

**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
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109

COMMENTS of CELLULAR SOUTH, INC.

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SUMMARY

Cellular South welcomes this opportunity presented by the Commission's *Further Inquiry Public Notice* to comment on two important issues in the Commission's pending rulemaking to transform its universal service and intercarrier compensation rules.

The structure of the new Connect America Fund support mechanisms will be critically important to the success of the Commission's efforts to promote and facilitate the ubiquitous deployment of advanced broadband networks — providing all Americans with the same economic growth benefits that competitive broadband access delivers to our Nation's urban areas.

The *Public Notice* draws particular attention to the issue of whether two separate CAF components should be created. One fund would provide support for fixed voice and broadband service, and the other would provide ongoing support for mobile voice and broadband. Cellular South endorses the establishment of two funds. A separate fund to facilitate the deployment of mobile wireless broadband networks throughout rural America would be an appropriate reflection of the fact that consumers and businesses across the country are increasingly seeking and utilizing mobile broadband services, and the fact that there is wide agreement that mobile broadband is becoming increasingly important as a driver of business investment and expansion.

The challenge for the Commission is to ensure that its CAF reforms are effective in helping to bring the benefits of mobile broadband to rural areas, so that consumers and businesses in rural America are not left on the sidelines. A separate CAF mechanism dedicated to promoting mobile broadband deployment would be an effective step for the Commission to take as it seeks to meet this challenge.

Merely establishing a separate funding mechanism for mobile broadband, however, would not go far enough, which brings Cellular South to the second important issue addressed in

the *Public Notice*. Put simply, there must be sufficient funding dedicated to a separate mobile broadband funding mechanism in order for the Commission to accomplish its goals for mobile broadband deployment. The Commission acknowledges this issue, asking in the *Public Notice* how it should set the relative budgets for two separate funding components. Cellular South is concerned that the Wireline Companies Proposals and the State Member Plan come up with the wrong answer to this question. Their proposed approach is to give the mobile broadband fund a sliver of the overall level of CAF funding, and to impose a cap on overall CAF support.

Allocating a substantial share of CAF support to wireline carriers would inevitably and significantly impair the extent and pace of mobile broadband deployment in rural America, and also would ignore the fact that carriers serving subscribers to wireless services are by far the largest category of contributors to the universal service fund. Moreover, the proposed cap would have the effect of closing off any realistic opportunity for the new CAF mechanisms to provide sufficient support for mobile broadband deployment on a going-forward basis.

The proponents of a disproportionate allocation of CAF support in favor of wireline networks augment their proposals with arguments in favor of granting incumbent LECs a right of first refusal for the receipt of CAF funding in their service areas, and in favor of continuing to rely on rate-of-return and embedded cost mechanisms for the disbursement of CAF support to rural incumbent carriers. These proposals would significantly inhibit competition in supported areas, prevent the efficient use of CAF funding, and, as a result, fail to advance the interests of rural consumers.

The Commission should reject these budget allocation and related proposals in favor of a more balanced approach to supporting separate funds for wireline and mobile wireless broadband. Specifically, the Commission should focus on an even distribution of support into the sepa-

rate funds. This would be responsive to consumer demand for mobile broadband services, and also would advance the government's goal of capturing the benefits that mobile broadband can bring to consumers, businesses, and the national economy.

Instead of relying on the discredited rate-of-return and embedded cost mechanisms for disbursing CAF support to rural incumbents, the Commission should adopt a forward-looking economic cost model for use in allocating support from both the wireline broadband and mobile wireless broadband funds. A forward-looking cost model would replace rate-of-return and embedded cost mechanisms that provide incentives for inefficient operations and inflated investments, with a support mechanism that encourages efficiency and promotes competition.

Another step the Commission should take to promote efficiency and competition is to provide that CAF funding will be fully portable within and between the separate wireline and mobile wireless broadband funds. Portability ensures that customer demand drives funding disbursements, because, if a customer switches to a new service provider, then universal service support follows the customer to the new carrier. This linkage between customer choice and CAF support would promote competition and efficient carrier operations.

Cellular South includes an Appendix to its Comments in which it demonstrates that the Commission lacks jurisdiction to provide universal service support to broadband service providers because such support, pursuant to the terms of the Communications Act of 1934, may be disbursed only to telecommunications common carriers for their provision of telecommunications services. The Appendix also includes an analysis that addresses a "Legal Authority White Paper" submitted by proponents of the America's Broadband Connectivity Plan, and demonstrates that the White Paper fails to construct any plausible basis for its contention that providing universal

service support for information services such as broadband is within the jurisdiction of the Commission.

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COMMENTS of CELLULAR SOUTH, INC.

Cellular South, Inc. (“Cellular South”), by counsel, hereby submits these Comments, pursuant to the Public Notice issued by the Wireline Competition Bureau in the above-captioned dockets.¹ The *Public Notice* seeks comment on the America’s Broadband Connectivity Plan (“ABC Plan”),² the RLEC Plan,³ the Joint Letter,⁴ and the State Member Plan,⁵ as well as certain

¹ *Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, DA 11-1348 (rel. Aug. 3, 2011), 76 Fed. Reg. 49401 (Aug. 10, 2011) (“*Public Notice*” or “*No-tice*”), Erratum (rel. Aug. 8, 2011). The due date for comments in response to the *Public Notice* is August 24, 2011. See *Connect America Fund, et al.*, DA 11-1374 (rel. Aug. 8, 2011) (declining to extend the deadlines for comments and reply comments).

² Letter from Robert W. Quinn, Jr., AT&T, Steve Davis, CenturyLink, Michael T. Skrivan, FairPoint, Kathleen Q. Abernathy, Frontier, Kathleen Grillo, Verizon, and Michael D. Rhoda, Windstream, to Marlene H. Dortch, FCC, WC Docket No. 10-90 *et al.* (filed July 29, 2011). In addition to submitting five

other proposals. The ABC Plan, RLEC Plan, and Joint Letter are referred to collectively in these Comments as the “Wireline Companies Proposals”.

Cellular South also addresses in an Appendix to these Comments the legal theories propounded jointly by AT&T, Inc. (“AT&T”), Verizon Communications Inc. (“Verizon”), CenturyLink, Inc. (“CenturyLink”), Windstream Corporation, Frontier Communications Corporation, and FairPoint Communications, Inc. (collectively “Price Cap Carriers”), and set forth in the Legal Authority White Paper (“White Paper”)⁶ that they submitted in support of the ABC Plan to reform the universal service and intercarrier compensation systems.

Cellular South is the Nation’s largest privately-held wireless carrier (measured by number of subscribers), serving all of Mississippi as well as portions of Florida, Alabama, and Tennessee. The area Cellular South serves is overwhelmingly rural and Cellular South faces enorm-

attachments containing the Framework of the Proposal and related materials, the filing parties submitted a separate letter outlining the proposal. Letter from Robert W. Quinn, Jr., AT&T, Steve Davis, CenturyLink, Michael T. Skrivan, FairPoint, Kathleen Q. Abernathy, Frontier, Kathleen Grillo, Verizon, and Michael D. Rhoda, Windstream, to Chairman Julius Genachowski, Commissioner Michael J. Copps, Commissioner Robert M. McDowell, Commissioner Mignon Clyburn, FCC, “America’s Broadband Connectivity Plan” (filed July 29, 2011) (“ABC Plan Letter”).

³ Comments of National Exchange Carrier Association, Inc., National Telecommunications Cooperative Association (“NTCA”), Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”), and Western Telecommunications Alliance (“WTA”) (the “Joint Rural Associations”), WC Docket No. 10-90 *et al.* (filed Apr. 18, 2011) (“RLEC Plan”).

⁴ Letter from Walter B. McCormick, Jr., United States Telecom Association, Robert W. Quinn, Jr., AT&T, Melissa Newman, CenturyLink, Michael T. Skrivan, FairPoint, Kathleen Q. Abernathy, Frontier, Kathleen Grillo, Verizon, Michael D. Rhoda, Windstream, Shirley Bloomfield, NTCA, John Rose, OPASTCO, and Kelly Worthington, WTA, to Chairman Julius Genachowski, Commissioner Michael J. Copps, Commissioner Robert M. McDowell, Commissioner Mignon Clyburn, FCC, WC Docket No. 10-90 *et al.* (filed July 29, 2011) (“Joint Letter”).

⁵ Comments by the State Members of the Federal-State Joint Board on Universal Service (“State Members”), WC Docket No. 10-90 *et al.* (filed May 2, 2011) (“State Member Plan”).

⁶ ABC Plan, Attach. 5.

ous challenges in competing with AT&T and Verizon (the “Big Two” carriers), who currently dominate the commercial mobile wireless industry in the United States.

I. INTRODUCTION.

Although Cellular South shares the Commission’s goals regarding reforming its universal service policies and mechanisms so that they can better facilitate the deployment of advanced broadband services, including mobile broadband services, in rural and high-cost areas throughout America, the record in the Connect America Fund (“CAF”) rulemaking proceeding has raised substantial concerns that a threshold jurisdictional issue stands in the way of the Commission’s pursuit of its universal service objectives. This issue is discussed in the Appendix attached to these Comments.⁷

If the Commission is able to take sufficient steps to remedy the jurisdictional impediments associated with its proposal to provide universal service support for the provision of broadband services, then a number of policy issues arise regarding the mechanisms and requirements that would best serve the Commission’s broadband goals. The Commission seeks comment in the *Public Notice* on a number of these issues, and also on various provisions of the Wireline Companies Proposals and the State Member Plan.

Cellular South addresses in the following sections several issues and questions raised in the *Public Notice*, as well as related issues. *First*, the Wireline Companies Proposals and the State Member Plan advance proposals for CAF funding mechanisms that are remarkable in their indifference to the need for sufficient support for the deployment and operation of mobile broadband networks in rural areas. Cellular South is encouraged by the focus in the *Public Notice* on

⁷ See Appendix, “Commission Jurisdiction To Fund Broadband Services with Universal Service Support.”

the issue of whether there should be separate funding mechanisms for fixed broadband and mobile wireless broadband, and by the fact that the *Notice* specifically cites a proposal made by the United States Cellular Corporation (“U.S. Cellular”) for a separate mobile broadband support mechanism funded at the level of at least \$1.3 billion annually.⁸

There is wide recognition that mobile broadband — fueled by powerful consumer demand, competitive markets, and robust technological innovation — is the wave of the future (and the present) in the U.S. communications marketplace. In the face of these facts on the ground, it is stunning that wireline broadband proponents have chosen to put forward plans for CAF funding mechanisms that are marked by a transparent imbalance in proposed funding levels for wireline broadband and mobile wireless broadband networks. As Cellular South explains in the following sections, the Commission should walk away from these proposals and instead adopt funding mechanisms that strike an equitable funding balance that reflects not only consumer demand but also the overarching potential that mobile broadband holds for the national economy.

