

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	

**COMMENTS OF
THE RURAL TELECOMMUNICATIONS GROUP, INC.**

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July 12, 2010

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Summary

RTG supports the provision of broadband in all regions of the United States as a vital economic driver. However, the FCC's decision to cap, cut, and eliminate "legacy" universal service fund ("USF") support violates Section 254 of the Act. Moreover, the FCC lacks the authority under Title II of the Act to transfer these legacy funds to broadband services and providers.

The FCC cannot fundamentally shift the Section 254 universal service emphasis from telecommunications services to broadband, absent Congressional authority. Universal service is defined in the Act as an evolving level of *telecommunications services*. Further, the Act limits the FCC's authority to fund broadband services. Specifically, in discussing "supported services" pursuant to Section 254 of the Act, the U.S. Court of Appeals for the Fifth Circuit rejected the FCC's attempt to redefine "services" to include services unrelated to telecommunications.

For decades, small rural providers have relied heavily on USF support as a cost recovery mechanism for their investments in building out modern, high-cost networks, both wireline and mobile, in hard-to-serve rural areas. The FCC's immediate focus on lower-cost, high-cost areas and eventual focus on higher-cost, high-cost areas will result in support flowing to areas surrounding larger population centers, leaving rural Americans served by genuine rural providers without comparable services at comparable rates, in violation of the Act.

Further, reducing support for wireless carriers will harm the public and is inconsistent with Section 254. The one-time support for deployment of 3G (or better) mobile service from the FCC's Mobility Fund will prove unavailing to most small, rural wireless providers and fails to recognize the importance of mobility for all Americans. The FCC's so-called "interim" cap

on competitive high-cost support also continues to harm small, wireless providers serving high-cost rural areas and should be lifted.

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To: The Commission

Comments of the Rural Telecommunications Group, Inc.

The Rural Telecommunications Group, Inc. (“RTG”),¹ by its attorneys, hereby submits its comments in response to the Notice of Inquiry (“NOI”) and Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceedings.² RTG, like the Federal Communications Commission (“FCC” or “Commission”), supports the provision of broadband in all regions of the United States as a vital economic driver. However, the Commission’s two-step plan, as outlined in its NOI, NPRM, and National Broadband Plan (“NBP”), runs afoul of Title II and Section 254 of the Communications Act of 1934, as amended (“Act”) and will harm rural businesses and rural America.

¹ RTG is a Section 501(c)(6) trade association dedicated to promoting wireless opportunities for rural telecommunications companies through advocacy and education in a manner that best represents the interests of its membership. RTG’s members have joined together to speed delivery of new, efficient, and innovative telecommunications technologies to the populations of remote and underserved sections of the country. RTG’s members are small, rural businesses serving or seeking to serve secondary, tertiary, and rural markets. RTG’s members are comprised of both independent wireless carriers and wireless carriers that are affiliated with rural telephone companies and each serves less than 100,000 subscribers.

² *In re Connect America Fund*, WC Docket No. 10-90, *A National Broadband Plan for Our Future*, GN Docket No. 09-51. *High-Cost Universal Service Support*, WC Docket No. 05-337, Notice of Inquiry and Notice of Proposed Rulemaking, FCC 10-58 (April 21, 2010) (“*NBP USF NOI NPRM*”).

I. Introduction and Background

The NOI and NPRM propose a two-step plan in which the FCC would raid the current high-cost universal service fund (“USF”) that supports, generally, voice-based telecommunications services, and use the bulk of those monies to fund broadband providers in a new, “Connect America Fund” (“CAF”).³ The FCC has tentatively concluded that it makes perfect policy sense to “cap and cut”⁴ the current, historically successful high-cost universal service mechanism in order to begin funding the provision of broadband to over 100 million homes at speeds of over 100 Mbps. Step 1 of the plan seeks to eliminate “universal service” as we know it today and Step 2 seeks to transfer these funds to the broadband CAF. Under the universal service provisions of the Act, both steps are legally suspect. Indeed, even the FCC Chairman has recognized that the FCC likely does not have the authority to transfer universal service funds to the broadband CAF. In response to questions about USF proposals laid out in the NBP, FCC Chairman Julius Genachowski recently acknowledged that the recent *Comcast v. FCC*⁵ decision “raises questions about whether [the FCC has] the authority to [fundamentally alter USF to support broadband.]”⁶

The Federal statutes that guide the FCC in its implementation of the universal service programs—Sections 254 and 214(e)—have not been repealed or amended. The FCC cannot choose to ignore the plain language of section 254 nor does the FCC have the authority to drastically shift the universal service emphasis from telecommunication services to broadband services. By the same

³ *NBP USF NOI NPRM* at ¶ 1.

