
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
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing an Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109

COMMENTS OF CELLULAR SOUTH, INC.

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SUMMARY

The American Recovery and Reinvestment Act of 2009 simply required the Commission to submit a report containing a national broadband plan to the commerce committees of the House and Senate. It did not authorize the Commission to implement the plan or grant it any additional regulatory authority. Nevertheless, the Commission's staff produced a 340-page plan entitled *Connect America: The National Broadband Plan*, which was obviously prepared for implementation. The plan's recommendation to "fundamentally modernize" the Universal Service Fund ("USF") to provide the public support necessary to bring "robust, affordable broadband to all Americans" is being implemented in this proceeding as well as in others.

For obvious reasons, the Commission found it necessary to solicit public comment on the issue of whether it has the legal authority to adopt rules to extend USF support to broadband services. It propounded six "approaches" to buttress its legal authority to support broadband, and invited parties to comment on its approaches and any other legal theories that they could come up with that may make it lawful to provide USF support for broadband. Cellular South, Inc. ("Cellular South") is submitting its comments specifically in response to that invitation.

The reason that the Commission is grasping for jurisdictional straws is that the clear and unambiguous language of the jurisdiction-granting provisions of Title II of the Communications Act of 1934, as amended ("Act"), make USF support available only to common carriers that have been designated as eligible *telecommunications carriers* ("ETCs") pursuant to § 214(e) of the Act to use to provide the *telecommunications services* that are eligible to be supported by the USF under § 254(c), (e) of the Act. To make matters worse, codified in Titles I and II of the Act is the Commission's *Computer II* framework under which "telecommunications service," but not "information service," is subject to mandatory common-carrier regulation under Title II.

The Commission started down the slippery slope past its jurisdictional boundary to where it is mired today, when it classified facilities-based wireline broadband Internet access service as an “information service” in 2005, thereby relieving wireline telecommunications carriers of their obligation to provide broadband Internet access service on a common-carrier basis subject to Title II regulation. Now, the Commission wants to extend to broadband information service providers the benefit of the public USF support that is available under Title II only to telecommunications carriers that are regulated as common carriers. But broadband information service providers are *ineligible* to receive USF support under § 214(e), and they provide broadband information services that are *ineligible* to be supported by the USF under § 254(c).

Cellular South is one of the competitive ETCs that is eligible to receive the USF support that the Commission has already capped to generate some of the nearly \$1 billion in savings that it hopes to make available to ineligible entities to provide ineligible services. Cellular South challenges the Commission’s authority to misappropriate public funds in that manner based on the following principles:

- If broadband information service providers want Title II benefits (USF support under §§ 214(e) and 254), they must accept Title II regulatory obligations.
- If the Commission wants to bestow Title II benefits (USF support) on broadband service providers, it can do so in accordance with Title II only if the broadband service is provided as a telecommunications service and meets the criteria of § 254(c)(1)(A)-(D) for inclusion on its list of services supported by the USF.
- If the Commission wants to bestow USF support on broadband information service providers, Congress must be persuaded to amend the Act to expressly authorize the Commission to provide USF support to broadband information service providers.

Section 254(a)(2) of the Act mandates that the Commission “shall” implement the recommendations of the Federal-State Joint Board on Universal Service (“Board”). By implementing the universal service recommendation contained in the *National Broadband Plan*,

the Commission bypassed the Board completely. Thus, the Commission both violated the rulemaking requirements of § 254(a) and exceeded its delegated authority by implementing its staff's universal service recommendations without congressional authorization.

The Commission latched on to some ambiguity midst the six statutory universal service principles in § 254(b) as the pretext to interpret § 254 to authorize it to provide USF support to ineligible broadband information service providers. But the § 254(b) principles are simply statements of congressional policy that the Commission must apply it exercising its authority to administer the USF. Congressional policy statements are not delegations of regulatory authority.

There is no ambiguity in the jurisdiction-conferring provisions of § 214(e) and 254. Section 254(a) expressly delegates to the Commission the authority to adopt rules to “implement” §§ 214(e) and 254. Thus, the Commission's universal service jurisdiction is derived from Title II, and it currently extends to taking such actions, not inconsistent with the Act, as may be necessary to execute its authority to adopt and enforce rules implementing the directives that USF support go only to ETCs under §§ 214(e) and 254(e) and be used only to provide telecommunications services that are eligible for support under § 254(c), (e).

The Commission cannot support broadband information services by exercising its forbearance authority under § 10 of the Act. The forbearance proposed by Commission would be to refrain from enforcing §§ 214(e), 254(c)(1) and 254(e) *against information service providers and information services*, when § 10 authorizes forbearance only with respect to telecommunications carriers and services. Moreover, §§ 214(e), 254(c)(1) and 254(e) are not enforceable against telecommunications carriers or services. They impose the mandatory duty on the Commission to administer the USF program and disburse public funds under the program in accordance with §§ 214(e) and 254, and that duty is not subject to forbearance.

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To: The Commission

COMMENTS OF CELLULAR SOUTH, INC.

Cellular South, Inc. (“Cellular South”), by its attorney and pursuant to § 1.415(a) of the Commission’s rules (“Rules”), hereby submits its response to the Commission’s invitation to submit comments on the legal theories propounded in § IV of its Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking in the above-captioned consolidated rulemaking proceeding to buttress its authority under the Communications Act of 1934, as amended (“Act”), to provide universal service support for the deployment of broadband services.¹

INTRODUCTION

One would expect that the Commission would have satisfied itself as to its authority

¹ See *Connect America Fund*, FCC 11-13, at 29 (¶ 74) (Feb. 9, 2011) (“Notice”).

before directing its staff to prepare an ambitious plan to “fundamentally modernize” the Universal Service Fund (“USF”) to provide the public support necessary to bring “robust, affordable broadband to all Americans.”² That apparently was not the case.

Once presented with the staff’s 340-page plan,³ as well as an agenda for its implementation,⁴ the Commission had to decide whether it had sufficient authority to provide direct USF support to broadband services before exercising that authority by putting that aspect of the *National Broadband Plan* into effect. The Commission could hardly overlook the issue since the plan itself recognized that the Commission’s authority to support broadband was subject to debate and was yet unresolved.⁵

Implementation of the *National Broadband Plan* began at least as early as September 3, 2010, when the Commission issued an order in WC Docket No. 05-337⁶ that began “reorienting” the USF to meet the nation’s broadband availability challenge.⁷ The Commission directed that the high-cost universal service support surrendered by Verizon Wireless and Sprint Nextel not be redistributed to other competitive eligible telecommunications carriers (“CETCs”), but be reserved “as a fiscally responsible down payment on proposed broadband universal service reforms, as recommended in the *National Broadband Plan*, including to ... directly support

² Notice at 4 (¶ 1).

³ See Federal Communication Commission, *Connecting America: The National Broadband Plan* (Mar. 16, 2010) (“*National Broadband Plan*”).

⁴ Accompanying, but not appended to, the *National Broadband Plan* was an agenda listing “more than 60 key actions, proceedings, and initiatives that the Commission intends to undertake over the next year and beyond to implement the recommendations of the National Broadband Plan.” *Broadband Action Agenda* at 1.

⁵ See *National Broadband Plan* at 337.

⁶ See *High-Cost Universal Service Support*, 25 FCC Rcd 12854 (2010) (“*Corr Wireless I*”).

⁷ Notice at 4 (¶ 1).

broadband internet service for all Americans.”⁸ The Commission subsequently amended its universal service rules to reclaim all high-cost support relinquished by CETCs so that the funds will be available to advance the universal service broadband initiatives recommended by the *National Broadband Plan*.⁹ The Commission rushed to make its rule change effective by December 31, 2010, for the express purpose of preventing the redistribution of approximately \$5.4 million in high-cost support to other CETCs.¹⁰

When it released its *Notice* just over a month later, the Commission found it necessary to solicit public comment on the issue of whether it has the legal authority to adopt rules to extend USF support to broadband services as recommended in the *National Broadband Plan*.¹¹ It described six “approaches” that would buttress its legal authority to support broadband.¹² And it invited parties to comment on those approaches and “any other legal theories that they believe will provide a sound legal basis for providing universal service support for broadband.”¹³ We find it telling that the Commission is grasping for legal theories to give it a legal basis for its universal service broadband initiatives.

