

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
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 an 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
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208
	)	

To: The Commission

**PETITION FOR RECONSIDERATION**

Donald J. Evans, Esq.  
Fletcher, Heald & Hildreth, PLC  
1300 North 17<sup>th</sup> Street, 11<sup>th</sup> Floor  
Arlington, VA 22209  
703-812-0400

December 29, 2011

## TABLE OF CONTENTS

	Page
Summary .....	1
I. Background .....	4
II. Proposed Modifications of Rules .....	8
III. Conclusion .....	14

## **SUMMARY**

The Commission's USF/ICC Order sets up a scenario for processing Mobility Fund allocations which significantly and counterproductively limits the range of entities which can participate. It also makes it impossible for interested entities to rationally plan development of systems to serve unserved areas. The timeline should be revised to: (i) establish at the outset what areas are unserved and therefore eligible for Mobility Funds, (ii) permit applicants to obtain ETC designation only if and when they receive Mobility Funding, (iii) detach Mobility Funding from any relationship to study areas or wireline centers, and (iv) award both operational support and construction support at the same time in an integrated process.

In addition, the transition period to a fully open and competitive procedure for allocating high support funds should be abbreviated to three years.

LECs receiving USF support should be barred from assessing excessive access charges.

Roaming rates for all wireless carriers should be capped at reasonable levels related to costs or retail offers.

AWS-3 spectrum should be allocated to diversify spectrum ownership and foster accelerated broadband deployment.

The definition of "unsubsidized competition" should be changed to more accurately reflect the real state of competition in many markets.

NTCH, Inc. (“NTCH”) hereby petitions the Commission to reconsider several provisions of its landmark *Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90, FCC 11-161, rel. November 18, 2011 (“*USF/ICC Order*”). NTCH is a Tier III provider of voice and telecommunications services in several markets around the country. It particularly addresses its services to segments of the public who are either financially or geographically challenged and thus fall beneath the radar of larger carriers. While the *USF/ICC Order* adopted numerous rules and policies that will eventually bring much needed reform to the most basic mechanisms governing exchange of telecommunications traffic, a number of rules have the unintended consequence of effectively excluding telecom providers from access to USF support, even when those providers would be the most efficient deliverers of desired service to unserved and high cost areas. For example, NTCH is capable of entering small towns in its service areas and providing them best in class mobile service at rates as low as \$25 per month (tax included) for unlimited voice, text and web, with free phones and local customer care. And this can be done with less than 5% of the environmental footprint of the major carriers and using less than 15% of the power of the major carriers while delivering a signal that is up to 30% more effective. Carriers like NTCH need to be given a chance to compete, but the new rules impede such competition.

As will be explained more fully below, the Commission should:

- Streamline and simplify the ETC designation system so that potential Mobility Fund recipients can (i) know in advance what areas will qualify for Mobility Fund build-out support, (ii) acquire ETC status based upon their receipt of such support, and (iii) have assured access to Phase II Mobility Funding if needed to provide continuing service to previously unserved areas. The letter of credit requirement is not economically realistic as security for performance. As currently structured, the Mobility Fund scheme excludes carriers who might otherwise be the best qualified candidates from receiving support.

- Eliminate procedural barriers to ETC designation and detach wireless service areas from wireline study areas and centers.
- Accelerate the provision of USF funding on the basis of which carrier can most inexpensively provide supported services to the public. The long glide path established by the Commission for transition to a rational system simply prolongs the current system to the financial benefit of LECs while diserving the public.
- At the same time, when LECs receive funds from the USF pot, they should be precluded from assessing excessive access charges on interconnecting carriers. Such charges should not be allowed to exceed those normally charged in urban areas. LECs who use their monopoly position to exact excessive access charges should forfeit their right to receive public funds.
- Clarify the eligibility of Lifeline only USF providers for Mobility Funding.
- Roaming arrangements across the industry must be rationalized so that smaller carriers can provide service in high cost or marginal areas while offering their customers reasonable access to the wider universe of mobile services.
- AWS-3 should be prioritized for service to unserved areas, with strong preferences for carriers other than those with huge spectrum holdings who have so far failed to serve those areas.
- The Commission's definition of an "unsubsidized competitor" should be broadened to include any competitor which provides broadband communications at the minimum levels set by the Commission, without regard to whether the service is fixed or mobile. Many consumers now rely on mobile devices for internet service whether at home or on the go, so there is no rational reason to ignore primarily mobile service offerors when considering whether an area has unsubsidized competition.

