

**Before the
Federal Communications Commission
Washington, DC 20554**

_____)	
Further Inquiry into)	
Issues Related to Mobility Fund)	WC Docket 10-90
)	
Phase II)	WT Docket 10-208
_____)	

To: Chief, Wireless Telecommunications Bureau
Chief, Wireline Telecommunications Bureau

Comments of NTCH, Inc.

NTCH, Inc. (“NTCH”), by its attorneys, hereby offers these comments in response to the Commission’s November 27, 2012 request for input on the Mobility Phase I process. As the Commission has forthrightly recognized, a number of lessons can be learned from the Phase I process both for price cap carriers and Phase I Mobility Fund participants. These lessons can be applied to streamline the Phase II process, direct the funds to the entities who will use it most efficiently to deliver the desired broadband services, and save the Fund (and ultimately American ratepayers) hundreds of millions of dollars.

Two themes will pervade these comments. First, wireless carriers as a rule can deliver broadband service to currently unserved areas (which now tend to be rural areas rather than densely concentrated urban areas where wireline carrier have an efficiency edge) much more economically than wireline carriers. The Commission should take advantage of that natural efficiency in shaping the most economical and expeditious plan to get broadband to the public. Second, the Commission must be a prudent steward of public funds, relying on a combination of market forces, licensing policy, and a broad competitive bidding field to obtain the desired results at the lowest cost.

I. The Commission Should Repurpose Unassigned Phase I Funds to Mobility Phase II

The Commission recently issued a Further Notice of Proposed Rulemaking (FCC12-138) seeking comment on how to incentivize price cap carriers to take the \$185 million that was left unclaimed from the \$300 million allocated to price cap carriers for broadband build-out. The reason that price cap carriers did not claim the money was because they did not feel they could meet the obligation to deliver broadband service to unserved areas for the specified \$775 per location. It remains unclear why the Commission gave price cap carriers access to \$300 million in CAF funds on a non-competitive basis in the first place. In an ideal world unclouded by political considerations, the Phase I build-out money would have been awarded to *any* carrier, wireline or non-wireline, which would be willing and able to do the job for the lowest amount of subsidy from the Fund. It is entirely possible, if not probable, that fixed or mobile wireless companies would have been perfectly capable of delivering the prescribed broadband speeds in unserved areas for \$775 a location. They never got the chance to bid for that opportunity.

Having given price cap carriers a full opportunity to receive CAF funds on a preferred, sole source, no-bid basis, the Commission should move to a market-based system for achieving its broadband goals. The Commission is now considering using a \$35,784 per mile metric as the standard for fiber deployment of broadband. NTCH believes that it – and presumably other wireless carriers – can comfortably deliver high quality broadband service meeting the 4mbps upstream and 1 mbps downstream standard required for Phase I for at least *one-tenth* of that amount in many areas that remain unserved after the initial round. Rather than broadening the definition of what is “unserved” to include many areas that already have some degree of broadband service (as the Commission is now proposing), the Commission should instead broaden the pool of recipients who might be willing and able to deliver broadband to truly unserved areas for the originally contemplated amount – or less. It’s as though the Commission is deviating from its original intent to expand broadband coverage to unserved areas simply in order to be able to induce price cap carriers to take more of the money off the Commission’s hands. This approach, to be sure, will quickly dispose of \$185 million, but it will not do anything to achieve the original goal of providing broadband to those who actually don’t have it.

At the same time, there is some possibility that winning bidders in the Mobility Phase I auction will fail to meet the strict requirements set by the Commission for the long form stage. The letter of credit and other requirements were so rigorous as to deter many companies from participating, and those who did may now be ruing their winning bids. We would expect, therefore, that some of the Mobility Phase I money might also be freed up for re-distribution.

