

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

In the matter of)
) WC Docket No. 02-60
Rural Health Care Support Mechanism)

REPLY COMMENTS OF NATIONAL LAMBDA RAIL, INC.

National LambdaRail, Inc. (“NLR”), by its attorneys, hereby submits these reply comments pursuant to the Commission’s Notice of Proposed Rulemaking in the above-captioned docket (“NPRM”).¹

In its comments in this matter, NLR supported the Commission’s proposal to allow Health Infrastructure Program (“HIP”) participants to receive up to 85 percent of the cost to access NLR and Internet2 and to pre-select connections to NLR and Internet2.² The record in this proceeding demonstrates similar support for the proposal.³ NLR, however, feels compelled to respond to the notion that the proposal adversely affects commercial backbone providers because it violates the Communications Act of 1934, as amended (“Act”), in particular, the “competitively neutral” requirement of section 254(h)(2) of the Act, that it conflicts with Commission precedent and that it runs counter to the goals of the Commission in this proceeding.

¹ *In re Rural Health Care Support Mechanism*, Notice of Proposed Rulemaking, 25 FCC Rcd 9371 (2010).

² It should be noted that the Commission is not proposing to require that HIP participants connect to NLR or Internet2. To the contrary, the Commission specifically states that such interconnections are neither “mandatory nor preferred.” *Id.* at 9388 ¶ 40.

³ *See, e.g.*, Comments of North Carolina TeleHealth Network, at IX; Comments of New England Telehealth Consortium at 3; Internet2 Ad Hoc Health Group Comments at 12-13; Fort Drum Regional Health Planning Organization at 3; Comments of California Telehealth Network at 14.

Although it is correct to state that section 254(h)(2) of the Act requires the Commission to establish “competitively neutral rules,” the phrase, as recognized by the Tenth Circuit, is not defined in the Act and is, at best, “ambiguous.”⁴ Nevertheless, it is reasonable to conclude that it is a question of fact that applies to firms who compete with one another.

NLR and Internet2 do not compete with commercial backbone providers. Indeed, as AT&T notes in its comments, they are a non-profit, membership organizations with “closed” networks that cater to the needs of their members who are representatives of the research and education community.⁵ Moreover, and also unlike commercial backbone providers, NLR does not impose any acceptable use policy on the users of its network and its focus is on links to government research institutions, as well as academic, public and private health care providers to provide them with advanced network capacity that can be tailored to meet their specific needs.

Based on these differences, it is difficult to fathom how a policy which encourages connections to NLR’s and Internet2’s networks is contrary to the statutory standard of competitive neutrality or the Commission policy in support of that standard. It is also difficult to fathom how it is contrary to the goals of the Commission in this proceeding, which is to encourage connections to such networks.

The Commission is merely acting on its belief that by connecting to NLR and Internet2 “health care providers at the state and local levels could have the opportunity to benefit from advanced applications in continuing education and research” and, further, that such connections

⁴ *RT Commc’ns, Inc. v. FCC*, 201 F.3d 1264, 1268 & n.2 (10th Cir. 2000).

⁵ Although NLR believes that non-profits and for-profits alike should be able to play a supporting role in the delivery of health care services to rural areas, it is clear that non-profits can and should be given a preference over for-profits. As stated in paragraph 77 of the Commission’s Order establishing the Rural Health Care Pilot Program in this Docket, non-profit funding ensures “efficiency in both cost and design” and “safeguards against program manipulation and protects against waste, fraud, and abuse.” *In re Rural Health Care Support Mechanism*, Order, 24 FCC Rcd 20360, 20399 ¶ 77 (2007). Congress recognized similar differences when it required by statute that non-profits receive a preference by NTIA under BTOP. *See* American Recovery and Reinvestment Act, Section 6001(e)(1)(B).

would yield “tremendous benefits,” including higher speeds, lower prices, greater redundancy, and more efficient and effective utilization of broadband by these institutions.⁶ Accordingly, NLR urges the Commission to adopt its proposal to fund membership fees to NLR’s and Internet2’s network for HIP participants and to permit such participants to pre-select access to those networks to meet their backbone needs.

Respectfully submitted,



Randall B. Lowe
Richard A. Gibbs
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20006
Tel: (202) 973-4200

Its Attorneys

September 23, 2010

⁶ NPRM, 25 FCC Rcd at 9388 ¶ 40. *See also* Federal Communications Commission, *Connecting America: The National Broadband Plan* at Ch. 10 (rel. Mar. 16, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf.