

September 19, 2014

Honorable Fred Upton, Chair
Honorable Greg Walden
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

The Information Technology and Innovation Foundation (ITIF)¹ once again appreciates this opportunity to comment on the initial steps by the House Committee on Energy and Commerce to modernize the Communications Act. ITIF looks forward to future white papers and roundtables as the Committee moves forward with this important project.

The Communications Act of 1934 (the Act) is a complex patchwork of laws, and the time is ripe for a comprehensive re-write. Although a modest “update” that tweaks only the most obvious points of pressure in the aging Act would be of help to drive digital transformation, many of the inefficiencies in telecom regulation emerge after patchwork, piecemeal adjustments are made within the existing legal framework. ITIF urges the Committee to acknowledge the need for a thorough re-write of the laws governing this sector, given the fundamental changes to underlying technology and competition. The Committee should take a holistic approach and bring the Communications Act into the 21st century, doing away with technological silos and clarifying the appropriate scope of regulatory oversight of a fast-paced industry.

Universal service has long been a key policy in telecommunications. The transition from the internal cross-subsidies of Theodore Vail’s “One Policy, One System” to a more modern, economically sound policy is still ongoing. A Communications Act Update can serve as a key opportunity to take stock of the ongoing universal service reforms and continue to strive to secure affordable basic electronic communication services for low-income and high-cost households, with

¹ The Information Technology and Innovation Foundation (ITIF) is a non-partisan research and educational institute – a think tank – whose mission is to formulate and promote public policies to advance technological innovation and productivity internationally, in Washington, and in the states. Recognizing the vital role of technology in ensuring prosperity, ITIF focuses on innovation, productivity, and digital economy issues.

transparent, easy-to-administer distribution and contribution mechanisms that are economically efficient and competitively neutral.

While the high-level principles of universal service are admirable, the specific implementation in the Universal Service Fund has not been without its critics. In particular, the high-cost fund has been singled out as economically inefficient. To put it bluntly, there is no clear policy reason to artificially maintain communications rates below cost for those who can and will pay cost-based rates.

As a starting point, it is important to recognize that the principle that “quality services should be available at just, reasonable, and affordable rates,” is to some extent hortatory – there should certainly be some bounds to the high-cost program. Within these bounds, there needs to be some differences in rates depending on geography. The cost of goods and services vary a great deal by geography, most obviously real estate, but no one would suggest the government should attempt to subsidize all real estate to be uniformly “just, reasonable, and affordable.” Rural areas or areas with difficult terrain should not always pay full freight – some subsidy is often justified given the importance of communications platforms to speech, commerce, and daily life. But these programs should be approached realistically with the recognition that prices should vary with costs at least to some extent. In other words, there is no reason why prices in high-cost areas cannot be somewhat higher than prices in lower-cost urban and suburban areas.

There are also obvious limitations to the geographic reach of the program. Obviously, the high-cost program should first focus on those households only marginally too costly for a private provider to profitably serve. The fund should subsidize a fixed connection to those households where cost exceeds the ability to recoup investment by a set, limited amount, recognizing that some remote locations will have to be served by other technologies, like satellite.² The line must be drawn somewhere. As the National Broadband Plan demonstrated, each additional more costly to serve

² Although satellite may never provide the same latency as a wired connection, the technology has been improving, with some offers up to 15/2 Mbps. *See, e.g.*, HughesNet, “Gen4 Plans,” <http://www.hughesnet.com/?page=Plans-Pricing>.

household quickly increases the demand on the fund.³ A Comm Act Update should ensure that a bulk of a high-cost fund is not spent on a small handful of exceedingly expensive locations, unless we want to see "fiber-to-the-mountaintop."⁴ In other words, it is likely not economically efficient—even when taking into account social benefit—to subsidize the last few percent of households at the top tail of the cost curve.

In addition, high cost areas are not evenly distributed by state. This suggests that there is no reason why high cost states should not contribute something to the high-cost program. As such the program should be transitioned to one where states are required to make at least some matching contribution to funding networks in high cost locations.

An update should also ensure that the Universal Service Fund is neutral with respect to technology. As we transition USF to more general-purpose broadband networks, it is important not to get tied to a particular technology. In many areas, a fixed wireless link, for example, will be a more cost effective means of deploying voice and data services. In other places, it may be cable; in still others, DSL copper (and as noted, for truly high cost places, satellite). Furthermore, we should ensure explicit support for mobile services. Although mobile data services can, in some circumstances, substitute for a wired connection, the converse is not true. Mobility has its advantages and is deserving of support. Regardless, the fund should determine eligibility based on neutral performance metrics.

In addition, metrics of performance should change over time as consumer demand and expectations for throughput grow. "Advanced" communications technologies generally expand out geographically over time based on where companies are first able to recoup the expense of build-out. To expect modest subsidies to enable companies to radically change the cost structure of deploying advanced networks is unrealistic. In this sense, we should expect and accept that most urban and suburban areas will likely have superior telecommunications services than high cost places, if only

³ To its credit, the Commission is already committed to "providing support that is sufficient but not excessive," but Congress should take this opportunity to provide more clarity on where the line between sufficient and excessive lies. *See* Fifth Order on Reconsideration, 27 FCC Rcd at 14557, para. 22.

⁴ *See, for illustration*, Order, In the Matter of Adak Eagle Enterprises, LLC and Windy City Cellular, LLC, DA 13-1578, (July 15, 2013) https://apps.fcc.gov/edocs_public/attachmatch/DA-13-1578A1.pdf.

because technology does not stand still. In other words, cutting edge communications will always be deployed first in low cost, high revenue places. As long as most high cost places though have adequate services – that, granted will evolve over time as technology improves – that is a sign of program success.

The USF program should also have a conscious strategy of encouraging firms to gain sufficient economies of scale. Currently a great deal of support goes to small rural LECs. Compared to larger firms, these small LECs usually face a higher cost structure and will not be able to put limited support dollars to as efficient of use as larger providers. At the very least, support mechanisms should not discourage large firms from participating in USF. Ideally they should help drive efficient consolidation. The goal of USF should not be to support carriers—large or small—it should be to support consumers in the most efficient way.

Also, a Comm Act Update of universal service should explicitly discourage overbuilding of duplicative networks in high-cost areas. Unfortunately, overbuilding is all too common. Only one fixed and one nomadic network should ever be receiving support in a single geographic area, from any federally-funded support program.

The Committee should also consider expanding the Lifeline program. Compared to the high-cost fund, where support can go to subsidize telecommunications service for those with the ability and willingness to pay higher, cost-based rates, assisting low-income households with both voice and broadband is a more cost-efficient and equitable way to ensuring universal service. There are well-recognized external benefits to society in getting everyone on communications networks. The greater economic, political, and social interactions of an online population justify assisting those for whom cost limits access to voice or broadband services.

However, just as governments should be technology agnostic when it comes to supporting carriers and networks, they should be similarly agnostic when it comes to what technologies consumers use and therefore should allow Lifeline participants to choose their communication platform of choice. The expansion of the program to wireless, although not without its troubles, has seen a growth in demand for the support and legitimate companies that can offer service at remarkably low rates and should be considered a success. Likewise the low-income fund should be

available to subsidize broadband and over-the-top VoIP, with a goal of transitioning to data services. However, if the low-income fund is to be transitioned to broadband support, it should have a cap to ensure funds are efficiently allocated.

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Introduction

ITTA, the Voice of Mid-Size Communications Companies, is a Washington, DC-based industry association dedicated to representing mid-size, incumbent local exchange carriers that provide a variety of communications services to consumers in predominantly rural areas across 45 states.

ITTA is pleased to respond to the Subcommittee on Communications and Technology's White Paper on Universal Service and welcomes the Subcommittee's interest in updating the outdated Communications Act.

Section 254 of the 1996 Telecom Act has served as one of the cornerstones of our nation's communications policy for nearly 20 years. Section 254, which established the federal Universal Service Fund (USF), helped lay the foundation of our modern communication networks. But just as the networks built and maintained by ITTA members continue to evolve, so must our country's universal service policy. ITTA looks forward to continuing to work with Congress to help ensure that our nation's universal service policies continue to keep pace with our dynamic communications ecosystem.

Thank you again for the opportunity to comment on this important subject.

Please feel free to contact Paul Raak, ITTA's Vice President of Legislative Affairs, by email at praak@ittha.us or by phone at 202.898.1514 with any questions or concerns.

1) How should Congress define the goals of the Universal Service Fund? Should Congress alter or eliminate any of the six statutory principles, codify either of the principles adopted by the FCC, or add any new principles in response to changes in technology and consumer behavior?

The Universal Service Fund is just as important today as it was when Congress enacted Section 254, which directed the FCC to adopt policies based on the principle that quality services should be available at just, reasonable and affordable rates to every American. Today, while technology has evolved, the economics of delivering modern telecommunications services to millions of Americans who live in rural areas has not changed significantly. It continues to be uneconomical to serve vast segments of rural America and Universal Service support remains a critical means of ensuring that rural consumers are not left behind. The underlining public policy goals of the Universal Service Fund therefore remain highly relevant and should be maintained by Congress.

At the same time, Congress should ensure that the FCC or the states do not impose or maintain obligations on carriers to serve high-cost areas unless carriers are afforded access to adequate support. In order to avoid unfunded mandates, Congress needs to ensure that Universal Service programs are sufficiently funded to enable service providers to meet the public policy goal of connecting millions of Americans to reliable and sufficient broadband. In order to continue the success of universal service policy, ensure the sustainability of the existing budget, Congress should direct the FCC to expand the universal service contribution base to include broadband services.

2) Universal service was created to fund buildout in areas incapable of economically supporting network investment. How should our policies address the existence of multiple privately funded networks in many parts of the country that currently receive support?

The rules adopted by the FCC's Transformation Order in 2011 that are in the process of being implemented limit universal service support to areas where there is no unsubsidized competition. ITTA supports these rules.

3) What is the appropriate role of states and state commissions with respect to universal service policy?

The states have played a valuable role in promoting universal service over the past decades. However, as technology has evolved it is reasonable to consider the proper role the states should play on universal service policy going forward.

The states traditionally have played an important role by providing "boots on the ground" analysis of the practical impact policies passed by Congress and administered by the Federal Communications Commission have had on consumers. Going forward, the states should continue this advisory role to the FCC on universal service policy. They are in the best position to

advise the Commission as to whether the universal service obligations adopted by the FCC are being met and whether those obligations are having their intended effect for consumers.

To the extent Congress concludes that the states should exercise a more substantive role with respect to filling the gap between the federal Fund and the total funding that is needed to achieve universal service in a state, Congress should ensure that no state-imposed universal service obligation imposes an unfunded mandate on any service provider. In addition, Congress should prohibit the states from imposing or maintaining any universal service obligations on incumbent carriers that they do not also apply to competitive or non-regulated service providers. Congress should insist on regulatory parity among all providers in today's competitive marketplace.

4) What is the appropriate role of the Federal-State Joint Board on Universal Service in a broadband, IP-enabled, largely interstate world? What is the appropriate role of related joint boards, such as the Federal-State Joint Board on Separations or the Federal-State Conference on Advanced Services?

As stated in response to Question #3, the states can play a valuable role in advising the Commission on how federal universal service policies are being implemented at the local level and the impact they are having on consumers. In 1996, Congress rightfully established the Federal-State Joint Board on Universal Service to advise and make recommendations regarding universal service. Going forward, Congress should encourage the Commission to utilize the expertise of the Federal-State Joint Board on a consistent basis.

5) The Universal Service Fund is one of several federal programs that support buildout of communications facilities. Are current programs at other federal agencies, like NTIA or RUS necessary?

First, Congress should end the practice of RUS and NTIA using taxpayer dollars to overbuild existing networks. The Universal Service Fund is unique in that consumers, not taxpayers, contribute to the USF. Programs administrated through NTIA and RUS are funded directly by American taxpayers. Therefore, to the extent NTIA and RUS play a role in building or supporting communications networks, their role should be limited such that no taxpayer dollars are being used to overbuild where existing private networks perform the same functions.

One area where federal agencies like NTIA and RUS can play an important role is in broadband education and adoption. Broadband adoption rates among Americans living in rural areas tend to be significantly lower than for those living in more urban areas. Government agencies like RUS can serve an important function by educating consumers on the benefits of broadband. They also can work with service providers and the states to develop grant programs that promote the value of broadband to consumers.

6) How can we ensure that the Universal Service Fund is sufficiently funded to meet its stated goals without growing the fund beyond fiscally responsible levels of spending?

As stated earlier, Congress and the FCC must immediately address the contribution mechanism of the Universal Service Fund. Failure to date to revise how contributions are assessed and who contributes to the Fund is irresponsible in light of the fundamental changes that have occurred in the telecommunications marketplace over the past decade. Continued use of an outdated mechanism that does not reflect today's competitive realities will have the unintended consequence of compromising the viability and success of the overall Fund.

Once the contribution mechanism has been updated, Congress should avoid setting a hard dollar cap on the Universal Service Fund. The FCC should retain the flexibility to set the Fund size to address industry and consumer demands and concerns.

7) Are all of the funds and mechanisms of the current USF necessary in the modern communications marketplace?

The value of the country's broadband networks increases as more Americans are afforded access to those networks. So as the Commission transitions the Universal Service Fund to support broadband services, it is vitally important that Congress continue to promote policies that encourage more, not less, network participation. The USF currently funds the Lifeline Program, the Schools and Libraries Program, and the Rural Health Care Program in addition to providing support to serve high-cost areas. Each of these programs helps make universal service more attainable for more Americans.

8) In lieu of the current support mechanisms, could any of the programs be better managed or made more efficient by conversion to:

- a. A state block grant program;**
- b. A consumer-focused voucher program;**
- c. A technology-neutral reverse auction; or,**
- d. Any other mechanism.**

The federal Universal Service Fund has been a public policy success in large part because of the way in which high-cost support is administered. By collecting surcharges on consumers' telephone bills and distributing those funds to eligible telecommunications carriers (ETC) to provide service in high-cost areas, the Fund operates very efficiently. ETCs understand the demands of their networks and are able to use limited USF support in the most efficient manner possible while meeting the policy priorities established by Congress and enforced by the FCC. ITTA encourages Congress to maintain the current framework for providing support to serve high-cost areas. However, Congress may want to explore whether the current federal Lifeline Fund which, unlike the High Cost Fund, is a social welfare assistance program, would be better administered through a voucher program.



September 19, 2014

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Re: Communications Act Update; Universal Service

Dear Representatives Upton and Walden:

Thank you for the opportunity to comment on universal service as part of your effort to update the Communications Act. You provided a thoughtful white paper on the concept of universal service and asked some valuable questions on how to address the issue going forward, something especially important as the US has transitioned from the paradigm of fixed line telephony to digital internet protocol.

In the re-released book [*Universal Service: Competition, Interconnection and Monopoly in the Making of the American Telephone System*](#), internet governance scholar Milton Mueller expertly documents that universal service meant something else when it was first implemented in the early 20th century. Indeed universal service was about interconnection, not a phone in every home. “Contrary to the prevailing mythology, it was that period of systems competition (1894-1912), not the ensuing period of regulated monopoly, which gave birth to both universal service as a policy prescription and the physical reality of a geographically ubiquitous telephone infrastructure. Moreover, the refusal of Bell and the independents to interconnect with each other actually promoted the rapid geographical extension of the network.” notes Mueller. As such, it is important to re-examine the meaning of universal service as Americans has largely jettisoned traditional telephones.

My one recommendation on universal service is to think of it not in terms in networks, but in terms of “services and applications”. There are many broadband networks in the US today—cable, DSL, fiber to the premises, 4G/TLE, satellite, wifi etc. Creating universal service commitments for each network would be unwieldy and inefficient. Instead Congress should focus on ensuring that key digital services for public safety, health, education, employment, egovernment and so on are designed to be consumed on low bandwidths. This will increase the likelihood of availability of essential services on any kind of broadband network, whatever it may be.

Moreover, given the existing footprint of DSL through copper networks enabled by universal service to date, the focus on applications and services available at low speeds will improve the likelihood that all citizens have access to essential services at low costs.

My colleague Justin (Gus) Hurwitz of the University of Nebraska Law School and I have elaborated on this notion in our recent paper “Debatable Premises in Telecom Policy”. We presented this paper at the Telecommunications Policy Research Conference earlier this month. The relevant section of the paper is attached, and the full paper can be accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2418733

Your whitepaper also indicates the abuse of the Low-Income program for free cellphones and service. It is an unfortunate state for taxpayers who by law must pay their communications bills, only to discover that their money has been squandered. Congress is wise to build future programs such that incentives for abuse are eliminated.

It is well documented that the United States has some of the lowest prices in the world for entry level broadband and mobile wireless access. My recent paper on broadband in the US discusses the data from both the OECD

and the ITU.¹ For example the ITU notes that connectivity should cost no more than 5 percent of income. Basic communications services in the US can be purchased for less than 1 percent of income. To the extent that services and applications can run on low bandwidths, Americans can purchase communications services outright without having subsidies.

Moreover Americans spend far more of their income on housing, energy, education, transportation, food, clothing, and even discretionary vacations than they do on telecommunications. If Congress is interested in helping low-income Americans, it should focus on these areas which take up a greater percentage and amount of income.

It is worth mentioning that designing applications and innovations to run on low bandwidth is an important incentive and opportunity for innovation. Rather than making subsidies, Congress can provide prizes and rewards for the best innovations.

Thank you for the opportunity to comment.



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¹ Michael Horney and Roslyn Layton, *Innovation, Investment and Competition in Broadband and the Impact on America's Digital Economy* (Mercatus Center at George Mason University, August 15, 2014), <http://mercatus.org/sites/default/files/Layton-Competitionin-Broadband.pdf>.

Excerpt from *Debatable Premises in Telecom Policy* by Gus Hurwitz and Roslyn Layton

Debates over telecom policy are necessary to the wellbeing and prosperity of our country. Sound telecom policy can benefit consumers nationwide; bad ideas can be terribly costly. At its best, telecom policy can help lift the poorest and least fortunate among us to prosperity, afford unparalleled access to education, health, and other essential services, and create platforms for expression and enterprise unknown at any prior point in human history. Few, if any, other technologies or industries have the potential to create so much good for so many.

As a result, these arguments tap into deep currents in the popular psyche. The questions at issue in telecommunications policy reflect values at the core of our democracy, social commitments to equality and universal access, and concern over censorship and centralized control of information. The intuitive appeal of these arguments ensures that they find substantial support among well-intentioned legislators, regulators, and much of the public. But intuitive appeal often leads analysis astray. This paper relies primarily on economic and technical analysis and research to demonstrate that the intuitive approach to these issues often leads to conclusions deleterious to consumers.

That the consumer must come first is a central theme that runs throughout this analysis, and should be a guiding principle through all telecom policy debates. It is too often the case that even well-intentioned and seemingly consumer-friendly policies do not fully appreciate the complexity of the market and therefore fail to place the interest of all consumers ahead of the interests of specific, often narrow, interest groups.

Hopefully, identifying faults in these premises will help us to address the issues that they represent with greater care; and hopefully this paper's presentation will foster discussion about the role of economically- and technically-informed research in policy debates. This is an exciting time in telecom policy. It is also a challenging time, given the fundamental shifts in technology and the industry that have occurred in recent decades.

This paper proceeds in six parts. Each of the first five parts corresponds to one of the premises listed above. Part six discusses themes that run through several of these premises and considers the role of substantive telecommunications research in telecommunications policy debates.

I. Premise One: Everyone Needs Low-Cost Access to High-Speed Broadband

The first premise considered is that everyone needs low-cost access to high-speed broadband. This idea is central to contemporary debates in the telecom space and guides much of current policy. This premise gives rise to several related policy prescriptions: ensuring the availability of service everywhere (universal service); ensuring that service is either low-cost or subsidized for those who may not be able to afford access; ensuring that at least one carrier offering such service is available to every consumer (a "carrier of last resort"); and imposing various service-level guarantees and quality of service requirements on every carrier.

As an initial matter, universal telephone service has historically been leveraged to support various important social commitments. Ensuring that everyone has access to some basic communications platform, so that they are able to get access to emergency services and avail themselves of other important government and social programs is an important value that we should strive to maintain. As will be repeated several times in this paper,

the consumer must come first – it is unquestionably the case that there is a set of basic services that we should ensure are available to all consumers.²

The challenging questions are at what level and by what means do we maintain these commitments. Many in the telecom policy space – often those with the loudest voices – have long advocated that every American needs access to high-performance telecommunications services (today, that is high-speed Internet service) at low cost. Indeed, a majority of what the FCC does today is done with this goal, directly or indirectly, in mind. But while there is a strong argument that we should endeavor to provide every American with access to some level of connectivity, it is unclear what that level of connectivity should be. Indeed, as we have transitioned from narrowband voice communications to broadband Internet connectivity, the advocates and policy makers have consistently increased their target for sufficient levels of connectivity. Importantly, these changes have tracked changes in median (or even high-end) usage patterns, as opposed to tracking what is sufficient to provision socially necessary services.

Historically, the difficulty of determining what services belong in this set has been masked by the nature of telephone technology. The basic unit of connection – the twisted pair of copper wires – that was necessary for any service was also sufficient for most services of interest to most consumers. As a result, by requiring universal provision of the most basic services, we also facilitated the provision of more advanced services.

This no longer holds in today's digital economy. One can get connected to the communications network through various means: fiber, coaxial cable, wireless voice, fixed and mobile wireless data, satellite, and even still, the good old twisted pairs of copper. Each of these means of connecting to the network offers better or worse support for various services and applications. Fiber is very fast but expensive; cable and (especially) DSL are somewhat slower, but are also somewhat cheaper; wireless is generally a bit slower still (at least as of today), a bit less reliable and often somewhat more expensive than cable – but it's mobile, which is pretty great! Some of these technologies are better for voice service, for video service, for downloading large amounts of data, or for playing video games. Some of these services are also better or worse regarding our social commitments: mobile wireless, for instance, is great in that you can bring your connection to emergency services wherever you go; but it is problematic that it can be difficult for those emergency services to know your location should you need them to find you.

Developments in the many technologies suggest that we need to take a more nuanced view of how to provision communications networks to support important social commitments. The historical precedent, that we would provision a connection capable of supporting nearly the full range of possible services, was a happy historical accident. It was possible in part because the basic unit of service was capable of supporting the full range of consumer-oriented communications services. And it was possible in part because the relative elasticities of demand for communications services offered a relatively efficient mechanism for funding universal service buildout.³

The most difficult aspect of this more nuanced view is that we need to think seriously about what services are included in the bundle of basic social commitments.⁴ Many advocates argue that every American should have

² See, e.g., Chairman Wheeler's Network Compact.

³ Cite discussing Ramsey pricing and how relative elasticities of demand for these services have changed over time (e.g., cross-subsidizing residential loops from business long distance is relatively more efficient than cross-subsidizing (inelastic) low-speed broadband from (elastic) high-speed broadband).

⁴ Another aspect of this is the relative lack of appreciation for the relative scale of bandwidth requirements for various applications.

access to low-cost Internet service capable of supporting streaming video services. That is quite an upgrade from the basic services historically provided through universal service – basic local voice communications service (long distance was available, but at substantial cost). Many advocates justify promoting this class of Internet service as “basic” on the grounds that such high-speed service is needed to ensure access to e.g., educational, health care, and governmental services. However, the reality is that most (and possibly all) of the services that clearly belong in the bundle of basic commitments – affordable access to a reliable communications platform that provides access to emergency services, essential government services and information, employment applications, and even basic e-commerce – do not require a class of service sufficient to support high quality streaming video. Those who think that other, more resource-intensive, services do belong in the bundle should face a stiff burden in advancing their argument.

Indeed, the idea that high-speed broadband is necessary in order to meet these social commitments, and also to provide various educational, healthcare, government and other services, implicitly excludes various disadvantaged communities from these services.⁵ The only reason that high-speed broadband is necessary for many of these services is because they have been developed to offer rich multi-media experiences. That is, they use audio and video. This means that they are not accessible to the deaf and blind. In our race to leverage the latest and greatest technologies for various (legitimately important) services, we too often forget that not everyone can avail themselves of those technologies.

Perhaps the most tragic aspect of this premise is that it is largely needless: there is little reason for many of the services being deployed online to *require* rich multi-media. The push for a resource-intensive user experience is in many cases driven by the existence of the technology, not by the needs of the users. This, in turn, drives up consumer need to high-speed broadband.

A better, more modest, regulatory initiative may be to require essential services – the sort of applications that would justify ensuring access to broadband – to be developed so as to not require high-speed broadband. Rather than fueling a race to use more bandwidth-intensive design practices, the government could instead lead the way in the adoption of more efficient, resource-conscious, design practices. This would serve the parallel goals of improving accessibility and decreasing reliance on high-speed broadband.

There is a more fundamental point underlying this idea: engineers optimize – that is they design products around – the simplest and least costly constraints. This means, for example, that if bandwidth is cheap and plentiful, programmers will design applications that make use of that bandwidth. If, on the other hand, bandwidth is costly, programmers will design applications that make less use of data – and consumers will demand such applications. For example as more users access Facebook with a mobile device, Facebook has re-engineered its mobile platform to decrease average monthly data use from 14MB/mo to 2MB/mo. Not only does this lower long term operating costs for Facebook, the lowered data requirement of the platform encourages users to access it more. Or consider recent research that computer users on metered Internet connections are more concerned about viruses and other harmful programs – thus they expend more resources to keep their computers free of such software to keep their monthly Internet bills lower.

And consider that in environments where bandwidth is scarce, for example India, Pakistan, and parts of Africa, engineers and entrepreneurs conceive applications from the beginning as needing to function within strict bandwidth constraints. Video conferencing and streaming video applications need to be delivered on less than 1 mbps connections, so they design technologies that make more efficient use of bandwidth than do engineers in economies where bandwidth is cheaper and greater.

⁵ See Premise Two, *infra*.

Recent telecommunications policy discussions have increasingly embraced ideas of dynamic competition and innovation. In the context of network neutrality, for instance, the FCC has made use of the idea that there is a “virtuous cycle,” where openness today drives innovation in application development, which in turn will drive increased consumer demand for broadband.⁶ But this cycle need not be “virtuous.” If we peg required bandwidth floors to a level sufficient to accommodate the most bandwidth intensive applications, this will tend to increase the bandwidth consumed by all applications by virtue of removing bandwidth as a constraint – this, in turn, will increase the amount of bandwidth that needs to be offered. The resulting incentive structure unravels, creating a constant upward pressure. A policy that implements such an incentive structure has the perverse effect of supporting – even incentivizing – lazy innovation and poor design practices.

A critical question – the most important one – about these services is often overlooked: where is the consumer in all of this? Those advocating high-speed broadband as a universal service often have more to gain from such programs than the median consumer. Firms such as Google, that provide services and applications that run over communications infrastructure, are clear beneficiaries; as are networking equipment manufacturers. Politicians, too, often have much to gain from this strategy, as the costs of provisioning these networks are not transparent to voters and indirectly borne. And the academy is more likely to reward academics who promote regulatory programs that appear to advance social needs than those who argue against programs that appear to benefit the public interest.

