth in high-cost universal service support disbursements," and as a result "is in dire jeopardy of becoming unsustainable."[5] Indeed, the Fifth Circuit has noted that "excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market."[6] Making matters worse, the Government Accountability Office has identified a litany of problems in connection with these funds, ranging from insufficient oversight to an absence of demonstrated need.[7] Such factors have fueled a nearly unanimous cry for reform.

Because the bloated size of the USF has already reached crisis proportions, the Commission should pursue measures that will reduce or at least freeze overall funding, rather than add to it, in implementing USF reform in connection with the National Broadband Plan. Moreover, the Commission should ensure that funding awards are justified by empirical demonstrations of need. Notably, current subsidy flows received by ILECs (and to a lesser extent by competitive ETCs) have not been justified by any such demonstration. For example, the Commission has not examined whether or to what extent rates would increase if support were withdrawn or reduced—much less whether any such increases would be unaffordable—despite the dramatic changes in the marketplace in recent years, including new revenue streams available to ETCs in a marketplace increasingly dominated by bundled service offerings. In order to address these issues, the Commission should independently assess the funding needed to support broadband services, without regard to legacy support payments for traditional voice services.

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5 *See High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, Recommended Decision, 22 FCC Rcd 8998, at ¶¶ 1, 4 (2007).

6 *Alenco Communications v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000).

7 General Accountability Office, *FCC Needs to Improve Performance Management and Strengthen Oversight of the High-Cost Program* (June 2008), *available at* http://www.gao.gov/new.items/d08633.pdf ("GAO Report").

B. Contribution Methodology

The Notice also raises several questions with respect to the proper methodology for assessing required contributions to the USF.[8] As it has in the past, TWC supports the adoption of a contribution methodology that assesses contribution amounts based on a flat numbers-based charge (with appropriate exceptions for low-volume or low-revenue services), plus an assessment on connections or revenues for telecommunications services provided to enterprise customers (such as special access services) on the basis of tiered capacity charges or revenues.[9] Such reform would ensure adequate support for legitimate funding needs, while spreading contribution costs broadly enough to avoid adverse customer impacts. Further, such reform would keep contributions by enterprise customers close to today's levels, avoiding an inequitable shift in the funding burden to residential consumers.

C. Transitioning the Current Universal Service High-Cost Support Mechanism to Support Advanced Broadband Deployment

Perhaps the most significant issue raised by the Notice is how funding for existing high-cost programs should be replaced with funding for a redesigned mechanism that explicitly supports broadband.[10] TWC supports repurposing high-cost universal service support to cover broadband infrastructure and services, consistent with their importance to the nation's economic, civic, and social vitality. In contrast, TWC opposes any proposal that would simply layer new broadband support mechanisms on top of existing mechanisms. As discussed above, there is widespread recognition that the growth in high-cost funding is unsustainable—even without adding broadband support. Further, outside sources, including the GAO, have made clear that

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8 Notice at ¶ 2.

9 *See* Comments of Time Warner Inc., WC Docket No. 06-122 (Aug. 9, 2006) (representing TWC, then a subsidiary of Time Warner Inc.).

there has been no empirical justification for maintaining the size of the fund at its current, exorbitant levels.[11] Notably, funding levels have not been reexamined in spite of the development of competition and the availability of new revenue streams from broadband Internet access and video services. Moreover, the Commission has recognized that high-cost support *already* provides indirect funding for broadband services—albeit for telecommunications carriers only—based on a policy of supporting multi-purpose infrastructure.[12] Thus, simply adding more support would exacerbate the funding crisis without any legitimate basis.

Rather, TWC believes that, as a bedrock principle of reform, any new high-cost support for broadband services should be accompanied by corresponding reductions in high-cost support for traditional voice services. In this respect, TWC strongly supports the petition for rulemaking recently submitted by the National Cable & Telecommunications Association (NCTA), under which existing high-cost support would be reexamined where there is unsubsidized competition and/or retail rates have been deregulated.[13] Among other notable benefits, the resulting

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[10] Notice at ¶ 3.

[11] *See, e.g.*, GAO Report at 27 (noting Commission's failure to establish "performance goals and measures for the high-cost program").

[12] *See, e.g.*, *Federal-State Joint Board on Universal Service; Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking, 16 FCC Rcd 11244, at ¶ 200 (2001) ("The public switched telephone network is not a single-use network. Modern network infrastructure can provide access not only to voice services, but also to data, graphics, video, and other services."). Thus, even today, when direct support for broadband services is not available, USF support contributes to broadband deployment. *See id.* ("High-cost loop support is available to rural carriers to maintain existing facilities and make prudent facility upgrades. Thus, although the high-cost loop support mechanism does not support the provision of advanced services, our policies do not impede the deployment of modern plant capable of providing access to advanced services.") (citation and internal quotation marks omitted).

