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EX PARTE

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

RE: 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 Chairman Genachowski:

I write to applaud your tireless efforts and those of your fellow Commissioners to bring the high-cost universal service support regime into the competitive, broadband era. I am concerned, however, that one critical element of the proposals now under consideration ignores the fundamental principle of competitive neutrality and potentially subjects your reform efforts to unnecessary litigation risk. Specifically, I am discouraged that you are considering “reform” proposals in which all support in areas served by rate of return phone companies would go to those providers, while all support in areas served by price cap phone companies would be subject to a “right of first refusal” throughout their entire telephone service area.

Prior filings by NCTA and many other parties have identified the numerous ways in which an incumbent phone company right of first refusal is inconsistent with the legal and policy principles that should be guiding this proceeding. We have heard two main defenses of the right of first refusal, but neither can withstand scrutiny.

First, it has been suggested that a right of first refusal is more efficient and provides greater certainty regarding deployment than competitive bidding because cable operators will not participate if the Commission adopts a competitive bidding process. This is incorrect and highly misleading. As the CEOs of many of our small and rural member companies explained in recent visits with you and others at the Commission, they are genuinely interested in participating in any broadband support mechanism. Our colleagues at the American Cable Association have expressed a similar sentiment. If you make billions of dollars available for broadband deployment in a manner that is fair to competitors, I have every confidence that my members and other competitors will give every consideration to participating.

Ultimately, however, whether or not a given cable operator chooses to participate, competitive bidding is preferable to perpetuating monopoly by granting the incumbent phone companies an exclusive right to take from this federal program. Allowing the virtues of competition to work causes no harm whatsoever. If we do not compete, incumbent phone companies will get the money, just as they would with a right of first refusal. If we compete and fail to offer the best bid, we will lose and they will get the money, just as with the right of first refusal. If we compete and win, we are the better provider, and consumers will get the benefit of a new service at a lower cost.

Moreover, it bears highlighting that granting incumbent LECs a right of first refusal provides no greater certainty that broadband will be deployed than competitive bidding. An incumbent is not obligated to provide broadband if in its self-interest it chooses not to do so. The right of first refusal, rather, gives them the luxury to decide whether to serve without any competitive pressure. If they decide to take the money, it is theirs—no matter how well-suited their network or efficient their business model. And, until the Commission establishes the actual level of support, no provider can pledge unequivocally that they will serve any area. In short, the only real purpose served by a right of first refusal is to shield incumbents from competition and provide an implicit government guarantee of their business models.

The second argument we have heard to justify the right of first refusal is that “the numbers don’t work” for the incumbent phone companies unless they get special treatment.¹ There are three fundamental flaws in this argument. First, the price cap phone companies that would receive the right of first refusal are among the largest, most sophisticated, most financially successful companies in the telecommunications industry. AT&T and Verizon are the two largest telecommunications companies in America and dwarf the size of any of NCTA’s members. The so-called “mid-size” price cap companies (CenturyLink, Frontier, Windstream) each have the financial wherewithal to have made substantial, billion dollar acquisitions while continuing to pay out some of the highest dividends among S&P 500 companies.² These companies have been planning for universal service and intercarrier compensation reform for years and are fully capable of making the transition to a new regime without special treatment. Indeed, the idea that they could not withstand a competitive bidding process with cable operators absent a right of first refusal is not remotely credible.

Second, universal service support is meant to benefit consumers, not phone companies. This point is not just a theoretical concept, but is a central premise of the Act that has been affirmed by the courts. To deny consumers in rural areas the benefits of superior broadband service from cable operators simply to protect incumbent phone companies’ bottom lines would not only be bad policy, but would violate the universal service provisions of the Act as well.

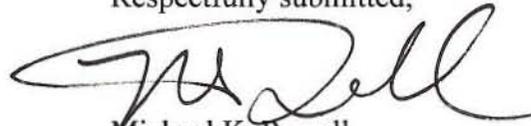
¹ *State Regulators Angry Over Draft USF Order; USTelecom “Confident” FCC Will Do Right Thing*, TRDaily (Oct. 13, 2011), at <http://www.tr.com/online/trd/2011/td101311/td101311.htm#TopOfPage> (“At the end of the day this is a very exact science,” Mr. [Walter] McCormick [President and Chief Executive Office, USTelecom] said. “It’s all about the numbers. If the numbers don’t work, then the plan will fail its essential purpose.”).

² Dividend Yield for Stocks in the S&P 500, at <http://indexarb.com/dividendYieldSortedsp.html> (Frontier, Windstream, and CenturyLink have the highest dividend yields among the S&P 500).

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Finally, as you appreciate more than anyone, this proceeding is about so much more than the “science” of telephone company revenue forecasts. Broadband is a transformative service and the Commission must develop an equally transformative support program that respects and promotes the competitive communications marketplace of the 21st century. It would be deeply disappointing if the Commission missed the opportunity for meaningful, forward-looking, competitively neutral reform simply because of self-serving claims of large telephone companies.

Respectfully submitted,



Michael K. Powell

cc: Commissioner Copps
Commissioner McDowell
Commissioner Clyburn