



NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION

The Voice of Rural Telecommunications

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December 6, 2012

Ex Parte Notice

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Rural Health Care Support Mechanism, WC Docket No. 02-60

Dear Ms. Dortch:

On Thursday, December 6, 2012, the undersigned, on behalf of the National Telecommunications Cooperative Association (“NTCA”), spoke via telephone with Michael Steffen, Legal Advisor to Chairman Julius Genachowski, to discuss matters in the above-referenced proceeding.

First, NTCA noted the legitimate questions surrounding whether Section 254(h)(1)(A) of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. § 254(h)(1)(A), permits Rural Health Care Program funds to be used by an institution for any purpose other than procurement of services. NTCA also explained that, particularly in areas served by small rural local exchange carriers, a central concern may not be one of availability, but rather affordability – which is precisely why Section 254 appropriately focuses on promoting procurement of services.

Second, NTCA expressed significant concern about the need for a carefully designed process to protect against overbuilding to the extent that infrastructure were supported under the rural health care program. NTCA observed that the record in this proceeding demonstrates that overbuilding is more than a hypothetical risk. *See, e.g.*, Comments of the Montana Telecommunications Association, WC Docket No. 02-60 (filed Sept. 8, 2010), at 12-13. NTCA highlighted that overbuilding in rural areas could effectively result in one universal service fund mechanism (Rural Health Care) imperiling already-existing infrastructure deployed through the support of another universal service mechanism (High-Cost). If infrastructure support were provided under the Rural Health Care Program, NTCA therefore urged the Federal Communications Commission (the “Commission”) to adopt a careful process to protect against overbuilding; such a process should include both publicly posted notice of applications and a sufficient and reasonable opportunity for interested parties to provide relevant data that would indicate whether existing networks in the vicinity could satisfy the needs of the applicant in lieu of self-provisioning infrastructure. *See* Comments of NTCA, WC Docket No. 02-60 (filed Sept. 8, 2010), at 4-6 (a copy of which is attached hereto).

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Marlene H. Dortch

December 6, 2012

Page 2 of 2

NTCA further cautioned the Commission against allowing contribution requirements to be satisfied through anticipated revenues from or in-kind use of excess capacity. Such proposals would not only appear to violate the prohibition in Section 254(h)(3) of the Act, 47 U.S.C. § 254(h)(3), on selling, reselling, or otherwise transferring any services or capacity obtained through the program, but it is also speculative at best whether such contributions through future sales or leases might actually be achieved. NTCA also noted that any sales or leases of excess capacity arising out of overbuilt networks would present a “double whammy” and harm existing networks in two ways – first, by removing an anchor institution from the potential pool of customers to be served by an existing network, and second, by adding a new competitor to an existing network in rural markets that have limited customer bases to serve. Indeed, such risks associated with reliance upon and use of excess capacity justify all the more the use of notice-and-comment processes and disclosures beyond those that would be employed through a simple “competitive bidding” mechanism; only by such additional review of (and public disclosure of excess capacity proposals within) applications as suggested by NTCA can the Commission ensure that an infrastructure application is truly sustainable, that a competitive bidding process was in fact fair and reasonable, and that the proposed deployment does not harm other universal service objectives.

Finally, NTCA explained that any evaluation of “cost-effectiveness” associated with deployment of telecommunications infrastructure in connection with the Rural Health Care Program must necessarily involve a long-term view of the “total cost of ownership” of that infrastructure. This analysis must include realistic and validated costs of equipment procurement, and also take account of the capabilities of an entity that does not regularly conduct telecommunications business to maintain and upgrade a network over its decades-long life.

