

October 13, 2011

VIA ECFS

The Honorable Chairman Julius Genachowski
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation, Connect America Fund, High-Cost Universal Service Support; WC Docket Nos. 10-90, 05-337, 03-109; GN Docket No. 09-51; CC Docket No. 96-45.

Dear Chairman Genachowski:

Southern Communications Services, Inc. d/b/a SouthernLINC Wireless ("SouthernLINC Wireless") and the Universal Service for America Coalition ("USA Coalition"), by their attorneys, write to encourage the Federal Communications Commission ("FCC" or "Commission") to reform the universal service system in a manner that benefits the public interest and complies with the requirements of the Communications Act of 1934, as amended, (the "Act"). While the industry cannot know the details of the proposal you discussed during a speech on October 6, 2011 (which itself is problematic in light of likely impact of the proposed reform), the proposal would limit support solely to areas where broadband information services of at least 4 Mbps download speeds are unavailable, and only one provider per area would be supported.

1. Limiting Support to a Single Carrier Would Harm Consumers and Violate the Act.

Any reform measure that eliminates the possibility of competitive entry by supporting only one carrier in the supported area would harm consumers and damage the communications market -- both within and beyond the supported area -- by:

- exacerbating barriers to entry, including both in supported areas and in the surrounding unsupported areas;
- fostering monopolies throughout rural America and industry consolidation across the nation;
- creating disincentives for carriers to implement the newest technologies in the most efficient manner possible; and
- reducing the availability of alternative technologies and handsets.

These results are fundamentally inconsistent with the requirements of the Act, which is based on the goal of fostering competition, consumer choice, and technological innovation. Congress and the Commission

have long recognized the benefits of competition for consumers, and thus the agency's apparent willingness to turn the clock back on competition is unjustifiable.

The claim that support must be limited to a sole provider in each area in order to control fund size is patently false. Fund size instead could be managed by allocating available funds by area according to relative need. Distributing the allocated funds in a manner that does not foreclose the possibility of competitive entry would far better serve consumers. Indeed, supporting a sole provider would unnecessarily insulate the supported provider from competitive forces (e.g., the threat of competitive entry), which would prove to be far more expensive over time.

The proposal to support only a single carrier in a given area, or to eliminate support entirely in areas where one provider offers service without subsidy, threatens to relegate rural American communities to the permanent monopolistic backwaters. Specifically, in a market where only one service provider receives support, the sole-supported provider will have both the capability and the incentive to price services at a price point designed to maximize profits while ensuring that competitive entry remains infeasible (i.e., monopolistic pricing). In contrast, in a market where more than one carrier is eligible for support, the supported carriers can all compete on price, driving the price of service for consumers down closer to the provider's marginal costs while forcing carriers to compete on service quality (including download speeds). See, e.g., Comments of USA Coalition, WC Docket No. 05-337, at 12-14 (filed Apr. 18, 2011).

Any proposal that would make a single carrier the sole beneficiary of USF support would contradict the policies of competitive and technological neutrality and would deny consumers the benefits of competition. This is true regardless of whether that single carrier is selected by default (i.e., the ILEC exercising a right of first refusal) or by reverse auction. While supporting both a wireline and a wireless provider in each territory naturally is better than supporting only one or the other, the problems described above would not be eliminated. Instead, for consumers to receive the full benefit of the statutory framework, service providers in rural areas must be subject to competitive forces (e.g., the threat of competitive entry), and Commission policies should work to eliminate entry barriers and to foster competition rather than insulating monopoly carriers from competitive forces by exacerbating entry barriers.

2. The Proposed Trigger For Support Would Be Fundamentally Inconsistent with the Act.

The proposed litmus test for support – whether broadband information services of 4 Mbps download speed or greater are available – is also fundamentally flawed. Triggering the availability of support that Congress mandated for telecommunications services based solely on the availability of an information service cannot be reconciled with the Act's requirements. Specifically, the trigger must be tied to the goals and requirements of the Act. Otherwise, there would be no rational connection between the availability of support and the Act's requirements.