## **I. Background**

The Commission's objective in reforming the high cost USF program was a long needed one: to control the expenditure of USF funds by ensuring that the supported services are delivered to the populations needing such services efficiently, without duplication, and only where subsidies are actually needed. The system is also intended to permit ETCs who are willing to provide mobile service to be able to step in on a least-cost-provider basis and offer these services. The Commission's decision went a long way in this regard. However, perhaps due to the volume of last minute politicking on eligibility for high cost support, the resulting system actually creates obstacles to the desired efficiency of funding and ETC eligibility. Here is the problem.

The scenario now adopted essentially entrenches LECs for a transitional period as the sole recipient of high cost support in their service areas. The Commission correctly did away with multiple high cost support recipients in the same serving areas, providing for a five year phased transition to a competitive, least-cost provider scenario. In both cases the glide path is too long, entrenching the current providers while stifling the ability of new entrants to provide the supported services at considerably lesser cost to the public. The Commission was ruthless in immediately slashing high cost support to CETCs (in some case by as much as 50%) when it capped their support in 2009. As the Commission has noted, those carriers managed to survive without the USF support. There is no reason to believe that LECs could not survive as well, particularly if they were given a generous three year phase-out period, with the least cost carrier then assuming the ETC mantle.

In addition to delaying the transition to funding the most economical provider for basic supported services, the new system impedes economical providers from even having a chance to obtain Phase I Mobility funds. First, the scenario devised by the Commission does not even tell interested parties which areas are unserved until shortly before the auction is to begin. The highest single priority in this whole process should be to identify where fixed and mobile broadband services are not currently available, since this is the exact problem that the Commission's scheme purports most urgently to address. Yet, despite the hundreds of millions of dollars allocated to the national broadband map under the ARRA, no comprehensive or accurate national broadband map exists. Nor does the Commission expect one to exist before the Phase I Mobility auction occurs. Thus, as was the case with stimulus funding, everyone must rush forward to address a perceived problem without knowing precisely where the dollars or services are required. The first step should really be to have policy-makers and interested service providers know where the holes are so they can plan whether and how they can fill those holes.

The need for this information early in the process is especially urgent because the Commission's scenario requires a lengthy lead time before one can even participate in the auction. At the state level, ETC designation can take years, particularly when incumbent recipients of USF funds have a strong incentive to keep out potential competitors for those funds. Imagine if incumbent holders of spectrum could prevent potential bidders in a spectrum auction from being eligible by simply protesting their eligibility at the outset. With huge financial benefits to be reaped by such tactics, incumbents would be expected to engage in them, and they do. The ETC designation process has become a major choke point in opening the door to new entrants who might be willing and able to provide supported services at lower cost than the incumbents. Even the Commission's relatively streamlined process for designating ETCs in

states under its jurisdiction can take a year and half or more. At that rate, many companies willing to compete for Phase I funding will be ineligible to do so simply because their ETC designation has been delayed – often by obstructionist tactics of potential competing bidders.

At the same time, if a prospective carrier were somehow able to identify an area as unserved but servable with USF support, it would be compelled to apply for and obtain ETC designation with no assurance that it will ever be the recipient of Phase I funding or how much funding it will receive if it does receive the funds. Yet the carrier will have taken on the responsibility of providing supported services in its service area. This cart-before-the-horse process places new entrants in a hopeless dilemma: by definition, the areas it desires to serve are unservable without high cost support, yet it must commit to provide the services without knowing that it will have the needed support. To be sure, the Commission alluded in passing to the possibility of having “conditional” ETC designations – designations presumably conditioned on the ETC ultimately obtaining USF support. But it is not at all clear that either the states or the Commission itself would permit “conditional” ETC applications, nor is such a process or its limits explained. In the best case, even a conditional process would entail numerous applicants applying for conditional ETC status, going through the time and expense to themselves and regulatory authorities of getting an ETC designation, and then abandoning it if the Mobility Funding is not obtained in the auction. This is a wasteful and inefficient process.