Pursuant to Section 1.1206 of the Commission’s rules, a copy of this letter is being filed via ECFS. If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

/s/ Michael R. Romano
Michael R. Romano
Senior Vice President – Policy

Enclosure

cc: Michael Steffen

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION AND SUMMARY.....	1
II. THE COMMISSION SHOULD CONSIDER THE SUBSTANTIAL RISKS AND IMPACTS OF ITS REFORM PROPOSALS ON EXISTING NETWORKS AND USAC’S OVERSIGHT RESPONSIBILITIES.	4
A If Implemented, the Infrastructure Program Could Create A Substantial Risk of Overbuilding Existing Networks, Prompting The Need For A 60-Day Public Comment On Applications To Determine Need and Other Safeguards.	4
B. The Scope and Extent of USAC’s Oversight Obligations Would Increase Dramatically Because of the Infrastructure and Broadband Services Programs.....	6
III. PROPOSALS FOR THE HEALTH BROADBAND SERVICES PROGRAM WILL INCREASE ACCESS TO HEALTH IT IN RURAL AREAS.....	8
IV. THE DEFINITION OF ELIGIBLE HEALTH CARE PROVIDERS SHOULD BE EXPANDED TO INCLUDE SKILLED NURSING FACILITIES, OFF-SITE ADMINISTRATIVE OFFICES AND DATA CENTERS, BUT THE DEFINITION OF “RURAL” ELIGIBILITY SHOULD REVERT TO ITS PRE-2005 FORM.	9
V. THE COMMISSION SHOULD GIVE PRIORITY TO EXISTING RHC PROGRAM PARTICIPANTS, TO EXISTING UPGRADABLE NETWORKS, AND TO PROJECTS THAT HIRE LOCALLY. THE COMMISSION SHOULD ALSO INDEX RURAL HEALTH CARE SUPPORT TO RETAIN THE VALUE OF THE RURAL HEALTH CARE INVESTMENT.	10
VI. CONCLUSION.	12

following a one-year extension for vendor selection.⁴

The Commission now proposes to restructure the RHC mechanism, allocating 25% (up to \$100 million) for a new Infrastructure Program and 75% (up to \$300 million) for the current Telecommunications Program and a new Health Broadband Services Program.⁵ The Infrastructure Program would support up to 85% of the construction costs of regional or statewide networks to serve public and non-profit health care providers where broadband service is unavailable or insufficient. The Commission proposes to define “insufficient” service for Health IT infrastructure as less than 10 Mbps, based on findings contained in the National Broadband Plan.⁶ Under the Broadband Services Program, USF funds will subsidize 50% of the monthly recurring broadband access costs for eligible rural health care providers.⁷

The Commission also proposes to expand eligibility by including skilled nursing facilities, renal dialysis centers and facilities, and off-site administrative offices and data centers that perform support critical health care functions within the definition of an “eligible health care provider.”⁸ Finally, the Commission seeks comment on prioritization techniques in light of anticipated demand for program funds.⁹

Although the proposed revisions to the RHC mechanism are intended to promote broadband availability, certain of these proposals could have the unintended consequence of undermining broadband deployment in rural America. The greatest risk is that the proposed Infrastructure Program within the RHC mechanism would enable “overbuilding” and subsidize

⁴ *Id.* at ¶ 7.

⁵ *Id.* at ¶ 128. The current Internet Access Program would be absorbed into the Broadband Services Program.

⁶ *Id.* at ¶ 20.

⁷ *Id.* at ¶ 93.

⁸ *Id.* at ¶¶ 3, 116-127.

⁹ *Id.* at ¶¶ 3, 131. The Commission received “overwhelming interest and participation levels in the Pilot Program,” which it takes as an indicator of future response to proposals in the NPRM. *Id.* at ¶ 12.

redundant networks in areas where high-capacity services are already available. To guard against such concerns, if the Commission chooses to implement an Infrastructure Program, it should post detailed information with respect to applications on USAC's website and create a 60-day public comment window to avoid the risk of waste and inefficient use that would arise from overbuilding or underutilizing existing networks. The Commission should further ensure that USAC has adequate resources and expertise to scrutinize and oversee carefully applications for overbuilding and other concerns.¹⁰

The Commission should also, through this proceeding or in response to the pending Nebraska Public Service Petition, revise its "rural" eligibility definition to reflect the former standard, which used a city population of 50,000 as the rate benchmark for rural health care provider rates. Increasing the discount for broadband services to 50% of eligible costs, including a one-time installation charge, for rural areas and keeping the minimum level of broadband capability at the national benchmark for all broadband services will advance broadband deployment in rural areas. Finally, the Commission should index the RHC funding cap to inflation— as is being considered for the E-rate funding mechanism — to preserve the value of rural health care investment.