A safety valve would be insufficient to cure this fundamental flaw. Indeed, even if a safety valve could ameliorate the harm that inevitably would arise from a trigger that has no rational connection to the Act's requirements, the Commission lacks the authority under the Act to adopt the proposed trigger. Specifically, the Commission lacks the authority under Title II of the Act to trigger the availability of support that Congress mandated for telecommunications services based solely upon the availability of an information service. This is particularly true here, where the Commission's explicit goal is foster

deployment of an information service rather than any telecommunications service, let alone any of the telecommunications services on the list of supported services that the Act requires the Commission to create with the Joint Board. The Commission likewise cannot rely upon its ancillary jurisdiction under Title I to justify its adoption of the proposal, because the agency does not need to support an information service (*i.e.*, broadband service) in order to support any telecommunications service pursuant to Section 254 or any other Title II mandate. Indeed, any decision by the Commission to eliminate support for existing telecommunications services in order to foster deployment of information services (*i.e.*, broadband services) would eliminate the agency's jurisdictional "hook" for the exercise of ancillary jurisdiction pursuant to Title I.

To be clear, the Commission can, and should, support information services in addition to telecommunications services. The Commission cannot, however, base the availability of support solely on the availability of an information service, and then make support available only to ETCs that provide the information service. The fact that the information service might facilitate similar functionalities to telecommunications services has no impact on the jurisdictional analysis.

The Commission has also failed to analyze the impact that triggering support based solely on the availability of an information service – broadband service with greater than 4 Mbps download speeds – will have on the continued availability throughout the nation of telecommunications services that are reasonably comparable in both service type and price to those adopted by the substantial majority of residential consumers. This analysis is critical to protect consumers and the communications market before the Commission undertakes such a radical departure from the current universal service support system.

The Commission's failure to perform the required analyses has also permitted the agency to gloss over the fact that the proposed one-factor trigger – the availability of an information service – is inconsistent with the Act's mandate that the Commission focus on multiple factors. These factors include not only the availability to customers in rural, insular, and high-cost areas of access to services that are "reasonably comparable" to those available in urban areas, but also the availability of those services at "reasonably comparable" prices. 47 U.S.C. § 254(b)(3). In determining which services must be available at reasonably comparable prices, Section 254(c) also requires the Commission to consider whether the services "have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers." 47 U.S.C. § 254(b)(3). The Commission must also determine whether the services available are "just, reasonable, and affordable." 47 U.S.C. § 254(b)(1). Accordingly, the trigger for support must be designed to identify areas where support is necessary to achieve the universal service goals mandated by the Act, which requires the consideration of the multiple factors set forth above. The proposed trigger is not designed to do this, and it could not identify areas where support is mandated under the Act. Specifically, just because consumers have access to broadband information services with download speeds of 4 Mbps or greater does not mean that they have reasonably comparable access at reasonably comparable rates to telecommunications services that, through the operation of market choices by customers, have been subscribed to by a substantial majority of residential customers, or that the available services are "just, reasonable and affordable." Although the proposed trigger asks a question that may be important from a policy standpoint, it fails to ask the various questions mandated by the Act.

3. The Proposal Does Not Appear To Reflect the Act's Requirements

As SouthernLINC Wireless and the USA Coalition have consistently advocated in the above-referenced dockets, properly structured reform is essential for promoting and advancing the goals of universal service. The adopted reforms must reflect the requirements of the Act as it is currently structured. Otherwise, the Commission's reform efforts will be overturned on appeal, which will merely delay the adoption of sustainable reform and create uncertainty that will harm the market and thus consumers.

While the Act provides the Commission with substantial discretion, the agency cannot depart from the framework of the Act, even if the majority of Commissioners believe the Act should be updated. The statutory framework established by Congress requires the Commission to:

1. institute a Federal-State Joint Board (47 U.S.C. § 254(a)(1));
2. work with the Joint Board to adopt, no later than May 8, 1997,
 - a) a definition of services that are supported by Federal universal service support mechanisms,
 - b) specific, predictable, and sufficient support mechanisms to preserve and advance universal service consistent with the principles set forth in Section 254(b), and
 - c) a specific timetable for implementation of such mechanisms (47 U.S.C. § 254(a)(2)); and
3. require "[e]very telecommunications carrier that provides interstate telecommunications services to contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." (47 U.S.C. § 254(d));

and, thereafter,
4. "complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations" (47 U.S.C. § 254(a)(2)), which the Joint Board may make "from time to time" on the issue of "modifications in the definition of the services that are supported" (47 U.S.C. § 254(c)(2)).