Second, while the *Public Notice* raises specific questions regarding procedures the Commission should follow in re-examining the current authorized rate of return (which Cellular South addresses in these Comments), Cellular South also believes that the Commission should not overlook the need to question whether there is any credible basis for continuing to utilize rate-of-return mechanisms as a basis for disbursing universal service support.

It is incongruous that fund disbursements based on rural incumbent local exchange carriers’ (“LECs”) embedded costs (with a built-in rate-of-return component) could be included as an element of universal service “reform.” The Commission itself has long been a skeptic regarding

⁸ *Public Notice* at 2 (citing Letter from David A. LaFuria, Counsel to U.S. Cellular, to Marlene H. Dortch, FCC, WC Docket No. 05-337 *et al.* (filed July 29, 2011)), at 5.

the utility of relying on rate of return as a basis for providing high-cost support. Cellular South urges the Commission to ensure that universal service reform lives up to its billing by adopting CAF funding mechanisms that leave embedded costs and rate-of-return mechanisms behind.

Third, the Commission should replace the outmoded and inefficient rate-of-return and embedded cost funding mechanisms with a forward-looking economic cost model, which would be effective in promoting efficiency and competition. In the *Universal Service Order*, the Commission determined that “the proper measure of cost for determining the level of universal service support is the forward-looking economic cost of constructing and operating the network facilities and functions used to provide the supported services[.]”⁹ and that “in the long run, forward-looking economic cost best approximates the costs that would be incurred by an efficient carrier in the market”¹⁰

Fourth, the Commission, as an important complement to its adopting two separate CAF funding mechanisms, should provide for the full portability of funding within and between the two support mechanisms. Without funding portability, there is a risk that carriers with inefficient operations and shrinking customer bases will continue to receive CAF support to maintain obsolete networks that are inadequate to meet the broadband needs of consumers and businesses. By making funding portable, the Commission will provide carriers with the proper incentives to operate efficiently, and will also encourage competition.

Fifth, Cellular South opposes the use of the proposed right-of-first-refusal (“ROFR”) mechanism as a means of enabling an incumbent LEC to receive CAF support to the exclusion of

⁹ *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8786, 8899 (1997) (“*Universal Service Order*”).

¹⁰ *Id.* (footnote omitted).

other carriers in its service area. Cellular South also recommends that the Commission should reject any continued use of rate-of-return and embedded cost mechanisms for purposes of awarding universal service support pursuant to the Commission's reformed Universal Service Fund ("USF") rules. If, however, the Commission decides to adopt new funding mechanisms that utilize rate-of-return mechanisms, then the new funding mechanisms should not be implemented and made operational until the Commission acts to represcribe the existing authorized rate of return.

And, *sixth*, the Commission should reject proposals to cap the level of CAF support, because adopting constrictive budget limits would be contrary to the Commission's obligation to seek adherence to the statutory principle that universal service mechanisms should be sufficient to provide levels of service in rural and high-cost areas that are comparable to those provided in urban areas.

II. POLICIES FOR UNIVERSAL SERVICE REFORM.

A. The Commission Should Provide Separate Support for Mobile Broadband.

Cellular South urges the Commission to establish separate, sufficiently funded support mechanisms for wireline broadband and mobile broadband networks, because doing so would be the best means of ensuring that the Commission's new CAF mechanisms will be effective in supporting the ubiquitous deployment of mobile broadband networks.

The proposals made in the Wireline Companies Proposals and the State Member Plan, for the levels of support that should be allocated for wireline broadband and mobile broadband networks, should be rejected by the Commission because these proposals would not provide the level of funding necessary to meet the Commission's mobile broadband goals.

1. Establishing Separate Support Funds Will Help To Ensure a Sufficient Focus on Meeting the Mobile Broadband Needs of Rural America.

The *Public Notice* indicates that “[s]everal parties propose that the Commission create two separate components of the Connect America Fund, one focused on ensuring that consumers receive fixed voice and broadband service (which could be wired or wireless) ... and one focused on providing ongoing support for mobile voice and broadband service”¹¹ and “seek[s] comment on providing separate funding for fixed broadband (wired or wireless) and mobility.”¹²

Cellular South urges the Commission to adopt separate funding mechanisms for wireline broadband and mobile wireless broadband networks, and to take the steps necessary to ensure that the level of funding for each of the separate funds is sufficient to meet the Commission’s broadband goals.

Cellular South’s view, in part, is in keeping with approaches suggested in the Wireline Companies Proposals and the State Member Plan, which call for the establishment of a separate universal service fund for mobile broadband services.¹³ Thus, there is considerable agreement among the various stakeholders that structuring CAF mechanisms to accommodate separate funds for wireline broadband and mobile wireless broadband would serve the Commission’s objectives for supporting broadband deployment.

There are three principal reasons why a separate CAF mechanism for mobile wireless broadband deployment — with *sufficient* levels of funding — makes sense. *First*, establishing a separate fund for mobile wireless broadband deployment would enable the Commission to give a

¹¹ *Notice* at 2.

¹² *Id.*

¹³ *See* ABC Plan, Attach. 1, at 8 (proposing a separate “Advanced Mobility/Satellite Fund;” State Member Plan at 68-73.

focus and priority to mobile broadband commensurate with the role that mobile broadband has come to play in the communications marketplace.

The view expressed in the Broadband Plan eighteen months ago, that “[m]obile broadband is the next great ... opportunity for the United States[,]”¹⁴ continues to be true, and the challenge for the Commission is to develop policies that capitalize on this opportunity. In the context of universal service, of course, the challenge for the Commission is to develop new CAF policies and mechanisms that ensure that consumers and businesses throughout rural America are not left with too few signal-strength bars on their mobile phones because universal service policies have been insufficient to stimulate and support the deployment of advanced mobile broadband networks in rural areas.

There is convincing evidence that mobile “phones and other [mobile] devices [are] becoming the central point of computing for consumers and businesses”¹⁵ A recent report indicates that nearly 30 percent of households are wireless-only, and more than half of all adults between the ages of 25 and 29 are members of households with only wireless phones.¹⁶ Another recent study has concluded that mobile phones “have become a near ubiquitous tool for information-seeking and communicating”¹⁷ And, according to the Commission’s Technology Advi-

¹⁴ Omnibus Broadband Initiative, FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (Mar. 16, 2010) (“Broadband Plan” or “NBP”), at 9.

¹⁵ Amir Efrati & Spencer E. Ante, *Google’s \$12.5 Billion Gamble*, WALL ST. J., Aug. 16, 2011, at A4.

¹⁶ Stephen J. Blumberg & Julian V. Luke, “Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2010, National Center for Health Statistics, Centers for Disease Control and Prevention (rel. June 8, 2011), at 1, 2. The data is from a survey covering the last six months of 2010.

¹⁷ Aaron Smith, “Americans and Their Cell Phones,” Pew Research Center (Aug. 15, 2011), at 2, accessed at <http://pewinternet.org/Reports/2011/Cell-Phones.aspx>.

sory Council (“TAC”), seven years from now only 8 percent of Americans will be served by traditional Time Division Multiplex access lines at their homes.¹⁸

These trends regarding mobile voice communications, and mobile computing through the use of smartphones and other devices, are in the process of reworking the modes of communication that keep people in touch with each other and that drive business operations and the national economy. The task for the Commission, as Cellular South has observed, is to design its transformative universal service reforms in a way that matches these sea changes in the role and means of communications in American society and commerce. Rural consumers and businesses must be the beneficiaries of Commission policies that enable them to access mobile wireless broadband services in ways that are comparable to the access available in urban America.

Second, a separate CAF funding mechanism for mobile broadband would facilitate the use of a forward-looking economic cost model tailored to the costs associated with deploying and maintaining mobile broadband networks in rural and high-cost areas. Cellular South agrees with U.S. Cellular’s observation that “[a] model provides the advantage of preserving competition as a driver of consumer benefit in rural areas.”¹⁹ Use of a forward-looking cost model, combined with requiring portability among funding recipients, would adhere to the principle of competitive neutrality and would help ensure the efficient use CAF support. Portability of support is a key to implementing universal service funding in a competitively neutral way.²⁰ If two funds

¹⁸ See TAC, “Status of Recommendations” (June 29, 2011), accessed at <http://transition.fcc.gov/oet/tac/TACJune2011mtgfullpresentation.pdf>.

¹⁹ Letter from David A. LaFuria, Counsel to U.S. Cellular, to Marlene H. Dortch, FCC, WC Docket No. 05-337 *et al.*, (filed June 16, 2011), Enclosure, “U.S. Cellular, USF Mobile Broadband Model, Model Methods and Output” (June 10, 2011), at 6.

²⁰ *Universal Service Order*, 12 FCC Rcd at 9093.

are adopted by the Commission, funding should be permitted to move within and between each program, to respond to rural consumers' decisions about which carrier best serves their needs.

And, *third*, both President Obama and the Commission have established aggressive goals for mobile broadband, and a separate CAF funding mechanism would help to achieve these goals. President Obama has stressed that “high-speed wireless service [is] how we’ll spark new innovation, new investment, [and] new jobs[,]”²¹ and that his administration’s goals for mobile broadband deployment are “about connecting every part of America to the digital age.”²²

Chairman Genachowski has reinforced the President’s views, observing, for example, that “few sectors of our economy offer greater opportunities [than mobile broadband] for economic growth and improvements to our quality of life”²³ The Commission has concluded that “[b]roadband deployment is a key priority for the Commission, and the deployment of mobile data networks will be essential to achieve the goal of making broadband connectivity available everywhere in the United States.”²⁴

The Commission also understands that bringing mobile broadband to rural America presents difficult challenges. For example, two years ago, then Acting Chairman Copps indicated that ““rural networks can often be even more expensive to deploy and potentially more expensive to maintain than networks in non-rural areas for a variety of reasons, which can serve as a

²¹ Barack Obama, Remarks by the President on the National Wireless Initiative in Marquette, Michigan, at 6 (Feb. 10, 2011) (unpaginated transcript).

²² President Barack Obama, State of the Union Address, Jan. 25, 2011, accessed at http://www.pbs.org/newshour/bb/politics/jan-june11/sotutranscript_01-25.html.

²³ Chairman Julius Genachowski, FCC, “Remarks on Broadband” (Mar. 16, 2011), at 5.

