

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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

REPLY COMMENTS OF THE USA COALITION

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Date: May 23, 2011

SUMMARY

The voluminous record in this proceeding reflects widespread agreement that comprehensive universal service reform is necessary, but no consensus about the appropriate replacement mechanism. However, the record makes clear that the reforms proposed in the NPRM, which are based on the recommendations set forth in the National Broadband Plan (“NBP”), are fundamentally inconsistent with the requirements of the Communications Act of 1934, as amended (the “Act”). As such, a decision by the Federal Communications Commission (“Commission”) to adopt the current proposals would risk further delay of real and sustainable reform since the proposals would be overturned by the courts in the litigation that inevitably will follow.

Instead of rushing to adopt questionable proposals with an uncertain legal foundation in an effort to meet a self-imposed and arbitrary timeline, the FCC should step back, focus on what consumers want and need, and base its reform efforts on the universal service provisions in its enabling statute, the Act. In this and related proceedings, numerous parties have repeatedly demonstrated the profound legal and policy flaws in the Commission’s proposed reforms. Rather than directly addressing these substantial flaws, the Commission has systematically ignored them in its various Notices and made clear in various public statements that an order will be adopted by August, which seemingly reflects a “damn the torpedoes” approach to rulemaking. Indeed, although the Commission now seeks to justify the proposed reforms on the recommendations of the NBP, the structural framework for reform remains largely the same as the proposals considered by the FCC in 2008. Despite the near impossibility of seriously considering all of the issues and proposals set forth in most recent round of comments and reply comments in this proceeding on the self-imposed timeframe the FCC has set for itself, the Commission continues to rush headlong down a path that ultimately will lead nowhere and accomplish nothing more than delaying the deployment of the very services that the Act seeks to support.

The USA Coalition respectfully submits that the Commission must address the serious issues raised by many parties regarding the fundamental inconsistencies between the proposed reforms and the requirements of the Act before adopting any order that would radically change the existing high-cost support mechanism. Among other issues, the Commission must consider arguments that:

- The Commission cannot use all high-cost funding solely to support a single service that has yet to be adopted by a “substantial majority” of residential consumers;
- The proposed use of single-winner auctions would be fundamentally inconsistent with the spirit and the letter of the Act;
- The Commission cannot justify the radically different transition periods proposed for wireline and wireless ETCs or the “keep-whole” or revenue replacement mechanisms for ILECs; and
- The Commission lacks the authority to fund broadband deployment by “reserving” funds “captured” from other, existing universal service programs.

Several commenting parties have also proposed alternative reform frameworks designed to achieve the policy objective of fostering broadband deployment while remaining true to the Act’s requirements. These proposals illustrate that the choice between either accepting the FCC’s broadband-centric vision of reform or idling indefinitely in the inadequate status quo is demonstrably false.

The Administrative Procedure Act (the “APA”) requires the Commission to respond to these significant concerns and alternative proposals raised by interested parties. To date, the Commission, unfortunately, has failed to do so despite the many years that have passed since the agency first proposed similar reform measures and numerous parties raised the concerns outlined above. Since many of the identified flaws go to the core of the Commission’s ability to adopt the proposed reforms and many of the proposed alternatives are radically different from the Commission’s proposals, the public should be provided with notice an opportunity to comment on the agency’s response. The Commission’s silence on these issues has made it difficult, if not

impossible, for anyone to fully consider any of the alternatives, or even the latest round of comments and reply comments, before the Commission's self-imposed, arbitrary deadline.

Rather than adopting measures that rest upon a shaky -- or non-existent -- legal foundation, the Commission should seriously consider the alternative reform proposed that actually reflect the requirements of the Act rather than only the NBP. The public interest would be better served by reform measures that focus on delivering the services that the substantial majority of residential customers want by directly addressing market entry barriers than by superficially appealing programs that seemingly cost less over the short term but that are far more costly over time both in terms of necessary support and harm to competition.

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REPLY COMMENTS OF THE USA COALITION

The Universal Service for America Coalition (“USA Coalition” or “Coalition”), by its attorneys, hereby replies to comments submitted in response to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (“NPRM”) released by the Commission in the above-captioned docket. In the NPRM, the FCC proposes broad reforms to the high-cost universal service fund (“USF”) and the existing intercarrier compensation (“ICC”) regime.¹ There is no doubt that the record in this proceeding reflects widespread agreement that comprehensive universal service reform is necessary, but the comments share little in common beyond the general consensus that reform is necessary.

¹ *Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing a Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (rel. Feb. 9, 2011).

