

**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
)	

**COMMENTS
OF THE
RURAL TELECOMMUNICATIONS CARRIERS COALITION**

**RURAL TELECOMMUNICATIONS
CARRIERS COALITION**

Kenneth C. Johnson
Gregory W. Whiteaker
Anthony K. Veach
Bennet & Bennet, PLLC
4350 East West Highway, Suite 201
Bethesda, MD 20814
(202) 371-1500

Its Attorneys

Date: April 18, 2011

TABLE OF CONTENTS

SUMMARY.....i

I. Overview - The FCC’s General Legal Theory Illicitly Rewrites the Act.....2

II. The FCC’s Agency Powers are Strictly Limited.....6

III. Sections 254 and 214 of the Act Limit Support to Telecommunications Carriers8

A. Section 254 Defines Supported Services in a Telecommunications Context.....8

B. Only Telecommunications Carriers Can Receive High-Cost Universal Service Support.....11

IV. Section 706 Does Not Give the FCC the Authority to Create New Regulatory Mechanisms.....12

V. The FCC Does Not Have the Ancillary Authority to Basically Ignore and/or Rewrite the Specific Universal Service Provisions of the Act14

VI. The FCC’s Regulatory Forbearance Authority Does Not Include the Removal of the Universal Service Provisions of the Act.....15

VII. The Legality of Any New Contribution Mechanism Must Be Addressed.....17

VIII. CONCLUSION.....18

Summary

The Rural Telecommunications Carriers Coalition (“RTCC”) agrees with Congress and the Federal Communications Commission (“FCC” or “Commission”) that the provision of broadband serves a vital national economic interest, especially in the remote rural areas served by RTCC members. However, the FCC lacks the legal authority to pursue many aspects of its proposed overhaul of the federal universal service fund (“USF”). The FCC’s authority is limited and clearly defined by the Act.

The FCC may support broadband pursuant to Section 254(c)(1), provided that the broadband service is included as part of a telecommunications service. Section 254(e) and 214(e) limit all USF support, including such broadband support, to “telecommunications” carriers. The FCC’s attempts to get around these provisions through Section 706, forbearance, or its limited ancillary authority virtually guarantee that the FCC’s efforts will be tied up in court and reversed.

**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
)	

To: The Commission

Comments of the Rural Telecommunications Carriers Coalition

The Rural Telecommunications Carriers Coalition (“RTCC”),¹ by its attorneys, hereby submits its comments in response to the Notice of Proposed Rulemaking (“NPRM”) and Further Notice of Proposed Rulemaking (“FNPRM”) in the above-captioned proceedings.² RTCC agrees

¹ RTCC is an ad hoc coalition of small, rural providers of wireline, fixed, and mobile services in some of the most high-cost areas of the country. RTCC’s members are located in and serve the high-cost rural communities where they provide service. RTCC’s members include Ardmore Telephone Company, Blue Valley Tele-Communications, Inc., BPS Telephone Company, Champaign Telephone Company, Copper Valley Telephone Cooperative, Interstate 35 Telephone Company, KanOkla Networks, OmniTel Communications, Panhandle Telephone Company of Oklahoma, Partner Communications Cooperative of Iowa, Peoples Telecommunications, LLC of Kansas, Pine Belt Communications, Inc., Pioneer Communications, Inc. of Kansas, Southern Kansas Telephone Company, Inc., Siskiyou Telephone, Syringa Wireless, Totah Communications, Inc., Twin Valley Telephone, Wheat State Telephone, and Wilson Communications.

² *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*,

with Congress and the Federal Communications Commission (“FCC” or “Commission”) that the provision of broadband serves a vital national economic interest, especially in the remote rural areas served by RTCC members. However, RTCC is concerned that the Commission’s ambitious plan to produce an Order mere months after receiving what promises to be voluminous comments in the above-captioned proceedings,³ will result in a hasty and illegal result if the FCC proceeds as proposed. As it stands now, the FCC lacks the legal authority to pursue many aspects of its proposed overhaul of the federal universal service fund (“USF”).

RTCC’s comments address the Commission’s legal authority to support broadband as outlined by the Commission in the NPRM⁴ and point out certain proposals that exceed the FCC’s authority pursuant to the Communications Act of 1934, as amended (“Act”), and established administrative law precedent. Any such agency overreach is likely to end up challenged in court which will hold up or reverse the Commission’s ambitious reform plans.

