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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; IP-Enabled Services, WC Docket No. 04-36***

Dear Ms. Dortch:

On October 17, 2011 Mike Glover and Chris Miller of Verizon, Scott Angstreich of Kellogg Huber representing Verizon, Cathy Carpino of AT&T, Jon Nuechterlein and the undersigned of WilmerHale representing AT&T, Jeff Lanning, Tim Boucher, and Tiffany Smink of CenturyLink, Mike Saperstein of Frontier, and Jennie Chandra and Malena Barzilai of Windstream, met with Austin Schlick, Julie Veach, Diane Griffin Holland, Michael Steffen, and Nandan Joshi of the Office of General Counsel, and Amy Bender and Marcus Maher of the Wireline Competition Bureau. Shortly after the meeting, Mr. Nuechterlein and the undersigned had a brief follow-up conversation by telephone with Mr. Schlick. The purpose of the meeting and follow-up conversation was to discuss the legal theories that the Commission may rely on with respect to the draft universal service and intercarrier compensation reform order now circulating with the commissioners. The points raised in the meeting and follow-up conversation are summarized below.

Universal Service Support for Broadband. We understand that, under one universal service funding option the Commission is considering, the Commission would not support broadband deployment directly, but would instead continue to support voice services while, for the first time, conditioning such support on a recipient's willingness to provide broadband services in addition to voice. We also understand that the Commission may consider concluding that section 254 of the Communications Act and section 706(b) of the 1996 Act authorize the Commission to support VoIP services even if they are classified as information services rather than telecommunications services. As we explain in the ABC Plan documents, the same provisions also authorize the Commission to support the underlying broadband platform services

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directly.¹ We suggested that the Commission draw that conclusion explicitly and, in addition (or as an alternative) to the “conditioning” approach, provide direct support for broadband under the Commission’s new universal service regime.²

Legacy Eligible Telecommunications Carrier (“ETC”) Obligations and Designations. Consistent with the ABC Plan, we said that it is critical for the Commission to relieve ETCs of their legacy ETC obligations (and ETC designations) in those geographic areas in which they do not receive either legacy high-cost support or CAF support. We explained that, as the Commission phases in its new universal service regime, it cannot sensibly or lawfully maintain its existing interpretation of section 214(e) or its ETC rules, which require ETCs to offer legacy services throughout their designated ETC service areas.³

First, by definition, the purpose of the “eligible telecommunications carrier” designation is to identify those carriers that are, in fact, *eligible* to receive universal service funding. As section 214(e)(1) directs, a “common carrier designated as an eligible telecommunications carrier . . . shall be eligible to receive universal service support.”⁴ The current regime satisfies this requirement because it enables more than one carrier to become an ETC and thereby qualify for any universal service funding distributed in a given geographic area. But the new regime will entitle just *one* provider to qualify for support in a given area in exchange for offering both legacy services *and* broadband. Under this new framework, many existing ETCs will not in fact be *eligible* to receive universal service funding and, in fact, will be categorically barred from receiving it. For that reason alone, section 214 would be violated if the Commission perpetuated ETC service obligations and designations for such carriers.

Second, many ETCs will lose their existing universal service funding under the new regime. Some carriers depend heavily on that support to offset the high costs of providing service in funded areas, and the Commission cannot rationally compel these carriers to continue

¹ See ABC Plan, Attachment 5, at 44-49 (“ABC Plan Legal Analysis”).

² We also explained that, if the Commission decides to maintain voice service as the sole supported service (and conditions the receipt of voice support on the recipient satisfying certain broadband-related obligations), the Commission should make clear in its order that states have no authority to impose additional eligibility criteria on a Connect America Fund (CAF) recipient’s provision of broadband service because the latter is not a supported service. Even if broadband were a supported service, however, because it is a jurisdictionally interstate information service, the Commission, not the states, should perform the CAF designations. See ABC Plan Legal Analysis at 58-59.

³ See 47 U.S.C. § 214(e)(1); 47 C.F.R. § 54.101(a).