But just as communications technologies and the services that they facilitate are diverse, so too are consumer preferences. It is absolutely the case that there are basic services to which we should do our best to ensure that everyone has reasonable access. But today we need to think more carefully about what these services are than we have historically needed. Most important, we should resist the urge to treat every American as though he or she has the same needs and wants as Washington, Silicon Valley, and academic policy makers.

Along these lines, the meaning of “universal service” is long past a need for review. Returning to the earlier discussion of how the basic unit of transmission has changed – from a unit capable of supporting the full range of telecommunications services to a range of units capable of supporting a range of services – the central question that “universal service” faces is what services need to be universal. There is a strong argument, for instance, that the basic service universally available should be sufficient to support access to basic news and information, health, educational, and governmental services. There may be some argument that such a connection should be capable of supporting basic online video services. But there is only a much weaker argument that high-definition, or even 4K, online video needs to be universally available.

Adding to this, we should also remember that broadband is rarely, if ever, a final product. Consumers don’t pay for Internet service for the sake of having Internet service.⁷ Rather, Internet access is merely an input that enables consumption of online goods and services. Universal Service support – and in many ways broadband marketing generally – therefore, should be developed around actual consumer demand and delivered in ways relevant to consumers.

⁶ See *infra*.

⁷ For some consumers it may at times appear that they do. Consumers may, for instance, prefer having the highest-speed Internet available, even if their usage patterns don’t benefit from that speed as compared to a lower-speed option. But even in these cases, the consumer likely derives some extrinsic value from having the higher-speed option, for instance through indicating status. In this sense, high speed Internet may be a form of Veblen good. In other cases, consumers simply may not appreciate how much speed their particular usage patterns require, so opt to purchase the highest-speed option available.

It may make sense, for instance, to reframe universal service goals to focus on enabling certain classes of applications. Rather than define universal service as generic high-speed Internet (itself defined at, e.g., “4 mbps down/1 mbps up” service), universal service could be defined as service sufficient to support a minimum bundle of services. That bundle may include, for instance, healthcare, education, employment, and government, services, common news and information services, basic online video services, and VoIP and other common over-the-top services.

There are two basic challenges to such an approach. The obvious challenge is defining what services should be included in this basic bundle – though this is the sort of task routinely overseen by regulators. A more subtle and potentially difficult challenge is that it may create an incentive for application designers to make excessive use of bandwidth. This incentive may exist because access providers would be required to provide a bundle of services sufficient to support those applications, no matter how inefficiently designed they may be. This approach to defining universal service, therefore, would need to be careful to take this into consideration. It may, for instance, be possible to competitively benchmark the bandwidth (and other) requirements of like-services in determining whether an access provider is sufficiently provisioning its network.⁸

More generally, the Commission may want to encourage similar experimentation with how Internet services are marketed and sold. Few consumers have an appreciable understanding of the difference between 6 mbps and 25 mbps service, or of the difference between the resources required to deliver an email as compared to a 60 minute streaming video. The norm of marketing Internet access in terms of peak download and upload capacity is confusing to consumers, ignores the possibility of service commitments and competition along other metrics (e.g., latency or jitter), and is generally irrelevant to what consumers care about. It would almost certainly be more relevant and less confusing to consumers were Internet access to be marketed in terms of the services that they support. And, perhaps even more important, such marketing would likely provide consumers with more meaningful remedies should access providers fail to live up to these promises. An express commitment that a given service package is capable of supporting HD streaming video, for instance, would more likely create an enforceable contractual commitment than the current approach to marketing; it would make enforcement actions by the FCC or FTC easier to bring and more likely to be successful; and it would require Internet access providers to upgrade their infrastructure to match changing requirements of various services. While anathema to the views of many policy advocates – those, for instance, who would view this idea as turning Internet access into a “cable-like” system – it could be among the most consumer-friendly of possible changes to how Internet services are marketed and provided.

A final possible innovation to universal service would be to allow localities to “buy out” of the system. While universal service, as defined by the FCC, may be an important federal goal, local municipalities may face other priorities, or have other ideas about how to best achieve the universal service goals. Just as we should recognize consumer welfare and preferences should be the loadstone of telecommunications policy, we should recognize that municipal governments may have a better sense of the wants and needs of a local population than the federal government. It may therefore be reasonable to allow local governments to “buy out” of federally-administered universal service programs by accepting a one-time payment of some amount less than that which would be invested in the locality through the federal program.

⁸ For instance, if a party were to raise concerns that an access provider’s network was insufficiently provisioned to handle a certain quality of streaming video offered by a given service, that concern could be rebutted by demonstrating that other services (including those offered by the provider’s own vertically-integrated offerings) were capable of delivering similar quality video.

II. Premise Two: High-speed broadband is necessary for education, health, government, and other social services

The idea that high-speed broadband is necessary for education, healthcare, and other social and government services is related to the first premise. This premise is problematic both because it is factually dubious, and also because its power is based in an implicit appeal to inherently emotional issues. It creates a sense that the only way to support high-quality education, provide access to healthcare and employment opportunities, and address concerns about the digital divide is to support a specific broadband policy – namely one of extensive government subsidies for high-speed broadband. As recognized in the previous installment, broadband Internet service and other communications technologies support many important services that should be viewed as basic social commitments – but the focus in telecom policy debates should be on ensuring Internet access that is sufficient to realize these basic social commitments, not on subsidizing higher-speed luxury services or services that the market would otherwise provide at competitive prices.

The first, most important response to this premise is that high-speed broadband connectivity isn't typically needed for education, healthcare, or other social services. It is especially true that the bandwidth sufficient for high-quality video streaming services – a critical benchmark for most broadband advocates – isn't necessary for these services. For example, today's system requirements for video conferencing applications, including programs routinely used for distance education and MOOCs ("Massive Online Open Courses"), is in the 1-2 mbps range.

The developers of these applications recognize that their products need to work even in low bandwidth environments, so design their applications to even without high-speed broadband. Adobe Connect, for instance, only requires 512 kbps connection for classroom participants. Coursera, a popular MOOC platform developed by Stanford, Princeton, the University of Michigan, and the University of Pennsylvania and that today comprises a consortium of over 100 universities, has recently announced a mobile-optimized app that allows students to view recorded class sessions on their mobile devices. Similarly, Adobe Connect has a mobile application that allows for real-time video participation.

More bandwidth is of course preferable, but typically is not required for basic operation. In technical terms, it is important to recognize that most of the video delivered in the MOOC setting is highly compressible. Unlike television or movie content, most of the frame is relatively static, with relatively simple background settings. Such video is readily and substantially compressible. Moreover, because MOOC software needs to support the typical student's computer hardware (e.g., a moderate resolution monitor displaying both in-class video and other class-related materials on a single screen), the typical resolution of video in the online teaching environment will be far below that of HD streaming video services.⁹ Additionally, and perhaps counterintuitively, MOOCs with their large enrollments generally require less bandwidth than smaller online teaching settings. The large class sizes mean that most video will be delivered one way, from the instructor to the students – due to the large number of students, interactivity will be achieved through non-video means (such as quizzes or written questions moderated by an in-class assistant). In such a setting, the user experience will be less sensitive both to bandwidth and latency variations.

⁹ See also Arnold Kling, *Many-to-One vs. One-to-Many: An Opinionated Guide to Educational Technology* (Sept. 12, 2012), available at [Many-to-One vs. One-to-Many: An Opinionated Guide to Educational Technology](#) (arguing that the more fundamental change to education enabled to technology is many-to-one teaching through adaptive textbooks, rather than the massive one-to-many model of teaching facilitate by MOOCs).

This reveals another often overlooked aspect of broadband policy debates: bandwidth isn't the only, and often isn't the most important, metric. Latency (the time it takes a packet of data to traverse the network), jitter (the change in latency between packets), and packet loss (the percentage of packets of data that never make it across the network) are incredibly important metrics, especially for applications in education and health care – applications where the user may need to interact in real time with a teacher, classmates, or healthcare professional. Substantial or irregular latency and packet loss can lead to jumpy, broken, or lost audio and video – it is far preferable to have a lower resolution but consistent-quality audio and video than high-quality but unreliable audio and video.

The idea that latency and packet loss can be as important as bandwidth is not new. But it is one that plays little role in contemporary policy debates. The failure to appreciate the importance of these metrics is a serious flaw in these policy discussions. It is akin to having a transportation policy that focuses on miles of highway constructed but pays no attention to whether those highways actually decrease commute times or accidents.

Indeed, where education, healthcare, or other services require high-performance Internet service, one important alternative to provisioning high-speed Internet service in high-cost areas is to rely instead on quality of service (QoS) and prioritization techniques to ensure sufficient performance over lower-speed links. This would not allow a service requiring an average 2 mbps throughput to operate over a 1 mbps link – but, where such a service may not function well on a 3-4 mbps connection, prioritization could allow it to operate over a lower-speed (e.g., 2 mbps) link. To make sure this paragraph's suggestion is clear: lower-speed links that do not adhere to "network neutral" routing may often be able to support the same services that would require a higher-speed (and higher-cost) connection on a neutral network.

Another important, and often overlooked, metric, is adoption. In recent years survey evidence, such as the Pew Research Center's study on Internet and American Life, has made clear that availability and price are not the primary reasons that people in the United States do not have Internet access. Rather, low adoption is driven by concerns about usability, relevance, and worries about online harms. These concerns are particularly salient among older demographics – those who would be most likely to benefit from (or even need) Internet-based healthcare, government, and other services.

