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October 21, 2011

Ms. 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

Dear Ms. Dortch:

On October 20, 2011, Steve Morris and Jennifer McKee of the National Cable & Telecommunications Association (NCTA), and Howard Symons of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. on behalf of NCTA met with Austin Schlick, Douglas Klein, Diane Griffin Holland, Nandan Joshi, and Michael Steffen of the Office of General Counsel (OGC) to discuss issues related to the above-captioned proceedings.

We discussed the significant litigation risk posed by the Commission's proposal to award all universal service high-cost broadband support under the "Connect America Fund" to incumbent phone companies. As discussed in more detail in Attachment A, awarding such funding solely to incumbent phone companies, through the combination of exclusive support for rate-of-return regulated phone companies and an exclusive right of first refusal for price cap regulated phone companies, violates the universal service principle of competitive neutrality. As we discussed with OGC staff, although the Commission has discretion to balance the universal service principles against each other, it may not ignore them. Providing broadband support through the Connect America Fund only to incumbent phone companies does not "balance" the principle of competitive neutrality; it eviscerates it completely.

There is no valid justification for the Commission to adopt these anticompetitive proposals. Other universal service principles that the Commission wishes to advance in this proceeding, i.e., ensuring that consumers in rural and high-cost areas have access to quality advanced services at just, reasonable and affordable rates on a reasonably comparable basis to services and rates offered to consumers in urban areas, can be achieved in a competitively neutral basis. Nothing in the record supports the contention that these other universal service principles can only be achieved by providing incumbent phone companies an exclusive preference for

funding. In fact, the record indicates just the opposite. Many competitive broadband providers, including NCTA member companies, have expressed a strong interest in participating in a broadband funding program if they are not precluded from doing so by the adoption of an anti-competitive funding mechanism.¹

We also explained that, for a variety of reasons, the number of cable operators that have become eligible telecommunications carriers (ETCs) to receive high-cost support for voice services provides no basis for predicting the number of cable operators that would seek to receive high-cost support for broadband. First, while cable operators generally did not need to seek universal service subsidies to upgrade facilities to provide voice service within their existing service areas, such support more likely would be necessary to extend broadband facilities into unserved areas. Second, while cable operators theoretically could have sought voice support to expand their footprint in very high-cost rural areas, the per-line subsidies received by competitive ETCs generally are not sufficient to justify building wireline facilities in such areas in competition with an entrenched incumbent phone company that receives support for its entire network regardless of the number of customers it serves. Conversely, in the broadband context, subsidies should be available for unserved areas where cable operators and phone companies can compete on a level playing field. Finally, competitive providers have often faced significant biases in being designated as ETCs for voice support. Even where state commissions do not oppose designating competitive providers as ETCs, the process is often extremely costly and time consuming.² Similarly, the Commission in 2008 signaled its own disapproval of competitive ETCs by capping the amount of high-cost support these entities can receive.³ Therefore, the Commission cannot base any prediction regarding the level of cable operator participation in a broadband funding mechanism on the industry's participation in the current voice funding mechanism.

We further explained that there is no basis for the theory that providing incumbent phone companies a right of first refusal was somehow necessary or acceptable because "cable would not show up" to bid in an auction. As discussed above, the record in this proceeding clearly demonstrates that cable operators would be interested in participating in a competitively neutral bidding process. The determining factor in whether a cable operator, or any other broadband provider, participates in a competitive process will be the amount of support available in a given area, and this will not be known until the Commission adopts a cost model. Consequently, *no*

¹ See, e.g., Letter from Rick Chessen, Senior Vice President Law and Public Policy, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, at 2 (Sept. 15, 2011); Comments of American Cable Association, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, at 2 n.7, 10-11 (Aug. 24, 2011); Letter from Rebecca M. Thompson, General Counsel, Rural Cellular Association, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket No. 01-92, at 2 (Sept. 27, 2011); Comments of the Rural Independent Competitive Alliance, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket No. 01-92, 3-4 (Aug. 24, 2011).

