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Via ECFS

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

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

Dear Ms. Dortch:

On October 4, 2011, Christopher Heimann of AT&T; Timothy Boucher of CenturyLink; Scott Angstreich (representing Verizon) of Kellogg, Huber, Hansen, Todd, Evans, and Figel; Jonathan Banks of USTelecom; Michael Glover and Chris Miller of Verizon; Heather Zachary (representing AT&T) of Wilmer, Cutler, Pickering, Hale and Dorr; and Malena Barzilai of Windstream met with Austin Schlick, Julie Veach, Diane Griffin Holland, Nandan Joshi, and Douglas Klein of the Office of General Counsel regarding the Commission's authority to adopt various elements of the ABC Plan.¹

Intercarrier Compensation Reform. We first discussed the Commission's authority to adopt comprehensive intercarrier compensation reform.² Specifically, we explained that section 251(b)(5) encompasses—and section 201(b) thus authorizes the Commission to regulate—all classes of intercarrier compensation involving traffic that originates or terminates on the circuit-switched PSTN. 47 U.S.C. §§ 201(b), 251(b)(5). We noted that this interpretation is supported by section 251(g), which *temporarily* grandfathers the intercarrier compensation regimes that predated the 1996 Act and thus makes clear that the Commission has authority to address intercarrier compensation for all “telecommunications” under section 251(b)(5), including access

¹ 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, CC Docket Nos. 01-92, 99-200, 96-98, 99-68; WC Docket Nos. 05-337, 07-135, 10-90, 03-109, 06-122, 04-36; GN Docket No. 09-51 (filed July 29, 2011) (“ABC Plan” or “Plan”).

² See ABC Plan, Attachment 5, Legal Authority White Paper at 9-39 (“ABC Legal Analysis”).

Marlene H. Dortch, Secretary
October 6, 2011
Page 2

traffic. *Id.* § 251(g). We also explained how nothing in section 252 limits the Commission’s section 201(b) authority to establish a uniform default rate for all traffic covered by section 251(b)(5). *Id.* § 252. In addition, we discussed why the Commission should also rely on a mutually reinforcing legal theory and assert that it has authority to establish a uniform default rate for all traffic pursuant to its authority under sections 201 and 332 and the *Louisiana PSC* “inseparability” doctrine.³

Authority to Fund Broadband Services. We also noted that the Commission has ample authority under section 254 of the Act, 47 U.S.C. § 254, to support broadband services with universal service funding.⁴ In particular, we discussed section 254(b), which mandates that “the Commission *shall* base policies for the preservation and advancement of universal service on” six principles, two of which concern access to information services. 47 U.S.C. § 254(b) (emphasis added). We acknowledged the potential tension with section 254(e), but we noted that, as in *Texas Office of Public Utility Counsel v. FCC*,⁵ here the Commission would be entitled to deference if it reconciled the statutory language by concluding that universal service funding can be used to support information services. We also noted that section 254(c) rejects a static focus on legacy technologies and confirms that the Commission can “modif[y] ... the definition of the services that are supported by Federal universal service support mechanisms” to include broadband. 47 U.S.C. § 254(c)(2). Finally, we explained that this interpretation of section 254 finds support in section 706(b) of the Telecommunications Act of 1996, *id.* § 1302(b).

Elimination of Federal Eligible Telecommunications Carrier (“ETC”) Obligations. We also discussed the Commission’s authority to eliminate federal ETC obligations altogether when it eliminates the legacy universal service programs (and to eliminate those obligations immediately where carriers receive no legacy high-cost funding).⁶ Our discussion focused on section 214(e)(1), which provides that ETCs “shall, throughout the service area for which the [ETC] designation is received ... offer *the services that are supported by Federal universal service support mechanisms* under section 254(c)[.]” 47 U.S.C. § 214(e)(1) (emphasis added). First, we noted that, after the Commission transitions all universal service support from legacy services to broadband, the former will no longer be “supported by Federal universal service support mechanisms” and thus, under the plain language of section 214(e), service providers will have no continuing obligation to offer them. Second, we explained that the Commission also should eliminate ETC obligations immediately in those geographic areas where a carrier does not

³ *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 376 n.4 (1986).