[13] National Cable & Telecommunications Association, Petition for Rulemaking (Nov. 5, 2009) ("NCTA Petition").

reduction in expenditures on legacy high-cost support would free resources that could then be used to fund a new broadband support mechanism, thus avoiding the need to increase the overall size of the USF.

Notably, transitioning from existing high-cost support mechanisms to a new broadband support mechanism would not eliminate support for voice services. In fact, funding for broadband investment also would support the provision of voice services, because, as noted above, common infrastructure (whether coaxial cable, fiber, copper, or wireless spectrum) is used in providing broadband Internet access and voice services (whether IP-based or circuit-switched).[14] The creation of a broadband support mechanism thus would eventually render explicit support for voice services moot.

In implementing the new broadband support mechanism, the Commission should adhere to the following principles:

- ***Funding Should Be Transitioned in Phases.*** Funding should be made available in increasing increments as corresponding reductions are made to existing high-cost mechanisms. In this way, the Commission could ensure that the size of the USF does not increase, even during the period of transition. While TWC recognizes that immediately zeroing out all existing high-cost funding and replacing it with competitively neutral broadband funding would be needlessly disruptive, the phased mechanism proposed in the NCTA Petition would ensure a measured transition that granularly withdraws legacy support based on particular marketplace conditions.

- ***Funding Should Be Limited to Unserved Areas.*** Because of the severe and continuing constraints on universal service funding and the significant burdens such subsidies impose on consumers, any broadband support should be targeted to unserved areas. Providing

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14 *See supra* note 12.

high-cost subsidies in areas that are already served would be at odds with the goal of expanding broadband *availability*. (And, as discussed herein, the Lifeline program should be the centerpiece of efforts to boost broadband *adoption*.) Moreover, subsidizing broadband services where companies have entered already would penalize those providers for having undertaken the risk to serve rural markets. Such subsidies also would chill future investment, as providers would fear being undercut in the market by a government-subsidized competitor.

- ***Funding Should Be Limited to Construction Costs for Last-Mile Facilities, With Potential Recurring Support for Middle-Mile Facilities.*** Generally, funding should be awarded only in the form of construction grants for last-mile facilities, because there is no basis to conclude that subscription fees would be insufficient to cover ongoing operational costs, particularly given the multiple revenue streams enabled by broadband networks. That being said, the Commission should consider whether to provide both construction grants and ongoing operational support for middle-mile facilities in remote areas, insofar as the record suggests that the availability of such transport facilities is critical to the viability of broadband investment.[15] In any event, funding awards should not duplicate grants awarded by the National Telecommunications and Information Administration ("NTIA") or the Rural Utilities Service ("RUS").

- ***Funding Should Be Awarded on a Competitively Neutral Basis.*** The Commission should ensure that any broadband support is awarded on a competitively neutral basis. As TWC has stated previously, the most efficient and competitively neutral mechanism for allocating broadband support would be reverse auctions. Auctions would avoid unnecessary expenditures and would allow the best-equipped provider—regardless of its regulatory status or history—to compete for subsidies. Alternatively, if the Commission declines to rely on auctions, it should award funding based on a forward-looking and technologically neutral measure of cost, without regard for a broadband provider's status as an ETC.

Requiring ETC designations would systematically bias the system in favor of ILECs, at the expense of competitive facilities-based providers, as any broadband support almost certainly would flow disproportionately to the ILECs. Notably, despite being the nation's leading providers of broadband services, very few cable operators are ETCs. And becoming an ETC can take an extraordinary amount of time and resources, as ILECs typically object to further designations and applications are not subject to statutory deadlines. Further, Section 214(e) of the Act defines the "service area" for which a competitive ETC would receive support in reference to a rural ILEC's study area.[16] Cable operators, however, often are unable to serve the entirety of the RLEC's study area, which would either deny them support or require costly and time-consuming proceedings at the state and federal levels to modify service-area boundaries. Even if cable broadband providers were to be designated as ETCs, the funding cap that applies to competitive ETCs alone would create an enormous structural advantage for ILECs that provide broadband services.

To eliminate this disparate treatment, the Commission should use its Section 10 forbearance authority to the extent necessary to eliminate ETC designations as a prerequisite for broadband funding.[17] Independent of ETC status, the Commission could retain requirements analogous to those imposed on ETCs today, including the obligations to provide service

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15 *See, e.g.,* Comments of Time Warner Cable Inc. – NBP Public Notice #11, GN Docket No. 09-47 (Nov. 4, 2009).

16 47 U.S.C. § 214(e).

17 47 U.S.C. § 160.

throughout a particular area, to advertise the availability of such services, and to develop a plan for using universal service funds to expand network coverage or to improve service quality.[18]

Finally, to ensure that any ambiguity in the Communications Act does not undermine the integrity of these efforts, TWC urges the Commission to use the National Broadband Plan as an opportunity to seek clarification from Congress regarding its authority to support broadband services.[19] While the Commission may have existing authority to accomplish its objectives, the interests of all parties would be served by an explicit grant of congressional authority.