² To ensure that the Commission's broadband goals are met, we recommend that the Commission take steps to reduce or eliminate these biases against designating competitive ETCs to receive broadband support.

³ *High -Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834 (2008).

provider, including an incumbent phone company, can provide a guarantee that it will serve an area unless and until it knows how much money will be available and the specific obligations upon which support will be conditioned. Until the Commission completes its proceeding to implement and run a cost model, any “guarantees” of service by the incumbent phone companies, including suggestions that they will or will not exercise a right of first refusal, are purely speculative and cannot be the basis for providing them with an anti-competitive exclusive right of first refusal.

To reduce the significant litigation risk inherent in providing Connect America Fund support exclusively to incumbent phone companies, the Commission should ensure that competitive broadband providers have a meaningful opportunity to receive support. As NCTA has previously commented, the Commission should eliminate any incumbent phone company right of first refusal.⁴ Instead, the Commission should make support available to all providers using market-based mechanisms. Specifically, the Commission can achieve the same purported benefits as some right of first refusal proposals (i.e., commitments by broadband providers to deploy broadband networks over large areas) in a way that will withstand judicial scrutiny by initially offering support to any entities willing to provide service on a countywide basis. As described in more detail in Attachment B, a countywide bidding process would promote broadband deployment in a manner that is fair to all competitors, thereby providing a far superior balancing of the various factors the Commission is obligated to consider in crafting universal service rules.

Respectfully submitted,

/s/

Steven F. Morris

Jennifer K. McKee

Attachments

cc: A. Schlick
D. Klein
D. Griffin Holland
N. Joshi
M. Steffen

⁴ Comments of NCTA, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, at 15-16, Attach. at 4-5 (Aug. 24, 2011). NCTA and the American Cable Association jointly filed an alternative right of first refusal proposal that would ameliorate some of the harms of providing an exclusive option to receive 100 percent of support to incumbent phone companies. This proposal would 1) limit the amount of support available under the right of first refusal to \$600 million per year; 2) provide a right of first refusal only in largely unserved areas; and 3) provide support for only six years. Letter from Ross J. Lieberman, Vice President of Government Affairs, American Cable Association, and Steven F. Morris, Vice President and Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 (Oct. 4, 2011). Although any right of first refusal that is made available only to incumbent phone companies is not competitively neutral, this proposal harms competitors less than offering all support to incumbent phone companies in the first instance.

ATTACHMENT A

USF REFORM MUST COMPLY WITH THE PRINCIPLE OF COMPETITIVE NEUTRALITY

The cable industry has been a leader in the deployment of broadband since its inception, building broadband networks that reach 93 percent of American households. Cable operators have demonstrated a significant commitment to bringing competitive broadband and voice services to rural America. Cable operators have deployed DOCSIS 3.0 technology, which enables them to offer consumers broadband speeds of 50 to more than 100 megabits per second, to 60 percent of U.S. housing units, including millions of homes in rural America.¹ While the vast majority of this deployment has been funded through private capital, some cable operators have sought high-cost support or stimulus funding to help defray the cost of extending networks in remote areas, notwithstanding the regulatory conditions applicable to such funding.² Cable operators also have devoted significant resources to obtaining interconnection with rural telephone companies, which the Commission has recognized helps drive broadband investment in rural areas.³

Given the important role that cable has played in delivering high-speed broadband service to American consumers, and the significant role that cable could play in extending broadband networks to areas where those networks have not yet been deployed,⁴ we are deeply concerned that the Commission appears to be considering universal service reforms that would preclude cable operators from having a meaningful opportunity to receive high-cost support. High-cost support proposals that would grant a single type of broadband provider – incumbent local exchange carriers – with exclusive access to, or a right-of-first refusal for, all newly-created broadband support would not only ignore the substantial consumer benefits attributable to competition in rural areas, but also would be flatly inconsistent with established federal universal service principles under section 254(b) of the Communications Act of 1934. Specifically, the Commission’s creation of a new Connect America Fund (CAF) to support broadband-capable

¹ Letter from Jennifer K. McKee, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 (Oct. 17, 2011).