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

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providing service at a loss after it withdraws that support. Such an unfunded mandate would also contravene section 254, which requires the Commission to design its universal service programs so that support is “sufficient” to enable providers to offer the services deemed “universal.”⁵

Third, the Commission could not lawfully force any ETC, whether funded today or not, to continue providing service in any high-cost area where it is not the CAF recipient. Under the new regime, only the CAF recipient will be entitled to universal service funding. And forcing an unsupported competitor to provide service at a loss in competition with a CAF recipient would violate both the Takings Clause and section 254’s mandate that universal service policies be “equitable and nondiscriminatory.”⁶ Such a service obligation would also violate the Commission’s well-established principle of “competitive neutrality,” which requires that universal service policies “be competitively neutral . . . [and] neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.”⁷ For all of these reasons, the Commission should release existing ETCs of their service obligations (and their ETC designations) in any area where they do not receive legacy high-cost or CAF support.

FCC Authority to Act on Legacy ETC Obligations in Areas That Are Not Funded. As we further explained, although section 214(e) does give the states a role with respect to ETC procedures, the Commission has ample authority to address existing ETC obligations and designations under several independent legal theories. Moreover, it can and should address the issue here without the need for further proceedings. Potential approaches include the following.

First, the Commission could adopt a rule based on its section 201 rulemaking authority providing that an ETC’s “service area” should be limited to those specific geographic areas (e.g., wire centers) where the ETC is receiving universal service support. For existing ETCs, such a rule would ensure that legacy service obligations and designations would apply only in those portions of state-defined service areas where the ETC actually receives support. And going forward, states would be bound by the Commission’s rule when defining ETC service areas. Although section 214(e)(5) provides that an ETC’s “‘service area’ means a geographic area established by a State commission . . . for the purpose of determining universal service obligations and support mechanisms,”⁸ section 201(b) of the Communications Act—as interpreted in *Iowa Utilities Board*—authorizes the Commission to adopt rules guiding the states’

⁵ *Id.* § 254(b)(5), (e), (f).

⁶ *Id.* § 254(b)(4), (d), (f).

⁷ Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶¶ 43-55 (1997).

⁸ 47 U.S.C. § 214(e)(5).

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exercise of the duties allocated to them elsewhere in Title II of the Act.⁹ Just as the Commission may adopt a pricing methodology that cabins the states' prerogative and determines what costs may and may not be included to "establish . . . rates" for unbundled network elements,¹⁰ the Commission could establish a methodology for defining service areas that is binding on the states with respect to both existing and future service-area designations.

Second, section 254(f) separately authorizes the Commission to adopt a rule that limits ETC "service areas" for purposes of determining where legacy obligations and designations apply. This conclusion follows from existing precedent, including the *First Universal Service Order*, in which the Commission cited section 254(f) as a basis for invalidating state service-area designations that are "unreasonably large."¹¹

Section 254(f) prohibits states from adopting universal service policies that (i) are "inconsistent with the Commission's rules to preserve and advance universal service" or (ii) do not require "[e]very telecommunications carrier that provides intrastate telecommunications services [to] contribute, on an equitable and nondiscriminatory basis . . . to the preservation and advancement of universal service in that State."¹² Here, perpetuating existing ETC service-area designations in the new regime would violate both prohibitions. First, that approach would be "inconsistent with" federal universal service policy. As discussed in the ABC Plan Legal Analysis, unfunded ETC service obligations hinder the deployment of broadband.¹³ In addition,

⁹ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-86 (1999). Section 201(b) authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of" the Communications Act. 47 U.S.C. § 201(b).

¹⁰ 47 U.S.C. § 252(c)(2); see *Iowa Utils. Bd.*, 525 U.S. at 384-85.

¹¹ See Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶¶ 184-85 (1997) ("*First Universal Service Order*"). See also Recommended Decision, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 87, ¶¶ 176-77 (1996) (noting that excessively large ETC service areas "could potentially violate section 254(f)" by undermining the Commission's efforts to preserve and advance universal service); Declaratory Ruling, *Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, 15 FCC Rcd 15168, ¶ 31 (2000) (relying on section 254(f) in preempting a state ETC requirement); Notice of Proposed Rulemaking, *Lifeline and Link Up Reform and Modernization*, 26 FCC Rcd 2770, ¶ 258 & n.458 (2011) ("[S]ection 254(f) . . . bars states from adopting regulations that are inconsistent with the rules established by the Commission to preserve and advance universal service.").

¹² 47 U.S.C. § 254(f).

¹³ ABC Plan Legal Analysis at 7-8, 49-53.