D. Impact of Changes in Current Revenue Flows

The Notice next asks how changes in USF policies would impact current revenue flows to service providers.[20] Implicit in this question is the suggestion that such concerns should drive the Commission's regulatory policies. TWC urges the Commission to reject the premise that particular providers' current revenue flows must be protected by regulation. As noted above, there has been no empirical justification for existing revenue flows—and, indeed, the GAO has found that there is no direct correlation between support payments and rate levels. Accordingly, it would be arbitrary and capricious to replace revenue losses from declining access charges on a dollar-for-dollar basis with new USF payments.[21]

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18 *See* 47 C.F.R. § 54.201.

19 *See, e.g.*, *Federal-State Joint Board on Universal Service*, Recommended Decision, 18 FCC Rcd 2943, at ¶ 19 (2002) (opining that broadband Internet access, as long as it is classified as an information service, "could not be included within the definition of supported services, because section 254(c) limits the definition of supported services to telecommunications services.").

20 Notice at ¶ 4.

21 *See, e.g.*, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 420-21 (1971) (requiring an agency to demonstrate careful consideration of all "relevant factors" and to provide a reasoned explanation of the basis and rationale for its decision).

Particularly in light of the new revenue streams enabled by bundled service offerings, the Commission should carefully examine service providers' ability to recover their costs in the marketplace before presuming that additional subsidies are required. Importantly, cable operators like TWC have been able to deploy broadband infrastructure and provide voice services in rural areas without *any* subsidies from intercarrier compensation or USF. It would distort competition and harm consumer welfare to guarantee selected providers' revenue streams without a compelling demonstration of need.

E. Competitive Landscape

The Notice further solicits input regarding the current state of the competitive landscape.[22] In doing so, the Notice recognizes that although the Commission has adopted "a principle of competitive neutrality to guide its future policymaking" with respect to universal service, in practice "the high cost fund provides support to some facilities-based broadband providers, but not others."[23] Indeed, as noted above, although cable operators are the leading providers of broadband services nationwide, very few are eligible to receive USF support.

The Commission's efforts to develop and implement the National Broadband Plan offer a golden opportunity to address this disconnect by adopting a neutral mechanism for distributing funding awards, such as reverse auctions or a grant program that does not require recipients to be designated as ETCs. Indeed, given the classification of broadband Internet access as an *information service*, it would make no sense to provide support only to eligible *telecommunications carriers*. Any mechanism that disadvantages cable broadband providers would distort competition and deprive consumers of what may be the most robust and affordable facilities-based platform for accessing the Internet.

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[22] Notice at ¶ 5.

F. Lifeline/Link Up

Finally, in response to the questions in the Notice relating to the establishment of a Broadband Lifeline/Link Up program,[24] TWC believes that extending low-income support for broadband equipment and facilities could help address the significant adoption challenges that impede the achievement of universal broadband goals. Specifically, TWC proposes establishing a voluntary Broadband Lifeline/Link Up program, under which service providers would apply to obtain funding for discounts off of broadband subscription rates for low-income consumers qualifying under the same criteria applicable to the existing Lifeline program (at least initially), based on funding captured through reductions in legacy support flows. Alternatively, the Commission could propose in the National Broadband Plan that Congress allocate money from general taxpayer funds to support the affordability of broadband for America's lowest-income consumers.

Before implementing support for equipment purchases (and addressing the attendant complications identified in the Notice), the Commission should examine the wide range of emerging initiatives to support distribution of computers to low-income families. Private and state efforts, for example, may obviate the need for Commission action, thus avoiding difficult questions about its statutory authority to take such action, among other challenges. NCTA's recently announced Adoption-Plus (A+) program holds particular promise in this regard, as it will harness public-private partnerships to provide discounted broadband subscriptions, computers, and digital literacy training for up to 3.5 million economically disadvantaged

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23 *Id.*

24 *Id.* at ¶ 7.

students.[25] After assessing available funding sources and their sufficiency, the Commission should make recommendations to Congress if it determines that additional funding is necessary to promote broader computer ownership in the interest of boosting broadband adoption.

Regardless of whether low-income programs apply to broadband services alone or to equipment purchases as well, a service provider's participation in the program (as with any high-cost support program for broadband services) should not be contingent on its designation as an ETC. Indeed, making current ETCs automatically eligible for participation, while requiring non-ETCs to undertake a laborious and costly designation process, would cause significant marketplace distortions and risk depriving consumers of the most cost-effective service options.

IV. CONCLUSION

For the foregoing reasons, TWC urges the Commission to ensure that its National Broadband Plan and related reports to Congress are consistent with the views expressed herein.

Respectfully submitted,

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25 *See* Press Release, *NCTA Proposes Adoption Plus (A+):A National Public-Private Partnership to Bring Broadband to Millions of Middle School Students in Low-Income Families* (Dec. 1, 2009), *available at* http://www.ncta.com/ReleaseType/MediaRelease/NCTA-Proposes-Adoption-Plus-Program.aspx.