² See, e.g., *Application by GCI Communication Corp. d/b/a General Communication, Inc. and GCI for Designation as an Eligible Telecommunications Carrier in the Study Area Served by Matanuska Telephone Association, Inc.*, U-06-41, Order No. 2, 2006 Alas. PUC LEXIS 453 (Reg. Comm. of Alaska 2006); BendBroadband BTOP Project Fact Sheet, http://www2.ntia.doc.gov/files/grantees/OR_BendBBCentralOregon.pdf (July 2010).

³ *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended*, WC Docket No. 10-143, Declaratory Ruling, 26 FCC Rcd 8259, 8266, ¶¶ 1, 13 (2011) (“Without interconnection for voice service, a broadband provider, which may partner with a competitive telecommunications carrier to offer a voice-video-Internet bundle, or ‘triple-play’ services, is unable to capture voice revenues that may be necessary to make broadband entry economically viable.”).

⁴ Letter from Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 (Sept. 15, 2011) (CEOs of rural cable operators “expressed their interest in participating in a high-cost program that would target support to unserved areas where it is currently uneconomic for the operators to deploy broadband without a subsidy. To encourage more broadband providers to participate in a reformed funding program, they asked the Commission to reject incumbent phone company requests for a right of first refusal for funding, and to reexamine Eligible Telecommunications Carrier requirements.”).

networks must fully comport with the principle of competitive neutrality adopted by the Commission pursuant to section 254(b)(7) of the Act.⁵

The Commission adopted competitive neutrality as a key principle of the high-cost support program when it was established pursuant to the Telecommunications Act of 1996. At the time, the Commission recognized that competition and universal service were fully compatible policy goals and that enabling competition to develop in rural America would produce tremendous public interest benefits:

We believe these commenters present a false choice between competition and universal service. A principal purpose of section 254 is to create mechanisms that will sustain universal service as competition emerges. We expect that applying the policy of competitive neutrality will promote emerging technologies that, over time, may provide competitive alternatives in rural, insular, and high cost areas and thereby benefit rural consumers. For this reason, we reject assertions that competitive neutrality has no application in rural areas or is otherwise inconsistent with section 254.⁶

Given this determination, the Commission decided against providing all universal service high-cost support for voice services solely to incumbent phone companies.

In conjunction with other pro-competitive policies, such as requiring incumbent phone companies to interconnect with competitors and provide local number portability, the Commission's competitively neutral approach to universal service has delivered the anticipated benefits to rural consumers. In many areas where it previously was assumed that service was only feasible from the incumbent telephone company, consumers now have the option to purchase voice and broadband services from cable operators, fixed and mobile wireless providers, and satellite companies, often with better performance and lower prices than offered by the telephone company.

Given the significant benefits attributable to competition in rural areas, we remain concerned that the Commission is considering policies that would threaten to limit rural consumers to broadband services provided by incumbent telephone companies. Specifically, our understanding is that the Commission is considering the creation of a broadband CAF support mechanism in which 100 percent of support would be made available solely to incumbent telephone companies. No CAF support at all would be available to competitive providers in areas served by rate-of-return regulated incumbent phone companies. And in price cap territories, competitive providers only would have an opportunity to receive CAF support if the incumbent elected not to exercise its preference (e.g., if it determined that there was no business case for deployment at the support level calculated by the cost model). Even then this support

⁵ 47 U.S.C. §254(b)(7); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8803 ¶ 50 (1997) (*Universal Service Report and Order*) (“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.”).

⁶ *Universal Service Report and Order*, 12 FCC Rcd 8776, 8803 ¶ 50.

would not be made available to competitive providers until the Commission has conducted additional rulemaking proceedings to establish competitive bidding procedures.