²⁴ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd 4181, 4182-83 (2010).

formidable barrier to rural broadband deployment”²⁵ Given this national commitment to bringing access to mobile broadband services to all Americans, and given the difficulties this objective presents in rural America, Cellular South urges the Commission to reach the reasonable conclusion, based upon compelling evidence, that a separate CAF funding mechanism for mobile broadband deployment is a sound policy choice that will contribute significantly toward meeting the Commission’s goals. The extent of this contribution, however, is inextricably tied to the level of CAF funding made available for mobile broadband. Cellular South examines this issue in the next section.

2. The Budgets Proposed for Mobile Broadband Deployment in the Wireline Companies Proposals and the State Member Plan Are Inadequate and Should Be Rejected by the Commission.

Although the Wireline Companies Proposals and the State Member Plan embrace the idea of establishing a separate CAF funding mechanism for mobile wireless broadband deployment, there may be grounds for concern that their doing so is colored by a desire to strand competitive ETCs providing mobile broadband services in a separate fund with anemic CAF support.

The ABC Plan would allocate \$2.2 billion annually to large price cap carriers.²⁶ The Joint Letter proposes an annual cap on rate-of-return carrier funding of between \$2 billion and \$2.3 billion through 2017.²⁷ Both the ABC Plan and the Joint Letter propose limiting mobile broadband support to \$300 million annually.²⁸

²⁵ Michael J. Copps, Acting Chairman, FCC, BRINGING BROADBAND TO RURAL AMERICA: REPORT ON A RURAL BROADBAND STRATEGY, 24 FCC Rcd 12792, 12842 (2009) (footnote omitted).

²⁶ ABC Plan, Attach. 1, at 2.

²⁷ Joint Letter at 2.

²⁸ ABC Plan, Attach. 1, at 8; Joint Letter at 2.

The State Member Plan proposes that the total fund size for high-cost support should be limited to \$4.2 billion annually.²⁹ Of that amount, \$500 million would be allocated to each of two funds — a Mobility Fund and a Broadband Wireline Fund — for two separate grant programs. The balance would be dedicated to a Provider of Last Resort (“POLR”) Fund, with the stipulation that the two grant programs “should not be so large as to prevent sufficient funding for the POLR Fund, on which we place primary reliance to prevent loss of continued voice service and to encourage new broadband investment using private capital.”³⁰ Competitive ETCs would, in theory, be eligible to receive support from the POLR Fund, with the State Member Plan explaining that “[i]n a very few cases where a CETC has overbuilt [incumbent LEC] facilities over a wide area, the State commission should, on petition, conduct a fact-specific proceeding to determine whether the ILEC or the CETC should be designated as the single supported carrier.”³¹ Otherwise, the incumbent carrier would be designated as the sole fund recipient.

Thus, the ABC Plan and the Joint Letter, taken together, call for an overall annual CAF budget of as much as \$4.5 billion,³² with only \$300 million (or approximately 6.7 percent) allocated for mobile broadband deployment.³³ Under the State Member Plan, approximately 12 percent of the \$4.2 billion annual budget would be reserved for the proposed Mobility Fund, and the

²⁹ State Member Plan at 11.

³⁰ *Id.* at 12.

³¹ *Id.* at 139.

³² Under the ABC Plan, funding to award recipients would be locked in for ten years, freezing out access to such funding by potential competitors in areas served by the funding recipients. ABC Plan, Attach. 1, at 2 (indicating that “[b]roadband providers that elect to receive support from the CAF will receive a fixed level of support for a term of ten years from the date on which support is awarded”).

³³ Under the ABC Plan, the \$300 million “Advanced Mobility/Satellite Fund” would be shared between mobile wireless broadband providers and satellite service providers.

\$500 million set aside for mobile broadband would be available only for “the building of wireless telecommunications towers”³⁴ and not for operational costs.

Cellular South encourages the Commission to compare these proposals to the widespread and accelerating demand for mobile broadband devices and services, to the fading demand for wireline services, to the costs associated with bringing mobile broadband networks and services to rural areas, and to the level of contributions into the existing USF program received from carriers providing wireless services.³⁵ Any such comparison must prompt a conclusion that the numbers put on the table in the Wireline Companies Proposals and the State Member Plan come up short. Allocating 6.7 percent (or 12 percent, under the State Member Plan) of CAF funding for mobile broadband deployment would lead down the wrong path, turning the Commission away from any opportunity to achieve its goal of making ubiquitous mobile wireless broadband a reality for all Americans.

There is no policy basis to support the budget proposals advanced by the Wireline Companies Proposals and the State Member Plan. In adopting policies for allocating CAF funding, the Commission should take a more balanced approach, focusing on an even distribution of support into separate funds for wireline broadband and mobile wireless broadband networks as the best means of responding to consumer demand for mobile broadband services, ensuring that consumers and businesses throughout rural America have access to mobile broadband, and advancing the government’s goals to capture the benefits that mobile broadband can bring to consumers, businesses, and the national economy.

³⁴ State Member Plan at 68.

³⁵ According to the most recent data available (for 2008), revenues of wireless service providers amounted to 39.7 percent of the Universal Service Fund (“USF”) contribution base, compared to 24.3

B. The Commission Should Not Provide Incumbent LECs with a Right of First Refusal Regarding the Receipt of CAF Support.

The ABC Plan proposes that, in certain circumstances, incumbent LECs should be afforded an opportunity to accept or to refuse to accept CAF funding in areas they serve, prior to the support being made available to other service providers.³⁶ The *Public Notice* queries whether “the opportunity to exercise a ROFR [would be] reasonable consideration for an incumbent LEC’s ongoing responsibility to serve as a voice carrier of last resort throughout its study areas, even as legacy support flows are being phased down”³⁷

There are two problems with the proposal made in the ABC Plan, which should lead to its rejection by the Commission. *First*, it is anti-competitive on its face and therefore would violate the Commission’s core universal service principle of competitive neutrality. Competitors in a position to provide service in rural areas more efficiently, and to respond to consumer demand that is not being sufficiently met by incumbents, should not be preempted from the receipt of CAF funding.

And, *second*, advancing COLR obligations as a basis for justifying an anti-competitive set aside of funding for incumbents is a red herring. Even assuming, *arguendo*, that COLR requirements impose unique obligations on incumbent LECs, the Commission has rejected this as a basis for walling off other carriers from universal service funding. The Commission has explained previously that “[t]he statute itself . . . imposes obligations on ILECs that are greater than

percent for fixed local service providers. Universal Service Monitoring Report, CC Docket No. 98-202 (2010) (“*Monitoring Report*”), Table 1.8 (“Revenues by Type of Carrier: 2008”).

³⁶ ABC Plan, Attach. 1, at 6.

³⁷ *Id.*

those imposed on other carriers, yet section 254 does not limit eligible telecommunications carrier designation only to those carriers that assume the responsibilities of ILECs.”³⁸

In addition, there is no basis for maintaining that incumbent LECs face unique regulatory obligations that should entitle them to special ROFR options. For example, as the Mississippi Public Service Commission (“MPSC”) has explained:

[T]he MPSC takes seriously its authority under the Act to scrutinize diligently the application made by each common carrier seeking ETC status. This obligation is reflected in the stringent requirements that the MPSC has assigned to all designated ETCs. These requirements have been clearly delineated in MPSC Orders and checklists associated with such Orders.³⁹

For these reasons, Cellular South urges the Commission to reject the ABC Plan’s proposal to give incumbent LECs the option of receiving CAF funding in their service areas and barring other ETCs from the receipt of support.

C. The Commission’s New CAF Support Mechanisms Should Not Make Disbursements Based on Investments Made by Rate-of-Return Rural Incumbent LECs.

Although Cellular South recognizes that the *Public Notice* limits itself to addressing specific issues concerning CAF support for rate-of-return carriers,⁴⁰ Cellular South, before addressing these issues in the following section, invites the Commission to take a step back to the basic issue of whether the problems inherent in providing CAF support to rural incumbents based on their “reasonable” actual investment⁴¹ should lead the Commission to conclude that a forward-looking economic cost model should be used to disburse support for rural incumbents.

³⁸ *Universal Service Order*, 12 FCC Rcd at 8857-58.

³⁹ MPSC Comments, WC Docket No. 10-90, at 5 (Apr. 18, 2011).

⁴⁰ *See Notice* at 5-7.

⁴¹ *Connect America Fund, et al.*, 26 FCC Rcd 4554, 4690 (2011) (“*CAF NPRM*”).

The Commission should not invest any effort attempting “to improve the incentives for rational investment and operation by small companies operating in rural areas[,]”⁴² because the embedded cost mechanism used to disburse support to rural incumbents is bankrupt and should have been discarded long ago. As the Commission itself observes in the *CAF NPRM*, “if support is based on cost, it should be based on forward-looking economic cost, not embedded costs, and ... there may be significant problems inherent in indefinitely maintaining separate mechanisms based on different economic principles.”⁴³

The Commission previously has indicated that “a support mechanism based on . . . a carrier’s embedded costs . . . provides no incentives for ETCs to provide supported services at the minimum possible costs[,]”⁴⁴ and the Commission has been cognizant of the fact that “[i]n many cases, support is used to offset the increasing revenue losses to ... incumbent carriers as the gap between legacy technology and more efficient technologies has widened.”⁴⁵ There is also considerable support in economics literature for the view that “[s]etting levels of [universal service] support to a carrier based on its own embedded costs is traditional cost-based regulation and the

⁴² *Id.* (footnote omitted).

⁴³ *Id.* (footnotes and internal quotation marks omitted).

⁴⁴ *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, 23 FCC Rcd 1495, 1500 (2008).

⁴⁵ *High-Cost Universal Service Support, 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 Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, IP-Enabled Services*, 24 FCC Rcd 5475, 6656 (2008).

main problem with such a process is that [it] completely stifles firms' incentives to reduce their costs."⁴⁶

In contrast to these concerns regarding reliance on embedded-cost and rate-of-return mechanisms as a basis for disbursing universal service support, the Commission has acknowledged the benefits of relying upon cost models. For example, the Commission has held that "[s]upport based on forward-looking models will ensure that support payments remain specific, predictable, and sufficient, as required by section 254, particularly as competition develops. To achieve universal service in a competitive market, support should be based on the costs that drive market decisions, and those costs are forward-looking costs."⁴⁷

For all these reasons, Cellular South encourages the Commission to abandon any further reliance on rate-of-return mechanisms in connection with the disbursement of universal service support, and instead to adopt a forward-looking economic cost model to govern support disbursements to rural incumbent LECs.

D. If the Commission Continues To Use Rate-of-Return Mechanisms To Award Universal Service Support to Rural Incumbents, Then It Should Not Implement New Funding Mechanisms Until It Has Represcribed the Authorized Rate of Return.