If there is any viable legal theory under which USF support can go directly to support broadband services, the Commission should have adopted it before issuing *Corr Wireless II* and reserving \$5.4 million in universal service funds for broadband deployment that were to be

⁸ *Corr Wireless I*, 25 FCC Rcd at 12862. See also *Notice* at 94 n.436.

⁹ See *High-Cost Universal Service Support*, 25 FCC Rcd 18146, 18148 (2010) (“*Corr Wireless II*”).

¹⁰ See *id.* at 18148.

¹¹ See *Notice* at 24 (¶ 60).

¹² See *id.* at 24-29 (¶¶ 61-73).

¹³ *Id.* at 29 (¶ 74). This was not the first time the Commission sought the assistance of the public in coming up with a legal theory under which it could provide universal service support for broadband Internet access service. On June 17, 2010, the Commission set forth its theories and, for each theory, asked for comment on the “administrative record that would be needed to successfully defend against a legal challenge to implementation of the theory.” *Framework for Broadband Internet Service*, 25 FCC Rcd 7866, 7883 (2010).

disbursed to support services that are currently eligible for USF support. Instead, the Commission claimed its legal authority under no less than §§ 151, 152, 154(i), 154(j), 201-205, 214, 220, and 254 of the Act.¹⁴ The *Notice* has succeeded only in repudiating that claim.

We submit that the Commission knows perfectly well that it has no legal authority to put all of its universal service broadband initiatives into effect. But it is perfectly clear that the Commission knows how to exercise its “express statutory authority to extend universal service support to broadband services that providers offer as *telecommunications* services.”¹⁵ In 2003, the Commission stated the obvious when it recited the statutory criteria set forth in § 254(c) of the Act that must be satisfied before broadband *telecommunications* services could be added to its list of services supported by the USF.¹⁶

The Commission is ignoring the obvious now, because in 2005 it classified “facilities-based wireline broadband Internet access service” as an “information service,” thereby relieving wireline telecommunications carriers of their obligation to provide broadband Internet access service on a common carrier basis subject to Title II regulation.¹⁷ Now, the Commission wants to allow the same carriers to “have their cake and eat it too.” Having allowed telecommunications carriers to avoid common carrier regulation under Title II — and to escape the mandatory Title II obligation to charge just, reasonable, and nondiscriminatory rates — by allowing them to offer broadband as an information service,¹⁸ the Commission claims it has the

¹⁴ See *Corr Wireless II*, 25 FCC Rcd at 18149.

¹⁵ *Notice* at 24 (¶ 60) (emphasis added).

¹⁶ See *Federal-State Joint Board on Universal Service*, 18 FCC Rcd 15090, 15091-96 (2003). See also *Notice* at 23 (¶ 57).

¹⁷ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14862 n.32, 14911 n.328 (2005) (“*Wireline Broadband Order*”), petition for review denied, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

¹⁸ See *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 975-76

authority to extend to broadband information service providers the benefit of the public support that is available under Title II only to telecommunications carriers that are regulated as common carriers.¹⁹

Cellular South is among the CETCs that are eligible to receive the USF support that the Commission is bent on capping or phasing out purportedly in the interest of “fiscal responsibility,” but in reality to generate some of the nearly \$1 billion in savings that the Commission hopes to make available to provide support to broadband information service providers that they are ineligible to receive.²⁰ Accordingly, Cellular South will subject the legal theories on which the Commission claims its jurisdiction to the “close and searching analysis” that is warranted when the Commission attempts to define the scope of its own power.²¹ That analysis will be guided by the following principles that Cellular South believes are firmly rooted in the universal service provisions of Title II:

- If broadband information service providers want Title II benefits (USF support under §§ 214(e) and 254), they must accept Title II regulatory obligations.
- If the Commission wants to bestow Title II benefits (USF support) on broadband service providers, it can do so only in accordance with Title II and only if the broadband service is provided as a telecommunications service and meets the criteria of § 254(c)(1)(A)-(D) for inclusion on the Commission’s list of services supported by the USF.
- If the Commission wants to bestow Title II benefits (USF support) on broadband

(2005).

¹⁹ *See Notice* at 24 (¶ 60).

²⁰ *See id.* at 7 (¶ 10), 94 (¶ 276).

²¹ *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987) (“*ACLU*”), *cert. denied*, 485 U.S. 959 (1988).

information service providers, Congress must be persuaded to amend the Act to expressly authorize the Commission to provide USF support to broadband information service providers.

ARGUMENT

I. THE COMMISSION LACKS THE STATUTORY AUTHORITY TO IMPLEMENT THE STAFF'S *NATIONAL BROADBAND PLAN*

In order to implement the broadband universal service initiatives recommended in the *National Broadband Plan*, the Commission is proposing that its statutorily-based universal service program be “comprehensively reformed” and transformed “into a new, more efficient, broadband-focused Connect American Fund” (“CAF”).²² Because the Commission is in the process of implementing the staff’s *National Broadband Plan*, we examined the authority granted the Commission under § 6001(k) of the American Recovery and Reinvestment Act of 2009 (“Recovery Act”) pursuant to which the plan was prepared.²³

The Recovery Act merely required the Commission to submit “a report containing a national broadband plan” to the commerce committees of the House and Senate by February 17, 2010.²⁴ It did not extend any additional authority to the Commission beyond authorizing it to have access to data provided to other federal agencies to use in the development of the plan.²⁵ In fact, Congress gave the Assistant Secretary of Commerce for Communications and Information the authority to prescribe the rules necessary to carry out the purposes of § 6001 of the Recovery

²² *Notice* at 9 (¶ 18).

²³ *See Joint Statement on Broadband*, 25 FCC Rcd 3420, 3420 & n.1 (2010). Section 6001 of the Recovery Act is codified at 47 U.S.C. § 1305.

²⁴ 47 U.S.C. § 1305(k)(1). The goal of the plan was to ensure that all the American people have access to broadband capability and the plan was to include benchmarks for meeting that goal. *See id.* § 1305(a)(2). Congress also specified the categories of information that the plan was to include. *See id.* § 1305(k)(2)(A)-(D).

²⁵ *See id.* § 1305(k)(3).

Act.²⁶ The Recovery Act provided funding for broadband programs at RUS and NTIA, but not at the Commission.²⁷

Congress neither authorized the Commission to implement a national broadband plan nor authorized the expenditure of funds necessary to prepare a plan for implementation. The Commission initially understood that it would play a limited role under the Recovery Act and that it was only one of a number of federal departments and agencies that had been tasked with substantive broadband-related responsibilities.²⁸ The Commission's job was to develop "a national broadband plan, which would include everything from policies the Commission could implement within its other statutory authority to recommendations to Congress regarding proposed policies or programs to be overseen by other governmental or non-governmental entities."²⁹ The Commission's responsibilities under the Recovery Act were to end by February 17, 2010.³⁰

The Commission's staff had a different view of the Commission's role under the Recovery Act. The staff obviously prepared its *National Broadband Plan* for implementation by the Commission.³¹ And it appears that the implementation of the *National Broadband Plan* has become the Commission's top priority.

The Commission complied with § 6001(k) of the Recovery Act by delivering the

²⁶ See 47 U.S.C. § 1305(m).

²⁷ *A National Broadband Plan for Our Future*, 24 FCC Rcd 4342, 4365 (2009).

²⁸ See *id.* at 4378, 4384-87 (App.).

²⁹ *Id.* at 4376.

³⁰ See *id.* at 4344.

³¹ See *National Broadband Plan* at 337. We note that the Commission issued *Corr Wireless I* on schedule. See *Broadband Action Agenda* at 3.