Any broadband funding mechanism so drastically tilted to advantage incumbent phone companies is inconsistent with the principle of competitive neutrality and a dramatic step backward in comparison to the existing high-cost support regime. While recognizing that “strict competitive neutrality” would be difficult to accomplish given the complexity and diversity of telecommunications technologies, the Commission has attempted to “minimize departures from competitive neutrality, so as to facilitate a market-based process whereby each user comes to be served by the most efficient technology and carrier.”⁷ In the Commission’s own words, competitively neutral rules are intended to “ensure that such disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of potential service providers.”⁸ A broadband CAF mechanism that provides incumbent phone companies with either exclusive access or priority access to funding would fail utterly in achieving these goals.

Although the Commission may afford the principles varying degrees of weight in accomplishing the goals of universal service, the United States Court of Appeals for the Tenth Circuit made clear that “the FCC may exercise its discretion to balance the principles against one another when they conflict, but may not depart from them altogether to achieve some other goal.”⁹ The Commission may not, therefore, completely ignore the principle of competitive neutrality in attempting to spur broadband deployment through universal service high-cost funding.

Nor should the Commission reverse or waive the principle for purposes of CAF support. There are no benefits to employing an incumbent phone company right of first refusal that could not be achieved through competitively neutral means. First, granting incumbent phone companies a right of first refusal will not speed broadband deployment. As proposed, the Commission must develop and adopt a cost model before the right of first refusal could be exercised. This is an extremely complex and time consuming process as demonstrated by the fact that it took 2½ years for the Commission to adopt its current high-cost support cost model. In contrast, the Commission could authorize a competitive bidding process within a relatively short period of time, relying on its extensive expertise in conducting auctions in the wireless spectrum context.¹⁰ To the extent the Commission wishes to encourage providers to offer broadband service in large areas to avoid “cherry picking,” the Commission could provide a preference for competitive bids that cover a large geographic area. For example, Attachment B to this filing proposes a mechanism for distributing support to providers that commit to serve all the supported areas within a county. This would achieve the Commission’s overall objective of

⁷ *Id.* at 8802, ¶ 48.

⁸ *Id.*

⁹ *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001)

¹⁰ In fact, the Commission is planning to complete a competitive bidding process for wireless support through its proposed Mobility Fund within a few months, in 2012.

deploying broadband to the areas that need it most in an expedited manner, while comporting with the principle of competitive neutrality.

In addition, relying on a competitive bidding process, rather than an anti-competitive right of first refusal, would achieve the Commission's stated goals of developing a market-based support mechanism in a fiscally responsible manner.¹¹ Rather than handing support to incumbent phone companies as a matter of right, competitive bidding would ensure that the most efficient provider would receive support in an area. Competitive bidding would also rely on market principles to reduce subsidy amounts to levels necessary to support broadband service, rather than guaranteeing that incumbent phone companies receive the full amount of support computed by the cost model.

Instead of distributing the entirety of CAF support pursuant to discriminatory mechanisms that preclude competitive entry, the Commission should develop an approach that better complies with the universal service principle of competitive neutrality. As noted above, competitive bidding should be the primary mechanism used by the Commission to distribute high-cost support. The Commission has sought comment on competitive bidding procedures for universal service on multiple occasions¹² and has received detailed proposals from many parties, including two members of the group now advocating adoption of the ABC Plan.¹³ As noted above, Attachment B to this letter proposes a competitively neutral mechanism for distributing support on a county-wide basis. To the extent the Commission includes an incumbent phone company right of first refusal, it should be limited in size and duration and focused on building broadband networks in areas where they have not yet been deployed, as proposed in the recent joint letter from NCTA and ACA.¹⁴

¹¹ *Connect America Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4560-61, ¶ 10 (2011) (*2011 USF-ICC Reform FNPRM*).

¹² *High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, 23 FCC Rcd 1495 (2008); *High-Cost Universal Service Support*, WC Docket Nos. 05-337, 03-109, 06-122, 04-36, CC Docket Nos. 96-45, 99-200, 96-98, 01-92, 99-68, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475 (2008); *Connect America Fund*, WC Docket Nos. 10-90, 05-337, GN Docket No. 09-51, Notice of Inquiry and Notice of Proposed Rulemaking, 25 FCC Rcd 6657 (2010); *2011 USF-ICC Reform FNPRM*, 26 FCC Rcd 4554.

