

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
Universal Service Gigabit Communities)	RM-11703
Race-to-the-Top Program)	

**COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (NCTA) opposes the petition for rulemaking submitted by the Fiber-To-The-Home Council (FTTHC) seeking to use universal service funding for the construction of gigabit fiber networks in Tier II and Tier III markets.¹ The proposal would undermine the Commission’s ongoing universal service efforts, including efforts to bring broadband to currently unserved areas, and would exceed the Commission’s statutory authority. Therefore, it should be rejected.

INTRODUCTION

In its petition for rulemaking, FTTHC asks the Commission to establish a “Gigabit Communities Race-to-the-Top Program” that would distribute up to \$150 million in universal service funding annually to “support the deployment of ultra-high-speed networks with symmetrical gigabit services for community anchor institutions and their surrounding related neighborhoods in Tier II and Tier III markets.”² The proposed program would provide federal subsidies from the Universal Service Fund (USF) for the construction of gigabit networks in up

¹ Fiber-to-the-Home Council Americas’ Petition for Rulemaking to Establish a Gigabit Communities Race-to-the-Top Program, RM-11703 (filed July 23, 2013) (Petition).

² *Id.* at 1.

to 15 communities each year over the five-year life of the program. In total, the Commission would fund up to 75 projects, up to \$10 million per project, for a total cost of up to \$750 million. The petition proposes that funding for the program would come from “Connect America Fund Phase I and Phase II monies that are not accepted or are refused” by incumbent local exchange carriers prior to the time when support would be distributed via competitive bidding.³

The Commission should decline to establish the proposed subsidy mechanism. As NCTA explains in these comments, the Commission should not devote limited USF resources to the construction of fiber networks in Tier II and Tier III markets that already have broadband service. The petition relies almost entirely on speculation about the economic and social effect such subsidies might have and the limited anecdotal evidence it provides falls far short of justifying creation of a new \$750 million subsidy program. Universal service support is funded by American consumers to ensure that individuals or communities are not being left behind; it is not intended to fund the construction of networks in areas of the country that already have broadband service.

I. FUNDING GIGABIT NETWORKS IS A POOR USE OF FEDERAL SUBSIDIES

The Petition rests on three critical assumptions: (1) existing services provided to community anchor institutions are inadequate; (2) gigabit fiber networks are the only way to address those inadequacies; and (3) a federal subsidy program is the only way to stimulate investment in such networks. None of these assumptions withstands scrutiny, and consequently, the petition provides a wholly inadequate basis on which to create a new \$750 million federal subsidy mechanism.

³ *Id.* at 4.

A. Overbuilding of Existing Networks Is Wasteful

The proposed gigabit subsidy mechanism would in almost all cases result in subsidized overbuilding of existing broadband networks, a practice the Commission is actively moving to eliminate in the context of high-cost universal service support.⁴ FTTHC pays lip service to this principle in the petition, but makes clear in a footnote that only gigabit networks offering “unlimited bandwidth” would be spared from government-subsidized overbuilding.⁵ An incumbent provider would have the ability to block a project from receiving subsidies, but only if the incumbent were willing to commit to build the same network without receiving any subsidy.⁶

FTTHC’s cavalier dismissal of all incumbent networks and services is totally unjustified. Cable operators generally offer “business class” broadband throughout the footprint of their hybrid fiber-coax networks. For business customers with more significant data needs, including community anchor institutions, most cable operators offer Metro Ethernet and other fiber-based services that offer speeds of 1 Gbps or even 10 Gbps. In almost all cases, these services are provided over networks that have been built without any federal subsidies. FTTHC makes no attempt to demonstrate or explain why these existing services are inadequate to meet the needs of community anchor institutions, let alone why American consumers should be forced to spend \$750 million to overbuild those networks. For this reason alone, FTTHC’s request should be rejected.

⁴ *Connect America Fund*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17767, ¶281 (2011) (*CAF Order*).

⁵ Petition at 18-19, n.49.

⁶ *Id.* at 19.

B. There Are Vastly Better Uses of Limited Universal Service Fund Resources

NCTA disagrees with FTTHC's assertion that subsidizing gigabit fiber networks is a worthwhile use of the money that American consumers contribute to the USF program. Adopting FTTHC's proposal would undermine the Commission's ongoing efforts to extend broadband to all Americans. Although FTTHC suggests that its proposed program "would not require an increase in the current universal service distribution budget,"⁷ that is plainly not the case unless the Commission reduces the amount of funding it distributes through the competitive bidding mechanism that will be used for CAF Phase II. Put differently, every dollar the Commission devotes to the proposed program is a dollar that is not being made available to provide broadband to consumers in price cap areas that currently have no broadband service whatsoever. In addition, establishing and implementing an entirely new grant program would require a significant commitment of the Commission's administrative resources.