I. Overview - The FCC’s General Legal Theory Illicitly Rewrites the Act

In the NPRM, the Commission discusses what it calls the “threshold legal issue: the Commission’s authority to provide universal service support for broadband under both the

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, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (Feb. 9, 2011) (“NPRM”) (“FNPRM”).

³ *FCC Announces First in a Series of Workshops on Intercarrier Compensation / Universal Service Fund Reform*, CC Docket Nos. 96-45, 01-92, WC Docket Nos. 03-109, 05-337, 07-135, 10-90 and GN Docket No. 09-51, DA 11-502 (March 15, 2011) (where the FCC Chairman and Commissioners announced that they all “look forward to moving to an Order within a few months” after the record is complete in late May).

⁴ See NPRM at ¶¶ 55-72 and ¶¶ 262-265.

current high-cost program and the CAF.”⁵ On this “threshold” issue, the FCC has the authority to fund broadband under the current high-cost, eligible telecommunications carrier (“ETC”) program developed by Congress, provided that broadband service is an element of a telecommunications service, consistent with Sections 254 and 214(e) of the Act.⁶ However, the Commission lacks the authority to eliminate the current USF mechanism and create a broadband-only Connect America Fund (“CAF”) that ignores the requirements of Sections 214(e) and 254 of the Act, which require funding to be directed exclusively to ETCs. In the NPRM, the FCC asserts a belief that it has the necessary authority to essentially eliminate the so-called “legacy” USF and replace it with a broadband-only CAF and seeks comment on this conclusion.⁷ RTCC notes that this conclusion conflicts with the conclusion of the U.S. Court of Appeals for the D.C. Circuit in *Comcast v. FCC*⁸ where the court determined that the FCC lacked authority over broadband issues. The Commission’s dubious legal authority over broadband is reflected in the NPRM’s contradictory exposition of its authority.

The FCC’s general legal argument on its authority to adopt its proposals can be boiled down to specific language in Sections 254(b)(2) and (3) of the Act. These sections require the FCC to ensure “access to advanced services”⁹ and “telecommunications and information

⁵ NPRM at ¶ 55.

⁶ See 47 U.S.C. §§ 254 and 214(e).

⁷ See, e.g., NPRM at ¶ 72.

⁸ *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

⁹ 47 U.S.C. § 253(b)(2).

services.”¹⁰ According to the FCC, this allows the Commission to support broadband, as well as fund non-ETCs.¹¹ In a preemptive attempt to ward off any challenges to the FCC’s suspect legal authority to fund non-ETCs, FCC Commissioner Robert McDowell argues that the FCC may support broadband, in and of itself, because any ambiguity in the Act, since it defines universal service as a “telecommunications service” that *also takes into account advanced services*,¹² would be subject to the FCC’s discretion and any FCC decision interpreting that ambiguity would likely be upheld by the courts.¹³ RTCC notes that Commissioner McDowell is the most vocal opponent of the FCC majority’s recent partisan vote in the “Open Internet” proceeding.¹⁴ It is not without irony that Commissioner McDowell was picked to publicly defend the FCC’s legal authority to fund broadband-only providers at the FCC’s Open Meeting announcing the NPRM. RTCC hopes that, upon reflection, Commissioner McDowell’s previous opposition to the FCC’s regulation of broadband and the majority’s “factual and legal manipulations,”¹⁵ typified by the FCC’s suggestion in this rulemaking that it can legally eliminate portions of

¹⁰ 47 U.S.C. § 253(b)(3).

¹¹ See NPRM at ¶ 72.

¹² 47 U.S.C. § 253(c)(1).

¹³ Statement of FCC Commissioner Robert M. McDowell, Re: *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 Inter-carrier 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 (February 9, 2011).

¹⁴ See Dissenting Statement of FCC Commissioner Robert M. McDowell, Re: *Preserving the Open Internet*, GN Docket No. 09-191, *Broadband Industry Practices*, WC Docket No. 07-52 (December 21, 2010).

¹⁵ *Id.* at p. 5.

Section 254 from the Act¹⁶ – in essence, performing the job of Congress, should also apply in this instance. The Commissioner’s stance, and the FCC’s posture, begs the question of how the FCC can fund providers who the FCC cannot, in Commissioner McDowell’s opinion, regulate.