The Commission's universal service reform proposals are based on the recommendations set forth in the *National Broadband Plan* ("NBP") that the Commission released over a year ago. As several parties have pointed out repeatedly in this proceeding, Congress did not authorize the Commission to implement the NBP, and thus the Commission's reform efforts remain governed solely by the Communications Act of 1934, as amended (the "Act"). As such, even if the recommendations in the NBP reflect noble and desirable policy objectives, the Commission can adopt reform measures based upon the NBP only if they are fully consistent with the letter and the spirit of the Act as it stands today. As several parties demonstrated in their initial comments, many of the Commission's proposed reforms are fundamentally inconsistent with the requirements of the Act.

While most parties recognize the critical importance of supporting broadband services in rural, high cost, and insular areas of the country, the parties also recognize the equal importance of ensuring that reform measures comport with the requirements of the Act. In light of the Commissioners' statements that an Order on universal service reform will be adopted "within a few months,"² many commenting parties are justifiably concerned that the Commission will rush to adopt policies that do not comport with the Act and that likely will be overturned in subsequent litigation. If the Commission continues to remain silent about the valid concerns and alternative proposals raised by commenting parties, the reform Order will also be vulnerable to challenge on the grounds that it violates the Administrative Procedures Act ("APA"). Indeed, the Commission's silence to date has made it nearly impossible for the agency to explore and adopt any of the alternative proposals before the Commission's self-imposed and arbitrary deadline. Rather than rush to meet a self-imposed deadline, now is the time for the Commission to fully

² Joint Statement of Commissioners Julius Genachowski, Michael Copps, Robert McDowell, Mignon Clyburn, and Meredith Baker, *Making Universal Service and Intercarrier Compensation Reform Happen* (Mar. 15, 2011), available at: <http://reboot.fcc.gov/blog?entryId=1335527>.

consider all alternatives before it moves forward with measures that are more likely to be overturned after years of litigation than they are to advance the Commission's broadband goals.

I. COMMENTING PARTIES AGREE THAT UNIVERSAL SERVICE REFORM MUST BE GUIDED IN THE FIRST INSTANCE BY THE ACT, NOT THE NBP

While almost all parties believe that while the policy goals expressed by the Commission in the NBP and the NPRM are certainly laudable, the core provisions of the NPRM do not comply with the Act as they are required.³ Indeed, as T-Mobile points out, the Commission itself recognized in the NPRM that any USF reform effort “must, of course, be guided in the first instance by the Act.”⁴ Despite this stated commitment to ground reform in the clear mandates of the Act, the Commission has unfortunately strayed from its statutory mandate and based its proposed universal service reforms primarily upon the recommendations of the NBP.

As recognized by several parties, when Congress directed the Commission to develop a national broadband plan in the America Recovery and Reinvestment Act of 2009, Congress did not grant the Commission any independent authority to implement the plan.⁵ As Cellular South explains, the NBP was not voted upon or otherwise adopted by the Commission and, therefore, does not carry the force of law.⁶ As such, even assuming that the recommendations in the NBP reflect noble and desirable policy goals that should be implemented, the Commission must recognize that it may implement such policies only if the recommendations are fully consistent

³ See e.g., Alexicon Telecommunications Consulting Comments at 14; Cellular South, Inc. Comments at 1 (“Cellular South Comments”); Rural Telecommunications Group, Inc. Comments at 2 (“RTG Comments”); George Mason University Mercatus Center Comments at 2 (“Mercatus Center Comments”); General Communications, Inc. Comments at 1-2 (“GCI Comments”); T-Mobile USA, Inc. Comments at 6 (“T-Mobile Comments”).

⁴ T-Mobile Comments at 6, quoting NPRM, ¶ 77 (internal quotations omitted).

⁵ See e.g., Cellular South Comment at 6-9; USA Coalition Comments at 4; Rural Telecommunications Carriers Coalition at 10 (“RTCC Comments”). See also USA Coalition Comments, WC Docket Nos. 10-90, 05-337, GN Docket No. 09-51, at 5-11 (filed July 12, 2010).

⁶ Cellular South Comments at 8.

with the letter and the spirit of the Act as it stands today. As the Coalition explains in more detail below, multiple parties have raised substantial concerns that several core provisions of the NPRM plainly and impermissibly contradict the binding requirements of the Act.

II. THE FCC CANNOT FOCUS SUPPORT SOLELY ON A SERVICE THAT HAS NOT YET BEEN ADOPTED BY A SUBSTANTIAL MAJORITY OF RESIDENTIAL CONSUMERS

As pointed out by several commenters including AT&T, the Commission’s objective of only supporting broadband at actual 4 Mbps download and 1 Mbps upload speeds is inconsistent with the Act’s focus on extending universal service support only to services that “have, through the operation of market choices by customers, been subscribed to by a *substantial majority* of residential consumers.”⁷ As the statute makes clear, the Joint Board and the Commission must analyze what services have already been adopted by a substantial majority in order to determine that such a service should be supported by universal service mechanisms. In this manner, the evolution of universal service support mechanisms is designed to *follow* the market after the Commission and the Joint Board identify services to be supported based upon a factual market analysis. Here, however, the Commission’s approach can be characterized as *pushing* the market towards an aspirational goal of universal adoption of services that have yet to be subscribed to by a substantial majority of residential customers. The Act requires that actual residential consumers, not the Commission, be the ultimate driving force behind what services are supported by universal service mechanisms.