⁴ *Id.* at ¶ 13.

⁵ *Comcast Corp. v. FCC*, ___ F.3d ___, No. 08-1291, 2010 WL 1286658 (D.C. Circ. Apr. 6, 2010).

⁶ *Wall Street Journal*, The Journal Report – Technology, R4 (June 7, 2010) available at <http://online.wsj.com/article/SB10001424052748704183204575288363378490860.html>.

token, the FCC cannot choose to ignore the Title II tangles associated with Step 2 of its “Availability”⁷ plan – funding the CAF and broadband providers with the old, “legacy” USF.⁸ The FCC lacks the legal authority to fund broadband services under Section 254 (including the authority to apply universal service funding principles to broadband). This lack of authority, combined with the Commission’s own concerns about the FCC’s broadband authority, make the FCC’s rush to dismantle the current universal service mechanism rash and unjustifiable, while threatening immense harm to rural businesses and rural consumers.

II. The FCC Does Not Have the Authority to Fundamentally Alter Universal Service Emphasis from “Telecommunications Services” to Broadband

A. Universal Service is Defined as a Telecommunications Service

The legal parameters of the FCC’s universal service program are set primarily by Section 254 of the Act. Universal service is defined in Section 254(c)(1) 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.”⁹ This first sentence of section 254(c)(1) clearly establishes that unless a service is a *telecommunications* service, it does not fall within the definition of universal service. Although Congress has “recognize[d] that *telecommunications* services would evolve over time, and that universal service should adapt to reflect those changes,”¹⁰ neither Congress nor the FCC has ever suggested that such services would evolve into non-telecommunications services.

⁷ The FCC appears to have abandoned the term “universal service” in the NBP and latched onto the vague term, “Availability.”

⁸ *NBP USF NOI NPRM* at ¶ 13.

⁹ 47 U.S.C. § 254(c)(1) (emphasis added).

¹⁰ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 98-67, Report to Congress, ¶ 144 (1998) (“*1998 Report to Congress*”) (emphasis added).

Information services and telecommunications services are mutually exclusive.¹¹ Although telecommunications services may contain an information service element, they may not transform into an information service. Telecommunications services are distinguishable from information services and the Act unmistakably intended to make this distinction between the two services for regulatory treatment by the FCC.¹² Though not defined in the Act, broadband has been established as an information service, and not a telecommunications service.¹³ Accordingly, a broadband service may not be regulated as a universal service.

The FCC and the Federal-State Joint Board are required to work in tandem when reviewing or altering the telecommunications services that may be designated as universal services.¹⁴ Section 254(c)(2) allows that “the Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.”¹⁵ However any recommendation for changes to the

¹¹ *1998 Report to Congress* at ¶¶ 13, 39, and 43 (where the FCC determined “that Congress intended the categories of ‘telecommunications service’ and ‘information service’ to be mutually exclusive”).

¹² In discussing the definition of “information services,” the FCC concludes that when an entity offers the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,” it is not offering telecommunications “even though it uses telecommunications” to offer such information services (*e.g.*, voicemail). *Id.* at ¶ 39.

¹³ *See in re Inquiry High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C. Rcd. 4798 at 4820-4824 ¶¶ 34-41, Declaratory Ruling (2002) (“*Cable Modem Declaratory Ruling*”) (designating cable modem service to be an interstate “information service” and not a cable TV service or a telecommunications service); *See also in re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C. Rcd. at 14,853 ¶ 102 (“*Wireline Broadband Order*”) (affirming “that wireline broadband Internet access service is an information service”).

¹⁴ 47 U.S.C. § 254(c)(1).