While the normal remedy here would be to conduct an auction of the unclaimed or defaulted on Phase I monies for both the price cap carriers and wireless carriers, the quicker course is to simply roll those Phase I funds into a Phase II auction where the funds can be used to support operational provision of broadband service by the winning carrier. The winning carriers would have to agree to build-out on their own dime broadband facilities to the required speed levels in the unserved areas where they bid. This would relieve the public of the burden of supporting the build-out in the first instance. However, carriers would have a strong incentive and business justification for undertaking build-outs in marginal economic areas because they could count on levels of ongoing support from Phase II that will reliably sustain operations on an ongoing basis. As a simple fail-safe, the Phase II money would not start to flow until the facilities were constructed and operational.

As noted before, the \$185 million in price cap money should be available to any carrier who is willing and able to deliver broadband to unserved areas. Any available Mobility Fund money would presumably have to be limited only to mobile carriers since the purpose of that Fund is more narrowly targeted at mobile broadband. This process rationally and quickly distributes the available funds to those who can meet the Commission's objectives at the lowest cost. It also preserves and furthers the Commission's original goal of bringing broadband to truly unserved areas rather than areas that already have some broadband.

II. Phase I Recipients Should be Barred from Receiving Phase II Funds

At an earlier stage of this proceeding, NTCH argued¹ that Phase I and Phase II should actually be integrated because no one could develop a rational business plan to serve a marginal or economically unsustainable area with broadband unless they knew not only how much of a

¹ See NTCH's December 29, 2011 Petition for Reconsideration filed in this Docket.

subsidy they were going to be receiving for construction but also how much they could expect in continuing operational support. The Commission rejected that concept. Instead, it required applicants for Phase I Mobility funds to affirmatively certify “that they [are] financially and technically capable of providing 3G or better service within the specified timeframe in the geographic areas for which [they seek] support” and that they “can provide the requisite service without any assurance of ongoing support for the area in question after Phase I support has been exhausted.” *Transformation Order* at Para. 401.² In other words, a winning Phase I applicant had to certify that it was fully capable of not only building out the broadband facilities using the Phase I funds, but that it could actually operate them without further support. Phase I recipients were therefore clearly demarcated from prospective Phase II recipients since Phase I recipients, by definition, would not need any further funds to support operations.

In the “*Further Inquiry into Mobility Phase II PN*,” the Commission seemed to waver from that clear demarcation. It pointed to language in the *Transformation Order* indicating that an area would not be considered “unsubsidized” for Phase II purposes if there was a recipient of Mobility Phase I funds designated for that area. *Further Inquiry* at para. 7. The Commission did indeed make that comment, but deeming an area “unsubsidized” is entirely different from proposing that Phase I recipients themselves should also be able to double-dip in the Phase II trough. It is not clear whether the Commission intended to open that window, but if so, it should be firmly shut.

Because the Phase I eligibility criteria required winning bidders to certify that they could and would be able to operate the constructed facilities without support, it would be bad policy – not to say irrational – for the Commission to then permit those same carriers to seek support for operations. Such a bid would either be unnecessary – why should the public subsidize a company which has its own sources of funding to operate facilities without government support? -- or a direct contradiction of the winning bidder’s certification that it had the necessary operating funds available in the first place. If anything, a bid by a Phase I winner to participate

² Connect America Fund, et al., WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (“*Transformation Order*”).

in Phase II should be grounds for automatic disqualification under Phase I and recovery of any funds paid out.

III. The Phase II Auction Should be Delayed Pending Completion of the 700MHz Build-Out

NTCH also argued at an earlier point in this proceeding that the Commission should let the licensing process do the work of ensuring broadband build-out. Specifically, we suggested that the Commission should simply require AWS-3 licensees to build-out broadband at the prescribed speeds to unserved areas as a condition of their license acquisition. By requiring that build-out upfront, the Commission could have saved the public the \$500 million dollars per year that it now proposes to spend for Phase II. Of course, the imposition of that obligation might have dented slightly the auction price that could be fetched for that spectrum, but the savings over the 10 year Phase II term would have been substantial, not to mention the elimination of the administrative costs of the auction and post-auction distributions of funds. The Commission dismissed that idea, to the detriment of the public's pocketbooks, but a corollary to that theory now presents itself.