National Broadband Plan to Congress for its consideration.³² The plan was not voted on by the Commissioners or otherwise adopted by the Commission.³³ It was not published in the Federal Register, the FCC Record, or Pike and Fischer Communications Regulation and, therefore, it cannot be relied upon, used or cited as precedent by the Commission, except as against persons who have actual notice of the plan.³⁴ As Commissioner McDowell observed, the *National Broadband Plan* that was sent to Congress “does not carry with it the force and effect of law.”³⁵

The Commission may plausibly claim authority to implement some of the *National Broadband Plan* under § 706 of the 1996 Act, now codified at 47 U.S.C. § 1302, which “authorizes the Commission (along with state commissions) to take actions, within their subject matter jurisdiction and not inconsistent with other provisions of law, that encourage the deployment of advanced telecommunications capability by any means listed in the [§ 706(a)].”³⁶ Section 706 does not authorize the implementation of the *National Broadband Plan* to the extent it calls for “reorienting USF ... to meet the nation’s broadband availability challenge.”³⁷ Implementation of the universal service recommendations contained in the *National Broadband Plan* is inconsistent with § 254(a)(2), which mandates that the Commission “shall” implement the recommendations of the Federal-State Joint Board on Universal Service (“Joint Board” or “Board”), not those of its own staff.³⁸

³² See *Joint Statement on Broadband*, 25 FCC Rcd at 3420.

³³ See *Statement of Commissioner Robert M. McDowell*, 2010 WL 972280, at *1 (Mar. 16, 2010).

³⁴ See 47 C.F.R. § 0.445(e).

³⁵ *Statement of Commissioner Robert M. McDowell*, 2010 WL 972280, at *1.

³⁶ *Preserving the Open Internet*, 25 FCC Rcd 17905, 17969 (2010).

³⁷ *Notice* at 4 (¶ 1).

³⁸ See 47 U.S.C. § 254(a)(2). By implementing the staff’s universal service recommendations, the Commission by-passed the Joint Board, thereby violating the notice-and-comment rulemaking requirements of § 254(a) and exceeding its delegated authority by implementing its staff’s universal service recommendations without congressional authorization. See *infra* pp. 28-31.

Finding no jurisdictional grant in § 6001(k) of the Recovery Act, we turn to the provisions of the Commission’s enabling statute, particularly §§ 214(e) and 254 which are the only direct sources of the Commission’s authority to administer its universal service program.

II. THE COMMISSION CURRENTLY LACKS JURISDICTION TO DISBURSE UNIVERSAL SERVICE FUNDS TO SUPPORT BROADBAND SERVICES

A. The Commission Must Conform to the Terms of the Jurisdiction-Confering Provisions of § 254 of the Act

Congress created the Commission’s universal service program by the enactment of §§ 102 and 256 of the Telecommunications Act of 1996 (“1996 Act”). The program is codified in §§ 214(e) and 254.³⁹ Thus, any examination of the Commission’s authority or jurisdiction⁴⁰ with respect to its universal service program must be founded on “the elementary tenet that it is the statute that constitutes law.” *Ayuda, Inc. v. Attorney General*, 848 F.2d 1297, 1299 (D.C. Cir. 1988). Absent a clearly expressed congressional intention to the contrary, the language of §§ 214(e) and 254 “must ordinarily be regarded as conclusive.” *Consumer Product Safety Comm’n v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

The language of §§ 214(e) and 254 is particularly clear, because the 1996 Act explicitly defined the key terms “information service” and “telecommunications service” based on the Commission’s *Computer II* framework.⁴¹ See *Brand X*, 545 U.S. at 975-77. Consistent with the Commission’s *Computer II* regime, the 1996 Act subjected telecommunications services and carriers, but not information services or information service providers, to mandatory regulation

³⁹ See 47 U.S.C. §§ 214(e), 254.

⁴⁰ We will use the terms “authority” and “jurisdiction” as synonymous with “subject matter jurisdiction” or the Commission’s “statutory or constitutional power” to take actions, make rules and regulations, and issue orders. Cf., *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (defining federal-court subject-matter jurisdiction) (emphasis in original).

⁴¹ See *Amendment of § 64.703 of the Commission’s Rules (Second Computer Inquiry)*, 77 F.C.C. 2d 384 (1980).

as common carriers under Title II. *See id.* Because the terms “telecommunications service” and “information service” directly impact on the Commission’s Title II jurisdiction, and the terms “telecommunications services” and “telecommunications carriers” were prominently employed by Congress in §§ 214(e) and 254, the Commission may not administer the universal service program in a manner that is at odds with the statutory definitions of those terms. *See ACLU*, 823 F.2d at 1566.

It is axiomatic that the Commission may act only pursuant to authority delegated to it by Congress. *See American Library Ass’n v. FCC*, 406 F.3d 689, 690 (D.C. Cir. 2005). Indeed, the source of the Commission’s jurisdiction must be an express delegation of regulatory authority. *See Comcast Corp. v. FCC*, 600 F.3d 642, 654-55 (D.C. Cir. 2010). That is particularly true in this case.

Because §§ 214(e) and 254 constitute the current law, and only Congress can amend the Act, it was for Congress to decide whether its Title II universal service program should be fundamentally “redirected” or “refocused.” Therefore, the circumstances call for a searching analysis of the language of the jurisdiction-conferring provisions of the Act, which are the “provisions going to the agency’s power to regulate an activity or substance.” *ACLU*, 823 F.2d at 1566 n.32. With respect to the Commission’s universal service program, §§ 214(e) and 254 are the only relevant jurisdiction-conferring provisions of the Act.

The universal service provisions of § 254 contain the Commission’s only express delegation of authority. The Commission was explicitly directed by § 254(a) to adopt rules to “implement” §§ 214(e) and 254, particularly including the definition of the service to be supported by the USF, by employing the notice-and-comment procedures specified in § 254(a).⁴²

⁴² *See* 47 U.S.C. § 254(a).

Thus, the Commission’s universal service jurisdiction is derived from Title II, and it currently extends to taking such actions, not inconsistent with the Act, as may be necessary to execute its authority to adopt and enforce rules implementing §§ 214(e) and 254.⁴³

B. The Commission Only Has Jurisdiction to Provide USF Support to ETCs that Offer Broadband Services If those Services Are Added to the List of Supported Telecommunications Services

As we will show, the language of §§ 214(e) and 254 was carefully crafted by Congress to ensure that only telecommunications carriers that are burdened with providing telecommunications services subject to Title II regulation would receive the benefit of the USF support available under Title II. The language of the governing provisions of §§ 214(e) and 254 simply cannot be read to permit universal service support to flow either to an entity other than a common carrier that has been designated as an eligible telecommunications carrier (“ETC”) under § 214(e), or to an ETC that will use the support for the provision of a service that does not meet the Commission’s definition of the telecommunications services that are supported by the USF under §§ 254(c)(1) and 254(e).

Section 214(e)(1) clearly provides that a “common carrier” designated as an ETC by a state commission under § 214(e)(2), or by a state commission or the Commission under § 214(e)(3) or § 214(e)(6), “shall” be eligible to receive universal service support in accordance with § 254 and “shall” offer the services that are supported by the USF under § 254(e).⁴⁴ That ETCs are limited to common carriers is reinforced explicitly in §§ 214(e)(2) and 214(e)(3).⁴⁵

⁴³ See 47 U.S.C. §§ 151 & 154(i).

⁴⁴ See *id.* § 214(e)(1).

⁴⁵ See *id.* at 214(e)(2) (“A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of [§ 214(e)(1) as an [ETC] . . .”) and 214(e)(3) (“the Commission, with respect to interstate services, or a State commission, with respect to intrastate service, shall determine which common carrier or carriers are best able to provide such service . . .”).

Common carriers are telecommunications carriers;⁴⁶ common carrier services are telecommunications services;⁴⁷ and telecommunications carriers are subject to mandatory common carrier regulation under Title II of the Act.⁴⁸ Thus, the Commission's jurisdiction is limited to adopting and enforcing rules that provide USF support only to common carrier ETCs that are subject to Title II regulation.