If the Commission decides to retain a rate-of-return mechanism — based on what Cellular South considers to be the misguided view that this mechanism can somehow be overhauled to improve the incentives of rural incumbents to make rational investments and to avoid the temptation of pumping up costs as a means of inflating the amount of support they receive — then a

⁴⁶ U.S. Cellular Comments, WC Docket No. 05-337 *et al.* (Nov. 26, 2008), App. A, William P. Rogerson, "An Economic Analysis of Universal Service Payments to Wireless Carriers," at 10. Professor Rogerson served as the Commission's Chief Economist from 1998 to 1999.

⁴⁷ *Federal-State Joint Board on Universal Service; Access Charge Reform*, 14 FCC Rcd 8078, 8103 (1999) (footnote omitted).

prerequisite for the continued use of the rate-of-return mechanism should be a represcription of the stratospheric 11.25 percent rate of return that has remained in place since 1990.⁴⁸

The Commission asks in the *Public Notice* whether it should expedite such an undertaking by “waiv[ing] the requirements in Part 65 of the Commission’s rules for a rate of return prescription proceeding, so that the Commission could quickly adopt a particular rate of return.”⁴⁹ Cellular South does not oppose waiving Part 65 rate-of-return prescription requirements and procedures, so long as the Commission takes sufficient measures to ensure that its process for re-prescribing of the current rate of return — which Cellular South presumes would result in a considerably lower rate of return — should be the product of a proceeding that, even if it is a somewhat abbreviated version of a Part 65 proceeding, still provides sufficient opportunity for participation by interested parties and still enables the Commission to take action based upon sufficient and reliable data. If it is necessary, in order to meet those goals, to delay implementation of new CAF mechanisms, then Cellular South urges the Commission not to hesitate in engaging in such delay.

E. The Commission Should Not Cap CAF Support, Nor Should It Phase In Funding for Mobile Broadband as a Means of Staying Within Any Cap That the Commission May Impose.

The *Public Notice* seeks comment on two further issues related to CAF funding: (1) Whether overall CAF funding should be capped at \$4.5 billion annually during a “budget period”

⁴⁸ *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, 5 FCC Rcd 7507 (1990).

⁴⁹ *Notice* at 6. The Commission notes that “[t]he Joint Letter proposes that CAF calculations for areas served by rate-of-return companies would be calculated using a 10 percent interstate rate of return. The State Members recommended that the rate of return for universal service calculations be set at 8.5 percent.” *Id.*

from 2012 through 2017;⁵⁰ and (2) whether the proposed \$300 million in annual funding for mobile broadband should “be phased in to help stay within the budget.”⁵¹

Cellular South strongly endorses the view that the Commission’s new CAF mechanisms should be designed, implemented, and administered in a fiscally responsible manner. Doing so, however, does not require the imposition of funding caps. The Commission has at its disposal many tools for improving the efficient use of funds (*e.g.*, through reliance on forward-looking economic cost mechanisms and portability of support) and for curbing waste, fraud, and abuse perpetrated by CAF funding recipients (*e.g.*, through meaningful penalties and audit requirements).

The principal problem with a funding cap is that the imposition of a cap, virtually by definition, would constitute a repudiation of the Commission’s statutory duty to base its universal service policies on the principle that its support mechanisms should be sufficient to preserve and advance universal service.⁵² Imposing a cap would run the risk that funding would *not* be sufficient to carry out the universal service policies and objectives enacted by Congress. As Cellular South has previously explained:

If the Commission agrees with the vast majority of consumers living in rural America, that there are significant dead areas which require facilities-based investment to improve wireless service, then absolute funding levels become secondary. Of primary concern should be the ability for regulators to see that the goals of the fund, to “preserve *and* advance” universal service in rural areas, are being fulfilled. Put another way, as long as wireless ETCs still need to construct

⁵⁰ *Notice* at 9 & n.35.

⁵¹ Joint Letter at 2, *cited in Notice* at 9.

⁵² 47 U.S.C. § 254(b)(5).

networks to get new service out to consumers, the amount of support provided only serves to accelerate, or decelerate, carriers' ability to complete the task.⁵³

Finally, the proposal in the Joint Letter to phase in CAF support for mobile broadband, in order to avoid CAF going over budget, is a non-starter. The authors of the Joint Letter do not present any explanation for their apparent view that imposing a unilateral funding phase-in on competitive ETCs providing mobile wireless broadband services would be a reasonable and equitable means of protecting any funding cap adopted by the Commission.

The Joint Letter's proposal cries out for some explanation. It would not be competitively neutral on its face, and suggesting such a funding phase-in approach also begs the question of why the Joint Letter chooses to ignore the possibility of phasing in support for other fund recipients as a means of saving the Commission from going over budget. For example, the Joint Letter proposes a baseline funding target of \$2 billion for rate-of-return carriers, compared to \$300 million in proposed funding for the Commission's "mobility objectives."⁵⁴ This funding imbalance would seem to make funding for rate-of-return carriers a candidate for a phase-in requirement in order "to help stay within the budget."⁵⁵ The Joint Letter's proposal is flawed and unsupported, and Cellular South urges the Commission to reject it.

III. CONCLUSION.

As the Commission moves through the final stages of its efforts to transform its universal service rules and policies, Cellular South respectfully urges the Commission to take the steps ne-

⁵³ Letter from David A. LaFuria, Counsel to Cellular South, to Marlene H. Dortch, FCC, WC Docket No. 05-337 *et al.* (filed Oct. 14, 2008), at 6 (emphasis in original).

⁵⁴ Joint Letter at 2. Rate-of-return carriers also would have exclusive access to an additional \$300 million in funding. *Id.*

⁵⁵ *Id.*

cessary to ensure that it has a jurisdictional basis for the means it adopts to provide support for the deployment of advanced broadband networks.

In shaping these support mechanisms, the Commission should be cognizant of the widespread demand for, and reliance on, mobile broadband networks and services, and should accordingly establish a separate funding mechanism for mobile broadband with support levels that are sufficient to provide consumers and businesses throughout rural America with access to advanced mobile broadband services.

Respectfully submitted,
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APPENDIX

**COMMISSION JURISDICTION TO FUND BROADBAND
SERVICES WITH UNIVERSAL SERVICE SUPPORT**

COMMISSION JURISDICTION TO FUND BROADBAND SERVICES WITH UNIVERSAL SERVICE SUPPORT

Cellular South addresses in this Appendix the jurisdictional issues¹ raised by the universal service portion of the so-called Joint Proposed Reform Framework of the ABC Plan.² The Price Cap Carriers specifically designed that framework “to facilitate the transition from the legacy PSTN and plain-old telephone service (“POTS”) to broadband infrastructure and IP-enabled communications.”³ Obviously, however, the Price Cap Carriers can obtain USF support to facilitate that transition under the existing statutory framework specified in Title II of the Act.⁴

As the Price Cap Carriers acknowledge,⁵ the Commission has found that more than 800 telecommunications carriers currently offer broadband transmission as a telecommunications service.⁶ To obtain USF support to transition legacy PSTN services and POTS to broadband, the Price Cap Carriers can urge the Commission to revise the definition of the USF-supported services under § 254(c)(1) of the Act (“Subsection (c)(1)”) to include broadband legacy services

¹ Cellular South has commented on the legal theories that the Commission initially propounded in this consolidated rulemaking to buttress its authority under the Act, to provide universal service support for the deployment of broadband services. *See Id.* at 4575-82. Because the Commission based its legal theories in part on a “white paper” submitted by AT&T, *see id.* at 4577 nn. 70-72, 74, and since the White Paper reiterates some of the same theories, Cellular South will repeat some of the arguments it made previously in this proceeding. For all of its arguments on the matter of the Commission’s subject-matter jurisdiction, *see* Comments of Cellular South, Inc., WC Docket No. 10-90, at 6-31 (Apr. 18, 2011) (“Comments”); Reply Comments of Cellular South, Inc., WC Docket No. 10-90, at 3-17 (Apr. 18, 2011) (“Reply Comments”).

² *See* White Paper at 1.

³ *Id.* at 49.

⁴ *See* 47 U.S.C. §§ 214(e), 254.

⁵ *See id.* at 58 n.68.

and broadband Internet access services. The Commission entertained a proposal to do just that in 2007 under its existing regulatory framework.⁷ That framework already allows facilities-based wireline telecommunications carriers to provide broadband Internet access service on a de-tariffed Title II common carrier basis.⁸

Because USF support can be made available to support broadband under the existing Title II framework, the Commission does not have to adopt the ABC Plan in order to “support broadband in areas in which there is no private sector business case.”⁹ In fact, the Commission determined in 2008 that the existing high-cost universal service program apparently had not “inhibited the deployment of broadband service to areas served by rural incumbent LECs.”¹⁰

AT&T and Verizon should not be heard to claim that the Title II universal service program should be overhauled to encourage private sector investment in broadband deployment.¹¹ The Commission effectively lifted Title II regulation of wireline broadband Internet access service to spur telecommunications carriers such as AT&T and Verizon to “invest in and deploy innovative broadband capabilities.”¹²

⁶ See *CAF NPRM*, 26 FCC Rcd at 457 n.68.

⁷ In 2007, the Federal-State Joint Board on Universal Service (“Joint Board”) exercised its authority under Subsection (c)(2) to recommend that “the Commission revise the current definition of supported services to include broadband Internet service.” *High-Cost Universal Service Support*, 22 FCC Rcd 20477, 20491 (Jt. Bd. 2007).

⁸ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14900-03 (2005) (“*Wireline Broadband Order*”), petition for review denied, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

⁹ ABC Plan Letter at 2.

¹⁰ *High-Cost Universal Service Support*, 23 FCC Rcd 8834, 8845 (2008) (“*Interim Cap Order*”), petitions for review denied, *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009).

¹¹ See *id.*

¹² *Wireline Broadband Order*, 20 FCC Rcd at 14856.

The Price Cap Carriers claim that they worked for months to develop a proposal that “balances the many policy and political challenges” of reforming the universal service and inter-carrier compensation systems.¹³ That may be true, but they obviously gave little thought to balancing the policy and political challenges of reforming the Commission’s universal service program against the Commission’s statutory obligation to “execute and enforce” the universal service provisions of Title II.¹⁴ For as Cellular South will show, the adoption of the ABC Plan would require the Commission to violate its statutory obligation to administer the USF in accordance with the jurisdiction-conferring provisions of §§ 214(e) and 254(a).