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as discussed above, perpetuating existing service-area designations would contravene a number of principles on which the Commission's universal service policies are based, including sufficiency and competitive neutrality. Second, retaining existing service-area designations would contravene section 254(f)'s directive that all providers "contribute, on an equitable and nondiscriminatory basis . . . to the preservation and advancement of universal service in that State." *Id.* Unless the areas where ETCs retain legacy obligations are limited to where they receive support, *all* ETCs will be required to offer legacy services in high-cost areas, even though only one provider—the CAF recipient—will receive the funding necessary to offset the costs of providing service there. As discussed above, that outcome would be neither equitable nor nondiscriminatory.

Third, and in the alternative, the Commission could exercise its authority under section 10 of the Act to forbear from section 214(e) to the extent the latter requires ETCs to offer service in areas where they receive no universal service support.¹⁴ ETC service obligations arise from section 214(e)(1), which provides that ETCs "shall, *throughout the service area for which the designation is received* . . . offer the services that are supported by Federal universal service support mechanisms under section 254(c)[.]"¹⁵ With respect to ETCs that receive no high-cost or CAF support for some or all locations within their designated "service areas," the Commission should forbear from any requirement that those ETCs offer services "throughout the service area for which the [ETC] designation is received." Such forbearance plainly satisfies the statutory requirement that forbearance authority be limited to "telecommunications carriers" or "telecommunications services."¹⁶ All ETCs are telecommunications carriers, and all of the existing "supported" services are telecommunications services. In addition, the Act authorizes the Commission to tailor forbearance relief to "any or some of [telecommunications carriers'] geographic markets."¹⁷

There is ample precedent for this approach. In *TracFone* and many later orders, for example, the Commission has forbore from the requirement in section 214(e)(1) that an ETC must offer services using at least some of its own facilities.¹⁸ This statutory requirement appears in the same sentence as the requirement that ETCs offer supported services throughout their service areas, and there is no conceivable basis for concluding that the Commission could

¹⁴ 47 U.S.C. § 160.

¹⁵ *Id.* § 214(e)(1) (emphasis added).

¹⁶ *Id.* § 160.

¹⁷ *Id.* § 160(a).

¹⁸ See, e.g., Order, *Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, 20 FCC Rcd 15095, ¶ 1 (2005).

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forbear from the former but not the latter. Forbearance here would also meet the Commission's mandate under section 706 of the 1996 Act to forbear from obligations that frustrate broadband deployment,¹⁹ as legacy ETC obligations do today.²⁰

Fourth, and again in the alternative, the Commission could address these issues by reinterpreting the language of Section 214(e)(1). This section provides that ETCs “*shall be eligible to receive universal service support* in accordance with section 254 and shall, throughout the service area for which the designation is received . . . *offer the services that are supported by Federal universal service support mechanisms* under section 254(c)[.]”²¹ The Commission has previously interpreted this provision as requiring an ETC to provide certain “supported services” throughout its service area, regardless of whether the ETC receives any support to offset the costs of providing those services in high-cost areas. But this is not the only permissible interpretation of the statutory language. Instead, section 214(e)(1) also can be read to mean that a carrier's obligation to offer service applies *only* in those geographic areas where the carrier is receiving support—*i.e.*, where the services “are supported.” This interpretation of the statutory language appropriately focuses on the text italicized above, which makes clear that service obligations should not be imposed without regard to whether a carrier is “eligible” for support and whether the services it provides “are supported.”

Finally, as applicable to any of these alternatives, we explained that the Commission has provided for ample notice and comment under the APA in order to grant carriers relief from their existing ETC obligations and designations. The Commission has specifically raised all relevant legacy ETC obligation issues, not once but twice—both in its February 2011 *NPRM*²² and again in its August *Public Notice*.²³ In the *NPRM*, the Commission included a section entitled

¹⁹ See, e.g., *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 907 (D.C. Cir. 2009) (“As contemplated by § 706, the FCC has utilized forbearance from certain Title II regulations as one tool in its broadband strategy.”).

²⁰ For a discussion of the ways in which legacy ETC obligations hinder the deployment of broadband, see the ABC Plan Legal Analysis at 7-8, 49-53.

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

²² Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, 26 FCC Rcd 4554 (2011) (“*NPRM*”).