The FCC also cites Section 706 of the Act¹⁷ for its authority, and cites its catch-all “ancillary authority,”¹⁸ buttressed by Section 706 and its forbearance provisions, as additional support for its legal authority. Section 706 gives the FCC the authority to promote advanced services and triggers certain forbearance powers pursuant to Section 10 of the Act.¹⁹ As discussed in more detail below, Section 706 does not give the FCC authority to eliminate or rewrite the Act. Section 706 only gives the FCC authority to “remove barriers to infrastructure investment,”²⁰ not authority to rewrite a statute.

Further, in its hasty, and as discussed below, arbitrary, rush to create the CAF, the FCC has forgotten that Section 214(e) of the Act requires support to flow only to “common carriers” that are “eligible *telecommunications* carriers.”²¹ The FCC’s argument that it can stop funding current ETCs in order to fund non-common carrier, broadband providers contradicts the intent of Congress. The FCC goes so far as to suggest that it can forbear from enforcing Section 214(e) in

¹⁶ NPRM at ¶ 72.

¹⁷ 47 U.S.C. § 706.

¹⁸ NPRM at ¶ 60.

¹⁹ 47 U.S.C. § 160(c).

²⁰ 47 U.S.C. § 706(a).

²¹ 47 U.S.C. § 214(e) (emphasis added).

addition to Section 254(e),²² even though, as discussed below, the Commission’s forbearance authority has nothing to do with universal service in the context of the NPRM. The legal principle at stake here is whether the FCC can simply ignore Sections of the Act that may conflict with the FCC’s broadband funding goals. RTCC believes that courts will not allow such broad regulatory overreach. The court that did not allow the FCC to overreach and “regulate the Internet,”²³ as well as other courts, will likely take a jaundiced look at the FCC’s justifications for eviscerating Section 254 universal service as we know it.

II. The FCC’s Agency Powers are Strictly Limited

The FCC’s expansive view of its powers in the NPRM, including its forbearance powers, is incorrect and would set unfortunate precedent that would allow the FCC to essentially write its own laws when it comes to high-cost universal service mechanisms and broadband regulation. The U.S. Constitution vests “[a]ll legislative powers” in the Congress of the United States.²⁴ Administrative agencies such as the FCC are “creature[s] of statute” and draw their authority from Congress.²⁵ The FCC’s regulatory reach is therefore constrained by the fundamental separation-of-powers principle that an agency “literally has no power to act – unless and until Congress confers power upon it.”²⁶ RTCC reminds the Commission that Congress has not rewritten the Act to allow the FCC to eliminate the current universal service provisions in the Act in order to provide support to non-telecommunications carriers.

²² NPRM at ¶ 72.

²³ *See Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

²⁴ U.S. Const. art. I, § 1.

²⁵ *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 614 (1983).

²⁶ *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

Moreover, RTCC reminds the FCC that courts are “skeptical” of agency efforts to assert power in “new arenas,” such as the broadband arena in this case, and courts will perform a “close and searching analysis of congressional intent” to authorize such undertakings.²⁷ Even where a statute is “imperfect,” or “ambiguous,” the Supreme Court has stressed that an agency “has no power to correct flaws that it perceives in the statute that it is empowered to administer” by extending its “rulemaking power” beyond the boundaries set by Congress.²⁸ Nowhere in the Act does Congress authorize the FCC to create a program such as its proposed CAF out of whole cloth while eliminating legacy universal service programs explicitly established pursuant to the Act.

Further, the FCC’s proposal to phase-out current support mechanisms concerns “serious reliance interests,” developed over decades under the FCC’s “legacy” universal service mechanisms that have provided carriers with “sufficient”²⁹ high-cost support. Such “serious

²⁷ *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). As the D.C. Circuit observed:

Where the issue is one of whether a delegation of authority by Congress has indeed taken place (and the boundaries of any such delegation), rather than whether an agency has properly implemented authority indisputably delegated to it, Congress can reasonably be expected both to have and to express a clear intent. The reason is that it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power. When an agency’s assertion of power into new arenas is under attack, therefore, courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue.

Id.

²⁸ *Board of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986).

²⁹ 47 U.S.C. § 254(b)(5).

reliance interests” trigger enhanced scrutiny by reviewing courts.³⁰ The FCC’s proposed elimination of current, relied-upon mechanisms in favor of an unlawful CAF will likely incur a *de novo* review of the Commission’s actions without any *Chevron*³¹ deference.