As an initial matter, it is unclear to what extent, if at all, that the Commission consulted with the Joint Board to fundamentally change the list of supported services and the trigger for support. However, based on recent statements by various individual members of the Joint Board and filings by various state members in various universal service dockets, it is apparent that, at a minimum, the state members were not consulted to the degree envisioned by Congress. See, e.g., Comments by the State Members of the Federal-State Joint Board on Universal Service, WC Docket No. 10-90, et al. (filed May 2, 2011) ("State Member Plan"); Notice of Ex Parte Communications of NARUC, WC Docket No. 10-09 et al. (filed Sep. 21, 2011) (describing presentation made by several state members of the Federal State Joint Board and lamenting the lack of state involvement).

The October 6 speech also failed to discuss how the proposed reform would be consistent with the principles enumerated in Section 254. For instance, the speech did not discuss how the proposal would ensure that the telecommunications services would continue to be available at “just, reasonable, and affordable rates.” 47 U.S.C. § 254(b)(1). As several consumer groups have pointed out in this docket, the most likely outcome of the reform plans currently under consideration is *higher* rates for all consumers. See, e.g., Letter of AARP et al to Chairman Genachowski, WC Docket No. 10-90 (Oct. 4, 2011) (opposing any steps that will result in an increase in the rates paid by consumers). Such increases in rates harm the most vulnerable, including seniors and low-income households, many of whom are still struggling to adopt broadband, and could represent a step backwards for universal service. *Id.*

The speech was also silent as to how the proposed reforms would ensure that consumers in rural, insular, and high-cost areas have access to services that are “reasonably comparable to those services provided in urban areas” and that are available “at rates that are reasonably comparable to rates charged for similar services in urban areas.” 47 U.S.C. § 254(b)(3). Thus far, there has been no attempt by the Commission to propose any measures designed to determine the services available in urban areas, the price level at which such services are available in urban areas, or the means of ensuring the deployment of “reasonably comparable “ services at “reasonably comparable” rates in rural areas. The Commission has repeatedly been chastised for failing to address these statutory requirements. Indeed, in both *Qwest I and Qwest II*, the Tenth Circuit remanded the Commission’s USF order for failure to adequately balance the principles enumerated in Section 254.¹ *Qwest Commc’ns Int’l, Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005) (*Qwest II*); *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001) (*Qwest I*). A similar outcome is likely if the Commission’s reforms fail to directly address these issues.

The proposal is also fundamentally inconsistent with the principle of competitive neutrality:

COMPETITIVE NEUTRALITY. Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules neither **unfairly advantage nor disadvantage one provider over another**, and neither unfairly favor nor disfavor one technology over another.

Federal-State Joint Board on Universal Service, WC Docket No. 96-45, *Recommended Decision*, 12 FCC Rcd 8776, ¶ 47 (1997) (emphasis added). The Commission added the principle of competitive neutrality based upon its finding that competitive and technological neutrality in the distribution of universal service funds is consistent with congressional intent and necessary to promote “a pro-competitive, de-regulatory national policy framework.” See, e.g., *First USF Report & Order* ¶ 26 (1996) (Joint Explanatory Statement) (cited in *First Report & Order*, 12 FCC Rcd at 8802, ¶ 48). The United States Court of Appeals for the Fifth Circuit similarly has held that competitive neutrality is an integral component of ensuring that the market, and not local or federal government regulators, determines who shall compete for and deliver services to customers. See *Alenco Communications, Inc. v. FCC*, 201 F.3d 608,616 (5th Cir. 2000). Competitive neutrality means more than just the opportunity to compete in a reverse auction:

¹ The Commission most recent attempt to respond to those remands is currently on appeal before the D.C. circuit. *Vermont PSC v. FCC*, No. 10-1184 (D.C. Cir. filed July 12, 2010).

Any reform to the support distribution methodology must be consistent with the principles described above. The Commission has considerable “discretion to balance the principles against one another when they conflict, but it may not depart from them altogether to achieve some other goal.” *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005)(*Qwest II*) (citing *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001)(*Qwest I*). Any reform that does not hew closely to these statutory requirements violates the Act. Indeed, the FCC’s failure to work within the Act’s framework while considering high cost reform unnecessarily undermines the FCC’s efforts to establish a sustainable distribution mechanism. In the end, absent a genuine attempt to square reform measures with the Act, the likely outcome of this prolonged rulemaking process will be a torrent of protracted litigation that will impede broadband network deployment and harm existing competition in the telecommunications marketplace for years to come. Regrettably, the statutory framework was almost entirely absent from the October 6 speech.