Other issues with the idea that high-speed broadband is necessary for these services become clear when looking at each service individually. In the case of health care, for instance, it is unlikely that residential users would have any need for the sort of telemedicine devices that require high-speed connections.¹⁰ Rather, consumer-grade healthcare applications are more likely to be used for monitoring and reporting – applications that either send occasional large bursts of data or send consistent, possibly latency-sensitive, small packets of data, and that in either case do not require particularly high-speed connections. The greater challenge for these applications is likely to come from the multiplicity of such devices – the so-called Internet of Things, where dozens of devices in one home or millions of devices on larger networks. There is concern that millions or billions of devices, each sending small bursts of data, will overwhelm networks. In such cases, even if the network provides sufficient bandwidth, it may not be able to handle the multiplicity of connections. To use the comparison with highways, the more cars you put onto a single road, the more accidents and delays there will be, independent of the speed limit or number of lanes. A network transmitting 100 million small packets per

¹⁰ Such devices include equipment such as MRIs and other imaging devices.

second will be far more congested than one transmitting 10 million large packets per second, even if they are both transmitting the same total amount of data.¹¹

It is important to distinguish between consumer-oriented Internet service and Internet service used by institutions such as schools and hospitals. There is a much stronger case that institutions need access to high-speed Internet service. Schools, for instance, often need to support simultaneous Internet use by hundreds of teachers and students. And, while each student remotely connecting to a video-based classroom may only need a modest amount of bandwidth, on the institutional side, connecting several students to the classroom will require a much greater amount of bandwidth for the institution as a whole.¹² There is legitimate concern that students need access to some sufficient level of bandwidth at home for educational purposes. But to date there have not been serious efforts to determine how much bandwidth is “sufficient” for educational purposes – rather, advocates’ estimates have tracked median consumer bandwidth preferences, which in turn track the bandwidth requirements for high-definition streaming video content.

Similarly, the amount of bandwidth needed by a hospital for real-time telemedicine applications, even for things as simple as transferring a patient’s MRI data to a doctor in another hospital for a “virtual” consultation, can be substantial. So, it is certainly the case that these institutions need for high-speed Internet access. But the market for these sort of institutional connections is much different from – and much more competitive than – the market for consumer-oriented Internet access. Still, as is usually the case for commercial-quality products compared to their consumer-oriented counterparts, Internet connections suitable to meet these institutions’ needs are often quite expensive, especially for public and non-profit institutions such as schools and hospitals. While current programs to assist in getting these institutions online (e.g., E-Rate) have their problems, there is a much stronger argument to be made for government support of these institutional Internet-access needs than for government support of consumer-oriented high-speed Internet access.

It is undoubtedly the case that broadband Internet can be an important tool for various educational, healthcare, and other social and government services. But speed – especially “high-speed” – isn’t the only or most important metric to consider when provisioning these services. It is unfortunate that advocates of government-sponsored consumer high-speed broadband Internet use the indisputable importance of services such as healthcare and education to buttress their argument for government intervention in the high-speed broadband market. At best, this represents a misunderstanding of these services’ actual requirements. It may also represent a willingness on the part of broadband advocates to assert their idealized view of how the Internet should be used over the needs of those who actual will rely on these services. At worst, it is a deliberate tactic, being used as an emotional appeal to advocate for a preferred policy that is not otherwise supportable by technical requirements.

¹¹ Importantly, most network switches are provisioned in terms of the number of packets they can switch per second, as the switching logic is more computationally intensive than copying data from an input port to an output port. For instance, the standard line-rate gigabit Ethernet port can switch 1,488,100 packets per second. If the typical packet size is 100 bytes, which may be typical for machine-to-machine communications, the network will only be able to run at less than 20% of its provisioned capacity.

¹² That said, a review of studies of how much bandwidth is needed by educational institutions suggests that the required bandwidth is often over-estimated. For instance, in presentations made at George Mason University’s Information Economy Project, both Robert Kenny and Scott Wallsten have raised concerns about these studies, finding basic errors in some (such as misattributing the bandwidth requirements of a small town for those of a single school in that town) and expressing concern that many of these studies are developed by hardware manufacturers with an interest in selling equipment.

#CommActUpdate

Universal Service Policy and the Role of the Federal Communications Commission

Comments of the Lifeline Connects Coalition

The Lifeline Connects Coalition hereby provides its comments on the House Energy and Commerce Committee's white paper entitled "Universal Service Policy and the Role of the Federal Communications Commission" focusing primarily on the Federal Communications Commission's ("FCC's or "Commission's") Low-Income Program – Lifeline. The members of the Lifeline Connects Coalition are Telrite Corporation, i-wireless LLC, Global Connection Inc. of America, and Blue Jay Wireless LLC, all wireless Lifeline eligible telecommunications carriers ("ETCs") in various states. All four members of the Lifeline Connects Coalition are top 15 wireless Lifeline providers and Telrite and i-wireless are top 5 wireless Lifeline providers. These ETCs have joined together to protect and preserve the integrity of the Lifeline program by educating and separating myths from facts about the program, sharing best practices on compliance and industry self-regulation, and by proposing additional reforms dubbed "Lifeline Reform 2.0" to the FCC in a petition for rulemaking filed last year.

I. Lifeline Serves an Important Purpose

The Lifeline program was established in 1985 to fulfill the obligation from the Communications Act that "consumers in all regions of the Nation, including low-income consumers...should have access to telecommunications and information services, including...advanced telecommunications and information services..."¹ This is a universal service principle that must be preserved, protected and promoted.

The Lifeline program uses funds collected by the Universal Service Fund (not appropriated funds) to provide a uniform monthly subsidy per eligible consumer of \$9.25 (plus an additional \$25 supplement for residents of Tribal lands). Wireless Lifeline providers generally offer 250 free minutes or texts for the \$9.25 benefit and 1,000 or unlimited minutes for the enhanced tribal benefit. Lifeline currently serves approximately 14.2 million subscribers at a cost of \$1.8 billion in 2013 (down from a high of \$2.2 billion in 2012), making it the smallest of the FCC's three major Universal Service programs (E-rate \$2.2 billion annually; High Cost/Connect America \$4.5 billion cap annually).² We estimate the nationwide participation rate in Lifeline to be less than 40 percent, which means that more than half of those eligible for discounted phone service do not receive it.

¹ 47 U.S.C. § 254(b)(3).

² See Universal Service Administrative Company 2013 Annual Report at 6-13, available at <http://www.usac.org/res/documents/about/pdf/annual-reports/usac-annual-report-Interactive-Layout-2013.pdf>.

Lifeline provides low-income Americans with affordable access to critical communications services necessary to connect to jobs, healthcare, emergency services, family and community. As the general telecommunications market has shifted toward wireless, so has Lifeline, with 85 percent of disbursements now supporting wireless services. The number of wireless minutes provided to low-income consumers has also increased from 68 to 250 as the number of wireless competitors in the space, including resellers, has grown. Therefore, the Lifeline service has transitioned from an emergency phone to a more robust wireless offering that allows the Lifeline beneficiary to juggle changing shifts often at multiple part-time jobs and cobble together childcare in order to cover those shifts, pick up overtime and provide better opportunities for their children. Mobility is key for low-income Americans. The ability to pick up an additional shift on the way home from another job or to arrange for a family member or neighbor to care for children so that an additional shift can be accepted is crucial for those Americans living paycheck-to-paycheck and trying to make ends meet.

As Professor David Super at Georgetown Law School has astutely observed, efficient administration of anti-poverty programs increasingly relies on access to communications by program recipients.³ That makes Lifeline a key glue that holds together the federal and state social welfare system and makes it more effective. Program administration and eligibility workers increasingly rely on telephone contacts and interviews to facilitate receipt and renewal of benefits so that agencies can have fewer physical offices and statewide caseloads for more efficient workload distribution.⁴ As more and more benefits transactions occur online, such as online Supplemental Nutrition Assistance Program (“SNAP”) benefit renewals, Lifeline will need to provide that Internet access to benefits recipients so that these efficiencies are not lost.

II. The Lifeline Program Has Been Successfully Reformed

The members of the Lifeline Connects Coalition would agree that the Lifeline program that relied entirely on applicant self-certifications of eligibility and lacked a duplicates database for companies to check to make sure that recipients did not receive multiple benefits was not fully safeguarding USF funds collected from American ratepayers. However, that is not the Lifeline program that we consider today. In early 2012, the FCC dramatically reformed the Lifeline program for the better and set the program on a new course to fiscal responsibility and effective administration.⁵

³ *Ex Parte* of David A. Super, Professor of Law, Georgetown Law, WC Docket Nos. 11-42, 03-109, CC Docket No. 96-45, at 4-7 (filed Nov. 7, 2011).

⁴ *See id.* at 4 (“Both to avoid making applicants and recipients miss time from their jobs and to more efficiently use agency staff, many states now are relying almost entirely upon telephone interview to establish the eligibility of applicants and recipients.”).