III. Sections 254 and 214 of the Act Limit Support to Telecommunications Carriers

The FCC asserts that Section 254 of the Act can be reasonably interpreted to authorize the FCC’s support of broadband services.³² RTCC agrees that Section 254 provides the Commission with the authority to fund broadband services as long as such advanced services are an element of a telecommunications service. The FCC’s authority to fund broadband, however, is limited to funding telecommunications carriers, pursuant to both Sections 254 and 214(e) of the Act, when read as a logical whole. The FCC’s stretched reading of these Sections eliminates Congress’ focus on telecommunications services and explicit concentration on telecommunications carriers from the Act.

A. Section 254 Defines Supported Services in a Telecommunications Context

The legal limits of the FCC’s universal service program are set primarily by Section 254 and, as discussed below, Section 214(e) of the Act. Universal service is defined in Section 254(c)(1) as “an evolving level of *telecommunications services* that the Commission shall

³⁰ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1823 (2009). In *FCC v. Fox Television Stations*, the U.S. Supreme Court found that “when an agency’s prior policy has engendered serious reliance interests[,] that must be taken into account.” Ignoring such matters by failing to provide a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy would be arbitrary and capricious. *Id.* In the instant case, the FCC must show that it has taken into account the serious aspects of rural providers’ reliance on current “legacy” mechanisms.

³¹ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

³² NPRM at ¶ 61.

establish periodically under this section, taking into account advances in telecommunications and information technologies and services.”³³ This first defining sentence of section 254(c)(1) establishes the decidedly *telecommunications* nature of universal service. Although Congress “recognize[d] that *telecommunications* services would evolve over time, and that universal service should adapt to reflect those changes,”³⁴ Congress never authorized the FCC to remove telecommunications from the universal service equation as the FCC has done with its proposal to eliminate current mechanisms in favor of a broadband-only CAF available even to non-telecommunications providers.³⁵

The FCC and the Federal-State Joint Board are required to work in tandem when reviewing or altering the telecommunications services that may be designated as universal services.³⁶ Section 254(c)(2) establishes that “the Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.”³⁷ However, any recommendation for changes to the definition of universal services is limited by the plain language of Section 254(c)(1), which states that “the Joint-Board, in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such *telecommunications* services are being

³³ 47 U.S.C. § 254(c)(1) (emphasis added).

³⁴ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 98-67, Report to Congress, ¶ 144 (1998) (“*1998 Report to Congress*”) (emphasis added).

³⁵ *See, e.g.*, NPRM at ¶ 228.

³⁶ 47 U.S.C. § 254(c)(1).

³⁷ 47 U.S.C. § 254(c)(2).

deployed in public *telecommunications* networks by *telecommunications* carriers.”³⁸ The FCC does not have the authority to change this obvious telecommunications component and allow funding to flow to entities other than ETCs.

Today’s universal service support mechanisms are based on the consistent application of Section 254(c) of the Act, and nowhere in the Recovery Act’s requirement for the FCC to develop the NBP³⁹ did Congress suggest jettisoning Section 254 or successful legacy USF mechanisms. Congress’ strict limitation on the FCC’s ability to define the services has been confirmed in *TOPUC v. FCC*.⁴⁰ Specifically, in discussing “supported services” pursuant to Section 254(c)(2), the Fifth Circuit called the FCC’s attempt to redefine “services” to include services unrelated to telecommunications “an implausible reading of Congress’ intent.”⁴¹ The FCC’s proposed elimination of current funding mechanisms and its CAF plan abandon this structural limitation and limitation to telecommunications services provided by telecommunications providers.

³⁸ § 254(c)(1)(C) (emphasis added).

³⁹ *American Recovery and Reinvestment Act of 2009*, Pub. L. No. 111-5, § 6001(k), 123 Stat. 115, 515 (2009) (“*Recovery Act*”).

⁴⁰ *Texas Office of Pub. Util. Counsel (TOPUC) v. FCC*, 183 F.3d 393 (5th Cir. 1999).

⁴¹ *Id.* at 442. In *TOPUC*, the Fifth Circuit concluded that the FCC could not use the Act’s “additional services” term in Section 254(c)(3) to expand supported services to schools and libraries subject to Section 254(h) beyond additional services that were also telecommunications services. The court went on to discuss this limitation pursuant to Sections 254(c)(2) and 254(c) generally, determining that the FCC did not have the authority to redefine services to include services unrelated to telecommunications.

