

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

In the Matter of)	
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Federal State Joint Board on Universal Service)	CC Docket No. 96-45
)	

To: Wireline Competition Bureau

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 Federal Communications Commission’s (“FCC” or “Commission”) Public Notice² and Notice of Proposed Rulemaking (“NPRM”)³ in the above-captioned proceedings. RTG opposes the FCC’s vague plan to direct the Universal Service Administrative Company (“USAC”) to “reclaim” high-cost support for some sort of broadband general fund for undetermined use at an undetermined time in the future. As discussed below,

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. Many of RTG’s members are competitive eligible telecommunications carriers. 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 *Wireline Competition Bureau Announces Deadlines for Comments on a High-Cost Universal Service Notice of Proposed Rulemaking*, WC Docket No. 05-337, CC Docket No. 96-45, DA 10-1790 (Sep. 21, 2010).

³ *In re High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Request for Review of Decision of Universal Service Administrator by Corr Wireless Communications, LLC*, WC Docket No. 05-337, CC Docket No. 96-45, Order and Notice of Proposed Rulemaking (Sep. 3, 2010) (“NPRM”).

the FCC lacks the authority to waive FCC Rule 54.709(b) and use high-cost universal service contributions for anything other than unambiguous high-cost support mechanisms.

I. Background

In the Order accompanying the NPRM, the FCC has decided to reclaim high-cost support surrendered by AT&T and Verizon in accordance with their respective mergers, and directs USAC to set these funds aside for a “fiscally responsible down payment” on future broadband universal service reforms as recommended by the National Broadband Plan (“NBP”).⁴ According to the FCC, the reclaimed support will be used as a “potential down payment on proposed broadband universal service reforms.”⁵ The FCC surmises that these funds *could* be used for indexing the E-rate funding cap to inflation; supporting a Mobility Fund to provide wireless broadband service in areas that lack coverage; improving utilization of the Rural Health Care program; and, in the long term, directly supporting broadband Internet services.⁶ In the NPRM, the FCC seeks comment on proposals to (1) permanently amend its rules to facilitate efficient use of reclaimed excess high-cost support, and (2) modify its rules to reclaim legacy support surrendered by a competitive eligible telecommunications carrier (“ETC”) when it relinquishes ETC status in a particular state.⁷ As discussed below, the funds from any new fund financed by the relinquished support must, by law, flow to a precise universal service mechanism and cannot be used for general NBP broadband funding.

⁴ NPRM at ¶20.

⁵ *Id.* at ¶1.

⁶ *Id.*

⁷ *Id.* at ¶2.

II. The FCC Lacks the Authority to Collect High-Cost Contributions for any Purpose Other than Precise Universal Service Mechanisms

The FCC does not cite any legal authority for the Commission and USAC to bank “reclaimed” support funds for an NBP “rainy day” fund or any other funding mechanism that is not currently a universal service support mechanism, nor can it. The FCC lacks such authority for its ill-defined fund to be made up of “reclaimed” high-cost contributions. Specifically, the FCC’s authority to assess high-cost support stems directly from Section 254(d) of the Telecommunications Act of 1934, as amended (“Act”). Section 254(d) of the Act requires telecommunications carriers that provide interstate telecommunications to contribute to specific, predictable, and sufficient *universal service mechanisms*.⁸ The FCC’s suggested uses for its new fund, made up of reclaimed high-cost support, are anything but specific “universal service mechanisms” as required by the Act. Further, the FCC does not have the authority to radically change the services that are supported by high-cost contributions without consulting the Federal-State Joint Board on Universal Service.⁹

Previous attempts by the FCC to expand its universal service contribution authority have been rejected by the U.S. Court of Appeals for the Fifth Circuit.¹⁰ The court also

⁸ 47 U.S.C. § 254(d) (emphasis added).

⁹ 47 U.S.C. § 254(c).

¹⁰ *Texas Office of Pub. Util. Counsel (TOPUC) v. FCC*, 183 F.3d 393, 447 (5th Cir. 1999) (limiting the FCC’s jurisdiction under Section 254 to interstate revenues after the FCC attempted to assess carriers for intrastate revenues).

clarified that the Act should be “narrowly” construed and authorizes the FCC to assess contributions only to fund “particular” programs.¹¹

A court would likely find the NPRM’s attempt to expand the Commission’s universal service contribution authority to be unconstitutional. RTG agrees with the argument that the FCC’s attempt to “bank” former high-cost funds for nebulous future uses violates the Origination and Taxing Clauses of the U.S. Constitution.¹²

The Commission’s proposal to take reclaimed money intended for high-cost support and instead use it for future, undetermined purposes is neither specific nor predictable, as required by the Act.¹³ The Act distinctly requires “support mechanisms” to be “specific” and “predictable.”¹⁴ The FCC’s proposed broadband general fund is in fact just the opposite. It is speculative and unpredictable, with support being earmarked and “banked” for programs that are yet to be created and that may lack legal justification.