¹³ Letter from Kathleen Grillo, Vice President Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-337, CC Docket No. 96-45, Appendix (Modernizing Universal Service: A Design for Competitive Bidding) (Feb. 9, 2007); Comments of AT&T Inc., WC Docket Nos. 10-90, 05-337, GN Docket No. 09-51, at 5-12 (July 12, 2010).

¹⁴ Letter from Steven F. Morris, NCTA, and Ross J. Lieberman, ACA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 (Oct. 4, 2011).

ATTACHMENT B

NCTA PROPOSAL FOR COMPETITIVE BIDDING ON A COUNTYWIDE BASIS

The Commission adopted competitive neutrality as a core principle of the high-cost support regime and it must be guided by that principle in transitioning to a broadband-focused support mechanism. As numerous parties have demonstrated, providing price cap incumbent LECs with a right of first refusal violates the principle of competitive neutrality. This problem is exacerbated where the ROFR would extend to an ILEC's entire service area in a state.

As in the Chairman's proposal, the Commission should establish competitive bidding on a census block or census block group basis as the best long-term approach for distributing support. In the interim, however, the following distribution mechanism satisfies the competitive neutrality principle in a manner that achieves the perceived benefit of a ROFR – a commitment by a broadband provider to serve a large geographic area:

- In lieu of awarding a ROFR to the incumbent LEC, the Commission should award support on a countywide basis in a competitively neutral manner.
 - At the time it adopts a cost model, the Commission would publish a list of all counties that include supported census blocks (i.e., high-cost census blocks with (1) no unsubsidized competitor and (2) that do not exceed the alternative technology cost threshold) and the amount of support available for each county.¹
 - 60 days after the list is published, broadband providers could submit a binding “letter of intent to serve” for any county where they would be willing to provide the required level of broadband services to the supported census blocks in exchange for the published level of support. Two or more providers could join together to serve a county.
 - Providers that are not already designated ETCs would be required to certify that they will apply for ETC status if they are selected to receive support and must acknowledge that no support will be provided until ETC status is obtained.
 - There are three possible outcomes after expressions of interest are submitted:
 1. In areas where a single provider (or group of providers) expresses its intent to serve, that provider would immediately begin to receive support on the terms established by the Commission.
 2. In areas where more than one provider (or group of providers) expresses the intent to serve, each party would submit a final offer and the lowest offer would be accepted.

¹ As NCTA has noted in prior filings, the Commission should consider alternative approaches in Alaska to reflect the unique history and circumstances that exist in that state.

3. In areas where no provider expresses the intent to serve, bidding would be conducted on a more granular geographic basis (census blocks or census block groups).
- The countywide bidding process includes many of the same elements as the ABC Plan ROFR and the Chairman's ROFR proposal.
 - All of these approaches require the Commission to adopt a cost model before distributing support.
 - All of these approaches require the Commission to develop a set of terms and conditions for support recipients before distributing support.
 - All of these approaches would carve out very high-cost areas that exceed the alternative technology cost threshold established by the Commission.
 - In scenarios 1 and 3 above (one provider or zero providers), the timing will be exactly the same as a ROFR; in scenario 2 (multiple providers), the process will take slightly longer (although it still could be done in an expedited manner) but includes the benefit of reduced support.
 - Countywide bidding offers many advantages over other proposals.
 - Countywide bidding open to all providers is a modern, forward-thinking approach to distributing support – granting ILECs a ROFR is nothing more than a continuation of the flawed policies of the past.
 - Using countywide bidding rather than an ILEC ROFR would significantly reduce the litigation risk associated with USF reform.
 - Conducting a bidding process for thousands of counties, as opposed to millions of census blocks, should be a relatively straightforward exercise from an administrative perspective.
 - Counties are smaller than the statewide ILEC study areas proposed by the Chairman, but the likelihood of attracting providers is greater and therefore it may generate more investment in unserved areas than the ROFR.
 - As compared to wire centers or statewide ILEC study areas, counties are more competitively neutral and easier to coordinate with existing FCC and NTIA datasets.