While the negative consequences to the Commission's existing USF programs are clear, the benefits in areas that would receive these new subsidies are less clear. The petition relies almost entirely on hyperbole about how subsidizing the construction of networks will lead to the development of new applications, which in turn will "open doors to as-yet-undreamed of activities and operations" and "spark more complete networks in the communities where they are located and, eventually, a nationwide roll-out of additional ultra-high-speed network builds."⁸ All of this is pure speculation. The petitioners offer no meaningful financial or economic analysis or any effort to compare the costs and benefits of gigabit fiber with the services already

⁷ Petition at 4.

⁸ *Id.* at 16.

available from (and increasingly being made available by) providers operating in the marketplace today.

While most of the Petition relies on speculation about the purported benefits of gigabit fiber networks, FTTHC points to anecdotal evidence regarding the gigabit networks that have been built in Kansas City and Chattanooga as “proof” that federal subsidies will yield transformative effects in communities where they are provided and beyond. These anecdotes are not a substitute for meaningful economic analysis of these projects, nor do they adequately demonstrate that such projects are sufficiently beneficial as to warrant \$750 million in new federal subsidies. While there may in time be applications and services developed that will require gigabit fiber networks, the Petition makes no showing whatsoever that private-sector broadband providers will be unable to accommodate this need.

There are no data to indicate that the anecdotal examples cited in the petition provide workable models, or that government subsidies should be spent to emulate them.⁹ For example, Google Fiber’s construction in Kansas City may indeed become a useful model for other private-sector providers, but it is yet untested. And as many commentators have observed, perhaps its most critical element was the willingness of municipal governments to relax and streamline regulations so as to attract private investment and facilitate construction of facilities.¹⁰ These

⁹ In Chattanooga, service provider EPB charges \$300 per month (previously \$350 per month) for 1 Gbps service despite having relied on taxpayer funds for the construction of its network, and it has reportedly failed to attract a meaningful number of subscribers for this service. See Ellis Smith, *EPB Urged to Cut Gig Internet Price in Chattanooga*, Chattanooga Times Free Press (Aug. 18, 2012) (indicating that, as of approximately one year ago, 34 customer subscribed to EPB’s 1 Gbps service), available at <http://www.timesfreepress.com/news/2012/aug/18/epb-urged-to-cut-gig-price-chattanooga/>. For its part, after almost a year in the marketplace, Google has not publicly released any subscription figures for its Kansas City project.

¹⁰ Press Release, *Statement of Commissioner Ajit Pai on his Visit to Kansas City’s Google Fiber Project* (rel. Sept. 5, 2012) (“The most important lesson I have learned thus far is this: It is critically important that states and local communities adopt broadband-friendly policies when it comes to rights-of-way management.”), at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-316114A1.pdf.

deregulatory, pro-investment measures could be taken by any local government, including the Tier II and Tier III cities that are the proposed beneficiaries of this new federal subsidy mechanism. If government is to do anything to encourage investment in networks of the future, these kinds of measures, not governmental subsidies, are the more useful and sustainable path to be followed and encouraged.

II. FUNDING GIGABIT NETWORKS WOULD EXCEED THE COMMISSION’S STATUTORY AUTHORITY

FTTHC fails to identify a plausible basis of statutory authority for the Commission to adopt its proposal. It argues that both Section 254 and Section 706 provide such authority, but neither of these arguments withstands scrutiny.

As to Section 254, the proposed program is completely inconsistent with the fundamental purpose underlying the Universal Service Fund. Whereas the primary purpose of the universal service high-cost support program is to ensure that people are not left behind (through lack of access to services that are “reasonably comparable” to services typically purchased in urban areas),¹¹ the purpose of the gigabit subsidy mechanism is to enable a small number of communities to receive faster broadband speeds than the vast majority of Americans in urban areas have chosen to purchase.