Parties who argue that broadband has already been adopted by a substantial majority of residential consumers fail to appreciate the difference between earlier definitions of broadband

⁷ 47 U.S.C. § 254(c)(1) (emphasis added); AT&T Comments at 93; Mercatus Center Comments at 3; USA Coalition Comments at 6.

and the level of broadband service called for by the NBP.⁸ The Communications Workers of America and the Greenlining Institute, for example, state that over sixty percent of Americans subscribe to broadband internet services.⁹ While that may well be true of services capable of delivering more modest download speeds, the adoption rate for services with more limited speeds is a radically different question than whether there has been substantial majority adoption of broadband at actual 4 Mbps download and 1 Mbps upload speeds. Indeed, as pointed out by AT&T and others, the Commission’s own analysis in March of this year clearly demonstrates that the vast majority of reportable internet connection *would not* satisfy this ambitious speed target and, therefore, broadband service at the proposed speeds is not currently eligible to be added to the list of supported services.¹⁰

The “substantial majority” adoption test set forth in the Act serves a number of important functions that should not be cavalierly tossed aside. First, the test provides an objective measure of consumer demand for a given service. As noted by the Mercatus Center at George Mason University, many consumers live in areas where higher download speeds are available, yet those consumers have chosen to subscribe to broadband at slower speeds than could otherwise be

⁸ See Greenlining Institute Comments at 4; Communications Workers of America Comments at 6.

⁹ Communications Workers of America Comments at 6 (“[Broadband]...[is] subscribed to by a substantial majority of residential customers (68 percent)”; Greenlining Institute Comments at 4 (“More than five out of eight Americans (65%) now connect to the internet with a broadband connection.”); accord NECA, NTCA, OPASTCO and WTA Comments at 83 (“the substantial majority of American households and businesses in urban and suburban areas continue to subscribe to both fixed and mobile voice and broadband services.”) (“NECA Comments”).

¹⁰ AT&T Comments at 93; accord USA Coalition Comments at 6-7; Mercatus Center Comments at 3 (“We also find that a substantial majority of residential customers do not subscribe to 4 Mbps/1 Mbps broadband.”). See also Dissenting Statement of Commissioner Robert McDowell, *Seventh Broadband Progress Report and Order on Reconsideration* (May 20, 2011) (“Over half of all high-speed connections are below 3 Mbps downstream, and the Commission’s surveys find that consumers are happy with both their existing broadband service and speed.”) (“McDowell Broadband Statement”).

obtained.¹¹ Thus, the substantial majority adoption test ensures that consumers actually desire a given service before universal service funds are expended to support the availability of such services. Further, by only supporting services that have been adopted by a substantial majority of residential consumers, fund size is kept to a manageable level. As AT&T points out, “a more modest threshold would reduce the size of the CAF” and thereby reduce the contribution burden on consumers.¹² Finally, the Act’s adoption test minimizes government interference with technological development by empowering consumers, rather than the government, to ultimately determine which services are sufficient critical to be supported as a universal service.

Given these valid concerns, the Commission cannot simply ignore the statutory requirement that services be added to the supported services list only after that service has been adopted by a substantial majority of residential consumers. Adding NBP-level broadband to the list of supported services without undertaking the mandatory factual analysis in coordination with the Joint Board would be a textbook example of arbitrary and capricious rulemaking. The Commission unquestionably had failed to conduct such an analysis here. Instead, the Commission has continued to focus myopically on pushing the aspirational speed targets identified in the NBP, thereby usurping the role of the market (*i.e.*, the demonstrated preferences of residential customers) and choosing the services that *should* be supported regardless of what services residential customers actually are purchasing. While the USA Coalition supports the goal of facilitating broadband deployment, we cannot support an approach that departs so radically from the Act.

¹¹ Mercatus Center Comments at 7; *accord* McDowell Broadband Statement.

¹² AT&T Comments at 94.