The current system also ties wireless ETCs to serving the entirety of wireline study areas. This tie is found in the statute and was originally intended to prevent cream skimming by new entrants. The problem is that in the case of wireless ETCs, their FCC-defined service areas usually are not congruent with the study areas of the LECs, and therefore there is inevitably some portion of a study area which will remain unserved by the wireless carrier no matter how

much it tries to provide universal service throughout its own service area. Rather than proceeding on a time-consuming and painful case-by-case redefinition of study areas, the Commission could obviate this issue by a blanket forbearance from the statutory requirement. At the same time, it could eliminate in this situation the rule requiring service to entire wire centers, which appears to be related to the now abandoned framework of providing identical support. With the identical support rule abolished, no reason remains to tie CETCs to wire centers.

The next cart-before-the-horse problem is that a recipient of Phase I Mobility funds is not assured of receiving Phase II funds. In fact, as we understand it, a Phase I recipient must show that it can operate the facilities it builds out *without* the need of outside funding. Yet it is quite possible, if not likely, that high cost areas which qualify for Phase I build-out money would also normally require Phase II money to support on-going operations. If this is indeed the case, there is no reason why Phase II funding should not be available, and a prospective provider of service in such an area should know in advance if it will have the funding. Otherwise it cannot rationally assess the economic viability of the entire project either initially or in the long run, and failures and defaults are therefore almost inevitable. As currently structured, the Commission's plan requires a prospective bidder to develop a difficult and marginal service plan while acting entirely in the dark about whether the funds needed to make it work will be there.

The requirement of a letter of credit backing up the hapless applicant's commitment serves as an even greater deterrent to entering the process since an LOC basically requires the provider to have that amount of cash in the bank or readily available. Yet most business plans, particularly for marginal areas such as the ones involved here, depend not on money currently in the bank but on the receipt of public funding along the way. Unless the Commission intends to

limit the participants in this program to companies which basically do not need the funding, the LOC requirement is an insurmountable obstacle.

Because service in the unserved high cost areas addressed by the Mobility Fund is by definition very limited in geographic scope and will generally be provided on the smallest margins to providing carriers, it is even more essential that roaming from the national carriers be available on reasonable terms. The largest carriers continue to demand roaming rates which grossly exceed not only their costs but the retail rates that they offer their own customers. Unless the Commission acts decisively to bring roaming rates down to rational levels, the ability of customers in high cost areas to roam could be seriously threatened, thus undermining the very basis for a “mobility” fund.

Finally, we suggest that the Commission clarify the posture of “Lifeline-only” ETCs in terms of eligibility for Mobility Funds and look to AWS-3 spectrum as a basis for addressing several of the issues raised above and at the same time expediting broadband service to unserved areas.

## **II. Proposed Modifications of Rules**

As indicated above, the procedures established by the *USF/ICC Order* either defeat the Commission’s objectives or make it unnecessarily difficult for prospective lower cost service providers to offer service in unserved high cost areas. NTCH therefore proposes the following changes in the ETC and Mobility Fund processes.

1. The Commission should first, at the earliest possible date, issue a public notice indicating which areas are deemed unserved. As originally contemplated, other parties would have a short opportunity to challenge any specific area as unserved. Thereafter the Commission would issue a second and final public notice identifying which areas will be unserved for

purposes of the Phase I auction. This would allow everyone – incumbents and new entrants alike – to focus on those areas that actually need service and where they can realistically offer to provide it.