¹⁵ 47 U.S.C. § 254(c)(2).

make-up of universal services is limited by the clear language of Section 254(c)(1), which states that “the Joint-Board, in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such *telecommunications* services are being deployed in public *telecommunications* networks by *telecommunications* carriers.”¹⁶

Today’s universal service support mechanisms are based on the consistent application of Section 254(c) of the Act, and nowhere in the Recovery Act’s requirement for the FCC to develop the NBP¹⁷ did Congress suggest jettisoning Section 254. Neither Section 254(c)(1), nor Section 254(c)(2), give the FCC power to flip USF 180 degrees and use universal service monies to create a broadband-based USF out of the ashes of the “legacy” fund as the FCC has suggested doing with its new CAF plan.¹⁸ The limitation on the FCC’s ability to define the services supported by universal service has been confirmed in *TOPUC v. FCC*.¹⁹ Specifically, in discussing “supported services” pursuant to Section 254(c)(2), the Fifth Circuit called the FCC’s attempt to redefine “services” to include services unrelated to telecommunications “an implausible reading of Congress’ intent.”²⁰ The FCC’s CAF plan abandons this structural limitation with its heavy, if not exclusive, concentration on broadband services.

¹⁶ § 254(c)(1)(C) (emphasis added).

¹⁷ *American Recovery and Reinvestment Act of 2009*, Pub. L. No. 111-5, § 6001(k), 123 Stat. 115, 515 (2009) (“*Recovery Act*”).

¹⁸ See *NBP USF NOI NPRM* at ¶ 13 (concluding that “legacy” high-cost programs should be capped and cut in order to shift those investments to “broadband infrastructure.”)

¹⁹ *Texas Office of Pub. Util. Counsel (TOPUC) v. FCC*, 183 F.3d 393 (5th Cir. 1999).

²⁰ *Id.* at 442. In *TOPUC*, the Fifth Circuit concluded that the FCC could not use the Act’s “additional services” term in Section 254(c)(3) to expand supported services to schools and libraries subject to Section 254(h) beyond additional services that were also telecommunications

In sum, the plain statutory language does not give the FCC the authority to drastically alter Section 254 and wholly redefine universal service to include broadband service as the Commission has proposed in the NBP generally, and in the NOI and NPRM.²¹

B. Only Telecommunications Carriers are Eligible to Receive High-Cost USF Support

Section 254(e) of the Act establishes the general eligibility requirement for receipt of universal service support. The eligibility criterion, “adopted without expansion”²² by the FCC, unambiguously states that “only an eligible *telecommunications* carrier (“ETC”) designated under section 214(e) shall be eligible to receive specific Federal universal service support.”²³

Section 214(e) declares that “[a] common carrier designated as an eligible *telecommunications* carrier under [Section 214(e)] shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received, offer the services that are supported by Federal universal service support mechanisms under section 254 (c), either using its own facilities or a combination of its own facilities and resale of another carrier’s services (including the services offered by another eligible *telecommunications* carrier); and advertise the availability of such services and the charges therefore using media of general distribution.”²⁴

services. The court went on to discuss this limitation pursuant to Section 254(c)(2) and 254(c) generally, determining that the FCC did not have the authority to redefine services to include services unrelated to telecommunications.

²¹ See *NBP USF NOI NPRM* at ¶ 53.

²² *1998 Report to Congress* at ¶ 150.

²³ 47 U.S.C. 254(e) (emphasis added).

²⁴ *Id.* (emphasis added).

In short, section 254(e) explicitly states that only an ETC designated as such under Section 214(e) shall be eligible to receive Federal universal service support. The law is simple: only ETCs are allowed to receive USF support, and only *telecommunications* carriers may be designated as ETCs.²⁵

The FCC's two-step plan abandons the Act's balance and emphasis on telecommunications services and providers. The FCC's shift from "universal service" to "availability" (the catch-all term used in the NBP) does not and cannot eliminate the Commission's responsibilities pursuant to Sections 254 and 214(e) of the Act. The hasty elimination of the current "legacy" fund,²⁶ absent a legal substitute, is inconsistent with Congress' intent in codifying universal service in 1996. No Section in the Act relating to high-cost universal service authorizes the FCC to perform a reconfiguration of USF on this scale. The FCC simply cannot proceed as if Sections 254 and 214(e) do not exist.

III. The FCC's NOI and NPRM Harm Rural Areas in Violation of Section 254 of the Act

The majority of high-cost support currently flows to small rural providers located in the communities that they serve. These providers rely on this vital support in order to build modern, high-cost networks, both wireline and mobile, in hard-to-serve rural areas. These rural providers have invested vast amounts of money and have undertaken serious amounts of debt in reliance on being able to pay their debts under the current USF system. These "serious reliance interests," developed over decades under the FCC's "legacy" universal service mechanisms, require the FCC to provide a much better explanation than it has done in its NOI and NPRM for

²⁵ *Id.*

²⁶ See *NBP USF NOI NPRM* at ¶¶ 51 and 53 (discussing "specific first steps" to cut legacy high-cost funding).

its blatant disregard of current facts, circumstances, and law when it proposes a complete about-face in its universal service policy.²⁷ Even if the FCC had the authority to decimate legacy USF and transfer this funding to non-telecommunications services (which, as discussed above, the FCC does not), the FCC has not and cannot provide an adequate legal justification for its two-step plan.

