

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

To: The Commission

Reply Comments of the Rural Telecommunications Service Providers Coalition

The Rural Telecommunications Service Providers Coalition (“RTSPC”),¹ by its attorneys, hereby submits its reply comments in response to comments filed in the Notice of Inquiry (“NOI”) and Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceedings.² The comment round ended with no adequate legal justification for the Federal Communications Commission’s (“FCC” or “Commission”) ill-advised plan to dismantle “legacy” Universal Service Fund (“USF”) support and replace it with a vaguely described

¹ 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, CT Communications, 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.

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*”).

broadband-based fund. While legal support for the Commission’s plan was lacking, a number of commenters outlined how the Commission’s two-step plan,³ as outlined in its NOI, NPRM, and National Broadband Plan (“NBP”), violates Section 254 and/or Title II of the Communications Act of 1934, as amended (“Act”).⁴

I. The FCC Lacks the Authority to Fund Broadband Exclusively

The FCC’s tentative conclusion to “cap and cut”⁵ the current, historically successful high-cost universal service mechanism in order to fund broadband services rather than telecommunications services is expressly prohibited absent new legislation granting the FCC permission to define broadband services as supported services. Accordingly, any attempt by the Commission to transfer “legacy” funding to the broadband-based CAF will ultimately be reversed in court, wasting time and industry resources. As RTSPC noted in its comments, even FCC Chairman Julius Genachowski recognizes that the FCC may not have the authority to transfer universal service funds to the broadband CAF, acknowledging that the recent *Comcast v.*

³ 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”). *NBP USF NOI NPRM* at ¶ 1.

⁴ See Comments of the Alaska Telephone Association at 3, Alexicon Telecommunications Consulting at 5, Small Company Committee of the Louisiana Telecommunications Association at 3, National Association of State Utilities Consumer Advocates (“NASUCA”) at 4, Joint Comments of the National Exchange Carrier Association, Inc., National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, Western Telecommunications Alliance, and Rural Alliance at 10, Pioneer Communications, Inc. at 3, Rural Telecommunications Group at 7, T-Mobile USA, Inc. at 4, ICORE Companies at 12-14, and USA Coalition at 4 and 5.

⁵ *Id.* at ¶ 13.

FCC⁶ decision “raises questions” about whether the FCC has the authority to fundamentally alter USF to support broadband.⁷

In a recent speech to representatives from the rural telecommunications industry, the FCC Chairman assured the audience that “any reductions in the existing USF would be coordinated with increased funding through the new Connect America Fund.”⁸ While, as a policy matter, the Chairman’s position may sound sensible, the FCC may not make such policy without legislative permission. As one commenter noted, the FCC may not substitute its own policy preferences for the dictates of federal law.⁹

In his OPASTCO speech, the Chairman avoided any mention of his uncertainty about the Commission’s authority to fund the CAF with dollars directed by Congress to fund “telecommunications” services, not broadband services.¹⁰ The limitation on the Commission’s ability to fund non-telecommunications services was recently confirmed in the Boucher/Terry USF Reform bill¹¹ that the Chairman mentioned in his speech.¹² In the Boucher/Terry bill, “high-speed broadband service” and “information services” are specifically added to the definition of the types of services eligible for high-cost funding.¹³ The bill recognizes the legal

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

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

⁸ Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, 47th Annual OPASTCO Summer Convention and Trade Show, Seattle, Washington at 5 (July 28, 2010) (“OPASTCO Speech”).

⁹ Alaska Telephone Association at 1 (decrying the “apparent substitution of agency policy for federal law”).

¹⁰ RTSPC’s statutory argument appears in its Comments at 3-7.

¹¹ “Universal Service Reform Act of 2010,” Reps. Boucher and Terry, H.R. ___ (111th Cong. 2010).

¹² OPASTCO Speech at 4.