⁵ *See Lifeline and Link Up Reform and Modernization, Lifeline and Link Up, Federal-State Joint Board on Universal Service, Advancing Broadband Availability Through Digital Literacy Training*, WC Docket No. 11-42, WC Docket No. 03-109, CC Docket No. 96-45, WC Docket No. 12-23, Report And Order and Further Notice Of Proposed Rulemaking, 27 FCC Rcd 6656, FCC 12-11 (2012) (“*Lifeline Reform Order*”).

The Lifeline program of today requires all applicants to show proof of eligibility for the benefit at enrollment, confirm extensive certifications,⁶ use the discounted service or lose it, and annually recertify eligibility. ETCs are required to provide extensive disclosures in marketing materials and applications, review proof of eligibility, and check all applicants in a national or state duplicates database prior to providing a wireless handset (if applicable), activating service, and seeking reimbursement for the services provided. Finally, ETCs are subject to constant auditing by the Universal Service Administrative Company (“USAC”) and large ETCs are required to pay for biennial compliance audits by independent auditors that report to USAC and the FCC.

The most important of the FCC’s 2012 reforms was the development and implementation of the National Lifeline Accountability Database (“NLAD” or national duplicates database). Prior to the implementation of the database, an ETC generally had only limited ways of knowing whether an applicant for its Lifeline service already received a Lifeline benefit from another ETC. The Lifeline Connects Coalition member companies joined with two dozen other ETCs to voluntarily utilize an interim inter-company duplicates database developed by CGM, LLC to prevent over 375,000 duplicate enrollment attempts. This equates to savings to the Lifeline program of over \$4 million per month or \$50 million annually. This was done on a voluntary basis as a matter of industry self-regulation while the NLAD was being developed, but it could only include the subscriber lists for those ETCs that voluntarily participated.

Thankfully, such inter-company duplicate detection is no longer voluntary. More than a year after it was due, the FCC’s duplicates database went live in the first quarter of 2014 and it is now up and running. The NLAD defines a duplicate subscriber as one with the same last name, date of birth AND last four digits of the social security number as another Lifeline subscriber. It uses this standard to screen duplicate Lifeline enrollment attempts in real-time at the time of application. The Lifeline Connects Coalition member companies actively worked with the FCC and the USAC on the implementation of the NLAD, and still contribute to bi-weekly calls and webinars regarding changes and clarifications to NLAD operation. No database is perfect, but the NLAD uses a clear and reasonable duplicate definition and is working well.

With the national duplicates database and other key reforms in place, the Lifeline program is now on stable footing and has transitioned into an efficient and effective helping hand for low-income Americans to access critical communications services necessary to connect to jobs, healthcare, emergency services, family and community.

⁶ Applicants must certify under penalty of perjury, among other things, that their household will receive only one Lifeline service, and that they are not already receiving Lifeline service, the applicant will update his or her address within 30 days of a change, and the applicant acknowledges that he or she may be required to recertify continued eligibility at any time. *See* 47 C.F.R. § 54.410(d)(3).

III. The Lifeline Connects Coalition Has Proposed Further Lifeline Reforms to Strengthen the Program

The FCC's 2012 reforms to the Lifeline program effectively reduced waste, fraud and abuse while producing significant cost savings. In June 2013, the Commission adopted additional reforms to bolster the integrity of the program.⁷ And yet, the members of the Lifeline Connects Coalition believed there was still more that could be done. In June of last year, we proposed a comprehensive package of reforms, dubbed "Lifeline Reform 2.0."⁸ Following comments submitted to the Commission, we advanced proposals that had garnered widespread support, especially among wireless Lifeline service providers. With the passage of time and the introduction of the NLAD that includes an identity verification component for which we had advocated, the Coalition modified its proposed package of key reforms.⁹ The most important of those reforms are discussed below: establishing minimum standards for state eligibility databases, FCC process reform on pending items and allowing ETCs to retain copies of applicants' proof of eligibility.

A. Minimum Standards for State Eligibility Databases

The *Lifeline Reform Order* called for the implementation of a national Lifeline eligibility database by the end of 2013, but that has proven to be a difficult task. We are unsure if or when a national eligibility database will be developed. In the meantime, some states have developed their own databases, which is an effort that the Lifeline Connects Coalition members generally support. "Good" state eligibility databases are beneficial to the Lifeline program because they accurately confirm each applicant's eligibility for Lifeline and they reduce burdens associated with recertification – burdens that can keep eligible subscribers out of the program while imposing substantial costs on ETCs. State databases that do not meet minimum standards, however, result in eligible consumers being denied benefits, impose significant costs on ETCs and do significant damage to the Lifeline program.

The FCC has recognized that states may develop their own databases to address Lifeline applications. However, there must be some standards set for those databases to avoid allowing duplicate enrollments or denying Lifeline service to eligible consumers. The FCC set such standards for duplicates databases. In an October 2012 Public Notice, the Commission "provide[d] guidance to states regarding the process of opting out of the National Lifeline Accountability Database" and required states to build duplicates databases at least as robust as

⁷ See *Lifeline and Link Up Modernization and Reform*, WC Docket No. 11-42, Order, DA 13-1441 (2013).

⁸ See Lifeline Reform 2.0 Coalition's Petition for Rulemaking To Further Reform The Lifeline Program, WC Docket Nos. 11-42, 03-109, CC Docket No. 96-45 (filed June 28, 2013) ("Petition").

⁹ See Lifeline Reform 2.0 Coalition Written Ex Parte Presentation; WC Docket No. 11-42 (filed Apr. 14, 2014).

the NLAD.¹⁰ If the state duplicates database fails to meet the minimum requirements, then ETCs in the state are required to use the NLAD for duplicate detection.

The Commission, however, has not provided any guidance to states or set minimum standards with respect to eligibility databases, which could have important implications for Lifeline-eligible consumers. Therefore, the members of the Lifeline Connects Coalition proposed that the Commission establish minimum requirements for state eligibility databases. The ETCs proposed the following minimum requirements for any state Lifeline eligibility database:

- (1) Real-time Application Programming Interface (“API”) access to data
- (2) Updated in a timely fashion, which ideally would be real-time or within 24-hours
- (3) Simple yes/no response without access to underlying data (to address privacy concerns)
- (4) Match based on last name, date-of-birth and last four digits of the applicant’s social security number (no address-related field)
- (5) Efficient exceptions and dispute resolution process
- (6) Provide access to the Commission and USAC for audit purposes

The companies believe these are all essential elements of an effective state eligibility database. A database that meets these minimum criteria is unlikely to result in significant numbers of eligible Lifeline customers being turned away. However, there should be an “exceptions management” process for situations where eligible consumers are not found in the applicable state eligibility database.

B. Establishing a “Shot Clock” Time Period for Bureau Review and Approval of Petitions for ETC Designation, Compliance Plans and to Complete Audits

The Lifeline program would also greatly benefit from improved program administration. “Shot clocks” for FCC action on various applications and appeals should be adopted. Many federal ETC petitions have been pending for years, including at least one since 2010.¹¹ The FCC’s Wireline Competition Bureau (“Bureau”) has not approved a compliance

¹⁰ See *Wireline Competition Bureau Clarifies Minimum Requirements for States Seeking to Opt Out of National Lifeline Accountability Database*, WC Docket Nos. 11-42, 03-109, 12-23 and CC Docket No. 96-45, Public Notice, DA 12-1624 (rel. Oct. 11, 2012) (“Opt Out Public Notice”).

¹¹ The Communications Act charges the states with designating ETCs, however, several states do not regulate wireless services and do not wish to designate wireless ETCs, so they have passed the designation responsibility back to the Commission.

plan¹² since December 2012 or a federal ETC petition since August 2012. These delays have artificially restricted competition among ETCs for Lifeline customers in all states, but especially in the twelve federal jurisdiction states.¹³ Now that the national duplicates database is in place, there is no excuse for not processing these applications.

As discussed briefly above, nearly a decade ago when there were only two major wireless Lifeline providers, the standard offering was a 68 minutes plan. As additional wireless competitors entered the market, the standard offering has increased to 250 minutes, for essentially the same reimbursement amount. Similarly, handset quality and customer care have improved in more competitive markets such as Oklahoma.¹⁴ The offering can continue to improve, and incorporate broadband data, if there is a healthy wireless Lifeline ecosystem with many ETCs approved to compete for low-income subscribers.

As the FCC has recognized previously,¹⁵ the regulatory certainty created by establishing predictable decision timelines is essential to maintenance of adequate investment in the markets it oversees and regulates. For those same reasons and mindful of the need for private capital to support the transition of Lifeline to broadband, “shot clock” deadlines should be adopted for the Bureau and the FCC to act on federal ETC petitions, compliance plans and audits. In the Commission’s recent Notice of Proposed Rulemaking seeking to reform the E-rate program, due to the significant delays identified especially for state networks and consortia, the FCC sought comment on proposals to reduce the time it takes USAC to review applications and release funding commitment decisions, including a proposal that USAC act within 90 days.¹⁶

Similar delays exist in the administration of the Lifeline program, as described above. Therefore, if no action is taken within 90 days of filing a federal ETC petition, it should be automatically granted. If no action is taken within 90 days of filing a compliance plan, it should be automatically approved. If no action is taken on an audit appeal within 90 days, it should be resolved to the benefit of the ETC. We are mindful that the Commission has many priorities and finite resources, therefore, consistent with the framework of Section 54.724, the Commission should have the ability to extend this deadline through public action by up to 90 days.