In defining universal service, Section 254(c)(1) of the Act requires the Commission to consider the “extent to which such telecommunications services: (A) are essential to education, public health, or public safety; (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers; (C) are being deployed in public telecommunications networks by telecommunications carriers; and (D) are consistent with

¹¹ 47 U.S.C. § 254(b)(3).

the public interest, convenience, and necessity.”¹² Based on these four factors, there is no basis under which networks built pursuant to the proposed program would qualify for universal service funds.¹³

First, gigabit services clearly have not “been subscribed to by a substantial majority of residential customers.”¹⁴ To the contrary, as noted above, even in the very limited number of areas where those services have been offered, a miniscule number of residential customers actually are purchasing service at gigabit speeds.¹⁵ For example, while gigabit services have been available in Chattanooga (a market touted by FTTHC) for four years, reportedly the service has very few subscribers.¹⁶

Second, even where they are being deployed, gigabit networks generally are not being deployed by “telecommunications carriers.”¹⁷ Google Fiber, for example, has been vocal about not offering voice services because “there are all of these special rules that apply” and therefore it is not considered a telecommunications carrier.¹⁸ Many of the other gigabit networks, such as those in Chattanooga and Lafayette, Louisiana, have been built by (or in conjunction with)

¹² *Id.*, § 254(c)(1).

¹³ To be sure, in the *CAF Order*, the Commission found that it had the authority to condition receipt of universal service support on the deployment of broadband networks even though broadband Internet access service is not a supported service under Section 254(c). *See CAF Order*, ¶¶ 60-65. However, the Commission cannot extend this theory to condition support on the deployment of gigabit networks because, as explained above, doing so would not promote the universal service policies outlined in Section 254(b).

¹⁴ *Id.*, § 254(c)(1)(B).

¹⁵ *See supra* note 9.

¹⁶ *Id.*

¹⁷ 47 U.S.C. § 254(c)(1)(C).

¹⁸ *Google considers but drops plans to include phone service, too*, Kansas City Business Journal (Dec. 4, 2012) (“We looked at doing that. The cost of actually delivering telephone services is almost nothing,” [Milo] Medin [Vice President of Google Access Services] said. “However, in the United States, there are all of these special rules that apply.”), at <http://www.bizjournals.com/kansascity/blog/2012/12/google-considers-drops-phone-service.html>.

municipal electric companies. The Petition does not identify any telecommunications carriers that have built such networks.

Third, for all the reasons explained in the previous section, it is not “consistent with the public interest, convenience, and necessity” to devote limited universal service resources to building gigabit networks in areas that already have access to broadband service while millions of American consumers have *no* access to terrestrial broadband service. At a time when the Commission has yet to provide any funding through the Remote Areas Fund or the tribal support mechanism contemplated by the 2011 *CAF Order*,¹⁹ it would be indefensible for the Commission to start handing out subsidies for gigabit networks in areas that already receive broadband service.

While FTTHC devotes considerable attention to the purported benefits that would result from the provision of gigabit services to community anchor institutions, Section 254 does not establish community anchor institutions as a separate class of customers that are entitled to special treatment for universal service purposes. Rather, Section 254 identifies a limited subset of community anchor institutions – schools and libraries and rural healthcare facilities – and directs the Commission to establish programs specifically geared to those institutions, which it has done.²⁰ FTTHC makes no attempt to explain how Section 254 can be read to authorize the Commission to create yet another special funding mechanism to meet the needs of community anchor institutions not covered by the E-Rate and Rural Health programs (or to provide additional support for the institutions that already are covered by those programs).

¹⁹ *CAF Order*, 26 FCC Rcd at 17675, ¶ 28 (“The Mobility Fund will include ongoing support for Tribal areas of up to \$100 million per year.”): *id.* ¶ 30 (“We allocate at least \$100 million per year to ensure that Americans living in the most remote areas in the nation . . . can obtain affordable access through alternative technology platforms, including satellite and unlicensed wireless services.”).

²⁰ 47 U.S.C. § 254(b)(6), (h).

FTTHC suggests that even if Section 254 does not authorize the creation of a gigabit subsidy mechanism, the Commission still could create such a program pursuant to its authority under Section 706(b), but this argument is unavailing. The Commission has never defined “advanced telecommunications capability” for purposes of Section 706 to mean gigabit services.²¹ Even if Section 706(b) is construed to grant the Commission independent authority not granted elsewhere in the Act, such authority is exceedingly narrow and permits the Commission only to take “action to accelerate” deployment of advanced telecommunication services to areas that would otherwise lack them. The Commission has rightly made no finding that the deployment of gigabit services is not reasonable and timely, so there is no question that it lacks authority under Section 706(b) to promote the deployment of such services through a new subsidy mechanism.

CONCLUSION

For all the reasons explained above, the Commission should not establish the program proposed in FTTHC’s petition for rulemaking. The proposal is contrary to the principles governing universal service and would take money away from the more important and statutorily-mandated goal of making broadband available to all Americans.

Respectfully submitted,

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²¹ See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, GN Docket No. 11-121, Eighth Broadband Progress Report (rel. Aug. 21, 2012) at ¶ 7 (“In this report, we assess our nation’s progress to date using the existing speed benchmark of 4 Mbps/1 Mbps.”).