¹³ Universal Service Reform Act of 2010 at 9.

necessity of expanding the definition of universal service if broadband services are to be funded. Further, the bill changes the definition of entities eligible to receive high-cost support from “eligible **telecommunications** carriers” (“ETCs”) to “communications service providers,”¹⁴ in recognition that current universal service law restricts high-cost funding to **telecommunications** providers.¹⁵ RTSPC suggests that the FCC acknowledge Congress’ direction on universal service and recognize that, for the time being, it has no authority to create the CAF. Lacking such authority, it makes no sense for the Commission to speed forward with its proposed decimation of the current, successful universal service mechanism. Instead, the FCC must reform universal service within the confines of the law.

II. The FCC’s Cost Model Lacks Legally Required Transparency

According to the FCC, its Cost Model was created to “estimate the amount of additional funding required to close the broadband availability gap”¹⁶ and to be used as a possible tool to calculate ongoing support levels as part of the CAF.¹⁷ As the Pennsylvania Public Utility Commission points out, the FCC’s Cost Model “lacks transparency.”¹⁸ Even assuming *arguendo* that the FCC has the legal authority to establish the CAF based on its secretive Cost Model (which it clearly does not), the FCC’s refusal to release the inputs and source code of its proprietary Cost Model will make any conclusions or regulations based on this Cost Model legally suspect and in violation of the Administrative Procedure Act (“APA”). Specifically, the APA requires that affected parties must be able to cross-examine all evidence used by an agency to make a decision.

¹⁴ Universal Service Reform Act of 2010 at 2.

¹⁵ See RTSPC Comments at 6-7.

¹⁶ *NBP USF NOI NPRM* at ¶ 12.

¹⁷ *Id.* at ¶ 13.

¹⁸ Pennsylvania Public Utility Commission Comments at 5.

The relevant portion of Section 7(c) of the Administrative Procedure Act, 60

STAT. 241, 5 U.S.C. 1006(c), states:

*Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. * * * no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.*

This procedural right to examine evidence has been upheld by the U.S. Court of Appeals for the D.C. Circuit which held that the right to examine evidence outweighs most all agency rationales for withholding information. In *Wirtz v. Baldor Elec. Co.*, the D.C. Circuit concluded that cases such as *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959); *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957); *Jencks v. United States*, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957); and *Communist Party of the United States v. Subversive Activities Control Board*, 102 U.S.App.D.C. 395, 254 F.2d 314 (1958), “suggest strongly that ordinarily the Government cannot take action adverse to a citizen, in an administrative decision aimed directly at him or his group, without disclosing the evidence on which it relies.”¹⁹

RTSPC reminds the Commission that Section 10(e)(B) of the Administrative Procedure Act provides that, upon review, courts shall “set aside agency action, findings, and conclusions found to be * * * (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 (of the Administrative Procedure Act).” See 60 STAT. 243, 5 U.S.C. 1009(e)(B).

¹⁹ *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 528 (C.A.D.C., 1964) (setting aside minimum wage calculations when the Secretary of Labor would not release the details, including input data, of its wage study).

By keeping its Cost Model “in-house,” the FCC risks having any and all conclusions based on its Cost Model set aside. Further, the lack of details on how the FCC’s Cost Model will fund broadband provides no basis for anything but arbitrary “guesswork” comments. In light of this, the FCC’s rush to raid “legacy” universal service when it has provided only vague details about the CAF and strictly controlled outputs from its Cost Model is not only dangerous to the rural telecommunications community that relies on “legacy” universal service mechanisms, it is reckless and without the requisite legal foundation needed to withstand judicial scrutiny.

III. Conclusion

As noted by commenters addressing the legalities of the FCC’s universal service plan, the FCC lacks the legal authority to dismantle “legacy” universal service in order to fund its barely-defined CAF. RTSPC respectfully urges the FCC to work with the rural telecommunications industry to reform universal service and encourage broadband implementation in a manner that complies with the law.

Respectfully submitted,

**RURAL TELECOMMUNICATIONS
SERVICE PROVIDERS COALITION**

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