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**Via ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> St., SW  
Washington, DC 20554

**Re: *Connect America Fund; High-Cost Universal Service Support; Establishing Just and Reasonable Rates for Local Exchange Carriers; Lifeline and Link-Up, WC Docket Nos. 10-90, 05-337, 07-135, 03-109; A National Broadband Plan for Our Future, GN Docket No. 09-51; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service, CC Docket Nos. 01-92, 96-45***

Dear Ms. Dortch:

On Thursday, June 9, 2011, Cathy Carpino and I, both of AT&T, and Heather Zachary of Wilmer Cutler Pickering Hale & Dorr LLP, met with Austin Schlick and Michael Steffen of the Office of General Counsel, Zac Katz of Chairman Genachowski's office, and Sharon Gillett and Carol Mattey of the Wireline Competition Bureau to discuss issues associated with the Commission's authority to support broadband Internet access deployment using universal service funds. Also, on June 13, 2011, Cathy Carpino, Hank Hultquist, Mary Henze, and I spoke with Carol Mattey about staff's consideration of a proposal to condition high-cost support for voice service on the provider deploying facilities capable of supporting broadband Internet access service.

First, we explained how the Commission has authority under section 254 of the Communications Act, as amended ("Act"), to support broadband deployment (without classifying broadband services as "telecommunications services") using its universal service programs. In this discussion, we reiterated arguments that we have made previously in the AT&T White Paper.<sup>1</sup> Specifically, we explained that Congress directed the Commission to base its universal service policies on the principles set forth in section 254(b)<sup>2</sup> and that two of those principles require the Commission to ensure that all consumers have access to "information

<sup>1</sup> See Letter from Gary L. Phillips, AT&T, to Marlene Dortch, FCC, GN Docket Nos. 09-51, 09-47, & 09-137 and WC Docket Nos. 05-337 & 03-109 (filed Jan. 29, 2010) (attaching *The Federal Communications Commission Has Statutory Authority To Fund Universal Broadband Service Initiatives*).

<sup>2</sup> See *Qwest v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001) ("The plain text of the statute mandates that the FCC 'shall' base its universal [service] policies on the principles listed in § 254(b). This language indicates a mandatory duty on the FCC.").

services.” 47 U.S.C. § 254(b)(2), (3). The Commission cannot simply begin and end its analysis of which services should be supported by universal service funds with section 254(c)(1), which provides that “universal service” is an “evolving level of telecommunications services.” To do so would ignore the principles in section 254(b), along with section 254(c)(2), which permits the Federal-State Joint Board on Universal Service (“Joint Board”) to recommend “modifications in the definition of the services that are supported by Federal universal service support mechanisms.” 47 U.S.C. § 254(c)(2). The Joint Board made such a recommendation in 2007, urging the Commission to add broadband and mobility to the list of services supported by the Commission’s high-cost universal service support program.<sup>3</sup> The Commission did not reject the Joint Board’s recommendations. Rather, in a one-sentence statement, the Commission merely stated that it chose “not to implement these recommendations *at this time*.”<sup>4</sup> Thus, there is no impediment to the Commission adopting the Joint Board’s recommendations now.

We also explained that this interpretation of section 254 finds support in section 706 of the Telecommunications Act of 1996 and in the American Recovery and Reinvestment Act of 2009. *See* 47 U.S.C. §§ 1302, 1305(k)(2). Both statutory provisions use mandatory “shall” language and make clear that Congress intended for the Commission to ensure that broadband service is deployed to all Americans.

Further, we explained that section 706 is an independent source of authority for the Commission’s creation of a broadband universal service fund. Section 706(a) provides that the Commission “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,” and section 706(b) states that if the Commission finds that advanced telecommunications capability is not being deployed to all Americans, it “shall take immediate action to accelerate deployment of such capability.” 47 U.S.C. § 1302(a), (b). Given the Commission’s findings regarding the obstacles to deployment of broadband in high-cost areas, section 706 authorizes the Commission to provide universal service funding to support such deployment.

We noted that the Commission also could rely on its Title I ancillary authority to provide universal service support to information service providers. Indeed, in 1997, the Commission relied on its authority in sections 254(h)(2) and 4(i) to permit non-telecommunications carriers to participate in its E-rate program, despite the fact that the relevant statutory text refers only to “telecommunications carriers.”<sup>5</sup> In support of its decision, the Commission explained that permitting non-telecommunications carriers to provide non-telecommunications services (e.g., Internet access, internal connections) furthers competitive neutrality and benefits schools and libraries by allowing them “to take the fullest advantage of competition to select the most cost-effective provider of Internet access and internal connections.” *Id.* ¶ 594. The same policy

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<sup>3</sup> Recommended Decision, *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, FCC 07J-4, 22 FCC Rcd 20477, 20480-82 ¶¶ 11-18 (2007).

<sup>4</sup> Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Inter-carrier Compensation Regime; Inter-carrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, 24 FCC Rcd 6475, 6492 ¶ 37 (2008) (emphasis added).

<sup>5</sup> Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 ¶¶ 587-600 (1997).

considerations apply here: universal service fund dollars would go further if the Commission could consider broadband funding applications or bids from entities that do not offer broadband on a common carriage basis but that, instead, offer it as an information service.

Commission staff asked us several questions about how the Antideficiency Act (“ADA”) and the Commission’s current annual ADA exemption would apply to the broadband fund. We explained that, if the Commission relies on both section 254 and its Title I ancillary authority to establish the broadband fund, we believe that the Commission’s current ADA exemption would apply fully to the broadband fund. The current congressional exemption applies to “any amount collected or received as Federal universal service contributions required by Section 254 of the [Act],” and “the expenditure or obligation of amounts attributable to such contributions for universal service support programs established pursuant to that section.” P.L. 108-494, 118 Stat. 3986, § 302(a). Just as the ADA exemption covers the use of universal service funds to reimburse non-telecommunications providers today (which, as noted above, the Commission established pursuant to both section 254 and Title I), so too would it apply to the broadband fund. In the event that the Commission no longer obtains an annual ADA exemption, the Commission would have to collect funds for the broadband fund before it could obligate them, just as it would have to do for its other universal service programs.

Finally, during the course of the discussion, staff asked whether the ADA analysis would be different under an approach that provided high cost support for voice services conditioned on also providing broadband. In a subsequent conversation with Ms. Matthey, AT&T raised a number of questions about how such a proposal would operate.

Sincerely,

/s/ Christopher Heimann

cc: via email: Austin Schlick, Michael Steffen, Zac Katz, Sharon Gillett, and Carol Matthey