Current uncertainty surrounding the Commission’s Title II authority over broadband services further underscores the problem with the Commission’s decision to bank reclaimed high-cost support. FCC Chairman Julius Genachowski has recognized that the FCC may not have the authority to transfer universal service funds to certain

¹¹ *Id.* at 527-428.

¹² *See Petition for Partial Reconsideration of SouthernLINC Wireless and the Universal Service for America Coalition*, WC Docket No. 05-337, CC Docket No. 96-45 (Sep. 29, 2010).

¹³ 47 U.S.C. § 254(b)(5).

¹⁴ *Id.*

broadband services, acknowledging that the recent *Comcast v. FCC*¹⁵ decision raises questions about the FCC's authority to adopt many of the well-intentioned proposals in the NBP.¹⁶ Until the FCC has clear Congressional authority to fund broadband services with universal service monies, it cannot "bank" funds for other, non-universal service purposes. In the meantime, the FCC should redistribute reclaimed high-cost support to existing ETCs.

If the Commission wants to stay within the letter of the law, it can only fund "specific" universal service mechanisms. RTG notes that the FCC does have additional authority over commercial mobile radio service ("CMRS") providers pursuant to Section 332 of the Act.¹⁷ Accordingly, RTG suggests that the Commission either redistribute reclaimed funds to existing wireless competitive ETCs pursuant to its current rules or consider a Mobility Fund that helps existing wireless competitive ETCs upgrade to 3G or better services.

Assessing carriers, and ultimately consumers, for "phantom" high-cost support needs is not in the public interest. The FCC originally instituted the interim, emergency cap to control universal service growth and it is disingenuous for the Commission to now abandon this rationale to create a slush fund for non-universal service projects-to-be-named-later. Consumers should not be asked to fund a legally suspect and undefined future fund.

¹⁵ *Comcast Corp. v. FCC*, ___ F.3d ___, No. 08-1291, 2010 WL 1286658 (D.C. Circ. Apr. 6, 2010).

¹⁶ Letter dated July 26, 2010 from J. Genachowski to Rep. John Dingell, Chairman, House Committee on Energy and Commerce.

¹⁷ 47 U.S.C. § 332.

III. The Interim Cap Rule Should Be Amended So That if an ETC Relinquishes Its ETC Status, Its Support Is Redistributed to Existing ETCs.

The Commission proposes amending the interim cap rule so that, if a competitive ETC relinquishes its ETC status in a state, the cap amount for that state is reduced by the amount of support that the competitive ETC was eligible to receive in its final month of eligibility, annualized.¹⁸ RTG opposes this conclusion since it will lead to the continued decimation of competitive ETC support. For example, states like Tennessee have witnessed competitive ETC support being cut by over 80 percent under the competitive support cap. RTG reminds the Commission that its competitive ETC Cap Order¹⁹ was “interim,” and it has harmed carriers in an arbitrary and long-term fashion since 2008. Basing future policy as suggested in the NPRM on “interim” logic is legally suspect and not in the public interest. RTG supports amending the interim cap rule so that if an ETC relinquishes its ETC status, its support is redistributed to existing ETCs or used for a precise and legal universal service purpose.

IV. Conclusion

The proposals in the NPRM would effectively deny competitive ETC’s additional high-cost support that they expected, pursuant to the FCC Rules, would be available once Verizon Wireless and Sprint surrendered their support. The public interest will not be served by continuing to assess consumers for Verizon Wireless’s and Sprint’s “phantom” high-cost support when such support will sit idle while the Commission attempts to implement its over-reaching

¹⁸ NPRM at ¶23.

¹⁹ *See High-Cost Universal Service Support; Federal State Joint Board on Universal Service*, 23 FCC Rcd 8834 (2008).

broadband plans. For the foregoing reasons, the FCC should not and cannot “reclaim” high-cost support for an unspecified future purpose.

Respectfully submitted,

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Date: October 7, 2010