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

Section 254(e) of the Act establishes the general eligibility requirement for receipt of universal service support. The eligibility criterion, “adopted without expansion”⁴² by the FCC, unambiguously states that “**only** an eligible *telecommunications* carrier (“ETC”) designated under section 214(e) shall be eligible to receive specific Federal universal service support.”⁴³

Section 214(e) declares that:

[a] common carrier designated as an eligible *telecommunications* carrier under [Section 214(e)] shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received, offer the services that are supported by Federal universal service support mechanisms under section 254 (c), either using its own facilities or a combination of its own facilities and resale of another carrier’s services (including the services offered by another eligible *telecommunications* carrier); and advertise the availability of such services and the charges therefore using media of general distribution.⁴⁴

In sum, section 254(e) explicitly limits high-cost support to ETCs designated as such under Section 214(e). There is no legal way for the FCC to get around this non-ambiguous restriction on entities that are eligible for support.

The FCC’s proposal to use CAF support to fund non-telecommunications carriers⁴⁵ is unlawful. The FCC has not provided any justification for ignoring Section 214(e) of the Act and, as discussed in more detail below, lacks the authority to forbear from enforcing Congress’

⁴² *1998 Report to Congress* at ¶ 150.

⁴³ 47 U.S.C. 254(e) (emphasis added).

⁴⁴ *Id.* (emphasis added).

⁴⁵ *See* NPRM at ¶ 89 (where the FCC seeks to modify or eliminate eligible telecommunications carrier requirements to allow non-telecommunications carriers to receive support).

directive that support flow only to eligible telecommunications carriers, and, even more specifically, telecommunications carriers that are “common carriers.”⁴⁶ At the beginning of the digital era, Congress, in the Telecommunications Act of 1996, amended the Act to authorize the Commission to regulate “telecommunications carriers, but not information-service providers, as common carriers.”⁴⁷ Further, the FCC has classified broadband Internet service providers as “information-service providers” that are, by definition, not subject to regulation as common carriers.⁴⁸ As discussed above, support can only flow to common carriers subject to Title II of the Act, as Congress intended. As the Supreme Court has admonished, “[i]t is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”⁴⁹

IV. Section 706 Does Not Give the FCC the Authority to Create New Regulatory Mechanisms

The FCC suggests that the Section 706 requirement that the Commission “remove barriers to infrastructure investment”⁵⁰ allows the FCC to create a *new* regulatory mechanism that would provide support for broadband providers.⁵¹ This is a tortured reading of Section

⁴⁶ See 47 U.S.C. § 214(e)(1) (identifying an eligible telecommunications carrier as a “common carrier”). See also 47 U.S.C. §§ 214(e)(2) and (3) (also specifically identifying carriers eligible for support as a “common carrier”).

⁴⁷ *National Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005).

⁴⁸ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4821- 23 ¶¶ 36-38, 2002 WL 407567 (2002).

⁴⁹ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

⁵⁰ 47 U.S.C. § 1302(a).

⁵¹ NPRM at ¶ 67.

706.⁵² Section 706 deals with the *removal* of barriers to advanced telecommunications services and nowhere does it authorize the FCC to create brand-new universal service mechanisms.

As a basis for authority, even on an ancillary basis, Section 706(a) fails. First, Section 706(a) does not impose any specific statutory mandate on the FCC that would allow a new support regime based on Section 706, nor the dismantling of “legacy” USF. Rather, Section 706(a) is simply a statement of “congressional policy,”⁵³ which itself “is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers.”⁵⁴ Second, Section 706(a) calls for forbearing,⁵⁵ not unleashing a new support regime untethered to the Act or the industry. Section 706 merely urges “regulatory forbearance” and “other regulating methods that *remove* barriers to infrastructure investment.”⁵⁶ These provisions cannot legitimately be read to encourage the development of new regulations. As the Supreme Court

⁵² RTCC notes for the record that the Commission recently reversed years of prior conclusions in its Sixth Broadband Deployment Report when it determined that broadband deployment to all Americans was not “reasonable and timely.” *See in re 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 Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 09-137, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Sixth Broadband Deployment Report, FCC 10-129 (July 20, 2010) at ¶ 2. Since nothing had dramatically changed from the previous reports other than the availability of more and more broadband, both fixed and mobile, the FCC’s conclusion is unjustified, arbitrary and unrelated to actual broadband deployment data.