Finally, the Price Cap Carriers have chosen to ignore that it is the job of Congress, not the Commission, to balance the policy and political consequences of redirecting universal service funding from regulated Title II telecommunications carriers to unregulated information service providers. Moreover, they appear to have closed their eyes to the reality that their jurisdictional arguments have no hope of surviving judicial review, particularly in the aftermath of *Comcast Corp. v. FCC*, 600 F.3d 642 (2010). By appearing to argue that § 254 can be read to authorize the Commission to provide USF support to entities that are not subject to regulation under Title II,¹⁵ and are expressly *ineligible* to receive such support under §§ 214(e) and 254(c),¹⁶ the Price Cap Carriers may *not* be accused of what Ralph Waldo Emerson felt was the “foolish consistency [that] is the hobgoblin of little minds.”¹⁷ But they can be accused of wishful thinking if they

¹³ ABC Plan Letter at 1.

¹⁴ *See* 47 U.S.C. § 151.

¹⁵ *See* Comments at 9-10, 11-14; Reply Comments at 4-5.

¹⁶ *See* Comments at 11-14, 20; Reply Comments at 7-9.

¹⁷ *New York State Electric & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 100-01 (2d Cir. 1996) (quoting Ralph W. Emerson, *Self-Reliance in the Best of Ralph Waldo Emerson* 119, 127 (1941)).

actually believe that any reviewing court will buy a jurisdictional argument that is so manifestly inconsistent with the text and structure of the Act.

I. THE COMMISSION IS WITHOUT JURISDICTION TO IMPLEMENT THE ABC PLAN IN THE ABSENCE OF AN EXPRESS DELEGATION OF AUTHORITY TO REGULATE INFORMATION SERVICES UNDER TITLE II.

Beginning with cases such as *Kontrick v. Ryan*, 540 U.S. 443 (2004) and *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), the Supreme Court has curtailed “drive-by jurisdictional rulings” by federal courts that miss the differences between “true jurisdictional conditions and non-jurisdictional limitations on causes of action.” *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1244 (2010). The Court has adopted a “readily administrable bright line” test to distinguish jurisdictional from non-jurisdictional statutory provisions,¹⁸ which essentially requires an examination of the text and structure of a statute to determine if Congress has clearly spoken to a court’s subject-matter jurisdiction (its “adjudicatory authority”).¹⁹ It seems that there has been a similar curtailment of drive-by jurisdictional rulings with respect to the Commission’s regulatory authority.

The D.C. Circuit’s holding in *Comcast* that the Commission is without jurisdiction to regulate the network management practices of Internet access service providers was a sea change from the drive-by jurisdictional holding of the Fifth Circuit in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (1999) (“*TOPUC*”) that allowed the Commission to provide support to Internet access service providers under the universal service program for schools and libraries under § 254(h) of the Act (“Subsection (h)”).²⁰ Disdaining the deferential *Chevron* two-

¹⁸ *Arbaugh*, 546 U.S. at 515.

¹⁹ *Reed Elsevier*, 130 S. Ct. at 1234-44.

²⁰ *See* 47 U.S.C. § 254(h)(1)(B).

step analysis,²¹ the *Comcast* Court applied the two-part *American Library* test²² to determine whether the Commission’s exercise of so-called ancillary jurisdiction could be linked to “any express statutory delegation of the authority” found in the Act.²³ In contrast, the Commission’s exercise of jurisdiction was upheld in *TOPUC*, because the court agreed that the Act does not “speak directly” to the issue and its “*silence* indicate[d] that the agency should receive *Chevron* deference.”²⁴

The Supreme Court’s insistence that a court’s subject-matter jurisdiction be linked to a clear statutory delegation of adjudicatory authority, and the D.C. Circuit’s decision that the Commission’s authority to regulate Internet access providers must be based on an express statutory delegation of authority, leads to the conclusion that *Chevron* step-two deference can no longer be applied in cases where the issue is whether Congress has actually delegated authority to the Commission to regulate. *See Motion Picture Ass’n of America, Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) (an “agency’s interpretation of [a] statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue”) (emphasis in original). In short, Cellular South believes the court got it right in *American Civil Liberties Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (“*ACLU*”), when it opined:

In our view, a pivotal distinction exists between statutory provisions that are jurisdictional in nature — that is, provisions going to the agency’s power to regulate an activity ... — and provisions that are managerial — that is provisions pertaining to the mechanics or inner workings of the regulatory process Where the issue is 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

²¹ *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

²² *See American Library Ass’n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005).

²³ *Comcast*, 600 F.3d at 654.

²⁴ *TOPUC*, 183 F.3d at 443.

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, courts should perform a close and search analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue.²⁵

With *ACLU* skepticism that Congress would implicitly authorize the Commission to make payments under a Title II program to entities that are not subject to Title II regulation and are ineligible to receive such payments, we turn to the Price Cap Carriers' claim that ambiguity in the language of Subsection (c) permits the Commission to direct USF support to broadband information services, including broadband Internet access services.²⁶

A. Ambiguity in a Title II Provision Is Not an Express Delegation of Authority to the Commission To Extend Title II Benefits to Information Services That Are Not Subject to Title II Regulation.

Under *Chevron* step-two, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."²⁷ The Price Cap Carriers contend that the Commission can seize on the ambiguity in Subsection (c) to claim authority to direct USF support to broadband information services confident in the knowledge that the *TOPUC* court "applied *Chevron* deference in virtually identical circumstances."²⁸ In view of the current law on subject-matter jurisdiction, the Commission can take no comfort from *TOPUC* if it adopts the ABC Plan.

It was ambiguity in the language of Subsection (h) that ultimately led the *TOPUC* court to defer to the Commission's decision to provide USF support to "non-telecommunications enti-

²⁵ *ACLU*, 823 F.2d at 1565 n.32 (citations omitted).

²⁶ See White Paper at 44-47.

²⁷ *Chevron*, 467 U.S. at 843.

²⁸ White Paper at 46.

ties that provide internet access and internal connections to school and libraries.”²⁹ However, the court agreed that “the statute and its legislative history do not support the FCC’s interpretation” of Subsection (h).³⁰ Tellingly, the *TOPUC* court also disagreed with the Commission’s construction of the term “additional services” in Subsection (c)(3):

[T]he agency’s broad reading of “additional services” would mean that the use of the word “services” in other parts of § 254(c) could be broadened to include non-telecommunications services. For instance, § 254(c)(2) authorizes the Joint Board to recommend modifications to the definition of “services.” Under the FCC’s interpretation, the Joint Board ... could be free to redefine “services” to include services unrelated to telecommunications. This result is an implausible reading of Congress’ intent.³¹

We also agree with GTE that the FCC is asserting unlimited authority to prescribe support for whatever it wishes. At oral argument, counsel for the FCC could not point out how its interpretation could be limited even to internet access services. For instance, the agency could not explain why satellite television services or even janitorial services would not fit within its understanding of “additional services.” In contrast, the plain language of § 254 provides an easily recognizable limit on FCC authority by confining § 254(h) support to telecommunications services. The superiority of GTE’s reading, however, does not necessarily make Congress’ intent unambiguous.³²

The application of the *Chevron* doctrine in *TOPUC* has been rightfully criticized even within the Fifth Circuit.³³ The *TOPUC* court did not employ “traditional tools of statutory construction” to ascertain the intent of Congress as required by *Chevron* step-one,³⁴ and it deferred to the Commission’s implausible construction of Subsection (c)(2) without making the requisite

²⁹ *TOPUC*, 184 F.3d at 443.

³⁰ *Id.* at 440.

³¹ *Id.* at 442.

³² *Id.* at 442 n.93.

³³ See *Comsat Corp. v. FCC*, 250 F.3d 931, 940-41 (5th Cir. 2001) (Poue, J., concurring). See also *Qwest Corp. v. FCC*, 258 F.3d 1191, 1201 (5th Cir. 2001).

³⁴ *Chevron*, 467 U.S. at 843 n.9.

determination under *Chevron* step-two that the construction was reasonable.³⁵ Never followed by another court, *TOPUC* represents, if anything, the outer limits of *Chevron* deference. Nevertheless, the Price Cap Carriers urge the Commission to adopt the construction of Subsection (c)(2) that even the *TOPUC* Court recognized would be “implausible.”

According to the Price Cap Carriers, the “direction to ‘modif[y] ... the definition’ of universal service” in Subsection (c)(2) “refers not to the ‘telecommunications services’ that are to be supported, but more broadly to the ‘services’ that are to be supported.”³⁶ From that implausible reading of Subsection (c)(2), they leap to the conclusion that “Congress’s use of the same broad term ‘services’ in [§] 254(c)(2) *authorizes* the Commission to ‘modif[y] ... the definition’ of universal service to include non-telecommunications services, even though [§] 254(c)(1) refers to ‘telecommunications services.’”³⁷

In the alternative, the Price Cap Carriers suggest that the language of Subsection (c)(2) at least “creates ambiguity about the reach of [§] 254” sufficient to warrant deference under *Chevron* step-two.³⁸ Finally, they contended that the language of § 254(b) (“Subsection (b)”), when coupled with that of Subsection (c), “create more than enough ambiguity to permit the Commission to direct universal service funding to broadband, regardless of any contrary suggestion in [§§] 254(c)(1) or 254(e).”³⁹

³⁵ See *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) (“If a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute”).

³⁶ White Paper at 45. Of course, Subsection (c)(2) contains no directive. It provides that “[t]he Joint Board *may*, from time to time, recommend to the Commission modifications in the services that are supported.” 47 U.S.C. § 254(c)(2) (emphasis added).

³⁷ White Paper at 46 (emphasis added).

³⁸ *Id.*

³⁹ *Id.* at 47.

Cellular South pauses here to interject that the Price Cap Carriers make too much of the use of the word “modification” in Subsection (c)(2). “Modify,” in the Supreme Court’s view, “connotes moderate change,”⁴⁰ and “what, in reality, is a fundamental revision of the [Act]” cannot be considered a “modification.”⁴¹ Thus, the best reading of Subsection (c)(2) is that the Joint Board may from time to time recommend to the Commission “moderate changes” in the definition of USF-supported services.⁴²

The Price Cap Carriers conflate so much ambiguity into the words “modifications” and “services” that the Commission could redefine the term “universal service” to mean an evolving level of whatever “services” it wishes to support. As foreseen in *TOPUC*, the Price Cap Carriers could have just as easily claimed that the ambiguity in Subsection (c) was enough to permit the Commission also to direct USF support to any type of service, be it satellite television service to schools, janitorial service to hospitals, or any type of information service to all Americans.

If it construes Subsection (c) to authorize USF support to information services, the Commission’s administration of the universal service program will come untethered to the text and structure of the Act. If the ABC Plan is implemented in accordance with the rulemaking requirements of § 254(a), information services will receive USF support under new Part 54 universal service rules, which will become the Title II *regulations* that the Commission must adopt un-

⁴⁰ *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 228 (1994).