²³ See Public Notice, *Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, DA 11-1348, CC Docket Nos. 01-92,

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“Eligible Telecommunications Carrier Requirements,” in which it comprehensively discussed section 214(e) and the respective roles of the Commission and the States and inquired “how the Commission can best interpret these existing requirements to achieve our goals for reform. We also seek comment on whether (and if so how) we should modify the ETC requirements as we proceed with reforms.”²⁴ The Commission further cited forbearance as one means of altering the ETC regime, asking whether it should “forbear from requiring that recipients of universal service support be designated as ETCs at all.”²⁵ It also raised the possibility of forbearing from section 214(e) in particular.²⁶ In another section of the *NPRM*, the Commission sought “comment on issues related to the geographic scope of ETC obligations and ETC designations. Current ETC obligations apply throughout a designated service area regardless of whether support is actually provided to an ETC operating within the designated service area. *To what extent could we limit ETC obligations to the targeted geographic areas for which an ETC receives support, under both the existing high-cost programs as well as the proposed CAF, consistent with section 214(e).*”²⁷ Then, in the *Public Notice*, the Commission teed up these issues a second time by seeking public comment on the ABC Plan. As the Commission highlighted,²⁸ the ABC Plan makes elimination of legacy ETC obligations a central priority, and the Plan explains in detail why the Commission can and should eliminate legacy ETC obligations in areas where carriers do not receive any universal service support.²⁹ In short, all interested parties have had ample notice of the ETC rule changes outlined above, and the Commission thus may adopt them in its upcoming order.

96-45; GN Docket No. 09-51; WC Docket Nos. 10-90, 07-135, 05-337, 03-109 (rel. Aug. 3, 2011) (“*Public Notice*”).

²⁴ *NPRM* ¶¶ 88-89.

²⁵ *Id.* ¶ 89.

²⁶ *Id.* ¶ 72.

²⁷ *Id.* ¶ 386 (emphasis added).

²⁸ For example, under the heading “Eligible Telecommunications Carrier (ETC) Requirements,” the Commission sought comment on the ABC Plan’s “procurement model” approach to universal service, under which carriers would “incur service obligations only to the extent they agree to perform them in explicit agreements with the Commission” in exchange for a specific amount of universal service support. *Public Notice* at 5. *See also* ABC Legal Analysis at 7-8, 52-53 (discussing procurement model). In addition, the Commission inquired whether “the opportunity to exercise a ROFR [is] 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.” *Id.* at 4.

²⁹ ABC Plan Legal Analysis at 6-7, 49-59; ABC Plan, Attach. 1, Framework at 1, 13.

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Default Intercarrier Compensation Rates and Permissive Detariffing. As we discussed, and consistent with our past filings, any intercarrier compensation rate or methodology the Commission establishes—including any transition rate—should be a default rate, and providers should be free to enter into voluntary agreements that set rates different from the default rates. However, under current law, some providers are required to file tariffs for certain of their services; for example, incumbent LECs must file tariffs for their interstate switched access services. Where a carrier is subject to such a mandatory tariffing requirement, the terms of the “tariff cannot be varied or enlarged by . . . contract . . . of the carrier.” *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990) (quoting *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922)). As a result, it is possible that an adjudicator may determine that the tariff would continue to apply, notwithstanding the terms of the contract. In the past, the Commission has granted forbearance from the tariffing requirements and instituted a regime of permissive detariffing, recognizing that it would permit carriers to enter into binding contracts with rates that differ from those in their tariffs.³⁰ Therefore, the Commission should grant forbearance and institute permissive detariffing here as necessary to enable the intended flexibility, namely, that carriers be permitted to enter into agreements that depart from the Commission’s default rates despite the fact that those default rates may be contained in tariffs.

Other Issues. In addition to the specific matters addressed above, during the meeting we generally discussed a CAF recipient’s flexibility to provide voice service based on any technology. We also discussed the intercarrier compensation rates that will be applicable to VoIP services during the anticipated transition for terminating rates and the legal rationale for the Commission to set those rates. We discussed the end state of intercarrier compensation reform and interpretations of statutory references to a “bill and keep” option. Finally, we discussed how section 251(f)(2) of the Act, which refers to potential suspensions and modifications of certain compensation requirements for small carriers, may fit within a new, broader intercarrier compensation regime.

Should you have any questions, please do not hesitate to contact me.

Respectfully submitted,

/s/ Heather Zachary

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³⁰ See, e.g., Seventh Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923, ¶ 57 (2001).

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