⁵³ *National Cable & Telecommunications Ass’n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002).

⁵⁴ *Association of Am. R.R.s v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977).

⁵⁵ The FCC’s forbearance authority pursuant to Section 706(a) is limited to “regulatory forbearance.” 47 U.S.C. § 1302(a). Section 706’s limited scope in no way authorizes the FCC to forbear from enforcing certain provisions of Section 254 and Section 214(e) of the Act.

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

has observed, Congress “does not . . . hide elephants in mouse holes.”⁵⁷ If Congress had intended to authorize the FCC to create a new, advanced telecommunications services support regime as part of Section 706, it would have specifically done so.

V. The FCC Does Not Have the Ancillary Authority to Basically Ignore and/or Rewrite the Specific Universal Service Provisions of the Act

The FCC’s suggestion that Title I ancillary authority gives it Congressional permission⁵⁸ to essentially ignore the telecommunications-based mandates of Section 254 and the common-carrier-based mandates of Section 214(e), discussed above, lacks legal justification. Specifically, the FCC’s ancillary authority must flow from “within the boundaries of the Act.”⁵⁹ When it comes to universal service, Congress was quite specific about the role of the FCC in implementing Sections 254 and 214(e). The FCC only has the ancillary authority to exercise its agency powers to carry out the clear mandates of Section 254 and Section 214(e) and may not go beyond that authority. As the Supreme Court has stated, the FCC’s ancillary authority does not give the FCC the power to *change* those laws and “expand its jurisdiction beyond the boundaries established by Congress.”⁶⁰ Simply put, the FCC’s ancillary authority is restricted by the actual universal service laws on the books.

The FCC also suggests that perhaps its Title II authority to set reasonable interstate rates, a *sub silentio* reason for its establishment of the pre-1996 Telecommunications Act universal

⁵⁷ *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

⁵⁸ NPRM at ¶¶ 68-69.

⁵⁹ *Board of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-374 (1986).

⁶⁰ *Id.*

service fund according to the U.S. Court of Appeals for the D.C. Circuit,⁶¹ now allows it to revamp post-1996 universal service laws. The problem with this legal theory is that the FCC is constrained by the boundaries of the Act's 1996 universal service provisions which clearly define what the FCC can and cannot do.

VI. The FCC's Regulatory Forbearance Authority Does Not Include the Removal of the Universal Service Provisions of the Act

The FCC cannot use its forbearance authority to essentially rewrite and eliminate Sections 254 and 214(e) of the Act. This would be a gross and unprecedented overreach by the FCC using a provision of the Act that solely concerns the promotion of “competition in the provision of telecommunications service” and “regulatory flexibility.”⁶² The FCC also seeks comment about its forbearance authority in case it decides to forbear from enforcing 254(c)(1) of the Act which defines universal service, in part, as a “telecommunications service”⁶³ and Sections 254(e)⁶⁴ and 214(e)⁶⁵ which restrict universal service support to ETCs.⁶⁶ RTCC notes that the latter statement concerning the scope of Sections 254(e) and 214(e) is an explicit acknowledgment by the FCC that it can only provide support to ETCs, which are regulated pursuant to Title II of the Act as common carriers.

⁶¹ NPRM at ¶ 68. Citing *Comcast Corp. v. FCC*, 600 F.3d 642, 656 (D.C. Cir. 2010).

⁶² 47 U.S.C. § 160.

⁶³ 47 U.S.C. § 254(c)(1).

⁶⁴ 47 U.S.C. § 254(e).

⁶⁵ 47 U.S.C. § 214(e).

⁶⁶ NPRM at ¶ 72.