The Commission recognizes that it has express statutory authority under § 254(c) to extend universal service support to broadband services that providers offer as telecommunications services.⁴⁹ However, the express language of § 254(c) leaves no room for the Commission to construct a theory under which it can extend USF support to broadband services, unless and until such services are determined to meet the § 254(c)(1) definition of the telecommunications services that can be supported by the USF.⁵⁰ To put broadband services on the list of supported services, the Joint Board must first recommend that the Commission do so “consider[ing] the extent to which such telecommunication services” are, *inter alia*, “being deployed in public telecommunications networks by telecommunications carriers.”⁵¹ Accordingly, the Commission cannot make broadband services eligible for USF support without first determining that such services are being provided on a common carrier basis as “telecommunications services” and are at least deployed in public telecommunications networks by “telecommunications carriers.”

⁴⁶ See *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21587-88 (1998) (“the term ‘telecommunications carrier’ means essentially the same as common carrier”).

⁴⁷ The Commission determined that the legislative history of the 1996 Act “indicates that the definition of telecommunications service is intended to clarify that telecommunications services are common carrier services.” *Cable & Wireless, PLC*, 12 FCC Rcd 8516, 8521 (1997).

⁴⁸ See *Brand X*, 545 U.S. at 975-76.

⁴⁹ See *supra* note 15 and accompanying text.

⁵⁰ See 47 U.S.C. § 254(c)(1).

⁵¹ *Id.* § 254(c)(1)(C).

If it takes into account “advances in telecommunications and information technologies and services,”⁵² the Joint Board could reasonably find that broadband Internet access service meets the statutory definition of “telecommunications service.”⁵³ If it determines that broadband Internet access service is being provided as a telecommunications service over telecommunications networks by telecommunications carriers, and the service otherwise meets the criteria of § 254(c)(1), the Board may recommend that the Commission add broadband access to Internet service provided by telecommunications carriers to the list of the nine services or functionalities that are supported by the USF.⁵⁴ If, and only if, the Commission adopts the Board’s recommendation can ETCs — and only ETCs — receive USF disbursements for providing broadband Internet access service.

The Commission is wrong to think that it has the authority “to extend universal service support to broadband services offered as an information service.”⁵⁵ Under the Commission’s current broadband regulatory scheme, “the categories of ‘information service’ and ‘telecommunications service’ are mutually exclusive.”⁵⁶ Thus, a broadband service cannot be deemed a telecommunications service if it is offered as an information service. And, under § 254(e), USF support can only be used for the provision, maintenance, and upgrading of telecommunications services and facilities.⁵⁷

Moreover, a telecommunications carrier can “be treated as a common carrier ... only to

⁵² 47 U.S.C. § 254(c)(1).

⁵³ See Lee L. Selwyn & Helen E. Golding, *Revisiting the Regulatory Status of Broadband Internet Access: A Policy Framework for Net Neutrality and an Open Competitive Internet*, 63 Fed. Comm. L.J. 91, 107-20 (2010).

⁵⁴ See 47 C.F.R. § 54.101.

⁵⁵ Notice at 24 (¶ 60).

⁵⁶ *Wireline Broadband Order*, 20 FCC Rcd at 14862 n.32, 14911 n.328.

⁵⁷ See 47 U.S.C. § 254(e).

the extent that it is engaged in providing telecommunications services.”⁵⁸ Consequently, when it offers broadband service as an information service, a broadband service provider cannot be treated as a common carrier. As a result, the provider would be ineligible to receive universal service under §§ 214(e)(1) and 254(e), since only a common carrier can be an ETC and receive USF support.⁵⁹

If it extended universal service support to broadband services offered as an information service, the Commission would permit support both to: (1) go to a broadband service provider that is ineligible to receive such support; and (2) be used for a service that is ineligible for such support. The Commission would not only exceed its jurisdiction, but violate its duty to execute and enforce §§ 214(e) and 254(e).⁶⁰ The same would be true if the Commission authorizes USF support to broadband services that are: (1) offered by entities that are not ETCs; and/or (2) not included among the supported telecommunications services listed in § 54.110 of the Rules.

C. The § 254(b) Universal Service Principles
Are Not Delegations of Regulatory Authority

Regrettably, the *Notice* evinces the Commission’s intent to concoct “a whole new regime of regulation” under the guise of statutory construction. *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 234 (1994). The Commission claims that § 254 could “reasonably be interpreted to authorize” universal service support to broadband service if it is “read as a whole.”⁶¹ However, the Commission finds its authority to support broadband specifically in § 254(b), which requires the Joint Board and the Commission simply to “base *policies* for the

⁵⁸ 47 U.S.C. § 153(44).

⁵⁹ *See id.* § 214(e)(1).

⁶⁰ *See id.* § 151.

⁶¹ *Notice* at 24 (¶ 61).

preservation and advancement of universal service” on the enumerated “principles.”⁶²

Adopting a statutory construction built by AT&T Services, Inc. (“AT&T”),⁶³ the Commission states that § 254(b) is “not merely aspirational — it directs that universal service ‘shall’ be based on [the statutory] principles.”⁶⁴ That is true. However, each of the principles in 254(b) internally is phrased in terms of “should,” which “indicates a recommended course of action, but does not itself imply the obligation associated with ‘shall.’” *Qwest Corp. v. FCC*, 258 F.3d 1191, 2000 (10th Cir. 2001). It can be presumed that “Congress knew very well what it was saying. It surely knows the difference between ‘should’ and ‘shall.’” *C.J. Community Services, Inc. v. FCC*, 246 F.2d 600, 664 (D.C. Cir.1957).

Under § 254(b), the Commission “must base its policies on the principles, but any particular principle may be trumped in the appropriate case.” *Qwest*, 258 F.3d at 1200. Therefore, § 254(b) may be construed to delegate “difficult policy choices to the Commission’s discretion” when it implements and executes §§ 214(e) and 254,⁶⁵ but it cannot be read to constitute a jurisdictional grant.

In fact, the § 254(b) principles, including the “key” § 254(b)(3) principle, are themselves subject to the statutory limitations on the Commission’s jurisdiction. *See Qwest*, 258 F.3d at 1199-1200 & n.6. Thus, those principles cannot constitute a delegation of regulatory authority separate and apart from that expressly delegated by § 254(a), much less a delegation of authority

⁶² 47 U.S.C. § 254(b) (emphasis added). In particular, the Commission relies on two “key principles” that basically provide that access to “advanced telecommunications and information services” should be available “in all regions of the Nation” and to “[c]onsumers in all regions of the Nation.” *Notice* at 22 (¶ 56) (quoting 47 U.S.C. § 254(b)(2), (3)).

⁶³ *See* AT&T, *The FCC Has Statutory Authority to Fund Universal Broadband Service Initiatives*, at 2 (Jan. 29, 2010) (“AT&T White Paper”). The AT&T White Paper was provided to the Commission as an attachment to the letter cited at footnote 70 of the *Notice*.

⁶⁴ *Notice* at 23 (¶ 56).

⁶⁵ *Id.* (¶ 56) (quoting *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 615 (5th Cir. 2000)).

to implement §§ 214(e) and 254 in a manner inconsistent with their terms.

The only authority arguably delegated to the Commission under § 254(b) is the discretion to adopt universal service “policies” based on the statutory “principles.” However, the principles are nothing more than congressional policy statements that the Commission should follow in the implementation and execution of §§ 214(e) and 254. But congressional policy statements “are just that — statements of policy. They are not delegations of regulatory authority.” *Comcast*, 600 F.3d at 654. For proof of that point, the Commission need look no further than to § 254(b)(7), which permits the Joint Board and the Commission to adopt “[a]dditional principles.”⁶⁶

If the § 254(b) principles could be considered a source of the Commission’s subject matter jurisdiction, the Commission could expand its jurisdiction by adopting additional principles as it, and the Joint Board, deem necessary and appropriate under § 254(b)(7). That cannot be, because it is “beyond dispute ... that ‘[a]n agency may not confer power upon itself.’”⁶⁷ The Commission may not conflate congressional authority to adopt universal service principles into permission to assume unfettered jurisdiction. As the court noted in *ACLU*, “it seems highly unlikely that a responsible Congress would implicitly delegate to [the Commission] the power to define the scope of its own power.” 823 F.2d at 1567 n.32.