¹⁰ In addition to providing comments herein on the application process and specific reform proposals, NTCA notes that the Commission must ensure as a threshold matter that any steps it takes with respect to funding of broadband access and/or infrastructure in support of rural health care are consistent in all respects with the statutory mandates, limitations, and authorizations for such programs. *See* 47 U.S.C. § 254.

II. THE COMMISSION SHOULD CONSIDER THE SUBSTANTIAL RISKS AND IMPACTS OF ITS REFORM PROPOSALS ON EXISTING NETWORKS AND USAC’S OVERSIGHT RESPONSIBILITIES.

A key component of the NPRM is to provide funding for the deployment of broadband facilities.¹¹ The Infrastructure Program envisions funding 85% of eligible costs, up to \$100 million, for the design, construction and deployment of dedicated broadband networks by rural health care providers who do not have sufficient broadband services available and who have an ownership interest, an indefeasible right of use (IRU) or capital lease interest in facilities.¹² This substantial funding opportunity will encourage some applicants to file in areas with existing broadband networks, thus creating an “overbuild” scenario.

A. If Implemented, the Infrastructure Program Could Create A Substantial Risk of Overbuilding Existing Networks, Prompting The Need For A 60-Day Public Comment On Applications To Determine Need and Other Safeguards.

The Commission appears to recognize the substantial risk of overbuilding existing networks that a new Infrastructure Program would create because, under the NPRM, each applicant must show “demonstrated need” for new infrastructure.¹³ This process, however, does not appear to include any opportunity for other parties to comment on the application and provide data regarding the availability and sufficiency of existing broadband networks in the area affected by the application.

All Infrastructure applications are to be made available publicly on USAC’s website, according to the NPRM.¹⁴ The Commission will require each applicant to verify that “either there is no available broadband infrastructure or the existing available broadband infrastructure is

¹¹ NPRM, ¶ 13.

¹² *Id.* at ¶ 55.

¹³ The NPRM envisions a four-stage Infrastructure Program process: 1) initial application phase; 2) project selection phase; 3) project commitment phase; and 4) five-year build-out phase. *Id.* at ¶¶ 15-18.

¹⁴ *Id.* at ¶ 16.

insufficient for health IT needed to improve and provide health care delivery.”¹⁵ The Commission proposes to set the minimum broadband connectivity speed for Infrastructure Program projects at 10 Mbps for dedicated Internet access networks.¹⁶ This speed is based on recommendations under the National Broadband Plan and a June 25, 2010 ex parte letter filed by Internet2, a nationwide backbone provider.¹⁷

If the Commission chooses to proceed with an Infrastructure program, existing providers and other interested parties must be given a reasonable chance to object or otherwise respond to proposals. Allowing public comment on pending applications would assist USAC in making informed decisions about where new infrastructure truly might be needed. The Commission should therefore create a 60-day comment window following the posting of all applications on USAC’s website. This comment process should provide interested parties with the opportunity to submit any and all data that they may deem relevant to a particular application, and the Commission should avoid placing overly narrow or artificial limits on the form and format in which such information may be submitted. This will better ensure that existing broadband service providers have fair notice and a meaningful opportunity to comment on applications, including the chance to demonstrate that purchasing services from an existing carrier (who could use RHC funds to upgrade existing plant) would be more efficient and timely than subsidizing and deploying redundant network over an extended period.

The Commission’s efforts to make transparent any proposed use of sharing or using excess capacity under the Infrastructure Program will not prevent the inefficient use of universal

¹⁵ *Id.* at ¶ 22.

¹⁶ *Id.* at ¶ 20.

¹⁷ *Ibid*; National Broadband Plan at 211; *see also* FCC Omnibus Broadband Initiative (OBI) Task Force Paper 5, “Health Care Broadband in America,” (rel. Aug. 2010), pp. 5-6.

service funds that would arise from overbuilding or underutilizing existing networks.¹⁸ Indeed, the potential for “shared use” or deployment of excess capacity exacerbates the risk that a project needed for a single rural health care facility could in turn be used to enable deployment of redundant network facilities. Consider the example of a single hospital in an outlying location that might legitimately need upgraded plant, even as several neighboring customers and/or communities already have substantial infrastructure in place – it would undermine those existing investments if “shared use” or opportunities to install excess capacity can be used to circumvent concerns about overbuilding and subsidize the construction of redundant networks to serve those nearby consumers and communities. Thus, in addition to any rules that limit or altogether preclude the use of funds to support excess capacity or shared use, if it chooses to proceed with an Infrastructure program, the Commission should create the 60-day comment window for the submission of any and all information that may be relevant to examining the broadband “ecosystem” in and around the area in which the proposed project would be funded.