III. THE RECORD DEMONSTRATES THAT SINGLE WINNER REVERSE AUCTIONS ARE INCONSISTENT WITH THE ACT'S REQUIREMENTS THAT UNIVERSAL SERVICE PROGRAMS BE COMPETITIVELY NEUTRAL

In another telling example of the Commission myopic focus on implementing the recommendations of the NBP to the exclusion of all other alternative plans is the FCC's continued support of a single winner reverse auction distribution mechanism. The Commission's consideration of the use of reverse auctions to distribute universal service funds dates back to 2008 and the same statutory and policy-based objections to this proposal that applied three years ago continue to apply with equal force today.¹³ In 2010, the Commission revived the single winner reverse auction concept in the NBP and the follow-on Notice of Inquiry and Notice of Proposed Rulemaking ("USF NOI & NPRM").¹⁴ When issuing the USF NOI & NPRM for comment, Commissioner Copps expressed concern regarding the use of reverse auctions to distribute funds and stated that "the prospect of using such a mechanism raised many questions that still remain unanswered."¹⁵ The ensuing comment cycle demonstrated the validity of Commissioner Copps' concerns and once again elaborated upon the infirmities inherent in the Commission's reverse auction proposal. In response to the USF NOI & NPRM the Commission received comments from a wide range of industry groups that the proposed reverse auction

¹³ See *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, 23 FCC Rcd 1495 (2008) ("Reverse Auctions Notice"); see also Statement of Michael J. Copps, Dissenting in Part [on the Reverse Auctions Notice], January 29, 2008 ("this purportedly market-based approach strikes me as hyper-regulatory. For these reasons, I must dissent from the NPRM's tentative conclusion that the Commission should develop an auction mechanism to determine high-cost support.").

¹⁴ *In the Matter of Connect America Fund; A National Broadband Plan for Our Future; High-Cost Universal Service Support*, WC Docket Nos. 10-90, 05-337, GN Docket No. 09-51, Notice of Inquiry and Notice of Proposed Rulemaking, 25 FCC Rcd 6657 at ¶¶ 19–20 (2010); accord NBP at 145.

¹⁵ Statement of Commissioner Michael J. Copps, *Re: Connect America Fund*, WC Docket No. 10-90, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, *High-Cost Universal Service Support*, WC Docket No. 05-337.

mechanism: (i) was inconsistent with the Act;¹⁶ (ii) would recreate a monopoly system that would require significant oversight and effectively preclude competition;¹⁷ and (iii) raised serious questions regarding a supported carrier's ongoing viability and performance.¹⁸ Nearly a year later, these same questions remain unaddressed, and the Commission has done nothing to demonstrate that these concerns are being taken into account in adjusting its recommendations in order to formulate a statutorily sound distribution policy.

Rather than heed the calls to address these valid concerns, the FCC has held fast to the reverse auction proposal and has signaled its intent to follow through on its recommendations “within a few months,”¹⁹ regardless of whether the proposed policy comports with the Act's requirements that universal service support be “specific, predictable, and sufficient” to provide rural and high costs areas with services that are reasonably comparable to those services available in urban areas at reasonably comparable rates.²⁰ Once again in this round of comments, the commenting parties have echoed the concerns that have been raised in the past several years: (i) the Commission lacks the statutory authority to adopt reverse auctions,²¹ and (ii) that even

¹⁶ TCA USF NOI & NPRM Comments at 17 (filed July 12, 2010) (“[A]llocating USF based upon the results of a reverse auction would not comply with the statutory requirement for specific, predictable and sufficient support mechanisms to preserve and advance universal service.”); RCA USF NOI & NPRM Comments at 14 (filed July 12, 2010).

¹⁷ CTIA USF NOI & NPRM Comments at 29 (filed July 12, 2010); Alaska Communications Systems USF NOI & NPRM Comments at 7 (filed July 12, 2010); Sprint Nextel USF NOI & NPRM Comments at 9, n. 13 (filed July 12, 2010).

¹⁸ NECA USF NOI & NPRM Comments at 25 (filed July 12, 2010).

¹⁹ Joint Statement of Commissioners Julius Genachowski, Michael Copps, Robert McDowell, Mignon Clyburn, and Meredith Baker, *Making Universal Service and Intercarrier Compensation Reform Happen* (Mar. 15, 2011), available at: <http://reboot.fcc.gov/blog?entryId=1335527>.

²⁰ 47 U.S.C. § 254(b).

²¹ United States Cellular Corporation Comments at 21 (“US Cellular”); MTPCS, LLC, d/b/a Cellular One and N.E. Colorado Cellular, Inc. at 36 (“Cellular One”); NECA Comments at 80-82.

assuming that the Commission possessed the authority to adopt a single winner reverse auction, that such a decision would still constitute a poor policy choice.²²

While the policy objections to single winner reverse auctions have been described at length in prior filings by the USA Coalition²³ and other parties,²⁴ it bears repeating once again that a single winner reverse auction distribution mechanism would be fundamentally inconsistent with the mandate that universal service support mechanisms be competitively neutral.²⁵ As argued by US Cellular, the FCC’s reverse auction proposals “is not competitively neutral because, instead of encouraging competitive entry and the natural price competition that comes with it, the proposed auction mechanism would install a government-selected monopoly service provider in each geographic service area.”²⁶ Or, in the words of RCA, “[t]his proposal appears superficially competitively neutral by making wireline and wireless carriers alike eligible to bid. In reality, however, a single-winner approach would most likely undermine competition, rather than promote it.”²⁷ Indeed, as argued by Cellular One, reverse auctions “by design, would

