

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

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| 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 |
|  | ) |                      |

**To: The Commission**

**Comments of the Rural Telecommunications Service Providers Coalition**

The Rural Telecommunications Service Providers Coalition (“RTSPC”),<sup>1</sup> 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.<sup>2</sup> RTSPC agrees with Congress and the Federal Communications Commission (“FCC” or “Commission”) that the provision of broadband services serves a vital national economic interest. However, the Commission’s two-step plan, as outlined in its NOI, NPRM, and National Broadband Plan (“NBP”), will surely destroy currently successful “legacy” universal service. Moreover, the FCC lacks the legal authority to fund broadband

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<sup>1</sup> RTSPC is an ad hoc coalition of small, rural providers of wireline, fixed, and mobile services. RTSPC’s members live in and serve the high-cost rural communities where they provide service. RTSPC’s members include Arctic Slope Telephone Association Cooperative, BPS Telephone Company, Copper Valley Telephone Cooperative, Farmers Mutual Telephone Company of Iowa, Farmers Telephone Company of Iowa, Grand River Mutual, Interstate 35 Telephone Company, KanOkla Networks, Mosaic Telecom, Nemont Telephone Cooperative, Panhandle Telephone Company of Oklahoma, Partner Communications Cooperative of Iowa, PenTeleData, Pine Belt Communications, Inc., Pioneer Communications, Inc. of Kansas, Sebastian Corporation, Siskiyou Telephone, SRT Communications, Syringa Wireless, Totah Communications, Inc., Twin Valley Telephone, West Kentucky and Tennessee Rural Telecommunications Cooperative, and Wheat State Telephone.

<sup>2</sup> *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*”).

service, violating both Section 254 and Title II of the Communications Act of 1934, as amended (“Act”).

## I. Introduction and Background

The NOI and NPRM suggest 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”).<sup>3</sup> The FCC has tentatively concluded to “cap and cut”<sup>4</sup> the current, historically successful high-cost universal service mechanism in order to fund broadband services rather than telecommunications services. 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. Pursuant to the universal service provisions of the Act, both steps are legally questionable. 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*<sup>5</sup> decision “raises questions” about whether the FCC has the authority to fundamentally alter USF to support broadband.<sup>6</sup> As discussed herein, capping and cutting legacy universal service funding mechanisms when the funding of broadband is legally suspect is unwise and will devastate rural businesses and communities.

The Federal statutes that provide direction for 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 Sections 254 and 214(e), nor does the FCC have the authority

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<sup>3</sup> *NBP USF NOI NPRM* at ¶ 1.

<sup>4</sup> *Id.* at ¶ 13.

<sup>5</sup> *Comcast Corp. v. FCC*, \_\_\_ F.3d \_\_\_, No. 08-1291, 2010 WL 1286658 (D.C. Circ. Apr. 6, 2010).

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

to drastically shift the universal service emphasis from telecommunication services to broadband services. Further, the FCC cannot ignore the Title II concerns associated with Step 2 of its “Availability”<sup>7</sup> plan – funding the CAF and broadband providers with the old, “legacy” USF.<sup>8</sup> Simply put, the Commission lacks the legal authority to fund broadband services under Section 254 (including the authority to apply universal service funding principles to broadband).

## **II. The FCC Does Not Have the Authority to Shift Universal Service Emphasis from “Telecommunications Services” to Broadband “Information Services”**

### **A. Universal Service is Defined as a Telecommunications Service**

The legal limits 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.”<sup>9</sup> This first sentence of section 254(c)(1) mandates that unless a service is a *telecommunications* service, it does not fall within the definition of universal service. Although Congress “recognize[d] that *telecommunications* services would evolve over time, and that universal service should adapt to reflect those changes,”<sup>10</sup> Congress never suggested that such services would evolve into non-telecommunications services or information services.

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

<sup>8</sup> *NBP USF NOI NPRM* at ¶ 13.

<sup>9</sup> 47 U.S.C. § 254(c)(1) (emphasis added).

<sup>10</sup> *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).

RTSPC reminds the Commission that information services and telecommunications services are mutually exclusive.<sup>11</sup> Although telecommunications services may contain an information service element, that does not make them 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.<sup>12</sup> Though not defined in the Act, broadband has been legally and traditionally treated as an information service, and not a telecommunications service.<sup>13</sup> Accordingly, a broadband service may not be treated as a universal service and, since the CAF does so, the FCC does not have the authority to create the CAF from the ashes of legacy *telecommunications-*based funding.

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.<sup>14</sup> Section 254(c)(2) establishes that “the Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported

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<sup>11</sup> *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”).

<sup>12</sup> In discussing the definition of “information services,” the FCC has concluded 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.

<sup>13</sup> *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”).

<sup>14</sup> 47 U.S.C. § 254(c)(1).

by Federal universal service support mechanisms.”<sup>15</sup> However any recommendation for changes to the definition of universal services is limited by the plain 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.”<sup>16</sup> The FCC does not have the authority to change this obvious telecommunication-based emphasis.