B. The Scope and Extent of USAC’s Oversight Obligations Would Increase Dramatically Because of the Infrastructure and Broadband Services Programs.

The Commission would rely heavily on USAC to review, approve and oversee the Infrastructure Program and the Broadband Services Program in addition to all its other responsibilities.¹⁹ The NPRM proposes to increase the demand for funds from the current \$60.7 million in funding year 2009 up to a \$400 million cap; this funding increase and other proposed reforms would necessarily increase USAC’s oversight obligations.²⁰ USAC must create and

¹⁸ NPRM, ¶¶ 65, 67, 73-79.

¹⁹ *Id.* at ¶ 16. USAC is a public non-profit corporation established by the Commission to administer the USF programs. USAC collects the USF contributions and distributes universal service support according to the Commission’s rules.

²⁰ *Id.* at ¶ 9.

maintain the application website, review all applications and proposed budgets, and select the winning projects.²¹ USAC must apply the Commission’s prioritization rules and notify the participants of their eligibility status.²² Each step of the project commitment phase for each application must be reviewed by USAC.²³ USAC must also provide additional coaching and instruction to winning applicants, and conduct technical and financial reviews of all proposed projects.²⁴ The Commission anticipates that USAC will request and review additional data and materials as needed, prepare and provide funding commitment letters, make disbursements to recipients, and conduct audits of the programs and recipients.²⁵

Thorough USAC oversight of the Infrastructure Program, if implemented, will be critical to avoid waste, fraud, and abuse – and particularly to ensure that USF dollars are not misspent on unnecessary and inefficient overbuilding of existing broadband networks. Yet the NPRM provides no additional funding for USAC’s increased oversight responsibilities. The NPRM seeks comment on providing up to \$5 million for broadband trials, but allocates nothing for oversight.²⁶ Moreover, while USAC is well versed in financial review and oversight matters, it is unclear to what degree USAC would have experience and expertise in matters such as reviewing “excess capacity disclosures” or making difficult technical determinations as to whether a particular project represents an “overbuild” of existing or easily upgraded network capacity. The Commission should ensure that USAC has adequate expertise on hand and all resources necessary to fulfill its additional duties to scrutinize and oversee carefully applications for the new Infrastructure and Broadband Services Programs.

²¹ *Id.* at ¶¶ 15, 16.

²² *Id.* at ¶ 16.

²³ *Id.* at ¶ 17.

²⁴ *Id.* at ¶ 18.

²⁵ *Id.* at ¶¶ 15-18, 22.

²⁶ *Id.* at ¶ 149.

III. PROPOSALS FOR THE HEALTH BROADBAND SERVICES PROGRAM WILL INCREASE ACCESS TO HEALTH IT IN RURAL AREAS.

NTCA asserts that the RHC mechanism should be for rural areas only, and that the Commission should not expand support to Health Professional Shortage Areas (HPSAs) in urban areas.²⁷ With a finite amount of funds available and in light of the specific need for broadband access in many hard-to-serve rural areas,²⁸ the initial focus of the Commission should be on addressing concerns in such rural areas before turning to other locations. To promote participation in the program and the most efficient deployment of resources, NTCA also concurs in the proposal to increase reimburse 50% (up from 25%) of recurring monthly costs for eligible advanced services that provide point-to-point connectivity, including dedicated internet access.²⁹ The Commission should include one-time installation charges as an eligible charge,³⁰ as these can often be substantial barriers to implementation and adoption. These suggestions reflect a reasonable approach to increase deployment and broadband access for rural telemedicine.

