

**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

Reply Comments of the Rural Telecommunications Carriers Coalition

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

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 Blue Valley Telecommunications, 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, 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*, 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*

The comments filed in this proceeding support the conclusion that the Federal Communications Commission's ("FCC" or "Commission") apparent determination to essentially eliminate the so-called "legacy" federal universal service fund ("USF") programs and create a broadband-only Connect America Fund ("CAF")³ is based on an arbitrary, capricious, and unsupported conclusion that the current USF mechanism is plagued with waste and inefficiency. The Commission's assertions regarding the levels of fraud, waste, and abuse are supported by anecdotal evidence at best and have not been properly vetted or supported.⁴ Because the Commission has offered no real evidence of the waste and inefficiency that it seeks to reduce and/or eliminate through its proposed reforms, commenters are unable to address, discuss or refute any specific issues of waste and inefficiency that may or may not exist in the current USF mechanism. Yet, based in part on this tenuous determination, the Commission is willing to eliminate USF support for highly-regulated common carriers and develop CAF support for unregulated, non-common carriers.⁵

As discussed further herein, Congress has restricted USF monies to eligible telecommunications carriers ("ETC") and common carriers subject to Title II regulation.⁶ The Commission's unlawful proposal to open the USF floodgates to non-ETCs by way of the CAF will almost certainly result in increased administrative costs to run the program and a marked increase in waste, fraud, and abuse. The Commission should not be so hasty to defy Congress' decision to provide funding only to highly-regulated common carriers since expanding the class of USF recipients beyond those intended by Congress is both illegal and based on an arbitrary premise.

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

³ See, e.g., NPRM at ¶ 72.

⁴ See, e.g., NPRM at ¶¶ 28 and 157.

⁵ See, e.g., NPRM at ¶¶ 30 and 62.

⁶ See 47 U.S.C. §§ 254 and 214(e).

I. The Commission Failed to Provide Meaningful Notice and Opportunity to Comment on Its Determinations Regarding Waste and Inefficiency

Throughout the NPRM and FNPRM, the Commission makes vague and unsupported references to USF “waste and inefficiency” that it seeks to reduce and/or eliminate through its drastic proposals.⁷ Indeed, in identifying its four guiding principles for USF and intercarrier compensation reform, the Commission describes the “Fiscal Responsibility” principle as “control[ling] the size of USF as it transitions to support broadband, including by reducing waste and inefficiency.”⁸ However, the Commission provides no concrete instances of widespread waste or inefficiency, nor does it provide any data or information to support its correlation of the size of USF with waste or inefficiency. In this regard, RTCC agrees with the comments of the Blooston Rural Carriers, which specifically discuss federal high-cost support to local exchange carriers (“RLECs”):

Over twenty-seven years of federal high-cost support to RLECs have produced quality telecommunications and information services, modern and reliable telecommunications network infrastructure and affordable rates for rural residents that are reasonably comparable to the services and rates available in urban areas. Moreover, this has been accomplished without any substantial scandals, waste or inefficiencies. Decades of National Exchange Carrier Association (“NECA”), Universal Service Administrative Company (“USAC”) and state utility commission audits, as well as Congressional and Commission investigations, have encountered some mistakes, misinterpretations, missing records and other human imperfections, but virtually no significant scandal, fraud or waste. Even where some have tried to turn individual RLECs into “poster children” for fraud or waste, a fair examination of the facts and circumstances has demonstrated a reasonable and legitimate basis for their costs and [high cost] support [...].⁹

RTCC also echoes the comments of the Rural Associations which emphasize that the high-cost program should be considered overall as an effective and efficient tool for achieving broadband

⁷ See, e.g., NPRM at ¶¶ 28 and 157.

⁸ See, e.g., NPRM at ¶ 10.

⁹ Comments of the Blooston Rural Carriers at p. 3.

availability, rather than a source of waste or inefficiency.¹⁰ Though RTCC and other commenters like the Rural Associations are able to broadly voice their support for the “legacy” high-cost program, they are left guessing as to what particular data or information the Commission has relied upon in determining the presence of current, so-called USF waste and inefficiency.

Pursuant to Section 553 of the Administrative Procedure Act (“APA”), the Commission is required to publish notice of “the terms or substance of the proposed rule or a description of the subjects and issues involved” in order to provide interested persons with an opportunity to participate in the rulemaking.¹¹ However, such notice is not sufficient if parties are deprived of the opportunity to present relevant information.¹² Here, the NPRM and FNPRM deprives commenters of the opportunity to participate in this rulemaking proceeding with respect to the data and information, if any, upon which the Commission relied to determine that there is waste and inefficiency within the USF mechanism that the Commission proposes to reduce or eliminate.