D. Section 706 of the 1996 Act Is Not an Independent Grant of Authority That Could Trump §§ 214(e) and 254(e)

As we have already established, the provision of universal support for broadband information services would violate §§ 214(e) and 254(e). And contrary to the Commission’s

⁶⁶ 47 U.S.C. § 254(b)(7).

⁶⁷ *Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of § 315(b) of the Act*, 7 FCC Rcd 4123, 4126 (1992) (quoting *Louisiana PSC v. FCC*, 476 U.S. 355, 374 (1986)).

suggestion, § 706 of the 1996 Act does not give the Commission the authority or discretion to reorient its Title II universal service program.⁶⁸ As the Commission has held, based on “the statutory language, the framework of the 1996 Act, its legislative history, and Congress’ policy objective,” § 706 “does not constitute an independent grant of authority.” *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24047 (1998) (“*Advanced Services Order*”). Because it has never overruled *Advanced Services Order*,⁶⁹ the Commission “remains bound by its earlier conclusion that [§] 706 grants no regulatory authority.” *Comcast*, 600 F.3d at 659.⁷⁰

We question how the Commission can read § 706 to trump §§ 214(e) and 254(e), especially after “disavowing a reading of [§] 706 that would allow the agency to trump specific mandates of the ... Act.” *Preserving an Open Internet*, 25 FCC Rcd at 17969. Be that as it may, § 706(a) requires the Commission and each state commission “with regulatory jurisdiction over *telecommunications services* [to] encourage the deployment ... of advanced telecommunications capability to all Americans ... by utilizing ... price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulatory methods that remove barriers to infrastructure investment.”⁷¹ Thus, § 706(a) speaks of advanced telecommunications capability using Title II regulatory language.

⁶⁸ See *Notice* at 26 (¶¶ 66 & 67).

⁶⁹ The Commission recently reaffirmed its holding in *Advanced Services Order* that § 706 “did not give it independent authority — in other words, authority over and above what it otherwise possessed.” *Preserving the Open Internet*, 25 FCC Rcd at 17969.

⁷⁰ Because § 706 does not grant it jurisdiction, the Commission should not have relied on the D.C. Circuit’s “conclusion” that “[t]he general and generous phrasing of § 706 means that the FCC possesses significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband.” *Notice* at 26 (¶ 67) (quoting *Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.3d 903, 906-07 (D.C. Cir. 2009)). The D.C. Circuit clarified that it concluded that § 706 “merely supported the Commission’s choice between regulatory approaches clearly within its statutory authority under other sections of the Act.” *Comcast*, 600 F.3d at 128.

⁷¹ 47 U.S.C. § 1302(a) (emphasis added).

Beyond encouraging the deployment of advanced telecommunications capability, § 706 did not work any change in Title II generally, nor §§ 214(e) and 254(b) specifically.⁷² And although the definition of “advanced telecommunications capability” in § 706(d)(1) may include “broadband Internet access,”⁷³ § 254(b) speaks in terms of “advanced telecommunications *and* information *services*,”⁷⁴ which means that advanced “telecommunications services” must be distinct from “information services” since both terms are defined as such under the Act.⁷⁵ Consequently, § 706 cannot be read to disturb the explicit language of § 254 which permits advanced telecommunications services to be supported by universal service if the Joint Board and the Commission comply with § 254(c)(1), does not speak to broadband information service.

We also note that the Commission already took the actions called for by § 706(b) when it issued its *Wireline Broadband Order* in 2005 that classified broadband Internet access service offered by wireline facilities-based providers as an information service under the Act. *See* 20 FCC Rcd at 14858, 14862-65. The Commission effectively lifted Title II regulation of ILEC broadband Internet access service, because it was “confident” that deregulation would “promote the availability of competitive broadband Internet access services to consumers, via multiple platforms,”⁷⁶ and allow ILECs “to respond to changing marketplace demands effectively and efficiently, spurring them to invest in and deploy innovative broadband capabilities.”⁷⁷ The

⁷² *See* Selwyn, *supra* note 53, at 117.

⁷³ *See Preserving the Open Internet*, 25 FCC Rcd at 17968.

⁷⁴ *See* 47 U.S.C. § 254(b)(2), (3) (emphasis added). *See also id.* § 254(c)(1) (“Universal service is 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”).

⁷⁵ *See id.* § 153(20), (46). The Commission erred when it claimed that the Act does not define “advanced telecommunications and information services.” *Notice* at 22 n.56. The terms refer to the advanced forms of “telecommunications service” and “information service” as defined in the Act.

⁷⁶ *Wireline Broadband Order*, 20 FCC Rcd at 14856.

⁷⁷ *Id.* at 14855. The Commission concluded that “the record show[ed] that the existing regulations

Commission specifically found that the “directives” of § 706 required it to take deregulatory measures that “promote infrastructure investment,”⁷⁸ consistent with its statutory obligations to promote competition, reduce regulation, and encourage the rapid deployment of new telecommunications technologies.⁷⁹

When it determined in July 2010 that § 706(b) was “triggered,”⁸⁰ the Commission effectively admitted that the deregulatory actions it took pursuant to § 706(b) in 2005 — that allowed ILEC broadband Internet access service to be provided on a non-common carrier basis as an information service — had failed to spur ILECs to make the investment in broadband infrastructure necessary to meet the § 706(a) goal of deploying broadband to “*all* Americans” in a “reasonable and timely” fashion.⁸¹

Having admitted that allowing ILECs to provide broadband as an information service did not incentivize them to invest their own capital to deploy broadband in high-cost areas, the Commission is proposing to give ILECs universal service funds to invest in providing broadband as an information service in high-cost areas. In short, the Commission is looking to § 706 to authorize the misappropriation of Title II universal service funding to support broadband provided on a *non-common carrier basis* as an information services, when the funds were statutorily-designated for telecommunications services provided on a *common carrier basis*.

constrain technological advances and deter broadband infrastructure investment by creating disincentives to the deployment of facilities capable of providing innovative broadband Internet access services.” *Id.* at 14865.

⁷⁸ *Wireline Broadband Order*, 20 FCC Rcd at 14865.

⁷⁹ *See id.* at 14856 n.8, 14865.

⁸⁰ *Notice* at 26 (¶ 66) (citing *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to § 706 of the 1996 Act, as Amended by the Broadband Data Improvement Act*, 25 FCC Rcd 9556, 9558 (2010) (“*Sixth Broadband Report*”).

⁸¹ *Sixth Broadband Report*, 25 FCC Rcd at 9558.

Neither § 706 nor any other provision of the Act authorizes such a gross violation of §§ 214(e) and 254(e).

E. Title I Ancillary Jurisdiction Does Not Allow the Commission to Disburse USF Support in a Manner that Violates §§ 214(e) and 254(e)

Because the provision of universal service to support broadband information service would be inconsistent with §§ 214(e) and 254(e), the Commission cannot invoke its so-called ancillary authority under Title I to provide such support.⁸² Ancillary authority is nothing more than the power that the Commission derives from § 4(i) of the Act,⁸³ which allows it to “perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with [the Act]*, as may be necessary in the execution of its functions.”⁸⁴ Ancillary authority is unavailable to the Commission when it attempts to disburse USF support to a non-common carrier *that is ineligible for support under § 214(e)* to use to provide broadband information service *that is ineligible to be supported under § 254(e)*.

At the risk of belaboring the obvious, we note that the Commission may exercise ancillary jurisdiction only when “(1) [its] general jurisdictional grant under Title I covers the regulated subject, and (2) the regulations are reasonably ancillary to [its] effective performance of its statutorily mandated responsibilities.” *American Library*, 406 F.3d at 700. Thus, under the second prong of the test, the Commission’s ancillary authority must be “really incidental to, and contingent upon, *specifically delegated powers under the Act*.” *Comcast*, 600 F.3d at 653 (quoting *NARUC v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976)) (emphasis in original). Thus, the Commission cannot find that providing USF support to broadband information services would be

⁸² See Notice at 27 (¶ 69).