47 U.S.C. § 254(b)(3) states:

*Consumers 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 interexchange services and advanced telecommunications and 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.*²⁸

The NBP's recommendation to first concentrate on less costly areas violates Section 254(b)(3)'s fundamental universal service principle that rural consumers have access to telecommunications services that are "reasonably comparable to those services provided in urban areas."²⁹ The NBP suggests the FCC first address "those areas that require lower amounts of subsidy to achieve [the] goal" of maximizing the number of households that can be served

²⁷ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1823 (2009). In *FCC v. Fox Television Stations*, the U.S. Supreme Court found that "when an agency's prior policy has engendered serious reliance interests[,] that must be taken into account." Ignoring such matters by failing to provide a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy would be arbitrary and capricious. *Id.* In the instant case, the FCC must show that it has taken into account the serious aspects of rural carriers' reliance on current "legacy" mechanisms.

²⁸ 47 U.S.C. § 254(b)(3).

²⁹ *Id.*

quickly.³⁰ Over time, the FCC will then get around to “addressing those areas that are the hardest to serve.”³¹ Until the FCC concentrates on these harder-to-serve areas, the FCC will be in violation of Section 254(b)(3) as these neglected areas will be lacking in comparable services and rates to urban areas and those areas the FCC decides can be “served quickly.” Further, the FCC’s suggestion that rural consumers be satisfied with less choice and less robust services for broadband violates the Section 254(b)(3) mandate of comparable services in rural and urban areas.³²

The FCC’s immediate focus on lower-cost, high-cost areas and eventual focus on higher-cost, high-cost areas is a thinly-veiled rationale for giving AT&T and Verizon support to build out less-costly rural areas near the population centers, and then seeing what sort of funding is left over for genuine rural local exchange carriers (“LECs”) and wireless carriers. Reading between the lines, it appears that the FCC will initially concentrate broadband support payments through the CAF to price-cap carriers serving less “rural” population centers. The prospect of raiding legacy high-cost funding to support the price-cap carrier broadband cherry-picking of rural population centers is an ugly irony, and again, is inconsistent with Section 254’s principle that consumers nationwide have access to services at reasonable rates.³³

³⁰ Federal Communications Commission, *Connecting America: The National Broadband Plan*, (March 16, 2010), Chapter 8 at p. 141 (“NBP”).

³¹ *Id.*

³² *See NBP USF NOI NPRM* at ¶ 22. The FCC appears to be suggesting that broadband provision through satellite will be good enough for rural areas.

³³ 47 U.S.C. § 254(b)(3).

The NOI's reverse auction suggestion,³⁴ combined with large bidding areas,³⁵ also favors large, price cap carriers, disadvantaging rural carriers and their local consumers. The FCC is looking for a reverse auction mechanism that will “identify the provider that will serve the area at lowest cost.”³⁶ RTG reminds the Commission that a number of price cap carriers used to provide service in high-cost areas at the lowest cost, leaving their customers begging for improved service from neighboring carriers. In many rural areas, rural carriers have stepped in to make a commitment to serve areas neglected and ignored by mid-sized and large carriers. Subjecting rural consumers to cut-rate, lowest-cost services that are not on par with those services offered to urban consumers is inconsistent with Section 254 of the Act and flies in the face of good public policy.

IV. Reducing Support for Wireless Carriers Will Harm the Public and Is Inconsistent With Section 254

A. A Mobility Fund, Limited to Deployment and Not Ongoing Operations, Disserves the Public Interest

In the NPRM, the FCC provides little detail on its proposed Mobility Fund,³⁷ but what it does provide proves unavailing to small, rural wireless providers, except in Alaska and West Virginia. The Mobility Fund will provide one-time support for deployment of 3G (or better) mobile service. The FCC will select a “market-based” mechanism (*i.e.* reverse auction) for supporting the provision of mobility in targeted areas. Based on details, or lack thereof,

³⁴ See *NBP USF NOI NPRM* at ¶ 19.

³⁵ *Id.* at ¶¶ 41-42.

³⁶ *Id.* at ¶ 19.