²² CTIA Comments at 13-14 (“Before the Commission prematurely gravitates toward a single methodology for determining and distributing all support nationwide, CTIA believes that the FCC should conduct trials of different types of market-based mechanisms”); CenturyLink Comments at 32 (“The potentially harmful impacts of a reverse auction on existing investment, future investment, and service quality, should discourage adopting this approach to distribution of high-cost support in existing service areas.”); RTG Comments at 14 (“RTG believes reverse auctions will result in second-class service for wireless consumers in high-cost, rural areas. Reverse auctions create an incentive for anticompetitive behavior by the largest carriers.”).

²³ USA Coalition USF NOI & NPRM Comments at 34-39 (filed July 12, 2010) (discussing the policy objections to the FCC’s reverse auction proposal).

²⁴ See e.g., RTG Comments at 14-15; Rural Cellular Association Comments at 17-18; TCA Comments at 9; NASUCA Comments at 84 (“reverse auctions are fundamentally flawed and cannot ensure that competitive bids will even be received in any particular area.”).

²⁵ Accord US Cellular Comments at 23 (“the Commission’s reverse auction proposal extend[] beyond its delegated authority under the Act”); accord Allband Communications Cooperative Comments at 21 (“The Commission has not cited applicable authority under the Act for the largely unexplained reverse auction.”).

²⁶ US Cellular Comments at 16.

²⁷ Rural Cellular Association Comments at 17 (“RCA”); accord Earthlink, Inc. Comments at 17 (“EarthLink disagrees with the Commission’s statement that its ‘proposal to support

depress, rather than promote, competitive entry in areas receiving universal service support. Such a result would directly contravene the mandate of the 1996 Act to promote competition in the local exchange marketplace.”²⁸ In short, the Commission should reject any proposal that would effectively contravene the mandate of competitive neutrality, especially in this era of rapid industry consolidation.

As several parties have noted in prior filings in this docket, competitive neutrality requires more than the ability of multiple parties to *bid for the ability* to compete in a high cost area; it requires a system in which competitors *actually* compete in the marketplace.²⁹ As RCA noted in its filings in response to the USF NOI & NPRM: “[w]hile a reverse auction would bring competition within an electronic auction room, it would not have a competitively neutral effect in the marketplace.”³⁰ Since the ultimate effect of a single winner reverse auction would be to establish a monopoly at the expense of a competitive system, such a proposal is impermissible under the plain language of the Act and the Commission’s own precedent.

These valid statutory concerns have not diminished with time. Nor should the FCC take the position that the failure by some parties to renew these concerns constitutes a waiver of these previously raised objections. Indeed, several parties appear resigned to the fact that the Commission is deliberately turning a deaf ear to these concerns. In the words of CTIA, “[a]lthough the Commission acknowledges the wireless industry’s concerns about limiting support to one provider per area, the NPRM evinces a clear preference for single-winner reverse

broadband is competitively neutral because it will not unfairly advantage one provider over another.”).

²⁸ Cellular One at 38.

²⁹ See e.g., USA Coalition USF NOI & NPRM Comments at 35 (filed July 12, 2010) (“the proper inquiry is whether the effect of the legal requirement, rather than the method imposed, is competitively neutral.”).

³⁰ RCA USF NOI & NPRM Comments at 17 (filed July 12, 2010).

auctions.”³¹ RTG morosely notes that “[w]hile RTG does not support the use of reverse auctions, it anticipates that the Commission will adopt them.”³² This fatalistic outlook is the product of the Commission’s myopic focus on single winner reverse auctions while simultaneously neglecting to explore other, potentially viable distribution policies. The FCC’s singular focus on single winner reverse auctions need not, and should not, be the case.

While the USA Coalition has consistently opposed the adoption of reverse auctions, we have noted that there exist viable policy alternatives that would reflect both the letter and spirit of the Act and would provide consumers with the competitive service options that they have shown an overwhelming demand for. Other parties have expressed similar views.³³ CTIA, for example, suggests that “[b]efore the Commission prematurely gravitates toward a single methodology for determining and distributing all support nationwide, CTIA believes that the FCC should conduct trials of different types of market-based mechanisms[.]”³⁴ Indeed, rather than blindly proceeding towards a pre-determined destination, the Commission should pause to consider a full range of alternative proposals to the reverse auction mechanisms,³⁵ and develop a distribution mechanism that attacks the underlying obstacles to deploying broadband instead of setting arbitrary, bright-line distinctions between services and speeds that would require the use of harmful distribution mechanisms like the proposed single winner reverse auction.