¹² The Commission’s 2012 *Lifeline Reform Order* granted blanket forbearance from the requirement that ETCs provide service using, at least in part, their own facilities, conditioned on approval of a compliance plan describing how the ETC (or prospective ETC) would comply with the Commission’s new requirements.

¹³ The federal jurisdiction states are Alabama, Connecticut, Delaware, the District of Columbia, Florida, Maine, New Hampshire, New York, North Carolina, Tennessee, Texas and Virginia.

¹⁴ The Oklahoma Corporation Commission deserves credit for recognizing that consumers rather than regulators should pick winners and losers in the marketplace.

¹⁵ See 47 C.F.R. § 54.724.

¹⁶ See *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Notice of Proposed Rulemaking, FCC 13-100, ¶236 (July 23, 2013).

C. Retention of Proof of Eligibility

Finally, the Lifeline Connect Coalition members, as well as others in the industry, have argued that ETCs should be permitted to retain proof of eligibility for audit purposes and in order to respond to negative media stories that undercut the public's confidence in program controls and erroneously claim an ETC did not require proof of eligibility.¹⁷ The ETCs understand the FCC's and other parties' concerns raised by this proposal regarding Lifeline subscriber privacy rights, and the ETCs also seek to ensure that strict privacy controls are maintained. For that reason, we proposed in our Petition that the Commission require that the electronic storage of documentation of eligibility be encrypted according to a reasonable standard. Further, the ETCs proposed a limited retention period to allow for USAC auditing and to respond to media inquiries or reports. In addition, after discussions with Lifeline stakeholders, we also supported the concept of having a trusted third party such as USAC or another entity retain the documentation of eligibility, rather than the ETCs. In this manner, a single encryption standard can be chosen and all private information can be stored in a single location rather than at multiple locations with multiple ETCs.

The Lifeline Reform 2.0 reform package would complement the FCC's important and effective 2012 and 2013 reform efforts by providing regulatory stability for a healthy and competitive ETC ecosystem and in turn benefit Lifeline-eligible consumers by ensuring that Lifeline benefits are not denied due to deficient state databases and by providing a regulatory environment conducive to competition, investment and the advancement of Lifeline to broadband.

IV. The Lifeline Program is Ready to Join the Other USF Programs to Increase Broadband Affordability and Adoption

According to the CDC's most recent data, 56.2% of low-income Americans do not have landline phone service.¹⁸ Low-income households are much more likely to live in wireless-only households. Today, the Lifeline program successfully provides access to mobile wireless communications services (voice and text) preferred by a majority of low-income Americans. In fact, approximately 85 percent of Lifeline benefits support wireless service for eligible consumers. One reason why low-income Americans choose wireless services over landline services is that wireless ETCs are generally eager to serve low-income Americans with innovative service offerings that are willingly adopted. A modernized Lifeline program must preserve consumer choice with respect to broadband, voice and text.

Today's Lifeline program, however, falls short in providing low-income Americans with affordable access to broadband services. Mobile broadband is the future of

¹⁷ The FCC's Lifeline rules currently prohibit ETCs from retaining a copy of the proof of eligibility.

¹⁸ See "Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2013," U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics at 3 (rel. July 2014).

Lifeline. Low-income Americans already choose to have a phone in their pocket (rather than on the kitchen wall) and that's where they are most likely to make the most use of broadband. A mobile broadband connection can be used on a bus, on a work break, at a school, in a library and at home. A modernized Lifeline program must do more to make affordable access to mobile broadband a reality for low-income Americans.

The “disruptive” technology combination of mobility and broadband holds tremendous promise to combat the cycle of poverty. Increasingly (and in some cases, exclusively), job applications, healthcare, government services, education and community are available “online.” Today, communications is the single greatest challenge facing those seeking to break the cycle of poverty. Lifeline is the only USF program that does not focus support on broadband. E-rate, rural healthcare and CAF are not substitutes for Lifeline. Low-income Americans live in cities and on farms. Some go to school and some do not. Some go to the library and some do not. No low-income American should have to go to a school or a library to get affordable Internet access. To achieve its purpose, Lifeline must bring affordable 24/7 broadband access to low-income Americans – a goal that is best achieved through mobile broadband.

A healthy Lifeline ecosystem is essential to a successful transition to broadband. Regulators, consumers and service providers will need to work together effectively. Maximizing the Lifeline program's promise, and each individual benefit, can be achieved through a public-private partnership between regulators and service providers – and by responsible consumer conduct.

Most consumers access and use the benefit responsibly. We must work hard to combat negative stigmas regarding use and negative perceptions arising from misinformation. We should consider means to curb serial abusers of the program. Most ETCs, their employees and their agents participate in the Lifeline program in a compliant and responsible manner. We must work hard to distinguish “bad actors” from ETCs, their employees and agents who are doing their best to achieve compliance in an imperfect environment. We should recognize the value that ETCs bring to the program in extending the reach and value of the Lifeline benefit.

The transition to broadband will require healthy wireless ETCs capable of attracting substantial investment and entrepreneurial talent. In order to attract the capital and talent needed to deliver low-cost smart phones and innovative broadband service offerings that will be adopted by low-income consumers, ETCs need a rational and relatively predictable regulatory environment. This means a rational approach to and timely resolution of misguided Notices of Apparent Liability, compliance plans, federal ETC applications and appeals of USAC audits.

With effective competition, wireless ETCs will compete for Lifeline customers by providing more in terms of service, handsets, customer care and creative add-ons. Competition today has resulted in many ETCs offering new rather than refurbished handsets. Minute packages that started at 68 minutes are now at 250 minutes. Text to minute rations are more favorable. Top-up purchases generally are now available in accessible \$5 increments. Customer

care often is available in multiple languages. And some ETCs are beginning to experiment with broadband service offerings.

In a broadband-focused low-income program, wireless ETCs will continue to innovate not only by figuring out which broadband offerings will be adopted by consumers, but also by developing solutions that make more of the benefit. Today, wireless ETCs can partner with Medicaid Care Organizations to maximize healthy outcomes and to reduce the cost of healthcare (e.g., by providing free calls and texts between patients and providers). Tomorrow, wireless ETCs can develop “apps” for use on broadband-enabled smart phones that will connect low-income households to job boards, resume-builders and robust email services that will be used to obtain employment and keep in touch with employers to, for example, change and take on additional shifts. The FCC should not force low-income consumers to choose broadband; just as consumers should be able to choose between landline and wireless service options, they should be permitted to choose between voice only, voice and text, broadband bundle and broadband only options.

The Lifeline Connects Coalition looks forward to working with the Committee and the FCC to strengthen the Lifeline program and transition it to robustly support important broadband capabilities for low-income Americans.

By:



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Counsel for the Lifeline Connects Coalition

September 19, 2014

September 15, 2014

The Honorable Fred Upton
Chairman
House Energy & Commerce Committee

commactupdate@mail.house.gov

RE: The Universal Service Fund

I submit these comments on reforming the Universal Service Fund (USF) on behalf of the Marketing Research Association (MRA), a non-profit national membership association representing the survey, opinion and marketing research profession.¹

MRA supports:

1. Limiting the growth of the fund and the programs it serves, because such an unfair proportion of the cost in the funding arrangement falls directly on survey, opinion and marketing researchers; and
2. Determining the "Contribution Factor" annually instead of quarterly, which would allow heavy telephone users to better prepare for the costs on their phone bills.

Background

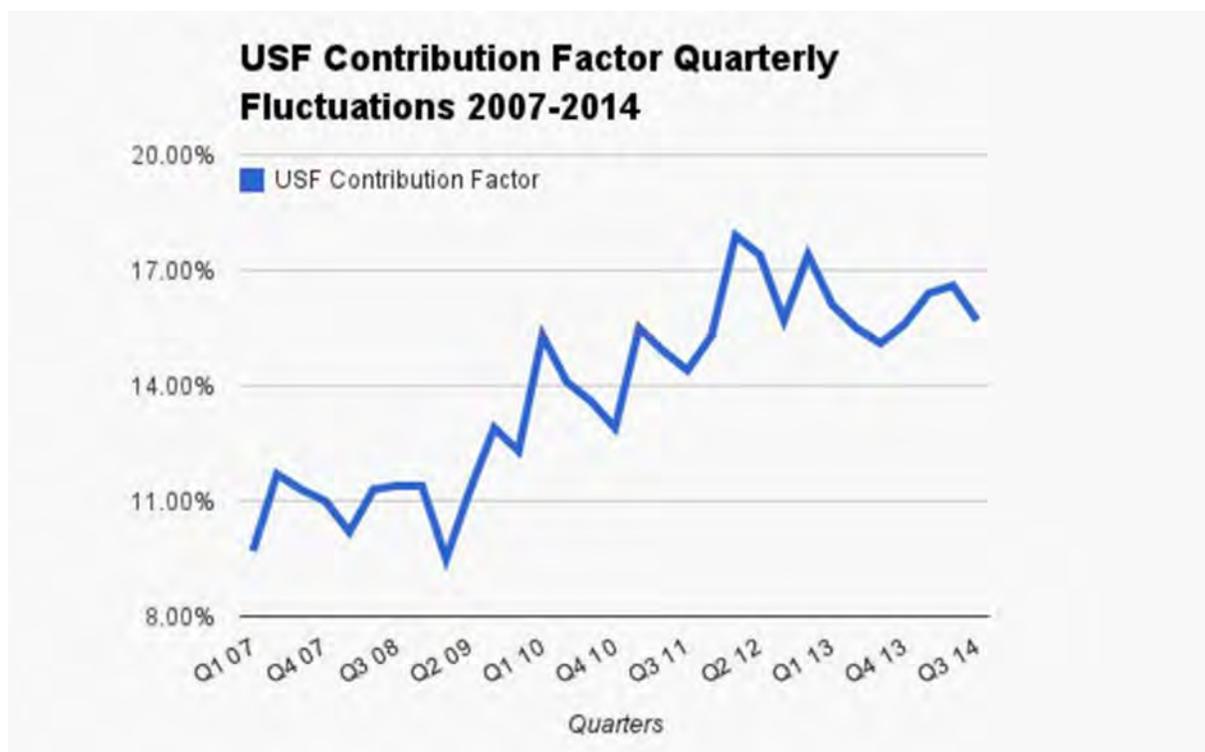
The Universal Service Fund (USF) was originally established to subsidize phone service for consumers with low incomes and those living in remote areas where connecting residents to the grid was very high. It expanded in the 1990s to subsidize access for schools and libraries and rural healthcare providers to Internet connections and information technology, and now focuses more on broadband access.