Finally, the Commission seeks to define the minimum level of broadband capability for providing services (as opposed to infrastructure) under the new Broadband Services Program as 4 Mbps. The National Broadband Plan and the Commission's OBI Tech Paper 5 suggested solo practitioners can use 4 Mbps; larger practices need more.³¹ The minimum approved speed for the Broadband Services Program, however, should never be lower than the national benchmark for all broadband levels. This will broaden the base of potential applicants for broadband

²⁷ *Id.* at ¶ 92, fn. 168.

²⁸ Deployment costs are the most significant barrier to broadband deployment in rural areas. NTCA 2009 Broadband/Internet Availability Survey Report, p. 4, available at: <http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2009ntcabroadbandsurveyreport.pdf>.

²⁹ NPRM, ¶ 93.

³⁰ *Id.* at ¶ 100.

³¹ *Id.* at ¶ 97.

services, keep rural Health IT speeds reasonably comparable to urban speeds, and maximize the options for service to rural health care providers.

IV. THE DEFINITION OF ELIGIBLE HEALTH CARE PROVIDERS SHOULD BE EXPANDED TO INCLUDE SKILLED NURSING FACILITIES, OFF-SITE ADMINISTRATIVE OFFICES AND DATA CENTERS, BUT THE DEFINITION OF “RURAL” ELIGIBILITY SHOULD REVERT TO ITS PRE-2005 FORM.

NTCA agrees with the Commission’s proposal to expand eligibility to include off-site administrative offices, off-site data centers, and skilled nursing facilities as eligible providers.³² In rural areas, such facilities can be integral to the provision of health care using telemedicine and health IT.

As part of its reforms, however, the Commission should also reinstate the pre-July 1, 2005 definition of the “rural” rate benchmark for services obtained under the RHC mechanism. This will maintain eligibility for many rural hospitals and other service providers that were eligible for RHC funding under the earliest versions of the RHC programs. It will also promote a wider swath of applications from rural areas going forward, leaving USAC with the ability to select the most meritorious candidates from among that broader pool. NTCA filed comments describing this issue on August 30, 2010, in response to a petition by the Nebraska Public Service Commission in this docket.³³ Briefly, the Commission set the rate in 1997 that telecommunications carriers could charge eligible rural health care providers for telecommunications services, using as a benchmark, the highest tariffed or public rate for a similar service in the closest city in that state over 50,000 in population. In 2004, the Commission reduced the relevant population count from 50,000 to 25,000. The FCC

³² *Id.* at ¶¶ 116-127.

³³ NTCA Initial Comments, *Nebraska Public Service Commission Request to Permanently Grandfather Rural Health Care Providers*, WC Docket No. 02-60, DA 10-1516 (filed Aug. 30, 2010).

subsequently grandfathered those health care providers who were no longer eligible due to this “rural” definition change until June 30, 2011.

On July 25, 2010, the Nebraska Public Service Commission filed a request to grandfather eligibility under the first “rural” standard to prevent some of its hospitals from losing over \$200,000 in annual funding from the RHC mechanism. The Nebraska request correctly highlights the need for the Commission to revert to the first “rural” standard. Although the Commission did not address this in its NPRM, the Commission should revise its “rural” rate benchmark definition to reflect the former 50,000 city population standard.

V. THE COMMISSION SHOULD GIVE PRIORITY TO EXISTING RHC PROGRAM PARTICIPANTS, TO EXISTING UPGRADABLE NETWORKS, AND TO PROJECTS THAT HIRE LOCALLY. THE COMMISSION SHOULD ALSO INDEX RURAL HEALTH CARE SUPPORT TO RETAIN THE VALUE OF THE RURAL HEALTH CARE INVESTMENT.

NTCA agrees that the Commission can likely expect substantial demand for support from the revised RHC programs. Recognizing this, the Commission seeks comment on prioritization of factors for consideration.³⁴

The Commission should establish a priority for existing RHC and RHC Pilot Program project recipients. These project recipients are already familiar with USAC administration and the Commission’s goals for rural health care.³⁵ Priority should also be given to projects that propose to use existing upgradable networks over proposals to build new networks – leveraging upgrades to existing networks will allow the Commission to realize a better “bang for the buck”

³⁴ NPRM, ¶¶ 128, 129.