2. Immediately thereafter, the Commission should publish a public notice allowing interested parties 30 days to declare their interest in applying for Phase I funding. These parties would then be required to apply immediately for tentative ETC status, conditioned on receipt of Mobility Fund funding. The application would be held in abeyance pending completion of the Mobility Fund auction. Award of Mobility Funds through the auction process, along with certification as to compliance with all of the eligibility, service and reporting obligations associated with such funds, would be deemed to automatically qualify a Mobility Fund awardee as an ETC in the areas it applied for. This eliminates duplicative and unnecessary processing of “conditional” applications, precludes obstructionist tactics by incumbents, and obviates premature ETC commitments made by companies which are then incapable of fulfilling them. It also ensures that recipients of Mobility funds are indeed ETCs as required by the statute.

3. Wireless ETCs should be able to bid to provide service to unserved areas within their FCC-authorized service areas without regard to study area and wire center distinctions. There is no rational need whatsoever to tie wireless service areas to LEC study areas or wire centers, and therefore it simply consumes time and money to go through the meaningless exercise of forbearing from such regulation and waiving the wire center rule on case by case bases. Retention of these requirements serves no useful purpose and actually impedes the entrance of new, better service providers into the USF mix. The Commission should therefore (i) forbear generically from requiring ETCs designated in connection with the Mobility Fund

process from having their service areas relate to study areas and (ii) make the requirement to serve entire wire centers inapplicable to wireless ETCs.

4. Receipt of Phase II funding should be related to, not independent of or even inconsistent with, Phase I funding. In high cost areas, any rational business plan with a chance of succeeding will involve knowing what funds are required to complete the construction to the Commission's and the carrier's satisfaction, what funds are needed to then operate the system for the foreseeable future based on projected revenues and subsidies, and, finally, what funds are available for these purposes from the carrier's own resources and USF funds. By dividing the process into two separate parts, the Commission makes prudent planning impossible. A more sensible approach would be to quickly wrap up the details of the Phase II funding process (which seems to have been envisioned as largely tracking the Phase I process) and then permit applicants to apply for both Phase I and Phase II funding in an integrated way. Indeed, they could be consolidated into a single phase in which a bidder's application for both construction money and operating money would be weighed together in determining the low bidder to provide service. This also permits the Commission to more meaningfully evaluate the real costs of subsidizing service to the unserved area and then to measure the successful bidder's achievement of its stated goals. By sequencing the Mobility Fund process as described above, the Commission will encourage new entrants who may be able to offer the full gamut of supported services for significantly less than the limited field of potential bidders who would otherwise qualify, with far less waste of time on unnecessary procedures. The savings to the USF bottom line should be significant.

5. After recognizing the evils and inefficiencies of the current USF distribution system, the Commission nevertheless prolonged that system by establishing generous glide paths

for LECs and CETCs. These measures certainly reduce the trauma to support recipients by slowly weaning them away from subsidies that were excessive and unnecessary in the first place. But in the same breath the Commission also noted that its mission is not to ensure profitability for carriers of any ilk but rather to ensure the provision of supported services at prices comparable to those in urban areas. The two points are irreconcilable: the glide path approach does precisely what its own principles decried – funding unnecessary and unjustified subsidies to carriers to support their bottom lines rather than the public interest. NTCH understands that a transition period avoids disruption of expectations, but the Commission had no compunctions about disrupting the expectations of CETCs when it capped funding and expanded the pool of recipients. Many CETCs suffered massive and immediate cuts in support with not a tear of sympathy from the Commission. Simply stated, the transition periods established are too generous. The Commission should reduce the transition period to three years, with the expectation that the reverse auction process will have been perfected through the Mobility Fund by then. The new open entry regime can kick in at that time to ensure that subsidies go to the carrier best able to provide the required services at the lowest prices.

6. The new ICC rules also provide for a very generous transition to a pure bill-and-keep access charge regime for LECs. Without questioning the length of the transition period, it does seem anomalous that LECs who will receive healthy measures of high cost support during the transition period can still continue to levy monopoly access charges on competing wireless carriers well in excess of access charges levied in urban areas. Since acceptance of high cost subsidies is a voluntary decision by carriers, the Commission should require, as a condition of accepting such support, that they cap their access charges at levels comparable to those charged in urban areas. In other words, offer the same benefits to their competitors that USF funding

makes available for their customers. If this is not possible for some reason, a waiver could be requested with the same high thresholds that the Commission established for others seeking relief from the new rules. See Paragraphs 540 *et seq.* of the *USF/ICC Order*.

