



**National Cable & Telecommunications Association**

25 Massachusetts Avenue, NW – Suite 100  
Washington, DC 20001  
(202) 222-2300

www.ncta.com

**Legal**

(202) 222-2445  
(202) 222-2446 Fax

October 21, 2011

**EX PARTE**

Marlene H. Dortch  
Secretary  
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 Ms. Dortch:

As the Commission moves forward to extend universal service support to broadband services, it is imperative that the Commission likewise establish a mechanism that will facilitate the provision of such support to the providers that will be expanding broadband to unserved areas. In this letter, the National Cable & Telecommunications Association (NCTA) offers recommendations on how the Commission can modify its eligible telecommunications carrier (ETC) requirements to ensure that they do not act as a barrier to the provision of broadband services by cable operators and other providers that have not been the traditional beneficiaries of the high-cost support program.

The Commission correctly recognizes in this proceeding that its rules regarding eligibility for universal service support may need to be amended to achieve its goals of expanding broadband services.<sup>1</sup> Section 254(e) of the Communications Act of 1934, as amended (the Act) states that “only an eligible telecommunications carrier [ETC] designated under section 214(e) shall be eligible to receive specific Federal universal service support.”<sup>2</sup> An ETC under section 214(e) of the Act must “offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own

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<sup>1</sup> See *Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4587-88, 4658, ¶¶ 88-89, 318-19 (2011) (*2011 USF-ICC FNPRM*).

<sup>2</sup> 47 U.S.C. § 254(e).

facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier)."<sup>3</sup>

The broadband services that the Commission seeks to support with universal service funding are information services, not telecommunications services.<sup>4</sup> It follows that providers of these services are not telecommunications carriers with respect to broadband services, and these providers may not provide any telecommunications services at all. Consequently, rigid application of the ETC requirements could lead to harmful results by excluding qualified broadband providers and rewarding less qualified telecommunications carriers. To ensure that universal service high-cost support is used in the most efficient and cost-effective manner, and to increase the number of providers that may provide broadband to consumers in high-cost and hard-to-serve areas, the Commission should interpret section 214(e) in a manner that does not preclude such providers from participating. We offer a number of recommendations below.

First, the Commission should make clear that the definition of "own facilities" in section 214(e)(1)(A) includes broadband facilities that are used in offering broadband service but not directly owned by the ETC. These broadband facilities may be controlled by a separate affiliated company under common ownership with the ETC, or may be controlled by a separate broadband entity that enters into a contractual relationship with the ETC to offer broadband to customers within the ETC's service area. This approach is consistent with the provision of voice over Internet Protocol (VoIP) service by cable operators. While some cable VoIP providers are certificated telecommunications service providers (and in some cases ETCs), others partner with an unaffiliated or an affiliated wholesale telecommunications carrier to provide interconnected VoIP service. Such partner arrangements should similarly allow non-carrier broadband providers to operate with ETCs to provide subsidized broadband service to consumers in high-cost areas.

Alternatively, the Commission could forbear from the "own facilities" requirement for ETCs that offer universal service-supported broadband service. Forbearance under section 10 of the Act shall be granted when the Commission finds that: 1) enforcement of the provision is not necessary to ensure that the charges, practices, classifications, or regulations connected with the telecommunications carrier or telecommunications service are just and reasonable and not discriminatory; 2) enforcement of the provision is not necessary to protect consumers; and 3) forbearance is consistent with the public interest.<sup>5</sup> These criteria are met with respect to ETCs

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<sup>3</sup> 47 U.S.C. § 214(e)(1)(A).

<sup>4</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4802, ¶ 7 (2002) (*Cable Broadband Declaratory Ruling*), *aff'd National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S. Ct. 2688 (2005); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14862, ¶ 12 (2005) (*Wireline Broadband Internet Access Order*); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5909-10, ¶ 22 (2007) (*Wireless Broadband Declaratory Ruling*).