³⁵ A useful analogy arises out of the Broadband Initiatives Program, under which the Rural Utilities Service (“RUS”) was required by law to give preference to former participants in certain RUS programs. In doing so, Congress clearly recognized the added value of participation by entities familiar with comparable program rules and readily able to engage in the kinds of network deployment required under the program. *See* Pub. Law 111-5, at Div. A, Title I.

in using program funds and such projects are almost certainly much better positioned to complete deployment in a timely manner. Allowing public comment on the applications as recommended earlier in these comments will also assist in determining whether upgrading existing networks is more cost effective over a long term (10 to 20 years) than building new networks. Finally, the Commission should give priority to projects that hire local vendors and subcontractors. Such a measure will have the added benefit of enhancing job creation and economic development in rural areas. Directing USAC to implement these priorities will better ensure that USF funds for rural health care will be spent efficiently and better serve the public interest. Given the expected high demand for RHC funding and the finite resources of the program, the Commission should not give priority at this time for projects that could be funded by other USF programs, like schools and libraries, public safety, low-income.³⁶ Should program demand fail to materialize as anticipated, nothing would preclude the Commission from revisiting this decision at a later date.

Finally, to protect the value of America's investment in rural health care, the Commission should index the RHC funding cap to inflation as is being considered for the E-rate funding mechanism.³⁷ In the pending E-rate NPRM, the Commission seeks to index E-rate funds "on a prospective basis, so that the program maintains its current purchasing power in 2010 dollars."³⁸ The proposed E-rate index is the quarterly-released gross domestic product chain-type price index (GDP-CPI) and is the same index the Commission uses to inflation-adjust revenue thresholds for various accounting and reporting purposes.³⁹ As with the E-rate proposal, the RHC support mechanism should remain at the level from the previous funding year during

³⁶ NPRM, ¶ 79.

³⁷ *In the Matter of Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan For Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Notice of Proposed Rulemaking, FCC 10-83 (rel. May 20, 2010) (*E-Rate NPRM*), ¶¶ 84-85.

³⁸ *Id.* at ¶ 84.

³⁹ *Id.* at ¶ 85.

periods of deflation.⁴⁰ The justifications for allowing the E-rate cap to rise with the rate of inflation apply equally to the Rural Health Care USF support mechanism. As with the E-rate, indexing the RHC mechanism will allow rural physicians, nurses, hospitals and other health providers to continue to benefit from upgraded broadband connections for faster and better broadband service as demand increases and technologies change. Supporting telemedicine and Health IT services in rural America is just as critical as supporting America's schools and libraries. The Commission should therefore take the same steps to index the RHC support mechanism to the rate of inflation.

VI. CONCLUSION.

For these reasons, if it chooses to implement an Infrastructure program, the Commission should create a 60-day comment window after all applications are posted to allow for public input on applications and to avoid the waste and inefficient use that would arise from overbuilding or underutilizing existing networks. The Commission should also ensure that USAC has adequate resources and expertise to scrutinize and oversee carefully the applications for the new Infrastructure and Broadband Services Programs. With respect to definitions, the Commission should expand the definition of eligible health care providers to include off-site administrative offices, off-site data centers, and skilled nursing facilities, and the Commission should also revise its "rural" eligibility definition to reflect the former standard, which used a city population of 50,000 as the rate benchmark for rural health care provider service rates.

Increasing the discount for broadband services to 50% of eligible costs, including a one-time installation charge, for rural areas and keeping the minimum level of broadband capability at the national benchmark for all broadband services will advance broadband deployment for

⁴⁰ *Id.* at ¶ 84.

telemedicine in rural areas. Finally, the Commission should index the RHC funding cap to inflation – as is being considered for the E-rate funding mechanism – to preserve the value of rural health care investment.

Respectfully submitted,



By: /s/ Michael Romano
Michael Romano
Senior Vice President - Policy

By: /s/ Karlen Reed
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September 8, 2010

CERTIFICATE OF SERVICE

I, Rita H. Bolden, certify that a copy of the foregoing Comments of the National Telecommunications Cooperative Association in WC Docket No. 02-60, FCC 10-125, was served on this 8th day of September 2010 via electronic mail to the following persons:

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