The 700 MHz A and B block licenses are coming up on their substantial service deadlines next June. These 12 MHz licenses will generally be used for broadband across the United States. The 700 MHz service rules require these licensees to be offering service in at least 35% of their service areas by June, an unusual area-based rather than population-based obligation which will require them to cover very large landmasses, much of which is currently unserved. An additional 35% must be served by the end of their license terms, thus ensuring that a very large proportion of the US area will have access to broadband without any government support at all by 2019. Since this massive build-out effort is now actively underway,³ it is very likely that the substantial service requirements associated with these licenses will satisfy to a very significant degree the need for broadband access in unserved areas. One might liken the situation to a county which is feverishly building a road to a new development using public funds, while ignoring the fact that a private developer is building a parallel road to the same area

³ Carriers like AT&T have already submitted substantial service showings demonstrating achievement of the 35% threshold.

as required by its zoning approval for the new development. If the licensing process is causing a service void to be filled, there is no need to waste public money to duplicate that service.

The Commission should therefore delay the auction until at least the fall of 2013 and then assess at that time which areas remain unserved. The likelihood is that the unserved areas will be so reduced that there will be no need to spend some or any of the \$500 million per year to supplement the private initiatives.

IV. Facilities-based Lifeline-Only ETCs Should be Eligible for Phase II Funds

In its *Fourth Order on Reconsideration* in this Docket⁴, the Commission addressed the question of whether Lifeline-only ETCs should be eligible to participate in the Mobility Fund. It decided that many Lifeline-only ETCs are not facilities-based and therefore would not be in a position to offer the services contemplated by Phase II. It also indicated that it could not “draw a blanket conclusion that a party designated as a Lifeline-only ETC would be qualified to expand or deploy network facilities to meet a Mobility Fund recipient’s public interest obligations.” *Id.* The Commission needs to re-think this position since it is doing a disservice to the public treasury and the people that the Mobility Fund is intended to help.

In Phase I of the Mobility Fund, the Commission’s pool of prospective recipients was severely circumscribed by the fact that potential full ETC applicants could not realistically hope to get ETC status in the few months between the release of the *Transformation Order* and the deadline for Mobility Fund applications. As NTCH pointed out in a petition for reconsideration of the *Transformation Order*, it had taken the Commission more than two years to act on its simple Lifeline-only ETC designation, and in states that process such requests, the designation process is often delayed by objections raised by competitors. In the best of circumstances, the ETC designation process can take more than a year and the whole exercise by both petitioners and regulators would be completely wasted for petitioners who did not win the auction. NTCH therefore suggested allowing applicants to apply for Mobility Phase I benefits and get relatively automatic ETC designation after they were provisionally awarded the funds, a suggestion which the Commission rejected.

⁴ Fourth Report and Order on Reconsideration in Docket 10-90, FCC12-82, rel. July 18, 2012, at Para.20.

In the aftermath of Mobility Phase I, NTCH has seen a carrier be awarded approximately \$20.8 million in Phase I funds to serve an unserved area of North Carolina (about \$35,000 per roadmile). This unserved area adjoins an area where NTCH's affiliate provides service. Had NTCH been eligible to receive Phase I funding in North Carolina, it is confident that it could have built out a system to provide equal or better service in that region for well under \$3 million in capital costs. But the delays inherent in achieving ETC status prevented it from being eligible to bid for ETC funds to accomplish that. Instead, the public (through their contributions to USF) are needlessly flushing \$17 million down the drain. This happens to be one situation with which NTCH is intimately familiar, but we assume it is repeated in region after region across the United States. The current Mobility Fund mechanism effectively entrenches and rewards incumbent ETCs who have to date failed to provide service to unserved areas, while preventing new, innovative, low cost providers from having a chance to offer significantly less expensive and equal or better quality service. This is simply bad policy and poor stewardship of the millions of dollars that the Commission administers through the USF. The people have a right to have their funds be applied effectively rather than squandered.