4. To the Extent the Commission Supports A Single Provider In An Area, the Supported Carrier Should Be Subject To Appropriate Conditions.

If the Commission moves forward with its announced plan to provide support to only a single carrier despite the infirmities described above, then the Commission must take steps to avoid (to the extent possible) skewing the competitive markets and to ensure that consumers, rather than the carriers, receive the benefit of the CAF. As the Commission noted in its Feb. 2011 NPRM, universal service support is a public-private partnership that is made to preserve and advance access to modern communications networks. See *In re Connect America Fund*, WC Docket NO. 10-90 *et al*, NPRM & FNPRM, FCC 11-13, ¶ 90 (rel. Feb. 8, 2011) (USF-ICC NPRM). As such, providers that benefit from public investment in their networks can and should be subjected to clearly defined public interest obligations associated with the use of such funding. *Id.*

To be clear, SouthernLINC Wireless and the USA Coalition strongly oppose any distribution mechanisms that limit support to a single wireline and/or wireless provider. SouthernLINC Wireless and the USA Coalition instead support distribution mechanisms that permit competitors to enter the market under the same terms and conditions, which would eliminate the need to for the types of conditions that supporting a single provider necessitate in order to protect consumers. However, to the extent that the Commission nonetheless chooses to ignore the constructs of the Act and support a single provider in each area, it should impose conditions that encourage efficient usage of the broadband infrastructure that consumers pay to deploy. The conditions should be designed to prevent the supported carrier from leveraging the unfair advantage it has gained as the sole recipient of universal service funding to prevent other ETCs from serving the supported area. To this end, SouthernLINC Wireless and the USA Coalition propose the following types of conditions:

- **Non-discriminatory Access to Services and Facilities Controlled by the Supported Carrier:** The Commission should condition support upon the requirement that the supported carrier make any service or facility that it owns or controls in the supported area (e.g., tower space, backhaul, collocation, roaming) available to any other ETC at rates, terms and conditions that are equal to that which the support carrier provides itself or any other party, whether affiliated or not. The condition should also prevent the supported carrier from frustrating the de facto availability of covered services and facilities through onerous requirements or eligibility criteria.

- **Prohibition on Exclusive or Discriminatory Contracts or Arrangements with Third Parties.** The supported carrier similarly should be prohibited from entering into any contracts or arrangements with third parties for services or facilities it uses to serve the supported area (e.g., tower space, backhaul, collocation) unless other ETCs can enter into similar contracts and arrangements with the third parties at the same rates, terms and conditions. The right for third parties to receive the same rates, terms and conditions would have to be included in any contract or arrangement that the supported carrier enters into, or relies upon, to serve the supported area.
- **Resale:** The supported carrier should be required to permit ETCs to resell supported services to customers who reside in the supported area for a specified percentage below the supported carrier's lowest retail rate for such services.
- **Minimum Speed, Maximum Price & Deployment Requirements:** Supported carriers should be required to provide consumers within their service territory broadband service at certain minimum speeds and at an affordable and reasonable price. See 47 U.S.C. § 254(b)(1)-(3); see also USF/ICC NPRM ¶¶ 313-15. To ensure affordable and reasonable prices, the prices charged by support recipients should be regulated to ensure that support recipients do not abuse their monopoly power to set rates.

These conditions are designed to permit consumers in the supported area to enjoy some of the benefits of competition despite supporting only a single ETC, which is inherently anti-competitive. By developing and enforcing these conditions, the Commission can mitigate (but not alleviate) some of the problems associated with providing support to only a single carrier. However, SouthernLINC Wireless and the USA Coalition continue to believe that alternative plans provided by other parties (including SouthernLINC Wireless and the Universal Service for American Coalition) to permit more than one ETC to receive funding in areas where support is necessary would be better from a policy standpoint. Importantly, however, the conditions discussed here cannot cure the fundamental inconsistency of the proposed reforms with the requirements of the Act.

Please contact the undersigned if you have any questions or need additional information.

Sincerely,



Todd D. Daubert

J. Isaac Himowitz

Counsel for SouthernLINC Wireless and
The Universal Service for America Coalition

CC: Commissioner Mignon Clyburn
Commissioner Michael J. Copps
Commissioner Robert M. McDowell