³¹ CTIA Comments at 13 (internal footnotes omitted).

³² RTG Comments at 15.

³³ See e.g., SouthernLINC Wireless Comments at 17-30, WC Docket No. 05-337; CC Docket No. 96-45 (filed Apr. 17, 2008).

³⁴ CTIA Comments at 14; accord US Cellular Comments at 41 (“the Commission should steer clear of any experimentation with untried and problematic reverse auction mechanisms, and instead proceed with the adoption of a cost model for use in disbursing CAF support.”). See also T-Mobile Comments at 14 (“a preferable approach is to have the Commission adopt several pilot programs to measure which approach, or perhaps combination of approaches, delivers the widest broadband coverage at the least cost.”).

³⁵ See e.g., Comments of SouthernLINC Wireless at 17-30, WC Docket No. 05-337; CC Docket No. 96-45 (filed Apr. 17, 2008); accord CTIA Comments at 14.

IV. THE FCC CANNOT PAY FOR THE CAF USING FUNDS “RESERVED” FROM OTHER, EXISTING UNIVERSAL SERVICE PROGRAMS

As argued by the USA Coalition in its initial comments³⁶ as well as by the Coalition and SouthernLINC Wireless in a joint Petition for Reconsideration of the *Corr Wireless Order and NPRM* (“Petition for Reconsideration”),³⁷ and in the Petition for Review of the subsequent order in the same proceeding made by the USA Coalition and the Rural Cellular Association in the United States Court of Appeals for the District of Columbia Circuit (“Petition for Review”),³⁸ the Commission lacks the authority to pay for its new distribution mechanism by “phasing down” several other existing forms of support and holding those funds collected from telecommunications providers indefinitely in “reserve” in order to distribute them, *via* a series of reverse auction mechanisms, to broadband service providers once a broadband support mechanism is adopted, if indeed such a mechanism is ever adopted at all.

The argument that the Commission cannot permissibly “stockpile” universal service funding for an undefined purpose under the Act has been before the Commission since the USF NOI & NPRM comment round in early 2010.³⁹ Since then several parties have concurred in this critique of the Commission’s planned source of funding for an as-yet uncreated universal service support program.⁴⁰ The USA Coalition’s September 30, 2010 Petition for Reconsideration

³⁶ USA Coalition Comments at 16-18.

³⁷ Petition for Partial Reconsideration of the USA Coalition and SouthernLINC Wireless, WC Docket No. 05-337, CC Docket No. 96-45 (filed Sept. 30, 2010).

³⁸ Petition for Review of the Rural Cellular Association and the Universal Service for America Coalition, *Rural Cellular Ass’n et al. v. FCC*, No. 11-1094 (D.C. Cir. March 28, 2011).

³⁹ See Verizon USF NOI & NPRM Comments at 22-23 (filed July 12, 2010) (“Stockpiling universal service funding to be distributed down the road from a mechanism that the Commission anticipates creating, but has not yet established or defined with reasonable particularity, would be inconsistent with [the Act].”)

⁴⁰ See *e.g.*, CTIA USF NOI & NPRM Reply Comments at 10; USA Coalition USF NOI & NPRM Reply Comments at 11 (filed Aug. 11, 2010).

discussed in detail the FCC's lack of authority to "reserve" universal service funds to be used for an unspecified purpose at an indeterminate point in the future.⁴¹

Specifically, the Petition for Reconsideration notes that the universal service system is structured to serve the critical function of ensuring that the universal service fund is consistent with the requirements of the Act and the Origination and Taxing Clauses of the United States Constitution. Specifically, these rules ensured that the mandatory contribution requirement is a fee, rather than a measure to raise revenues or a tax. Thus, the universal service system is intended to act as a "pass-through" system, whereby contributions are expressly tied to expenses of particular programs, and any excess funds collected on an incidental basis are used to reduce the next quarter's contributions rather than "held in reserve" for use at some unspecified future time.⁴² The FCC has already abandoned this concept by creating a pool of funds for an unspecified purpose in the Corr Wireless Order. Rather than double down on the mistakes of its past, the Commission should reconsider this misguided approach to funding its proposed broadband mandate.

Before creating any reformed contribution mechanism, the Commission must address the serious questions that have been raised regarding the Commission's authority to fund any program with universal service funds "reserved" from other forms of support. Otherwise, the Commission risks undermining its own efforts to implement sustainable universal service reform and risks inciting contentious litigation that would slow broadband network deployment by creating unnecessary and avoidable regulatory uncertainty.

⁴¹ See Petition for Reconsideration at 7-11.