⁴ See ABC Legal Analysis at 44-49.

⁵ *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 440-44 (5th Cir. 1999).

⁶ See ABC Legal Analysis at 49-59.

Marlene H. Dortch, Secretary
October 6, 2011
Page 3

receive any universal service support. We discussed how the Commission could reinterpret section 214(e)(1) to achieve this result or, alternatively, could direct the states to redefine the “service areas” of existing ETCs so that they include only those areas where the ETCs are receiving support.⁷

Commission Authority over “Broadband ETC” Designations. We also discussed how the Commission can exercise exclusive jurisdiction over the designation of broadband support recipients.⁸ We noted that nothing in the Act requires that broadband eligibility determinations be performed under the cumbersome process outlined in section 214(e), which provides for a state role in ETC designations for legacy telecommunications services. To the contrary, section 214(e)(2) grants state commissions authority only to “designate a *common carrier* ... as an eligible *telecommunications carrier*.” 47 U.S.C. § 214(e)(2) (emphasis added). Because broadband Internet access is an information service, the Commission has authority to create a separate process for evaluating which providers of that service should be eligible for broadband funding. Furthermore, the Commission could preempt any state effort to impose additional eligibility requirements on broadband funding recipients. Section 2(b) would not constrain the Commission’s power to preempt state rules, as that provision limits the Commission’s jurisdiction only with respect to “intrastate communication service[s],” *id.* § 152(b), and broadband Internet access is a jurisdictionally interstate service.

Preemption of State Carrier-of-Last-Resort (“COLR”) Obligations. Finally, we discussed the Commission’s authority to preempt state COLR obligations.⁹ We explained that, for the reasons detailed in the ABC Plan Legal Analysis, COLR obligations are fundamentally inconsistent with the Commission’s efforts to ensure that broadband is deployed throughout the nation as quickly as possible. We also explained that COLR obligations will frustrate the Commission’s efforts to adopt a so-called “procurement model” for universal service. Next, we explained that these conflicts between state and federal policy justify preemption under at least three different theories.

First, the Commission could preempt COLR obligations under the analysis laid out in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). There, the Supreme Court held that section 2(b) of the Act is an obstacle to preemption of state law *only* “[i]nsofar as Congress has remained silent” and the Commission is attempting to exercise its ancillary authority. *Id.* at 380-81 & n.8. Here, because section 254 grants the Commission authority to promote the ubiquitous deployment of broadband—an interpretation confirmed by section 706 and the Recovery Act—

⁷ See ABC Legal Analysis at 54-58.

⁸ See ABC Legal Analysis at 58-59.

⁹ See ABC Legal Analysis at 49-53, 59-68.

Marlene H. Dortch, Secretary
October 6, 2011
Page 4

section 2(b) does not constrain the Commission's ability to preempt COLR obligations, which hinder such deployment. Second, the Commission could preempt COLR obligations under section 254(f) of the Act, because (i) they are "inconsistent with the Commission's rules to preserve and advance universal service," (ii) they "rely on [and] burden Federal universal service support mechanisms," and (iii) they do not ensure that "every telecommunications carrier that provides intrastate telecommunications services contribute[s], on an equitable and nondiscriminatory basis ... to the preservation and advancement of universal service in that State." 47 U.S.C. § 254(f). Third, the Commission could preempt COLR obligations under the traditional *Louisiana PSC* "footnote four" analysis.¹⁰ The facilities and services at issue here unquestionably are jurisdictionally mixed. And, as discussed, COLR obligations negate the Commission's exercise of its authority over jurisdictionally interstate communications, including broadband.

Respectfully submitted,

/s/ Heather Zachary

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¹⁰ *Louisiana PSC*, 476 U.S. at 376 n.4.