APA precedent is clear that whatever data or information upon which the Commission will rely in promulgating these USF reform rules must be made available during the rulemaking proceeding to give RTCC and others meaningful notice and opportunity for comment.¹³ Without the FCC disclosing

¹⁰ Comments of the National Exchange Carrier Association, Inc., the National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies, and Western Telecommunications Alliance (“Rural Associations”) at p. 8, fn. 6.

¹¹ See 5 U.S.C. § 553(b)-(c).

¹² See *WJG Tel Co., Inc. v. FCC*, 675 F.2d 386, 389 (D.C. Cir. 1982) (“[n]otice is sufficient ‘if it affords interested parties a reasonable opportunity to participate in the rulemaking process,’ and if the parties have not been ‘deprived of the opportunity to present relevant information by lack of notice that the issue was there’”) (citations omitted); see *Fla. Power & Light Co. v. Nuclear Regulatory Comm’n*, 846 F.2d 765, 771 (D.C. Cir. 1988).

¹³ See *Amer. Radio Relay League v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008) (“[i]t would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment”).

the basis for its conclusions on USF waste and inefficiency, any subsequent rule adopted will have been based on information known only to the Commission and *not* on adequate notice and informed comment pursuant to APA procedures.¹⁴

If the Commission is relying on any staff reports, such reports must be disclosed.¹⁵ If the Commission is selectively relying on certain data or information to support its determinations regarding conclusions on USF waste and inefficiency, but is ignoring conflicting data, such cherry-picking is not permitted and must be made transparent.¹⁶ To the extent the Commission may be relying on data or information that is publicly available, this reliance would be inadequate because the Commission's methodology in considering the data or information would not have been part of the public record.¹⁷ To remedy this fatal defect of the NPRM and FNPRM, the Commission must release data and information relating to any determination it has made regarding USF waste and inefficiency and properly seek industry comment on the data and its conclusions.

¹⁴ See *Portland Cement Ass'n v. Ruckelhaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency").

¹⁵ See *Amer. Radio Relay League at 236 citing Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984) ("[d]isclosure of staff reports allows the parties to focus on the information relied on by the agency and to point out where that information is erroneous or where the agency may be drawing improper conclusions from it").

¹⁶ *Id.* at 237 ("[w]here, as here, an agency's determination 'is based upon 'a complex mix of controversial and uncommented upon data and calculations,'" there is no APA precedent allowing an agency to cherry-pick a study on which it has chosen to rely in part"). See *Solite Corp. v. EPA*, 952 F.2d 473, 500 (D.C. Cir. 1991) (quoting *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978)).

¹⁷ See *Nat'l Black Media Coalition v. FCC*, 791 F.2d 1016, 1023 (D.C. Cir. 1986) (holding that the FCC's methodology used in creating publicly available maps and studies should have been a part of the public record and that such a non-disclosure prevented petitioners and others from making relevant comments).

II. The Communications Act Strictly Limits the Receipt of Universal Service Support to Highly-Regulated Eligible Telecommunications Carriers

In the NPRM, the FCC sought comment on the minimum requirements that should be imposed on entities applying for support during the first phase of the CAF and presumably for whatever long-term CAF framework is adopted.¹⁸ The Commission asked whether an entity should be designated as an eligible telecommunications carrier pursuant to the Communications Act of 1934, as amended (“Act”) in order to receive CAF support.¹⁹ Specifically, the Commission asked whether it can provide support to information service providers even though section 254(e) states that only eligible telecommunications carriers designated under section 214(e) are eligible to receive Federal universal service support, and, if not, under what mechanism the FCC could designate and provide support to information service providers.²⁰

In essence, the Commission has asked whether it can or should open up CAF as a “free-for-all” to all types of broadband providers, regardless of whether they are regulated as a common carrier under the Act. Both the legal and policy answer is “no.” RTCC reminds the Commission that Congress has spoken directly to the issue – only ETCs, specifically designated as common carriers, may receive universal service support – and the Commission’s proposals in the NPRM to ignore the ETC requirements of the Act are contrary to Congress’s clear intent as mandated in the Act.²¹

In addition to the clear language of the Act, there are policy reasons why universal service support is strictly and explicitly limited to ETCs. ETCs, which are common carriers regulated pursuant to Title II of the Act, are subject to strict FCC requirements for service and accountability that ensure designation is in the public interest and prevent cream skimming or receiving support for only

¹⁸ See NPRM at ¶ 316.

¹⁹ *Id.*

²⁰ See NPRM at ¶62.