⁴² *Id.*

V. THE DISPARATE PHASE-DOWN PERIODS FOR EXISTING HIGH-COST SUPPORT AND TRANSITION PROPOSALS BASED ON CARRIER TYPE ARE NOT COMPETITIVELY NEUTRAL

As several commenters pointed out, several of the NPRM's proposals contradict the Commission's requirement that universal service support mechanisms and rules should "neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor one technology or another" under Section 254(b)(7) of the Act.⁴³ In particular, the proposed accelerated phase-down of competitive eligible telecommunications carrier ("CETC") support, and the proposed "keep-whole" revenue replacement proposals for incumbent local exchange carriers ("ILECs") and "right of first refusal" to become the long-term CAF recipient in its service area are patently discriminatory and should be rejected.

A) Any Phase-Downs of Existing Support Should Be On Identical Timelines, Regardless of Carrier's Competitive Status

Several parties have demonstrated that the Commission's failure to transition both ILECs and CETCs from their existing support to new CAF support mechanisms the same timeline and terms would not be competitively neutral, in contravention of the principle of competitive neutrality codified by the Commission under Section 254(b)(7) of the Act.⁴⁴ As argued by T-Mobile, "[n]o class of providers should receive preferential treatment in the phase-out of legacy high-cost support, nor in the allocation of CAF support. Any such preference... violate[s] the principles of competitive and technological neutrality."⁴⁵ Indeed, it is difficult to conceive of any scenario in which the five-year phase-out of existing funding for CETCs would be considered competitively neutral when a longer transition period is being considered for other carrier types.

⁴³ Cellular One Comments at 5-6; T-Mobile Comments at 6; CTIA Comments at 23; TIA Comments at 8; *accord Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 8801 (1997).

⁴⁴ *See e.g.*, US Cellular Comments at 60; Cellular One Comments at 9; T-Mobile Comments at 9.

⁴⁵ T-Mobile Comments at 9.

B) The FCC Should Reject the Right of First Refusal Proposal for ILECs

The NPRM proposal that would guarantee certain ILECs the right of first refusal (“ROFR”) to become the CAF recipient in its service area has received considerable and justifiable criticism.⁴⁶ In the words of CTIA, “giving the wireline incumbent the option of becoming the only CAF recipient in its service area would flatly contradict the policies of competitive and technological neutrality.”⁴⁷ T-Mobile put it more bluntly, calling the ROFR proposal “blatant favoritism.”⁴⁸ However the policy is characterized, affording a ROFR to a certain subset of carriers based upon their competitive status simply cannot be squared with the Commission’s requirement that universal service support mechanisms and rules should “neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor one technology or another.”⁴⁹ While it is not surprising that the carriers that would most benefit from such a preference would overwhelmingly favor the ROFR proposal,⁵⁰ there has been no support offered by any such party that could plausibly justify such preferential treatment in a manner consistent with the Act.

C) No Carriers Should Be Kept “Whole” During the Transition to the CAF

The FCC should similarly reject any “revenue replacement” or “keep-whole” policy proposal. In the words of Sprint, “[t]here is no statute that guarantees LECs a steady revenue stream, and it would be counter-productive to adopt a mechanism that would allow LECs to

⁴⁶ See Verizon Comments at 65; Time Warner Cable Comments at 30-31; Sprint Nextel Comments at 41; US Cellular Comments at 16; Rural Independent Competitive Alliance Comments at 15.

⁴⁷ CTIA Comments at 24.

⁴⁸ T-Mobile Comments at 16.

⁴⁹ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8801 (1997); accord RCA Comments at 18 (“the Commission should emphatically reject any right of first refusal for incumbent LECs. A right of first refusal would be grossly anticompetitive and would simply preserve legacy inefficiencies and ensure higher costs and diminished innovation.”).

⁵⁰ See e.g., CenturyLink Comments at 38-39.

“recover” (or, more accurately, retain), on a dollar-for-dollar basis, current revenues that may be reduced through the reform of the USF.”⁵¹ As argued by PAETEC, “[a]s many incumbents have recognized, they should not expect a revenue recovery mechanism to make them whole for all lost intercarrier compensation revenues.”⁵² Indeed, protecting ILECs from the impact of USF reform only kicks the can down the road, masking inefficiencies that would otherwise be dealt with more quickly and reducing the likelihood that a competitor would be able to effectively compete with the supported carrier.

VI. THE COMMISSION CAN FACILITATE BROADBAND DEPLOYMENT IN A MANNER THAT FULLY REFLECTS THE ACT’S MANDATES BUT HASN’T SUFFICIENTLY EXPLORED THESE VIABLE ALTERNATIVES

The USA Coalition wholeheartedly joins those who support the Commission’s stated goals of preserving and advancing voice service, increasing deployment of modern networks, ensuring rates for broadband and voice services are reasonably comparable throughout the nation, and limiting the contribution burden on households.⁵³ However, the FCC should pause to consider NASUCA’s rhetorical question: “[s]hould the Commission embark on a convoluted course that would be unlikely to withstand legal challenge in order to accomplish its laudable goals of ensuring greater broadband deployment?”⁵⁴ The USA Coalition submits that NASUCA’s question applies broadly to the larger issue of reform. By failing to ground the policies it wishes to pursue firmly in the foundation of statutory authority, the Commission’s efforts recklessly run the risk that the time and effort spent developing this ill-fated reform will prove wasted, and, worse, that irreversible damage will be wrought upon supported areas in the meantime.

