

Heather Zachary

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Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Ex Parte Notice — 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 a 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***

Dear Ms. Dortch:

On June 17, 2011, Christopher M. Heimann of AT&T and Jonathan Nuechterlein, Elvis Stumbergs, and the undersigned of Wilmer Cutler Pickering Hale and Dorr LLP spoke by telephone with Austin Schlick, Julie Veach, Larry Atlas, and Debra Weiner of the Office of General Counsel, Carol Matthey of the Wireline Competition Bureau, and Stuart Benjamin of the Office of Strategic Planning and Policy Analysis regarding the Commission's authority to support broadband Internet access with universal service funding.

We first discussed substantive and remedial issues regarding the application of the Antideficiency Act, 31 U.S.C. § 1341(a) ("ADA"), to the disbursement of universal service support for broadband service. Consistent with our previous filings, we explained that the Commission has ample authority under section 254 of the Communications Act, 47 U.S.C. § 254, to support broadband services using universal service funding¹ and that, accordingly, the ADA is no obstacle to creation of a broadband funding mechanism. We also noted that Congress has exempted the Commission from the ADA for "any amount collected or received as Federal universal service contributions required by section 254" and for "the expenditure or obligation of amounts attributable to such contributions for universal service support programs established

¹ See, e.g., Comments of AT&T, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, at 111-20 (filed Apr. 18, 2011); Letter from Gary L. Phillips, AT&T, to Marlene Dortch, FCC, GN Docket Nos. 09-51, 09-47, 09-137, 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*); Letter from Christopher M. Heimann, AT&T, to Marlene H. Dortch, FCC, WC Docket Nos. 10-90, 05-337, 07-135, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 (filed June 13, 2011).

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pursuant to that section.”² We explained that this exemption would provide the Commission additional flexibility in designing a broadband fund, particularly with respect to the timing of funding obligations.

Next, we explained that section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302, provides clear authority for the Commission to support broadband with universal service funding. In particular, section 706(b) provides that “the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission’s determination is negative, it *shall take immediate action* to accelerate deployment of such capability by *removing barriers to infrastructure investment* and by promoting competition in the telecommunications market.” 47 U.S.C. § 1302(b) (emphasis added). We noted that, under fundamental principles of statutory interpretation, this provision must have independent significance apart from section 706(a), which provides that the Commission “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing ... price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or *other regulating methods that remove barriers to infrastructure investment.*” *Id.* § 1302(a) (emphasis added). Read in context, section 706(b) separately requires the Commission to take immediate action to remove barriers to infrastructure investment in those areas where the “other regulatory methods” that Congress directed the Commission to use are insufficient to ensure that broadband is “deployed ... in a reasonable and timely fashion.” *Id.* § 1302(a), (b). While section 706(b) does not specifically identify what “immediate action” the Commission should take to remove such barriers to investment, it plainly requires the Commission to implement measures beyond those identified in section 706(a). This interpretation of the statutory language is necessary to avoid draining the last sentence of section 706(b) of independent significance. And, insofar as the Commission already has concluded that the principal impediment to infrastructure investment for broadband service in high-cost areas is economic (*i.e.*, the lack of a positive business case for such investment), it reasonably can, and should, take action to remove that barrier by providing universal service support for such investment.

² Pub. L. No. 108-494, 118 Stat. 3986, Title III § 302(a) (2004). Congress has extended the exemption through December 31, 2011. Pub. L. No. 111-322, 124 Stat. 3518, Title I § 155 (2010).

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Respectfully submitted,

/s/ Heather Zachary

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cc: (via email): Austin Schlick, Julie Veach, Larry Atlas, Debra Weiner, Carol Matthey, and
Stuart Benjamin