²¹ See 47 U.S.C. § 254(e).

serving areas with higher concentrations of population.²² Broadband providers are simply not regulated in any manner comparable to common carriers. These deregulated broadband providers do not file tariffs, are not subject to the same state and federal reporting requirements as ETC common carriers, are not subject to FCC network outage rules, and are allowed to discriminate among customers or pick and choose which customers to provide service to in their service territory.²³ By suggesting that non-common carriers should have access to broadband funding, the FCC has opened up funding to entities that it has no authority to regulate to the extent that the Commission can oversee and regulate common carriers. Opening up support to non-regulated entities is a recipe for the very “waste and inefficiency” that, as discussed above, the FCC is using to justify its proposed universal service rules. With limited, if any, legal authority over non-regulated entities, the FCC’s tools to limit waste and inefficiencies will also be limited. Therefore, from a policy standpoint, it makes no sense to allow non-common carriers to receive high-cost support.

Numerous non-regulated entities are now making their pitches for federal support.²⁴ For example, satellite broadband providers claim that there is no justification for restricting their ability to

²² In 2005, the FCC adopted a “more rigorous ETC designation process,” and recommended all states apply the requirements in order to “improve the long-term sustainability of the universal service fund.” *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 20 FCC Rcd 6371, ¶2 (rel. Mar. 17, 2005). Previously, the Commission had strengthened its competitive ETC designation framework in its 2004 Virginia Cellular ETC Designation Order. *See Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 1563 (2004).

²³ Cable companies, a type of non-common carrier, have suggested universal support should be opened up to anyone going forward. *See* Comments of the National Cable & Telecommunications Association at p. 7. This is a prime example of why the Act requires only common carriers be eligible to receive support. Cable companies’ typical business plans involve them serving only the most-densely populated, highly-profitable areas, rather than high-cost areas served by common carriers that are required, by law, to serve all those that request service.

²⁴ *See* Comments of Comcast Corporation at 17 (recommending broadband providers be eligible for CAF support); *see also* Comments of New America Foundation, Consumers Union, and Media Access project at 6 (arguing community networks should be eligible for CAF funding); Joint Comments of

participate fully and directly in all phases of the CAF.²⁵ Satellite broadband providers also claim that the technological limitations of their service, characterized by slow speeds, incurable latency, and frequent disruptions, should not prevent them from receiving direct CAF support.²⁶ However, it is not satellite broadband's inability to be a truly reliable, robust service that disqualifies the providers of such service from receiving any type of CAF support, it is the fact that they have not been designated ETCs pursuant to the statutory provisions in Sections 254 and 214(e) of the Communications Act.

Other non-regulated carriers also advance arguments that generally support dismantling the current high-cost USF program and creating a new broadband fund that is open to all broadband providers.²⁷ In making this argument, these non-regulated entities generally characterize universal service as a system that is susceptible to fraud, waste, and abuse, and claim that the current USF does not advance broadband deployment.²⁸ However, these commenters provide no evidence to support such assertions of waste, fraud, and abuse and even ignore record evidence showing that current USF support has advanced broadband in rural areas served by RLECs.²⁹ As discussed above, flimsy allegations of waste do not provide the adequate legal justification for dismantling legacy USF

Satellite Broadband Providers at 6 (stating that satellite broadband providers should be eligible for direct CAF support); Comments of the Wireless Internet Service Providers Association at 5 (proposing a CAF eligibility standard that includes all broadband providers and is confirmed by the FCC and not state commissions); Comments of the Information Technology Industry Council at 5 (calling for participation of all broadband providers in CAF reverse auctions); Comments of Cox Communications, Inc. at 8 (suggesting the FCC evaluate whether it can ignore ETC provisions or in the alternative, relax its ETC rules).

²⁵ Joint Comments of Satellite Broadband Providers at 7.

²⁶ *Id.*

²⁷ *See generally* Comments of the Wireless Internet Service Providers Association; Comments of NCTA; and Comments of Cox Communications.

²⁸ *See, e.g.,* Comments of the Wireless Internet Service Providers Association at 11.

²⁹ RTCC notes that of the unserved housing units that are in rural areas, the vast majority are in areas served by a Regional Bell Operating Company or a mid-sized price cap carrier, not a rate-of-return RLEC. Federal Communications Commission, *The Broadband Availability Gap*, OBI Technical Paper No. 1, 20-21 (2010).

mechanisms, especially when doing so would allow non-regulated entities to possibly abuse the new system with the FCC having limited recourse.

III. Conclusion

The FCC's authority is limited and clearly defined by the Act. Sections 254(e) and 214(e) limit such broadband funding to highly-regulated, "telecommunications" carriers. The FCC's assertion that waste and inefficiency support the dismantling of legacy universal service mechanisms is unsupported by the record in this proceeding and has not even been properly vetted pursuant to administrative law. Further, opening up broadband funding to non-regulated entities would allow waste and fraud to flourish unchecked and un-regulated.

Respectfully submitted,

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