Section 10 of the Act, adopted concurrently with Sections 254 and 214(e) of the Act, directs the Commission to forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or classes of such carriers or services, if the Commission determines that: 1) enforcement of such regulation or provision of the Act is not necessary to ensure that “charges, practices, classifications, or regulations by, for, or in connection with that telecommunications... are just and reasonable and are not unjustly or unreasonably discriminatory;” 2) enforcement of such regulation is not necessary for the protection of consumers; and 3) forbearance from applying such regulation or provision is consistent with the public interest.⁶⁷ Section 10 further provides that forbearance is in the public interest if the Commission determines that forbearance from application of a statutory provision or a regulation promotes competition among providers of telecommunications services.⁶⁸

The plain language of the statute concerns the Commission’s removal of regulatory barriers and the need to provide “regulatory flexibility”⁶⁹ in order to “promote competitive market conditions.”⁷⁰ The Commission cannot shoehorn a regulatory flexibility provision specifically meant for the promotion of competition and the regulation of rates and charges into Congressional permission to ignore non-germane universal service provisions of the Act in Section 254 and Section 214(e). The Commission’s forbearance authority is firmly rooted in its authority to prevent unjust, unreasonable, or unreasonably discriminatory rates or terms of

⁶⁷ 47 U.S.C. § 160(a)(1)-(3).

⁶⁸ 47 U.S.C. § 160(b).

⁶⁹ 47 U.S.C. § 160(a).

⁷⁰ 47 U.S.C. § 160(b).

service, *not* in any advanced services or universal service context that would allow the Commission to essentially rewrite portions of the Act.

In addition, the three-pronged forbearance test mentioned above is logically inapplicable in the universal service context of the NPRM since it only concerns telecommunications rates, charges, and market power. As the Supreme Court has noted, it is “implausible” that Congress would delegate such power to an agency by simply leaving such a significant issue unaddressed.⁷¹ Had Congress wanted the FCC to support broadband through forbearance measures or by revising Section 254 or Section 214(e) of the Act, Congress would have explicitly included that language in Section 10 of the Act. Congress did not and, therefore, the FCC cannot use Section 10 to rewrite the Act. Further, assuming for the sake of argument that a Section 10 analysis could be applied to Sections 254 and 214(e) in the context of the NPRM, forbearance would not be appropriate because Sections 254 and 214(e) are necessary, pursuant to the command of Congress, to keep rates reasonable and protect consumers.

VII. The Legality of Any New Contribution Mechanism Must Be Addressed

The FCC cannot proceed with a goal of funding solely broadband Internet providers⁷² without addressing the USF contribution mechanism in this proceeding. Both concepts are conceptually linked on a legal level. As provided by Section 254(d) of the Act, every telecommunications carrier that provides interstate telecommunications services must contribute

⁷¹ See, e.g., *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) and *Christensen v. Harris County*, 529 U. S. 576, 590 (2000).

⁷² See, e.g., NPRM at ¶¶ 30 and 62.

to universal service mechanisms.⁷³ If pure broadband providers expect to receive high-cost support, they should expect to contribute. By suggesting that non-telecommunications providers be supported,⁷⁴ the Commission has brought pure broadband service providers into the universal service contribution equation.

The Commission's decision to put off dealing with a new contribution mechanism that would include pure broadband providers highlights the Commission's misgivings about the legality of including pure broadband providers in the universal service mix. If the Commission believes it is unable to seek contributions from pure broadband providers – since they are not providers of interstate telecommunications pursuant to Section 254(d) of the Act – it has no business concluding that pure broadband providers may avail themselves of support paid for by telecommunications carriers. In addition, Section 254(d)'s contribution requirement provides further support that Congress intended that high cost support only flow to telecommunications carriers.

VIII. Conclusion

The FCC's authority is limited and clearly defined by the Act. The Commission may fund broadband pursuant to Section 254(c)(1), provided that the broadband service is included as part of a telecommunications service. Sections 254(e) and 214(e) limit such broadband funding to “telecommunications” carriers. The FCC's attempts to get around these provisions through

⁷³ 47 U.S.C. § 254(d).

⁷⁴ The FCC proposes forbearing from the Act's statutory requirements that only ETCs are allowing to receive universal service funding. *See, e.g.*, USF NPRM at ¶ 72 (suggesting the Commission forbear from applying Sections 254(e) and 214(e), which restrict universal service support to ETCs).

Section 706, forbearance, or its limited ancillary authority virtually guarantee that the FCC's efforts will be tied up in court and reversed.

Respectfully submitted,

**RURAL TELECOMMUNICATIONS
CARRIERS COALITION**

By: */s/ Kenneth C. Johnson*

Kenneth C. Johnson
Gregory W. Whiteaker
Anthony K. Veach
Bennet & Bennet, PLLC
4350 East West Highway, Suite 201
Bethesda, MD 20814
(202) 551-0015

Its Attorneys

Date: April 18, 2011