⁸³ See *Comcast*, 600 F.3d at 646 (“Courts have come to call the Commission’s [§] 4(i) power its ‘ancillary’ authority”).

⁸⁴ 47 U.S.C. § 154(i) (emphasis added).

“reasonably ancillary” to its “statutory responsibilities” under §§ 254(b) and 706.⁸⁵ As we have demonstrated, neither § 254(b) nor § 706 specifically delegated any power to the Commission over and above what it otherwise possessed under §§ 214(e) and 254(a).

F. The Commission Lacks the Authority to Condition the Receipt of USF Support on Offering Broadband Service Alongside a Supported Service

Notwithstanding the fact that it lacks § 4(i) authority to provide USF support in a manner that is inconsistent with §§ 214(e) and 254, the Commission nevertheless claims that it has the authority to direct USF support to broadband services “by conditioning awards of universal service support on a recipient’s commitment to offer broadband service alongside supported services.”⁸⁶ Assuming for the moment that it can impose any conditions on an “award” of USF support, the Commission could not impose a condition requiring ETCs to use USF support to “invest in broadband-capable networks.”⁸⁷ The Act prohibits ETCs from using USF support for the provision, maintenance, and upgrading of any service that is not included in the definition of supported service that the Commission has established in accordance with § 254(c)(1).⁸⁸

Again, it is axiomatic that the Commission may only impose a condition on the receipt of universal service support pursuant to an express delegation of authority by Congress.⁸⁹ The Commission received such express grants of statutory authority to impose conditions on a certificate of public convenience and necessity issued pursuant to § 214(a),⁹⁰ or on a Title III

⁸⁵ *Notice* at 27 (¶ 69).

⁸⁶ *Id.* (¶ 70).

⁸⁷ *Id.* at 28 (¶ 71).

⁸⁸ *See* 47 U.S.C. § 254(c)(1), (e). *See also supra* pp. 11-12.

⁸⁹ *See supra* p. 10.

⁹⁰ *See* 47 U.S.C. § 214(c).

license,⁹¹ but it has not been expressly authorized to impose a condition on the designation of an ETC under § 214(e). Consequently, the Commission can only attach a condition to an ETC designation pursuant to its ancillary authority under § 4(i). However, as we have just shown, the imposition of a condition binding the ETC to “offer broadband alongside supported voice service” under § 4(i) is foreclosed because it would be inconsistent with § 254.⁹²

Rather than asserting statutory authority to impose conditions on ETC designations, the Commission attempts to confer such authority on itself by analogizing to cases in which it imposed eligibility requirements on ETCs or applicants for ETC designation.⁹³ First, it points to its requirement that ETCs “certify that universal service support will be used only for the facilities and services for which the support is intended as a condition of receiving support.”⁹⁴ Assuming that the certification requirement constitutes a “condition,” the requirement hardly sets a precedent for the Commission to prescribe a condition that an ETC must use universal service support for services that are ineligible to be supported by universal service as a condition to receiving support. It is one thing for the Commission to prescribe a condition requiring compliance with § 254. It is quite another thing for the Commission to prescribe a condition requiring non-compliance with § 254.

The Commission also relies on the fact that it has imposed eligibility requirements on applicants for ETC designation.⁹⁵ Obviously, the fact that the Commission has imposed eligibility requirements on ETC applicants does not mean that the Commission had the authority

⁹¹ See 47 U.S.C. § 303(r).

⁹² See *supra* p. 20.

⁹³ See *Notice* at 28 (¶ 71).

⁹⁴ See *id.* at 28 n.103 (citing 47 C.F.R. §§ 54.313(a)-(b), 54.314(a)-(b)).

⁹⁵ See *id.* 28 n.104 (citing *Virginia Cellular, LLC*, 19 FCC Rcd 1563 (2004) and *Federal-State Joint Board on Universal Service*, 20 FCC Rcd 6371 (2005) (“*ETC Designation Order*”).

to do so. Indeed, petitions for reconsideration were filed that challenged the Commission's jurisdiction to adopt ETC eligibility requirements in *Virginia Cellular* and the *ETC Designation Order*.⁹⁶ Those petitions have been pending for six and seven years, respectively, but the Commission has yet to address the issue of its jurisdiction. Under such circumstances, and even if its past practices are material to the issue of its jurisdiction here, the Commission should not rely on its yet-untested imposition of ETC eligibility requirements in *Virginia Cellular* and the *ETC Designation Order* to establish its jurisdiction.

We also note that the Commission imposed eligibility requirements on *common carriers* that apply to be designated an ETC by the Commission under § 214(e)(6).⁹⁷ However, those eligibility requirements cannot be considered the functional equivalent of a condition imposed by the Commission on the *grant* of an application for ETC designation under § 214(e)(6). When a condition was not requested by the applicant, a conditional grant of an application for ETC designation constitutes a partial grant of the application and entitles the applicant to a hearing if it rejects the grant as made.⁹⁸ Conversely, if an ETC applicant accepts the conditional grant of its application, the ETC takes its designation subject to the condition under federal common law⁹⁹ and would be subject to sanction for failure to comply with the condition.¹⁰⁰

The jurisdictional problem is that the Commission must have explicit statutory authority

⁹⁶ See *N.E. Colorado Cellular, Inc. et al.*, Petition for Reconsideration, CC Dkt. No. 96-45, at 23-25 (Feb. 23, 2004) ("NECC Pet."); *Guam Cellular and Paging, Inc.*, Petition for Reconsideration, CC Dkt. No. 96-45, at 2-4 (June 24, 2005) ("GCPI Pet.").

⁹⁷ See 47 C.F.R. § 54.202(a), (d).

⁹⁸ See *id.* § 1.110.

⁹⁹ See *Capital Telephone Co., Inc. v. FCC*, 498 F.2d 734, 740 (D.C. Cir. 1974).

¹⁰⁰ See *P&R Temmer v. FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984); *Peninsula Communications, Inc.*, 16 FCC Rcd 11364, 11368-70 (2001).

to impose a sanction,¹⁰¹ and nothing in the Act or in any other statute, expressly authorizes the Commission to impose a sanction on an ETC. Indeed, that very issue was raised on reconsideration of *Virginia Cellular* and the *ETC Designation Order* and has yet to be addressed by the Commission.¹⁰²

If it conditions its ETC designations on the ETC's commitment to offer broadband service, the Commission would be acting without statutory authority and in a manner inconsistent with §§ 214(e) and 254(e) of the Act and Subparts A and B of Part 54 of its rules, which it does not propose to amend.¹⁰³ Consequently, the proposed condition would place an ETC under an enforceable commitment to use universal service funds to support a service that is ineligible for USF support under § 254 and do so in violation of § 54.7 of its own rules.¹⁰⁴ If an ETC failed to comply with the condition, the Commission would face the prospect of sanctioning an ETC for complying with one of its own universal service rules.

In the final analysis, the Commission's claim to jurisdiction comes down to the fact that “[n]othing in [§] 254 prohibits the Commission from conditioning the receipt of support.”¹⁰⁵ This jurisdictional refrain — that it can take an action because the Act did not expressly foreclose the possibility — has been heard from the Commission before and has been soundly

¹⁰¹ See 5 U.S.C. § 558(b) (“A sanction may not be imposed ... except within jurisdiction delegated to the agency and as authorized by law”). See also *American Bus Ass'n v. Slater*, 231 F.3d 1, 6 (D.C. Cir. 2000).

¹⁰² See NECC Pet. at 24-25; GCPI Pet. at 3.

¹⁰³ See Notice at 229-39 (App. A).

¹⁰⁴ 47 C.F.R. § 54.7 (A carrier shall use universal service support “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended”). Of course, broadband service has yet to be added to the Commission's list of services designated for USF support. See *id.* § 54.101(a).