7. The *USF/ICC Order* declares that only ETCs are eligible for participation in the Mobility Fund, a category that by its terms would include Lifeline-only ETCs. NTCH understands, however, that Lifeline-only ETC designees are not deemed to be eligible, but this appears nowhere in the Order. The Commission should clarify whether this is the case.

8. The Commission in recent months has come to a sharper appreciation of the importance of roaming as an element in the menu of services expected by a mobile customer. Particularly when we are dealing with carriers providing service to high cost areas with far lower subsidies than had been the norm in the past, it is critical that wireless carriers have the right to roam on terms that are truly reasonable. By reasonable, we mean rates that are not 700 or 800% higher than the rates offered by large carriers to their own customers, and rates that are not thousands of times higher than actual costs. A simple way to ensure some semblance of reasonableness in roaming rates would be to treat the retail or MVPN rate offered by a carrier for a certain package of services as a cap on what can be charged as a roaming rate. Obviously the carrier offering such a rate is making a return on its investment, so there is no reason why roaming rates should be significantly higher.<sup>1</sup> By simply taking reasonable steps to curb excessive roaming fees, the Commission can also limit the amount of support that will ultimately be needed for high cost operations.

---

<sup>1</sup> For instance, assume an unlimited use retail smartphone customer will use 1500 minutes of voice, 1200 text messages, and 500 Mbps of data. A carrier's roaming offering should be priced in a manner that, when applied to these elements of use, result in a total cost that would yield that carrier the same return in a wholesale arrangement that they are accepting through either a MVNO or retail arrangement. Typically there would also be at least a 20% discount offered to a roaming partner off the retail or wholesale arrangement.

9. The Commission effectively protected LECs currently receiving high cost support from being denied that support due to the existence of “unsubsidized competition.” While recognizing that it makes no sense to subsidize one service provider in a market when another one is providing adequate service without a subsidy, the Commission flinched when it came to putting teeth in that principle. By limiting the definition of unsubsidized competitors to “facilities-based providers of residential fixed voice and broadband services,” the Commission essentially ignored the many areas where LECs are subject to vigorous broadband competition from wireless carriers who provide primarily mobile service. Such carriers are the most common sources of competition for wireline carriers, and since the chief virtue of wireless service is its mobility, the Commission’s definition drastically undercuts the principle of not subsidizing one provider when another is offering unsubsidized service. The Commission should therefore redefine “unsubsidized competitor” to include *any* provider of residential voice and broadband service so long as the provider meets minimum service thresholds.

10. One further step which the Commission did not consider in connection with accelerating the delivery of broadband to unserved areas is using AWS-3 for that purpose. This virgin swath of spectrum could be made available in the near future if the Commission had the incentive to do so. The Commission could use this as a historic opportunity to expand diversity of ownership of spectrum from its current highly consolidated state to a state where smaller carriers would have a realistic chance to get the spectrum and offer their services. This could be done by auctioning the spectrum but simply barring or severely handicapping companies who already own significant spectrum in a given market from acquiring even more. The fact is that incumbent spectrum owners have done a poor job of putting their spectrum to use outside urbanized centers; they have spectrum – they just aren’t using it. Yet other carriers willing to do

the job cannot get their hands on the spectrum. By skewing the AWS-3 auction in the direction of competing carriers, the Commission can ensure that fresh blood with fresh ideas and low cost structures is injected into the current tired and outdated carrier gene pool.

### **III. Conclusion**

The changes proposed above will serve to improve the USF scheme even further by lowering overall subsidy costs and encouraging new competitive entry. The Commission has made a seismic movement in the direction of real reform. Adopting the rule changes outlined above will help to bring that process to fruition.

Respectfully submitted,

NTCH, Inc.

By\_\_\_\_/s/\_\_\_\_\_  
Glenn Ishihara  
Its President

December 29, 2011  
PMB 813  
703 Pier Ave. #B  
Hermosa Beach, CA 90254  
310-798-7111