NTCH proposes two potential fixes to this problem. First, the Commission could simply make Lifeline-only ETCs eligible for Phase II money. This benefit would have to be limited to facilities-based Lifeline-only ETCs, since non-facilities-based carriers who are dependent on the facilities of underlying carriers could obviously not propose to serve "unserved" areas. (The underlying carrier would be serving those areas so they could not, by definition, be unserved.) A facilities-based Lifeline-only provider would, of course, have to agree to "meet a Mobility Fund recipient's public interest obligations," thus alleviating the concern which prevented the Commission from permitting participation by such carriers in the first Phase. Importantly, by expanding the access of Lifeline-only ETCs to Phase II money, the Commission would be directly furthering the purposes of Lifeline support. Areas which are unserved have the *greatest* need for Lifeline-only services because in these areas *any* service is truly a lifeline and might actually be able to save lives. In short, there is no reason not to make Lifeline-only carriers eligible for this support and every reason to do so.

V. ETCs Could Be Designated Expeditiously Under Section 214 (e)(3)

A second avenue of support is offered by section 214 (e)(3) of the Act.⁵ That section of the statute requires the appropriate ETC designating body, whether the FCC or a state PUC, to determine which carriers are best able to provide services supported by USF support mechanisms in unserved areas. The statute then requires the Commission or the state PUC to designate the selected carrier as an ETC to serve those unserved areas.⁶ The way this plays out in the Mobility Fund context is that the Commission will have already, as a precursor to the auction, made the determination of which areas are “unserved” by any carrier and thus eligible for 214(e)(3) treatment. Then the Commission can conduct the auction, with the proviso that any winning carrier which is not already designated as an ETC must agree to meet all ETC obligations for the areas in which it is awarded funding. The auction would, by definition, determine the carrier “best able to provide such service to the requesting unserved community.” The final step is for the Commission or the PUC to simply designate the winning carrier as an ETC in those areas without further ado, as contemplated by the statute. Since the statute gives the Commission and the PUC no discretion to do anything but designate the carrier as an ETC, there is no need for a time consuming petition process, study-area redefinition, or any other administrative rigamarole: the statute *requires* ETC designation when a carrier is deemed best able to serve an otherwise unserved area. In the case of the Commission, the Bureau could simply grant ETC status at the same time that it grants the auction application. In the case of PUCs, the winning applicant could petition the PUC for ETC immediately upon the grant of the award, and the PUC would have to grant the designation.

⁵ **(3) Designation of eligible telecommunications carriers for unserved areas**

If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section [254\(c\)](#) of this title to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services or an area served by a common carrier to which paragraph (6) applies, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof. Any carrier or carriers ordered to provide such service under this paragraph shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

⁶ The statute speaks in terms of unserved areas which “request” service supported by the USF. It is unclear how such a “request” would be communicated by these unserved areas, many of which are undeveloped and unincorporated. The Commission may safely assume, consistent with the imperatives of the National Broadband Plan, that any area not receiving broadband service requests it.

The beauty of alternative two is that it opens up the Phase II funding opportunity to all carriers willing to undertake the burdens of providing service to unserved areas -- not just incumbents. And it streamlines the process enormously by a year or more by using the auction process itself to both (i) identify unserved areas subject to Section 214(e)(3) and (ii) determine who the best carrier is to provide the needed services. It then permits -- indeed requires -- an immediate grant of ETC status to the winning party. The result is that the public will have a greater range of potential providers of service and the real likelihood, as in the case of North Carolina, that a provider willing to provide the services at a much lower cost to the public will be selected.

VI. Conclusion

Adoption of the suggestions set forth above will save the public millions of dollars, eliminate a host of expensive and time-consuming administrative proceedings at the state and federal level, and ensure that broadband service is delivered quickly and economically to the areas that need it most. For these reasons the Commission should modify its Phase II procedures as proposed herein.

Respectfully submitted,

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