¹⁰⁵ Notice at 28 (¶ 71).

rejected by courts.¹⁰⁶ As the D.C. Circuit stated *en banc*, “Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony.” *Railway Labor Executives’ Ass’n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (emphasis in original).

G. Section 10 of the Act Does Not Authorize the Commission to Forbear from Administering the USF as Directed by Congress

The Commission misconstrues § 10 of the Act when it suggests that it can exercise its § 10 forbearance authority “to facilitate use of funding to support broadband information services.”¹⁰⁷ The plain language of § 10 requires the Commission to refrain from *enforcing* any regulation or provision of the Act if it makes certain determinations.¹⁰⁸ The word “enforce” means “to put or keep in force; compel obedience to.”¹⁰⁹ Thus, § 10 authorizes the Commission to refrain from compelling obedience to any regulation or provision of the Act, provided it makes three specified findings. Consequently, § 10 has no application to the Commission’s duties under §§ 214(e) or 254.

When employed in a statute, the word “shall” is “the language of command,” *e.g.*, *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935), which is the case when the word “shall” is used in the Act.

¹⁰⁶ See *American Library*, 406 F.3d at 705-06; *Motion Picture Ass’n of America v. FCC*, 309 F.3d 796, 805-06 (D.C. Cir. 2002).

¹⁰⁷ *Notice* at 28 (¶ 72).

¹⁰⁸ Section 10 provides in pertinent part that the Commission “shall forbear from applying any regulation or any provision of [the Act] to a telecommunications carrier or telecommunications services, or class of communications carriers ... in any or some of its or their geographic markets,” provided it determines that the “*enforcement* of such regulation or provision” is not necessary (1) “to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunication carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory,” and (2) “for the protection of consumers,” and that (3) forbearance from applying such provision or regulation is consistent with the public interest.” 47 U.S.C. § 160(a) (emphasis added). When making its public interest determination under § 10(a)(3), the Commission “shall consider whether forbearance from *enforcing* the provision or regulation will promote competitive market conditions.” *Id.* § 160(b).

¹⁰⁹ Random House Webster’s Unabridged Dictionary 644 (2d ed. 2001).

See, e.g., Southwestern Bell Corp. v. FCC, 43 F.3d 1515, 1521 (D.C. Cir.1995). Courts have universally read the word “shall” in the Act to make the provision “mandatory.”¹¹⁰ Even the Commission recognizes that the use of the word “shall” in § 254(b) meant that Congress had burdened it with a “mandatory duty.”¹¹¹ Because the word “shall” is used repeatedly in §§ 214(e) and 254, the plain language of those provisions works to place the Commission in a “mandatory regulatory role”¹¹² with respect to the implementation and administration of the Title II USF program.

Section 214(e) commands that the Commission “shall” designate a common carrier to be an ETC in an unserved area,¹¹³ and “shall” upon request designate a common carrier that is not subject to the jurisdiction of a state commission to be an ETC.¹¹⁴ Likewise, § 254(a) commands that the Commission “shall” institute a Joint Board proceeding to recommend regulatory changes to implement §§ 214(e) and 254,¹¹⁵ and “shall” establish rules to implement the Joint Board’s recommendations, including a rule defining the services that are supported by the USF.¹¹⁶ Furthermore, § 254(c) defines “[u]niversal service ... as an evolving level of telecommunications services that the Commission *shall* establish periodically under this section.”¹¹⁷ It also commands that, when recommending and establishing the definition of the telecommunications services that are to be supported by the USF, the Joint Board and the Commission “*shall*

¹¹⁰ *See TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 75 (2d Cir. 2002); *Qwest*, 258 F.3d at 2000; *Iowa Utilities Bd. v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000); *City of Dallas, Texas v. FCC*, 165 F.3d 341, 358 (5th Cir. 1999); *Southwestern Bell*, 43 F.3d at 1521.

¹¹¹ *Notice* at 23 (¶ 56).

¹¹² *TCG New York*, 305 F.3d at 67.

¹¹³ *See* 47 U.S.C. § 214(e)(3).

¹¹⁴ *See id.* § 214(e)(6).

¹¹⁵ *See id.* § 254(a)(1).

¹¹⁶ *See id.* § 254(a)(2).

¹¹⁷ *Id.* § 254(c)(1) (emphasis added).

consider the extent to which such telecommunications services” meet the criteria of § 254(c)(1)(A)-(D).¹¹⁸

After the effective date of the rules adopted by the Commission to implement § 254, § 254(e) commands that only an ETC designated under § 214(e) “shall” be eligible to receive USF support.¹¹⁹ It also mandates that a carrier receiving USF “shall” use that support only for the services for which the support is intended.¹²⁰

The three provisions of the Act that the Commission wants to forbear from “applying” — §§ 214(e), 254(c)(1) and 254(e) — are not enforceable against telecommunications carriers. Rather, they impose mandatory duties on the Commission to establish and administer a Title II USF program as directed by Congress. If it refrains from applying §§ 214(e), 254(c)(1) and 254(e) as it contemplates, the Commission would not be forbearing from enforcing those provisions against any telecommunications carrier or service. The Commission would simply be refusing to fulfill the mandatory duties that Congress imposed on it with respect to the administration of the statutory universal service program.

Even if §§ 214(e), 254(c)(1) and 254(e) could be read as applying to or regulating telecommunication carriers or services for the purposes of § 10, the forbearance that the Commission is proposing would have no direct impact on any telecommunications carrier or service, unless the Commission is proposing to *exclude* the eligible carriers and services from receiving support. Forbearance would mean that the Commission would refrain from enforcing §§ 214(e), 254(c)(1) and 254(e) *against information service providers and information services*. Moreover, § 10 not only applies to telecommunications carriers and services, but it permits the

¹¹⁸ 47 U.S.C. § 254(e) (emphasis added).

¹¹⁹ *Id.*

¹²⁰ *Id.*

Commission to forbear from enforcing a provision of the Act that is not necessary “to ensure that the charges ... by, for, or in connection with that telecommunications carrier or telecommunication service are just and reasonable and not unjustly or unreasonably discriminatory.”¹²¹ Information service providers and information services are under no such Title II obligation and have no need for forbearance.

Congress obviously tailored the Title II universal service program for the exclusive benefit of designated common carriers (ETCs) that provide telecommunications services subject to mandatory Title II regulations. ETCs, for example, must provide telecommunications service upon reasonable request, must charge just, reasonable, and nondiscriminatory rates, and must engage in just, reasonable, and nondiscriminatory practices in connection with their services. Congress clearly took pains to craft §§ 214(e) and 254 to ensure that information service providers that are not subject to mandatory Title II regulations do not receive the benefits of the Title II universal service program.

Turning a blind eye to the will of Congress as expressed in the clear and mandatory language in §§ 214(e) and 254, the Commission insists that it can divert funds that were contributed to the Title II universal service program to the coffers of broadband Internet access service providers that chose not to avail themselves of USF funding by opting not to provide their services on a common carrier basis under Title II. Put bluntly, the misappropriation of universal service funds cannot be authorized by § 10 of the Act. Whatever the breadth of the Commission’s authority to forbear from enforcing provisions of the Act, it does not extend to the Commission’s refusal to comply with clear congressional commands.

¹²¹ 47 U.S.C. § 160(1).

III. THE COMMISSION VIOLATED § 254(a) BY BYPASSING THE BOARD AND EXCEEDED ITS JURISDICTION BY IMPLEMENTING THE STAFF'S RECOMMENDATIONS WITHOUT CONGRESSIONAL AUTHORIZATION

The 1996 Act established the Joint Board to conduct notice-and-comment proceedings to develop recommended changes to the Commission's universal service regulations.¹²² The Board was to possess the same jurisdiction, powers, duties, and obligations as those conferred by law on administrative law judges ("ALJs") under § 3105 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 3105.¹²³ Thus, Congress intended that the Board discharge its duties in an impartial manner¹²⁴ and to operate with a high degree of independence from the Commission.¹²⁵

Like all federal-state joint boards established pursuant to § 410 of the Act, the Joint Board was to be composed of three commissioners of the Commission and four state commissioners.¹²⁶ However, Congress added an eighth member: a state-appointed utility consumer advocate.¹²⁷ Congress obviously intended that consumers be represented during the formulation of the Board's recommendations.