⁵¹ Sprint Nextel Comments at 37.

⁵² PAETEC Comments at 35; Time Warner Cable Comments at 8; T-Mobile Comments at 13.

⁵³ NPRM at ¶ 482.

⁵⁴ NASUCA Comments at 34.

Compounding this problem, the Commission now faces the fact that it has placed all its reform eggs in the NBP basket. The vast majority of the discussion in the NPRM revolves around how the FCC may permissibly implement the NBP's proposals under any conceivable interpretation of the Commission's authority, not whether or not these ideas should be tested against alternative proposals. The result is an utter dearth of alternative options that the Commission *could* adopt in lieu of the FCC's NBP-centric proposal. This lack of alternatives is not for lack of effort by the several parties who have done their part in proposing alternative frameworks that could accomplish the Commission's underlying objectives of promoting the deployment of modern communications networks, but do so in a manner that is fully consistent with the Act.

The USA Coalition and other parties have set forth proposals that demonstrate alternative approaches that could form the basis for distribution mechanism reform and facilitate broadband deployment in a manner that is consistent with the requirements of the Act.⁵⁵ However, there is scant evidence in the NPRM or elsewhere that the Commission has taken these alternatives into account in formulating this latest iteration of a fundamentally flawed proposal. Indeed, the Commission cannot simply abdicate its duty to develop reasonable alternatives or to otherwise refuse to consider alternative proposals unless the party identifying the alternative is able, on its own, to perform a comprehensive data analysis. As the Circuit Court of Appeals have made abundantly clear, when an agency departs from its prior policies, as envisioned here, "the agency must consider reasonably obvious alternatives and, if it rejects those alternatives, it must give reasons for the rejection, sufficient to allow for meaningful judicial review."⁵⁶ Despite this

⁵⁵ See CTIA Comments at 14; USA Coalition Comments at 29; SouthernLINC Comments at 17-30, WC Docket No. 05-337; CC Docket No. 96-45 (filed April 17, 2008).

⁵⁶ *N.Y. Council, Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir. 1985); *accord Public Citizen v. Steed*, 733 F.2d 93, 99 (D.C. Cir. 1984).

requirement, the various alternative proposals discussed above, as well as others, have been before the Commission for several years and yet they have not been considered by the Commission. To continue to ignore these valid alternatives would be arbitrary and capricious and otherwise inconsistent with the APA.

VII. THE COMMISSION MUST REASONABLY RESPOND TO COMMENTS THAT RAISE SIGNIFICANT ISSUES

The USA Coalition and other parties have laid out significant concerns regarding the Commission's proposed course of action in this and previous comment cycles. The courts have consistently held that, in order to satisfy the APA's requirement that parties be given a meaningful opportunity to participate in the rulemaking process, that an agency must "reasonably respond to those comments that raise significant problems."⁵⁷ While it is true that "[a]n agency need not respond to every comment" an agency is duty-bound to "respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule."⁵⁸ The FCC's actions in the current docket have fallen far short of this modest charge, a reality that will likely not be lost upon a reviewing court. The USA Coalition has raised the above issues to illustrate the significant questions that the FCC has thus far failed to address. It is our hope that the Commission will take note of these objections, even at this late date, before the Commission rushes to implement a proposal that is more likely to lead to years of litigation than the broadband deployment the Commission seeks to achieve.

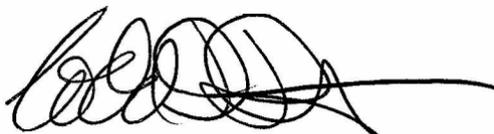
⁵⁷ See *Action on Smoking and Health v. Civil Aeronautics Bd.*, 699 F.2d 1209, 1216 (D.C. Cir. 1983); *North Carolina v. FAA.*, 957 F.2d 1125 (4th Cir. 1992).

⁵⁸ *Id.*

CONCLUSION

For the reasons set forth above, the USA Coalition urges the Commission to base its reforms squarely on the Act's requirements. In reforming the existing universal service system, the Commission should strive to create a system that operates on a fair and technologically-neutral basis so that people throughout the United States will have the freedom to choose among reasonably comparable telecommunications and information services at reasonably comparable rates. Reform that reflects the requirements of the Act would better ensure that all consumers benefit from broadband and technological advances, regardless of where they live and work.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "Todd D. Daubert", with a long horizontal flourish extending to the right.

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Date: May 23, 2011