<sup>5</sup> 47 U.S.C. § 160(a).

that rely on an affiliated or unaffiliated entity in providing supported broadband services because these providers will be required to comply with all the same substantive obligations that the Commission imposes on other ETC broadband providers that receive high-cost support.

Furthermore, section 10(b) of the Act directs the Commission to weigh the competitive effect of forbearance. Allowing ETCs to offer broadband service in conjunction with another provider will enhance competition by increasing the number of telecommunications carriers that may become ETCs for purposes of receiving universal service broadband support.<sup>6</sup> Conversely, a strict requirement that the ETC own all the facilities used to provide broadband service would preclude most potential competitors from obtaining support, a result that is inconsistent with the language of section 214(e), which specifically contemplates competitive ETCs.<sup>7</sup>

Second, to further facilitate the provision of broadband support to high-cost areas, the Commission should adopt a framework that will ensure that the ETC designation process does not become a barrier to entry for cable operators and other competitive providers that are interested in providing supported broadband services in areas where deployment has not yet occurred. Section 214(e) of the Act delegates ETC designations to state commissions, with the Federal Communications Commission designating ETCs that are not subject to state jurisdiction.<sup>8</sup> Regardless of whether a state commission or the Federal Communications Commission is making the designation, the process should be streamlined to expedite the deployment of broadband services to high-cost areas. To that end, the Commission should adopt rules limiting the designating entity to consider the following questions with respect to the provision of broadband support: 1) will the ETC be able to provide the supported voice and broadband services, either directly or through arrangements with other providers, throughout the relevant area; 2) will the ETC commit to comply with applicable obligations regarding the provision of 911 service, emergency preparedness and network outages; 3) will the ETC commit to comply with any applicable consumer protection requirements; and 4) will the ETC offer voice service on a stand-alone basis.<sup>9</sup>

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<sup>6</sup> 47 U.S.C. § 160(b).

<sup>7</sup> 47 U.S.C. § 214(e)(2), (6) (stating that state commissions and the Federal Communications Commission shall designate multiple ETCs within the same area).

<sup>8</sup> 47 U.S.C. § 214(e)(1), (6).

<sup>9</sup> There is well-established precedent that broadband Internet access services are jurisdictionally interstate, and therefore state commissions cannot impose requirements beyond those established by the Commission. *See, e.g., Wireless Broadband Declaratory Ruling*, 22 FCC Rcd at 5911, ¶ 28 & n.72; *Wireline Broadband Internet Access Order*, 20 FCC Rcd 14853; *Cable Broadband Declaratory Ruling*, 17 FCC Rcd at 4832, ¶ 59. Consistent with the U.S. Court of Appeals for the Fifth Circuit's decision in the *TOPUC* case, state commissions remain free to consider additional criteria for designating ETCs with respect to the intrastate telecommunications services provided by these entities. *Texas Off. of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 418 (5<sup>th</sup> Cir. 1999). Regardless of whether states choose to examine additional criteria related to an ETC's provision of intrastate telecommunications services, the Commission should require the state commission to complete its review within the 30 day timeframe discussed below.

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Once these threshold ETC requirements have been established, the ETC would be eligible for high-cost support, subject to any broadband service requirements imposed by the Commission. Because broadband is a jurisdictionally interstate information service, state commissions would have no authority to use the ETC designation process to impose substantive obligations on broadband providers. The Commission should also ensure that ETC designation requests are addressed in a timely manner by adopting a requirement that such requests be deemed granted within 30 days of their filing unless the relevant designating entity finds that the ETC has not demonstrated compliance with the criteria within that timeframe.

NCTA supports the Commission's goal of reorienting universal service for the 21st century to focus on bringing broadband to unserved areas. To do so, the Commission must streamline the ETC designation process to ensure that high-cost support is available to the widest possible range of qualified entities, including ETCs that partner with non-carriers to offer supported broadband services to consumers.

Sincerely,

/s/

Steven F. Morris  
Jennifer K. McKee

cc: S. Gillett  
C. Matthey  
A. Bender