¹²² See 47 U.S.C. § 254(a)(1).

¹²³ The 1996 Act required the Commission to institute the Joint Board in accordance with § 410(c) of the Act. See 47 U.S.C. § 254(a)(1). Under § 410(c), a joint state-federal board is to "possess the same jurisdiction, powers, duties, and obligations" as a state joint board established by the Commission pursuant to § 410(a). *Id.* § 410(c). A state joint board is to have "all the jurisdiction and powers conferred by law upon an examiner" provided for in § 3105 of the APA. *Id.* § 410(a). APA § 3105 now provides for the appointment of ALJs. 5 U.S.C. § 3105.

¹²⁴ The impartiality of ALJs is required by the APA, see 5 U.S.C. §§ 554(d), 556(b), 557(d)(1), and expected by the Commission. See, e.g., *Catalina Radio*, 5 FCC Rcd 3710, 3710 (1990).

¹²⁵ By equating the Joint Board with an ALJ, Congress evidently intended that the Joint Board exercise the same degree of independence that the APA affords ALJs. Under the APA, ALJs operate as "a special class of semi-independent subordinate hearing officers," *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 132 (1953), who are, in many respects, "functionally comparable" to federal district court judges. *Butz v. Economou*, 438 U.S. 478, 513 (1978). See Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 9.9, at 99 (3rd ed. 1994) (ALJs "are almost entirely independent of the agencies at which they preside" or "very nearly as independent of federal agencies as federal trial judges are of the Executive Branch").

¹²⁶ See 47 U.S.C. § 410(c).

¹²⁷ See *id.* § 254(a)(1).

Congress specified that the Joint Board would take the lead in recommending the regulatory changes necessary to implement §§ 214(e) and 254.¹²⁸ The Board had to complete its initial notice-and-comment proceeding and make its recommendations to the Commission by a statutory deadline of November 8, 1996.¹²⁹ Congress made it clear, however, that the Board’s authority to recommend changes to the Commission’s universal service rules generally, and specifically to recommend modification of the definition of supported services, was to continue after the initial implementation of §§ 214(e) and 254.¹³⁰ That is how the Commission understood § 254 in 1996, when it promised to “periodically review, *after obtaining further Joint Board recommendations*, the definition of services supported by universal services mechanisms ... as well as the regulations adopted to implement the universal service mandates of the 1996 Act.”¹³¹

The Joint Board did not give the public the opportunity to comment on whether the existing high-cost USF should be transformed into a new, broadband-focused CAF.¹³² Nor, for that matter, did the Board make a recommendation on the issue. It made its last recommendation on high-cost support on November 19, 2007, when it recommended that comprehensive reforms be made in existing universal service mechanisms, including the revision of the definition of

¹²⁸ See 47 U.S.C. § 254(a)(1).

¹²⁹ See *id.*; *Federal-State Joint Board on Universal Service*, 11 FCC Rcd 18902, 18904 (1996) (“*First NPRM*”).

¹³⁰ See 47 U.S.C. § 254(a)(2) (after its May 8, 1996, deadline to implement the 1996 Act, “the Commission shall complete any proceeding to implement subsequent recommendations from [the] Joint Board ... within one year after receiving such recommendations”); § 254(b) (“[t]he Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles”); § 254(c)(1) (“[t]he Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported ... shall consider the extent to which such telecommunications services”); § 254(c)(2) (“[t]he Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported”).

¹³¹ *First NPRM*, 11 FCC Rcd at 18094 (emphasis added) (footnote omitted).

¹³² *Notice* at 9 (¶ 18).

supported services to include broadband Internet service.¹³³ But the Commission declined to implement the Board's recommendations in 2008.¹³⁴ Consequently, the Board's recommendations for comprehensive reform, including its broadband recommendation, lapsed in 2008 by operation of the Commission's statutory one-year deadline to implement Board recommendations.¹³⁵

By the 1996 Act, Congress empowered a board comprised of federal and state regulators and a consumer advocate, acting independently of the Commission, to put forward universal service recommendations developed after notice and opportunity for public comment. Here, the Commission is in the process of implementing the universal service recommendations of its staff as published in the *National Broadband Plan*. The Commission's staff is neither the independent Joint Board nor remotely close to the Board's functional equivalent. The Commission has not only bypassed the Joint Board in the process of implementing the *National Broadband Plan* recommendations, but it has relegated the state members of the Joint Board to the role of commenters¹³⁶ with a May 2, 2011 deadline to submit their comments.¹³⁷ In the process, the Commission both violated the notice-and-comment rulemaking requirements of § 254(a) and exceeded its delegated authority by implementing its staff's universal service recommendations without congressional authorization.

CONCLUSION

The jurisdiction-conferring provisions of § 254 may not speak with "crystalline clarity"

¹³³ See *High-Cost Universal Service Support*, 22 FCC Rcd 20477, 20491 (Jt. Bd. 2007).

¹³⁴ See *High-Cost Universal Service Support*, 24 FCC Rcd 6475, 6492 (2008).

¹³⁵ See 47 U.S.C. § 254(a)(2).

¹³⁶ See *Notice* at 32 (¶ 84).

¹³⁷ See *Comment and Reply Comment Dates Established for Comprehensive USF and Intercarrier Compensation Reform Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, DA 11-411, at 1 (Mar. 2, 2011).

with respect to the Commission's authority,¹³⁸ but they speak with more than sufficient clarity to inform the Commission that it must ensure that universal service funds go to common carriers or telecommunications carriers that have been found to be eligible to be supported under § 214(e) to use to provide telecommunications services that are eligible to be supported under § 254(c). There is no ambiguity in those provisions, and the Commission found none over the first fifteen years it administered the USF.

For perfectly obvious policy reasons, the Commission has latched on to some ambiguity amidst the six statutory universal service principles as the pretext to interpret § 254 in its entirety to authorize the Commission to direct that universal service support flow to information service providers that it has classified as *ineligible* to be supported under § 214(e) to use to provide an information services that are *ineligible* to be supported under § 254(c). To state the Commission's theory suffices to refute it. In any event, if there can be any doubt as to the Commission's willingness to depart from the unambiguous language of §§ 214(e) and 254(e), one need only consider that the Commission actually solicited comment on whether it "could or should forbear from requiring that recipients of universal service support be designated as ETCs at all."¹³⁹

Cellular South concedes that implementation of the *National Broadband Plan* may be exactly what the nation needs to meet its broadband availability challenge. Cellular South is loath to appear as an obstructionist. Hence, these comments would not have been submitted had the plan's broadband universal service initiatives been even remotely within the Commission's authority to implement. But they are not.

One "approach" that was mentioned in the *National Broadband Plan* "would involve

¹³⁸ *ACLU*. 823 F.2d at 1568.

¹³⁹ *Notice* at 35 (¶ 89).

Congress enacting legislation to direct or enable the FCC to implement specific plan recommendations.”¹⁴⁰ Unsurprisingly, the legislative approach is not among those that the Commission put forward for public comment. But if it wants to implement its universal service “reforms” *in toto*, the Commission must first approach Congress. Otherwise, it is bound to “give effect to the unambiguously expressed intent of Congress.”¹⁴¹ So bound, the Commission cannot authorize universal service funds go to ineligible entities to provide ineligible services.

Respectfully submitted,



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¹⁴⁰ *National Broadband Plan* at 337.

¹⁴¹ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

CERTIFICATE OF SERVICE

I, Linda J. Evans, hereby certify that on this 18th day of April, 2011, a copy of the foregoing Comments of Cellular South, Inc. was sent by e-mail, in pdf format, to the following:

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/s/ Linda J. Evans