⁴¹ *Id.* at 231-32.

⁴² *See* 47 U.S.C. § 254(c)(2).

der the express statutory mandate to continue to implement §§ 214(e) and 254.⁴³ But information services are not subject to Title II regulation at all.⁴⁴

Also, if the ABC Plan is adopted, information service providers will receive USF support. But under the Commission’s current broadband regulatory scheme, “the categories of ‘information service’ and ‘telecommunications service’ are mutually exclusive.”⁴⁵ Therefore, information service providers are ineligible to receive USF support insofar as only a “common carrier designated as an eligible telecommunications carrier [“ETC”] ... *shall* be eligible to receive universal service support in accordance with [§] 254,”⁴⁶ and only an ETC “designated under [§] 214(e) ... *shall* be eligible to receive specific Federal universal support.”⁴⁷

To buy the Price Cap Carrier’s argument, one must accept the notion that Congress explicitly left a gap for the Commission to fill when it permitted “modifications in the definition of the services that are supported” by the USF,⁴⁸ and that the gap was large enough to authorize the Commission to regulate information services for the first time under Title II. To put that notion into the proper perspective, Subsection (c)(2) was enacted as part of the Telecommunications Act of 1996 (“1996 Act”), by which Congress overhauled the entire Act. In particular, Subsection (c)(2) was enacted under Subtitle A (“Telecommunications Services”) of the 1996 Act, which

⁴³ See Comments at 9-10.

⁴⁴ See *Brand X*, 545 U.S. at 973 (broadband Internet access services provided as information services are “exempt from mandatory common-carrier regulation under Title II”); *Time Warner*, 507 F.3d at 213 (“Only telecommunications service is subject to mandatory regulation under Title II”).

⁴⁵ *Wireline Broadband Order*, 20 FCC Rcd at 14862 n.32, 14911 n.328.

⁴⁶ 47 U.S.C. § 214(e)(1) (emphasis added).

⁴⁷ *Id.* § 254(e) (emphasis added).

⁴⁸ *Id.* § 254(c)(2).

added two new parts to Title II (“Subchapter II — Common Carriers”).⁴⁹ The subsection was included in one of the eleven sections in the second new part (“Part II — Development of Competitive Markets”),⁵⁰ all of which address telecommunications carriers or the regulation of telecommunications carriers.⁵¹

Needless to say, the political and policy decision to subject information services, particularly Internet access service, to common carrier regulation would have engendered substantial controversy. It is fanciful to suggest that Congress made that momentous decision in 1996 and implemented it solely by the enactment of Subsection (c)(2), where the delegation of the authority remained hidden in Title II unnoticed for 15 years before being discovered by the Price Cap Carriers. Furthermore, if it intended a delegation of authority, Congress would have delegated the authority to the Commission in clear and mandatory terms.⁵² In contrast to the mandatory “shall” used in Subsection (c)(1), Subsection (c)(2) speaks to the Joint Board’s discretion using the permissive “may.” The use of both words in Subsection (c) underscores that Subsection (c)(2) is not a jurisdictional provision.⁵³

Finally, there is a presumption recognized in *ACLU* that a responsible Congress would not allow an agency to “define the scope of its own power.”⁵⁴ Yet, the Price Cap Carriers construe the provision stating that the Joint Board “may” recommend to the Commission “modifica-

⁴⁹ See H.R. Rep. No. 104-458, at 2, 7 (1996) (“Conference Report”).

⁵⁰ See 1996 Act, § 101(a); Conference Report at 7.

⁵¹ See 47 U.S.C. §§ 251-261.

⁵² “The mandatory ‘shall’ ... normally creates an obligation impervious to judicial discretion.” *Lexecon, Inc. v. Milberg Weiss Bershad & Lerach*, 523 U.S. 26, 35 (1998).

⁵³ See *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (“Congress’ use of the permissive ‘may’ ... contrasts with the legislators’ use of a mandatory ‘shall’ in the very same section”).

⁵⁴ *ACLU*, 823 F.2d at 1565 n.32.

tions in the definition of the services that are supported” to authorize the Commission to define USF-supported services to only include information services previously outside its jurisdiction. If allowed to assume authority by the process of interpreting a non-jurisdiction-conferring provision of the Act, with no link to an express statutory delegation of authority, the Commission will “enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.” *Railway Labor Executives’ Ass’n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

B. Subsection (c)(2) Unambiguously Refers to USF-Supported Telecommunications Services and Subsection (c)(3) Unambiguously Refers to the Special Services That Telecommunications Carriers Provide to Public Users Under Subsection (h).

As noted previously, traditional tools of statutory construction are employed under *Chevron* step one to ascertain whether Congress clearly expressed its intention on the precise question at issue.⁵⁵ A cardinal rule of construction is that a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes.⁵⁶ Accordingly, “[s]tatutory provisions *in pari materia* normally are construed together to discern their meaning.”⁵⁷ Read in context, Subsection (c)(2) cannot bear the meaning given it by the Price Cap Carriers.

⁵⁵ See *Chevron*, 467 U.S. at 843 n.9.

⁵⁶ Statutory construction “is a holistic endeavor,” *United Savings Ass’n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 215, 221 (1988), and “at a minimum, must account for a statute’s full text, language as well as punctuation, structure, and subject matter.” *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 455 (1993). See *National Cable Television Ass’n v. FCC*, 33 F.3d 66, 75 (D.C. Cir. 1994).

⁵⁷ *Motion Picture Ass’n*, 309 F.3d at 801.

Subsection (c)(1) provides, “[u]niversal service is an evolving level of telecommunications services that the Commission *shall* establish periodically under [§ 254].”⁵⁸ It provides further that, when the Joint Board recommends, and the Commission establishes, the “definition of the services that are supported ... [they] *shall* consider the extent to which such telecommunications services” meet the requirements of Subsection (c)(1)(A)-(D).⁵⁹ Thus, as the Price Cap Carriers acknowledge, Subsection (c)(1) refers to “telecommunications services.”⁶⁰ And the term “definition of services” plainly refers to the “definition of the [telecommunications] services that are supported” by the USF as established periodically by the Commission. These defined telecommunications services were initially referred to by the Commission as the “core services” eligible for universal service support.⁶¹

Under the heading “Alterations and modifications,”⁶² Subsection (c)(2) provides, “[t]he Joint Board *may*, from time to time, recommend to the Commission modifications in definition of the services that are supported.”⁶³ The phrase “definition of the services that are supported” in Subsection (c)(2) must be construed to have the same meaning that it has in Subsection (c)(1). Thus, the plain meaning of Subsection (c)(2) is that the Joint Board may periodically recommend modifications in the “definition of the [telecommunications] services that are supported” that the Commission establishes periodically under Subsection (c)(1).

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

⁵⁹ *Id.* (emphasis added).

⁶⁰ *See* White Paper at 46.

⁶¹ *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9093 (1997) (“*Universal Service Order*”).

⁶² The title of a statute or section “can aid in resolving an ambiguity in the legislation’s text.” *INS v. National Center for Immigrants’ Rights*, 502 U.S. 183, 189-90 (1991) (citing *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) and *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 388-89 (1959)).

⁶³ 47 U.S.C. § 254(c)(2) (emphasis added).

Finally, under the heading “Special services,” Subsection (c)(3) provides that, in addition to the services included in the definition of universal service under Subsection (c)(1), the Commission “*may* designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of [S]ubsection (h).”⁶⁴ In other words, Subsection (c)(3) afforded the Commission the discretion to designate services in addition to the “core telecommunications services” as eligible for support.⁶⁵

For the purposes of Subsection (h), schools, libraries, and health care providers are defined as “public institutional telecommunications user[s]” (“Public Users”).⁶⁶ The only services provided under Subsection (h) are “[t]elecommunications services for certain providers;”⁶⁷ the only service providers are “telecommunications carriers.”⁶⁸ The legislative history makes it clear that Subsection (c)(3) was for the purpose of authorizing the Commission “to designate a *separate definition* of universal service applicable only to [Public Users].”⁶⁹

When the three provisions of Subsection (c) are construed together, the various uses of the terms “telecommunications services,” “services,” “special services” and “additional services”

⁶⁴ 47 U.S.C. § 254(c)(3) (emphasis added).

⁶⁵ *Universal Service Order*, 12 FCC Rcd at 9093.

⁶⁶ *See* 47 U.S.C. § 254(h)(7)(C).

⁶⁷ “Telecommunications services for certain providers” is the heading enacted by Congress for Subsection (h). Thus, it is considered in conjunction with the statutory text to determine the “statute’s clear and total meaning.” *United States v. Wallington*, 889 F.2d 573, 577 (5th Cir. 1989). Congress clearly identified those “certain providers” in the headings it enacted for Subsections (h)(1)(A) and (h)(1)(B): “[h]ealth care providers for rural areas” and “[e]ducational providers and libraries.”

⁶⁸ Subsection (h) only applies to telecommunications carriers that either receive a bona fide request for: (1) telecommunications services necessary for the provision of health care services to any public or non-profit health care provider for a rural area, *see* 47 U.S.C. § 254(h)(1)(A); or (2) “any of its services that are within the definition of universal service under [S]ubsection (c)(3)” to elementary schools, secondary schools, and libraries for educational purposes. *Id.* § 254(h)(1)(B).

⁶⁹ Conference Report at 133 (emphasis added). *See id.* at 131 (Subsection (c) gives the Commission specific authority “to provide a different definition for schools, libraries, and health care facilities”).

are easily harmonized. The terms “telecommunications services” and “services” used in Subsection (c) refer specifically to the telecommunications services that are included from time to time in the Commission’s definition of USF-supported telecommunications services. The terms “special services” and “additional services” refer the services provided to Public Users under Subsection (h).

Subsection (c) clearly authorizes USF support only for telecommunications services or the special services designated by the Commission that telecommunications carriers provide for Public Users. Because Subsections (c)(1) and (c)(2) limit USF support to telecommunications services, they cannot be construed to authorize USF support for information services. Subsection (c)(3) can be construed to give the Commission the discretion to direct support to services that telecommunications carriers provide to Public Users that are not included in its definition of USF-supported services. However, nothing in the plain language of Subsection (c) can be construed as a delegation of authority, much less an express delegation of authority, to provide USF support to information services and Internet access services that are *not provided by telecommunications carriers*.