³⁷ *NBP*, Chapter 4, in general, and Chapter 8 at p. 141.

regarding the Mobility Fund, these targeted areas appear to only include the states of Alaska and West Virginia.

The FCC's intention to dismiss high-cost support for competitive eligible telecommunications carriers ("CETCs"),³⁸ the majority of whom are wireless carriers, and instead create an anemic and one-time Mobility Fund fails to recognize the importance of mobility for all Americans and, consistent with Section 254 of the Act, consumer choice. Customers want and need both wireless and wireline services. These services are complementary and support should be available for both wireline and wireless carriers with separate mechanisms to measure costs and to determine the amount of support. Mobile services are both "telecommunications services" and "supported services," and, arguably, more important to the public interest (*i.e.*, safety services such as E911), than many broadband applications (*i.e.*, entertainment services and interactive gaming). Discriminating against mobile CETCs is short sighted and inconsistent with the goals of Section 254. The elimination of CETC high-cost support and the limited and one-time nature of the Mobility Fund does not recognize the ongoing costs associated with the provision of wireless high-cost support in rural areas and would deny support for services that the majority of consumers enjoy today and that Congress recognized in Section 254 are worthy of support.

B. The FCC's CETC Interim Cap Must Be Lifted

The FCC indicates that it has decided to issue an Order to implement the voluntary commitments of Sprint and Verizon to reduce the high-cost funding they receive as CETCs over a five-year period.³⁹ In other words, as a result of concessions required by these carriers'

³⁸ *NBP USF NOI NPRM* at ¶ 60.

³⁹ *NBP USF NOI NPRM* at ¶ 59.

respective mergers, they had to give up high-cost support. However, it appears certain now that this support will not be available as part of the capped support available to remaining smaller ETCs, many of whom have seen their support amounts decimated by the FCC's so-called "interim" cap that has been interim for well over two years. RTG notes for the record that the Commission's lack of transparency and apparent intent to force this decision on the industry without seeking adequate comment is contrary to the Administrative Procedure Act.

RTG also notes that the FCC's "interim" cap can no longer be characterized as "interim" and requests that the FCC lift the cap immediately or act upon requests by CETCs to demonstrate their own costs. The CETC cap violates the Act's Section 253(b)(3) comparability principle since it distinctly favors incumbent providers of wireline services and discriminates against competitive service providers. Small, rural CETCs providing wireless service in high-cost rural regions of the country benefit from high-cost universal service funds and have committed to robust buildout plans in order to deliver better coverage to rural consumers. The cap on funding has a chilling effect on new buildout and the expansion of wireless service into previously unserved areas as carriers go without needed funding or wait on "permanent" rules in order to make financial decisions with any degree of predictability.

V. The FCC Must Have Congressional Authority Before It Establishes a Broadband Universal Service Fund

Absent Congressional authority to fund broadband services, RTG suggests that the Commission continue to provide high-cost support to voice-based telecommunications services until it has such specific authority to establish a broadband universal service fund. The FCC has been rebuffed in the past when it has pursued a policy where it lacked the authority to do so.⁴⁰

⁴⁰ See, e.g., *TOPUC* at 447 (limiting the FCC's jurisdiction under Section 254 to interstate revenues).

As currently proposed, the FCC is proceeding with the first step of dismantling legacy USF when it has no idea (and neither does the industry) how the CAF will be implemented and whether the CAF is legal. This dismantling will deny rural carriers expected support based on their network investments, causing immediate and demonstrable harm to rural regions with no guarantee that any broadband promise will be fulfilled. The FCC needs a broadband funding program in place, pursuant to Congressional authority, before it can disassemble the current high-cost mechanism as codified in Sections 254 and 214 of the Act which are currently only set up to fund telecommunications services.

VI. Conclusion

In a “look before you leap” scenario, the FCC has “looked” and recognized extreme doubt for its legal authority to support funding broadband services under sections 214(e) and 254. However, the FCC has tentatively concluded to take the “leap” of decimating legacy USF anyway. Not only does the FCC lack the legal authority to pursue this plan, its extreme “about face” on universal service will subject it to increased court scrutiny and considerably limited, if any, court deference. Moreover, the Commission’s plan abandons the Act’s balance and emphasis on telecommunications services and providers and violates the overall principles of universal service codified by Congress.

For the foregoing reasons, RTG respectfully urges the FCC to abandon its two-step plan to reform USF.

Respectfully submitted,

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Date: July 12, 2010