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 NBP<sup>17</sup> did Congress suggest jettisoning Section 254 or successful legacy USF mechanisms. 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 ruins of the “legacy” fund as the FCC has suggested doing with its new CAF plan.<sup>18</sup> This strict limitation on the FCC’s ability to define the services supported by universal service to telecommunications services has been confirmed in *TOPUC v. FCC*.<sup>19</sup> 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

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<sup>15</sup> 47 U.S.C. § 254(c)(2).

<sup>16</sup> § 254(c)(1)(C) (emphasis added).

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

<sup>18</sup> 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.”)

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

implausible reading of Congress' intent."<sup>20</sup> The FCC's CAF plan abandons this structural limitation with its heavy, if not exclusive, concentration on broadband services.

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.<sup>21</sup>

### **B. Only Telecommunications Can Receive High-Cost Universal Service Support**

Section 254(e) of the Act establishes the general eligibility requirement for receipt of universal service support. The eligibility criterion, "adopted without expansion"<sup>22</sup> 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."<sup>23</sup> 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

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<sup>20</sup> *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 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.

<sup>21</sup> See *NBP USF NOI NPRM* at ¶ 53.

<sup>22</sup> *1998 Report to Congress* at ¶ 150.

<sup>23</sup> 47 U.S.C. 254(e) (emphasis added).

general distribution.”<sup>24</sup> In sum, section 254(e) explicitly limits high-cost support to ETCs designated as such under Section 214(e).

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,<sup>25</sup> 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 Plan Violates the USF Principles of Specificity, Predictability, and Sufficiency**

The NBP has not changed any part of the Communications Act. Specifically, Congress’ directions to the FCC have not amended or repealed any mandates relating to the governing principles of universal service. Under Section 254(b)(5), “[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.”<sup>26</sup> The FCC’s two-step plan, with its evisceration of legacy high-cost support and legally dubious CAF, is by no means “specific,” “predictable,” or “sufficient.”

Under the proposed CAF, rural telecommunications providers will definitely lose legacy high-cost USF support and may never receive broadband support. With capped and cut legacy support,<sup>27</sup> rural providers will have no way to “preserve and advance universal service,”<sup>28</sup> as

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<sup>24</sup> *Id.* (emphasis added).

<sup>25</sup> *See NBP USF NOI NPRM* at ¶¶ 51 and 53 (discussing “specific first steps” to cut legacy high-cost funding).

<sup>26</sup> 47 U.S.C. § 254(b)(5).

<sup>27</sup> *NBP USF NOI NPRM* at ¶ 13.

<sup>28</sup> 47 U.S.C. § 254(b)(5).

required by law, since they will be denied the necessary and “sufficient” funding to maintain and advance their networks. Rural carriers rely on USF high-cost support to deliver advanced telecommunications services to their customers. The costs of constructing and maintaining rural communications networks are substantially higher than in urban areas. Capping and cutting USF support eliminates high-cost support intended for rural providers, in violation of the Act. Nonexistent support cannot, by definition, be “specific.” In addition, transferring this funding to the CAF introduces an extreme element of unpredictability into the entire universal service mechanism, also violating the Act. Rural carriers, many of whom are providers of last resort, will not be able to maintain their current networks, let alone continue building new infrastructure. Furthermore, rural providers rely on legacy high-cost support to finance private loans. Without the cost recovery provided by current USF mechanisms, this private lending will come to a halt, further stifling the preservation and advancement of universal service.

#### **IV. The FCC’s NOI and NPRM, if Implemented, Harms Rural Regions in Violation of Section 254 of the Act**

A large portion of high-cost support currently flows to small rural providers located in the communities that they serve. These rural 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 that have provided “sufficient”<sup>29</sup> high-cost support, require the FCC to provide a much better explanation than it has done in its NOI and NPRM for its blatant disregard of current facts,

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<sup>29</sup> 47 U.S.C. § 254(b)(5).

circumstances, and law when it proposes a complete about-face in its universal service policy.<sup>30</sup> 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.

In addition, the NOI's reverse auction suggestion,<sup>31</sup> combined with large bidding areas,<sup>32</sup> will likely favor 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."<sup>33</sup> 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.<sup>34</sup>

## V. Conclusion

The FCC has admitted acute doubt regarding its legal authority to support funding for broadband services under sections 214(e) and 254. However, the FCC has tentatively concluded to decimate legacy USF anyway. Not only does the FCC lack the legal authority to pursue this ill-advised 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

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<sup>30</sup> 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 providers' reliance on current "legacy" mechanisms.

<sup>31</sup> See *NBP USF NOI NPRM* at ¶ 19.

<sup>32</sup> *Id.* at ¶¶ 41-42.

<sup>33</sup> *Id.* at ¶ 19.

<sup>34</sup> See 47 U.S.C. § 254(b)(3) (requiring "comparable" urban and rural rates and services).

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, RTSPC respectfully urges the FCC to abandon its two-step plan to reform USF.

Respectfully submitted,

**RURAL TELECOMMUNICATIONS  
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Date: July 12, 2010