C. The Subsection (b) Principles Do Not Constitute Jurisdiction-Conferring Statutory Mandates.

The Price Cap Carriers state that Subsection (b) “*directs* the Commission to use universal service programs to promote access to information services.”⁷⁰ No such directive is either expressed or implied within the provisions of Subsection (b). Congress employed the mandatory “shall” in Subsection (b) merely to direct the Joint Board and the Commission to “base *policies*

⁷⁰ White Paper at 44 (emphasis added).

for the preservation and advancement of universal service” on seven enumerated “principles.”⁷¹ That constitutes the sole statutory mandate of Subsection (b).

The Price Cap Carriers claim to find “ample authority” for the Commission to support broadband services in two principles that “concern access to information services.”⁷² The first is that “[a]ccess to advanced services” — advanced telecommunications and information services — “*should* be provided in all regions of the Nation.”⁷³ The second is that all consumers, including those in rural and high cost areas “*should* have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services” that are reasonably comparable to those provided in urban areas.”⁷⁴ Congress framed the two principles with language that is neither mandatory nor jurisdictional.

The word “should” is used as a substitute for “may” as a permissive word in statutes.⁷⁵ So it was in Subsection (b), where Congress employed “should” not only in Subsections (b)(2) and (b)(3), but in all six of the statutory universal service principles.⁷⁶ That was enough to enable the *TOPUC* court to conclude that Subsection (b) “identifies seven principles the FCC should consider in developing policies; it hardly constitutes a series of specific statutory commands.”⁷⁷

⁷¹ 47 U.S.C. § 254(b) (emphasis added). In actuality, the universal service principles encompass six statutory principles and such “additional principles” as the Joint Board and the Commission may adopt pursuant to Subsection (b)(7). *Id.* § 254(b)(7).

⁷² White Paper at 44. Unsurprisingly, the Price Cap Carriers rely on the same two “key principles” on which the Commission tried to build its case for jurisdiction in the *CAF NPRM*. 26 FCC Rcd at 4575.

⁷³ 47 U.S.C. § 254(b)(2) (emphasis added).

⁷⁴ *Id.* § 254(b)(3) (emphasis added).

⁷⁵ See *Union Electric Co. v. Consolidated Coal Co.*, 188 F.3d 998, 1001 (8th Cir. 1999).

⁷⁶ See 47 U.S.C. § 254(b)(1)-(6).

⁷⁷ *TOPUC*, 183 F.3d at 421.

By using “basic principles of statutory interpretation,” the Tenth Circuit reached a similar conclusion:

The plain text of the statute mandates that the FCC “shall” base its universal policies on the principles listed in § 254(b). This language indicates a mandatory duty on the FCC. However, each of the principles in § 254(b) internally is phrased in terms of “should.” The term “should” indicates a recommended course of action, but does not itself imply the obligation associated with “shall.” Thus, the FCC must base its policies on the principles, but any particular principle can be trumped in the appropriate case. We hold the FCC may exercise its discretion to balance the principles against one another when they conflict, but may not depart from them altogether to achieve some other goal.⁷⁸

The Commission once viewed Subsection (b) as providing an “aspirational guideline” and its interpretation of the statutory principles as “aspirational only” was upheld on appeal at least twice.⁷⁹ But in the *CAF NPRM*,⁸⁰ the Commission reversed course and tried to claim Subsection (b) is “not merely aspirational — it directs that universal service ‘shall’ be based on these principles.”⁸¹ Obviously, however, Subsection (b) is not aspirational only with respect to its directive that universal service *policies* “shall” be based on the statutory principles.

The fact that Congress used the mandatory “shall” to direct that policies be based on the statutory principles, but used the non-mandatory “should” in conjunction with the principles, prevents the construction of the principles as “*specifically delegated powers under the Act*”⁸² or as including a “statutorily mandated responsibility.”⁸³ Otherwise, if each principle was a statuto-

⁷⁸ *Qwest*, 258 F.3d at 1199-2000 (citations omitted).

⁷⁹ *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313, 321 (10th Cir. 2001). See *TOPUC*, 183 F.3d at 421.

⁸⁰ *Connect America Fund, et al.*, 26 FCC Rcd 4554 (2011) (“*CAF NPRM*”).

⁸¹ *CAF NPRM*, 26 FCC Rcd at 4576.

⁸² *Comcast*, 600 F.3d at 653 (quoting *NARUC v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976)) (emphasis in original).

⁸³ *American Library*, 406 F.3d at 692.

rily mandated responsibility, the Commission would not have the discretion to balance one principle against the other⁸⁴ or, on one occasion, to profess to “temporarily prioritizing” among the principles.⁸⁵

The mandate that the Subsection (b) principles form the basis for the Commission’s policies shows that the principles themselves are nothing more than policy statements. And congressional policy statements “are just that — statements of policy. They are not delegations of regulatory authority.” *Comcast*, 600 F.3d at 654. For proof of that point, one need look no further than to Subsection (b)(7), which permits the Joint Board and the Commission to adopt “additional principles.”⁸⁶

If the Subsection (b) principles could be considered a source of its subject matter jurisdiction, the Commission could expand its jurisdiction by adopting additional principles as it, and the Joint Board, deem necessary and appropriate under Subsection (b)(7). That cannot be, because it is “beyond dispute ... that ‘[a]n agency may not confer power upon itself.’”⁸⁷ Again, as noted in *ACLU*, “it seems highly unlikely that a responsible Congress would implicitly delegate to [the Commission] the power to define the scope of its own power.”⁸⁸

Finally, the Price Cap Carriers’ claim that Subsection (b) directs the Commission to provide USF support to “promote access to information services.”⁸⁹ That claim is defeated by the

⁸⁴ See *supra* note 78 and accompanying text.

⁸⁵ *Interim Cap Order*, 23 FCC Rcd at 8845.

⁸⁶ 47 U.S.C. § 254(b)(7).

⁸⁷ *Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of § 315(b) of the Act*, 7 FCC Rcd 4123, 4126 (1992) (quoting *Louisiana PSC v. FCC*, 476 U.S. 355, 374 (1986)).

⁸⁸ *ACLU*, 823 F.2d at 1567 n.32.

⁸⁹ White Paper at 44.

plain meaning of the mandate that the Commission “shall base policies for the preservation and advancement of universal service” on the statutory principles.⁹⁰

The word “preservation” is synonymous with conservation and means the act of preserving or “keep[ing] alive or in existence.”⁹¹ The term “universal service” is defined as “an evolving level of telecommunications services that the Commission shall establish periodically under [§ 254].”⁹² If the intent of Congress expressed in Subsection (b) was to preserve and advance universal service as an “an evolving level of telecommunications services,” then the statutory principles cannot be construed as an implied delegation of authority to promote information services. Telecommunications services and information services are distinct services under the Act⁹³ and only telecommunications carriers are subject to regulation under Title II and the Commission’s Subsection (b) policies.

D. The Term “Information Services” in Subsection (b) Unambiguously Refers to the “Information Services” Access to Which Telecommunications Carriers Provide to Public Users Under Subsection (h).

The Price Cap Carriers do not address Subsection (b)(6), which completely undermines their strained interpretation of § 254. It provides that Public Users “should have *access* to advanced telecommunications services as described in [S]ubsection (h).”⁹⁴ The only *access* service described in Subsection (h) is “access to advanced telecommunications and information services” for Public Users.⁹⁵ The schools, libraries, and health care providers that meet the eligibility

⁹⁰ 47 U.S.C. § 254(b).

⁹¹ Random House Webster’s Unabridged Dictionary 1530 (2d ed. 2001).

⁹² 47 U.S.C. § 254(c)(1).

⁹³ *Compare* 47 U.S.C. § 153(20) *with id.* 153(46).

⁹⁴ *Id.* § 254(b)(6) (emphasis added).

⁹⁵ 47 U.S.C. § 254(h)(1)(2)(A).

requirements of Subsection (h)(4)⁹⁶ are the Public Users that Congress intended to have access to advanced telecommunications and information services under Subsections (b)(6) and (h)(2)(A).

Subsections (h)(2) (“Advanced services”) and (h)(3) (“Terms and conditions”) supply the only description of an access service provided by Subsection (h). The two subsections can be harmonized by reading them to provide that the Commission “shall establish competitively neutral rules”⁹⁷ defining “the circumstances under which a telecommunication carrier may be required”⁹⁸ to provide the “[t]elecommunications services and network capacity”⁹⁹ necessary “to connect its network” to a Public User¹⁰⁰ in order “to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries.”¹⁰¹

Cellular South’s reading of Subsections (h)(2) and (h)(3) comports with the applicable canons of construction. It gives effect to every word of the “advanced services” provisions of Subsection (h)(2), as well as giving effect to the material terms “telecommunications services” and “network capacity” in Subsection (h)(3).¹⁰² Cellular South’s construction of Subsections

⁹⁶ *See id.* § 254(h)(4).

⁹⁷ *Id.* § 254(h)(2).

⁹⁸ *Id.* § 254(h)(2)(B).

⁹⁹ *Id.* § 254(h)(3).

¹⁰⁰ *Id.* § 254(h)(2)(B).

¹⁰¹ *Id.* § 254(h)(2)(A).

¹⁰² “In construing a statute we are obliged to give effect, if possible, to every word Congress used.” *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

(h)(2) and (h)(3) rendered no part of their provisions superfluous.¹⁰³ And it is supported by the legislative history:

New [S]ubsection (h)(2) requires the Commission to establish rules to enhance the availability of advanced telecommunications and information services to [Public Users]. For example, the Commission could determine that telecommunications and information services that constitute universal service for classrooms and libraries shall include dedicated data links and the ability to obtain access to educational materials, research information, statistics, information on government services, reports developed by Federal, State, and local governments, and information services which can be carried over the Internet. The Commission also is required to determine under what circumstances a telecommunications carrier may be required to connect [Public Users] to its network.¹⁰⁴

The Price Cap Carriers' attempt to read disharmony into § 254 fails with the recognition that Subsection (h) permits telecommunications carriers to provide the telecommunications services and network capacity to Public Users that will allow them to have access to advanced telecommunications and information services. That recognition explains the Subsection (b) principles that “[a]ccess to advanced telecommunications and information services” should be provided nation-wide,¹⁰⁵ that consumers nation-wide should have “access to ... advanced telecommunications and information services” at reasonably comparable rates,¹⁰⁶ and that Public Users should have the “access to advanced telecommunications and information services” as described in Subsection (h)(2)(A).¹⁰⁷

Since exactly the same phrasing appears in the “key principles” in Subsections (b)(2) and (b)(3), as well as by reference in Subsection (b)(6), the phrase “access to ... information servic-

¹⁰³ “But of course we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.” *Astoria Federal Savings and Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991).

¹⁰⁴ Conference Report at 133.

¹⁰⁵ 47 U.S.C. § 254(b)(2).

¹⁰⁶ *Id.* § 254(b)(3).

¹⁰⁷ *See id.* § 254(b), (h)(2)(A)..

es” must be read the same to mean access to information services provided to Public Users via telecommunications services and network capacity provided by telecommunication carriers.¹⁰⁸ Thus, support is provided for “basic conduit access to the Internet” that telecommunications carriers provide to Public Uses.¹⁰⁹ Congress repeated the phrase in three of its principles simply “to ensure that health care providers for rural areas, elementary and secondary school classrooms, and libraries have affordable access to modern telecommunications services that will enable them to provide medical and educational services to all parts of the Nation.”¹¹⁰

The foregoing construction of § 254 brings Subsection (h) into complete harmony with Subsections (b) and (c) in a manner that is consistent with the intentions expressed by Congress in the 1996 Act. Given that construction of § 254, the support of the Title II universal service program can only be provided to *telecommunications carriers* that either (1) provide *telecommunications services* to consumers in rural, insular, and high-cost areas and to low-income consumers in all areas, or (2) provide the *telecommunications services and facilities* necessary for Public Users to have access to advanced telecommunications and information services.

Recall that the Price Cap Carriers claim that the Commission has direct authority under § 254 — not Title I ancillary jurisdiction — to support information services.¹¹¹ No provision of § 254 conveys authority to the Commission to direct universal service support to a service *other than* a telecommunications service or a telecommunications access service provided by a telecommunication carrier subject to common carrier regulation under Title II. In the absence of

¹⁰⁸ See *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (“A term appearing in several places in a statutory text is generally read the same way each time it appears”).

¹⁰⁹ *Universal Service Order*, 12 FCC Rcd at 9012.

¹¹⁰ Conference Report at 132.

¹¹¹ See White Paper at 44.

such a delegation of authority, the Commission is powerless to support any information service that is not included in its current definition of USF-supported telecommunications services. *See Comcast*, 600 F.3d at 655.¹¹²

II. THE ABC PLAN CANNOT BE IMPLEMENTED BECAUSE INFORMATION SERVICES PROVIDERS ARE INELIGIBLE TO RECEIVE USF SUPPORT UNDER SECTION 214(e).

The Price Cap Carriers even conceded that there is “some tension” between their view of the Subsection (b)(2) and (b)(3) principles and § 254(e) (“Subsection (e)”), which provides that only ETCs designated under § 214(e) “shall” be eligible to receive USF support.¹¹³ However, they make no attempt to relieve the tension beyond suggesting that Subsection (e) is “not sensibly read to bar the Commission from using universal service funding to support broadband.”¹¹⁴

Cellular South is not alone in pointing out that Subsection (e) works in conjunction with § 214(e) to expressly and completely bar USF support for broadband information services.¹¹⁵ The Price Cap Carriers’ silence in the face of an explicit statutory bar to their proposal is conspicuous and telling.

¹¹² The Price Cap Carriers argue that § 254, as interpreted in light of § 706 of the 1996 Act, 47 U.S.C. § 1302, and § 6001 of the American Recovery and Reinvestment Act (“Recovery Act”), *id.* § 1305, gave the Commission the direct authority to provide USF support for broadband information service. *See* White Paper at 44, 47-48. If § 254 does not include an express delegation of authority, the jurisdictional defect cannot be corrected by the process of construing other statutory provisions. For Cellular South’s discussion of § 706 and the Recovery Act, *see* Comments at 6-9, 16-20.

¹¹³ White Paper at 44 (quoting 47 U.S.C. § 254(e)).

¹¹⁴ *Id.* at 45.

¹¹⁵ *See* Comments, at 11-14, 26-27; Reply Comments at 7-9; Comments of the National Association of State Utility Consumer Advocates, WC Docket No. 10-90, at 28 (Apr. 18, 2011); Comments of NECA, NCTA, OPASTCO and Western Telecommunications Alliance, WC Docket No. 10-90, at 81-82 (Apr. 18, 2011); Comments of COMPTTEL, WC Docket No. 10-90, at 29-30 (Apr. 18, 2011); Comments of Rural Telecommunications Carriers Coalition, WC Docket No. 10-90, at 5-6, 11-12 (Apr. 18, 2011).

The statutory bar to the ABC Plan really begins with § 1 of the Act, which provides that the Commission “shall execute and enforce the provisions of [the Act].”¹¹⁶ The plain meaning of the word “execute” is “to carry out; accomplish” or “to perform or do.”¹¹⁷ The word “enforce” means “to put or keep in force; compel obedience to.”¹¹⁸ Obviously, by employing the word “shall,” Congress imposed a mandatory duty on the Commission to carry out, and compel obedience to, the provisions of § 214(e)(1) and Subsection (e). And those two provisions speak with “crystalline clarity” on the precise issue of whether USF support can be extended to information services providers.¹¹⁹

There is no ambiguity in the mandatory language of § 214(e)(1), which provides, “[a] *common carrier* designated as an eligible telecommunications carrier ... shall be *eligible* to receive universal service support in accordance with [§] 254.”¹²⁰ The word “eligible” means “fit or proper to be chosen” or “meeting the stipulated requirements, as to participate, compete, or work; qualified.”¹²¹

¹¹⁶ 47 U.S.C. § 151.

¹¹⁷ Random House at 676. In law, the word means “[t]o complete; to make; to sign; to perform; to do; to follow out; to carry out according to its terms; to fulfill the command or purpose of.” Black’s Law Dictionary 527 (6th ed. 1990).

¹¹⁸ Random House at 644. The legal definition of “enforce” is “[t]o put into execution; to cause to take effect; to make effective; as, to enforce a particular law ...; to compel obedience to.” Black’s at 528.

¹¹⁹ *ACLU*, 823 F.2d at 1568.

¹²⁰ 47 U.S.C. § 214(e)(1) (emphasis added). Again, by using the mandatory “shall,” Congress made it mandatory that a common carrier designated as an ETC be eligible to receive USF support in accordance with § 254.

¹²¹ Random House at 632. In law, the word “eligible” means “[f]it and proper to be chosen” or “[c]apable of being chosen.” Black’s at 521. The Commission understands that the word “eligible” means “qualified to participate or be chosen.” *CAF NPRM*, 26 FCC Rcd at 4645.

The terms “common carrier” and “telecommunications carrier” are defined in § 3 of the Act¹²² and are treated as synonymous. A common carrier is a telecommunications carrier;¹²³ common carrier services are telecommunications services;¹²⁴ and a telecommunications carrier is subject to mandatory common carrier regulation under Part 1 (“Common Carrier Regulation”) of Title II,¹²⁵ as well as to regulation under the “competitive markets” provisions of Part 2.¹²⁶ Thus, the Commission’s jurisdiction is limited to adopting and enforcing rules that provide USF support only to common carrier ETCs that are subject to Title II regulation.

The statutory definition of a telecommunication carrier is “any provider of telecommunications services.”¹²⁷ The definition also includes the proviso that “[a] telecommunications carrier shall be treated as a common carrier under [the Act] only to the extent that it is engaged in providing telecommunications services.”¹²⁸ To give effect to both the statutory proviso and the provision that a “common carrier designated as an [ETC] ... shall be eligible” for support under § 254 requires § 214(e)(1) to be read to mandate that a common carrier ETC is designated as meeting the requirements to receive universal service support under § 254 “only to the extent that it is engaged in providing telecommunications services.”

¹²² See 47 U.S.C. § 153(10), (44).

¹²³ See *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21587-88 (1998) (“the term ‘telecommunications carrier’ means essentially the same as common carrier”).

¹²⁴ The Commission determined that the legislative history of the 1996 Act “indicates that the definition of telecommunications service is intended to clarify that telecommunications services are common carrier services.” *Cable & Wireless, PLC*, 12 FCC Rcd 8516, 8521 (1997).

¹²⁵ See *Brand X*, 545 U.S. at 975-76.

¹²⁶ See *supra* note 53 and accompanying text.

¹²⁷ 47 U.S.C. § 153(44).

¹²⁸ *Id.*

Because § 254 is referenced in § 214(e)(1), and § 214(e) is referenced in Subsection (e), § 214(e)(1) and Subsection (e) are *in pari materia* and should be construed in concert. Subsection (e) plainly mandates that “only an [ETC] designated under [§] 214(e) ... shall be eligible to receive specific Federal universal service support.”¹²⁹ The word “only” means “without others or anything further; alone; solely; exclusively.”¹³⁰ Thus, construed together, § 214(e)(1) and Subsection (e), mandate that ETCs alone meet the requirements to receive universal service support. Their combined text speaks too clearly to permit a misinterpretation of their meaning.

The Price Cap Carriers’ effort to redirect universal service support to information services will come to nothing because of their failure to seriously consider the eligibility requirements of § 214(e)(1) and Subsection (e). Even if the Commission could find authority in § 254 to provide USF support for information services, only a common carrier telecommunications carrier can be found eligible to receive the support. Information services providers are the intended beneficiaries of the ABC Plan, but because they are statutorily ineligible to receive the benefits, implementation of the plan is impossible. The Commission should reject the ABC Plan as beyond its authority to implement.

III. THE COMMISSION LACKS THE AUTHORITY TO PREEMPT THE STATES IN FURTHERANCE OF A PLAN THAT IT LACKS AUTHORITY TO IMPLEMENT.

If the ABC Plan was not dead jurisdictionally on its arrival at the Commission, Section III of the White Paper could be considered a 19-page bucket list of the Price Cap Carriers. Pursuant to the baseless jurisdictional theory, the Price Cap Carriers contend that the Commission

¹²⁹ 47 U.S.C. § 254(e) (emphasis added).

¹³⁰ Random House at 1354. The legal definition of “only” is “[s]olely; merely; for no other purpose; at no other time; in no otherwise; along; of or by itself; without anything more; exclusive; nothing else or more.” Black’s at 1089.

has the authority to eliminate or preempt any “legacy” state universal service regulation that could conceivably “hinder” the transition to an all-IP communications infrastructure.¹³¹

It suffices to note that the Commission is without authority to implement the ABC Plan much less dismantle the dual federal-state regulatory scheme that Congress enacted for universal service in 1996, or to prevent state commissions from exercising the authority Congress delegated to them by the mandatory terms of § 214(e) or the permissive terms of § 254.¹³² Perhaps preemption would be appropriate where state regulation would negate the exercise of the Commission’s lawful authority,¹³³ but the Commission can take no preemptive action in furtherance of misappropriating universal service funding to support the Price Cap Carriers’ transition to an all-IP communications infrastructure.

¹³¹ See White Paper at 49.

¹³² See Reply Comments at 13-17.

¹³³ See White Paper at 62 n.74, 63 n.75.