Telecommunications companies providing interstate phone service -- whether wireline, wireless, or purely voice-over-Internet-protocol (VOIP) -- must contribute to pay for the Fund.

¹ The research profession is a multi-billion dollar worldwide industry, comprised of pollsters and government, public opinion, academic and goods and services researchers, whose members range from large multinational corporations and small businesses to academic institutes, non-profit organizations and government agencies.

Most companies pass their contribution costs through to customers as a percentage of their usage. The USF "[Contribution Factor](#)," which is the percentage of the interstate end-user revenue that telecommunications providers must pay, changes quarterly, depending on the needs of the USF programs, as determined by the Universal Service Administration's quarterly filings with the Federal Communications Commission (FCC).

In the second quarter of 2000, the USF fee was 5.7 percent, but has since grown dramatically (and erratically). The high point of 17.9 percent in the first quarter of 2012 has subsided a bit to the current rate of 15.7 percent for the third quarter of 2014.



USF and the impact on research

Telephone research is still widely used in survey, opinion and marketing research, even as it struggles under the burdens of a growing wireless-only and wireless-mostly population (currently 57.1% of U.S. households) and the Telephone Consumer Protection Act (TCPA) restrictions on using an autodialer to call a cell phone without express prior consent.² That is why MRA more broadly opposes the imposition of USF payments as a pass-through charge to telephone users.

² <http://www.marketingresearch.org/tcpa-restrictions-on-using-autodialers-to-call-cell-phones>

Although MRA remains agnostic on the USF itself, we support efforts to limit the growth of the fund and the programs it serves, because such an unfair proportion of the cost in the funding arrangement falls directly on those we represent.

MRA also advocates making the determination of the "Contribution Factor" an annual change instead of the current quarterly one, which would allow telephone users to better prepare for the costs on their phone bills. The quarterly changes can be quite jarring, and make it exceedingly difficult for subscribers to account for in their own annual budgeting.

The changing technology landscape

The House Energy & Commerce Committee's white paper³ identified "rapid change in communications technologies" and "shifts in consumer preferences," both of which drive the need to reconsider the USF.

Rural phone and Internet access is not a huge concern anymore and the average public school student carries more computing power in their wireless device than they might find in a desktop computer at their school or library, so USF focus has shifted to expanding high-speed broadband Internet access as a USF rationale (which indicates that the USF may be a never-ending program⁴).

On August 6, the FCC asked the Federal-State Joint Board on Universal Service to recommend how the FCC should modify the "Universal Service methodology," with their report due back in April 2015. With the focus having grown far beyond mere telecommunications, it is possible that the Joint Board could recommend that the USF could be applied to every provider of Internet connectivity (and online research could feel the pinch as well).

Because they can pass the cost on to customers, telecommunications providers don't sweat these changes too much. Internet service providers, in their various forms, may or may not feel the same way.

FCC Commissioner Michael O'Reilly recently warned that "contributions reform" shouldn't become "a backdoor way of increasing the size of the universal service fund or imposing new fees on the Internet."⁵ O'Reilly advocated reforms that wouldn't impose "additional burdens on the consumers that pay to support universal service."

3

<http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUdate/20140822White%20Paper-USF.pdf>

⁴ <http://techliberation.com/2012/08/07/universal-service-subsidies-public-choice-economics-yet-another-case-study/>

⁵ http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0807/FCC-14-116A1.pdf

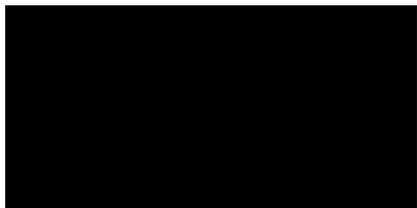
Conclusion

The survey, opinion and marketing research profession identifies the USF fees as a real problem, because an anachronistic federal program is driving up the cost of telephone research.

The dramatic fluctuations in the USF fee may have a minimal impact on an ordinary phone subscriber's bill, but for a company or organization conducting telephone research -- or the many more companies, organizations and governments purchasing that research -- those changes can be drastic. Unpredictable quarterly changes make it next to impossible to budget and set a cost structure for research. This is why MRA advocates that the USF fee determination should at least be changed only annually.⁶

Chairman Upton, we look forward to working with the Energy & Commerce Committee in pursuit of reforms that will best protect telecommunications users, like survey, opinion and marketing researchers.

Sincerely,



Howard Fienberg
Director of Government Affairs
Marketing Research Association (MRA)

⁶ <http://www.marketingresearch.org/universal-service-fees-and-telephone-research>

MICROSOFT'S RESPONSE TO THE
ENERGY AND COMMERCE COMMITTEE WHITE PAPER
CONCERNING UNIVERSAL SERVICE POLICY AND
THE ROLE OF THE FEDERAL COMMUNICATIONS COMMISSION

September 19, 2014

The statutory framework for universal service should be refocused on the goals of measurable and meaningful deployment and adoption of broadband Internet access, and should provide the Federal Communications Commission with sufficient flexibility and a variety of regulatory tools to accomplish those goals in targeted, efficient ways. The framework should continue providing support to schools and libraries for broadband connectivity, network equipment, and services.

Focus on Defining Universal Service Policy Goals

Congress should define broad goals but should resist legislating the specific ways of accomplishing those goals, such as which technologies or what types of providers are or are not eligible to participate in fulfilling the goals.

Broadband connectivity is critically important; it enables consumers to communicate in a variety of ways and increasingly is becoming the network upon which our economy and democracy rests. Today, individuals, businesses, non-profit organizations, and governments access and disseminate critical medical, governmental, and commercial information, conduct research, pay bills, utilize educational tools, shop for products and services, engage in community discussions, and even vote using broadband capabilities. The capabilities and tools that broadband connectivity provides to consumers render broadband connectivity even more critical – personally and societally – than ubiquitous telephone service.

Accordingly, the 21st century approach to universal service should emphasize the goals of universal adoption of broadband connectivity, and should stimulate the provision of ever-increasing speeds as technology progresses.¹

To establish broadband adoption and deployment as goals, the universal service policy should pivot away from its traditional focus on voice telephony. The Federal Communications Commission has begun this pivot with respect to supply-side subsidies under the high-cost and schools and libraries funds and any legislative update of the universal service provisions in the Communications Act should

¹ Although it would be unnecessary and unduly complicating as a *statutory* requirement, the FCC, in implementing the program, should reasonably balance expenditures on broadband deployment and broadband adoption. In the early years of the fund, the amounts distributed to the E-rate program and the high-cost fund were roughly equal. See Universal Service Administrative Co., *1999 Annual Report to Congress and the FCC: Reaching and Connecting Americans* at pp. 9, 18 (March 31, 2000), available at: <http://www.usac.org/_res/documents/about/pdf/annual-reports/usac-annual-report-1999.pdf>. Today, the size of the high-cost fund (a program designed to promote deployment) dwarfs the other components of the universal service program. A rebalancing of financial emphasis is warranted for a new broadband-focused universal service program so that more resources are devoted to promoting widespread consumer adoption of higher speed services.

reflect this change. Achieving the twin goals of deployment and adoption of broadband at sufficiently high speeds should be the new focus of the fund.

The manner in which consumers utilize broadband services helps to define the sufficiency of broadband speeds and other quality of service elements of broadband service. As Americans (and their connected devices) do more online and utilize more bandwidth-intensive applications, consumer and societal expectations about what constitutes adequate broadband service are likely to evolve. The FCC should be encouraged to ensure universal service programs predict this evolution and change their requirements and goals in lockstep.

Maximize the Availability of Regulatory Tools

Congress should make the full array of regulatory tools available to the FCC so that it may better achieve the dual broadband deployment and adoption goals quickly and efficiently. ***Without advocating any particular approach***, basic economics indicates that the FCC could seek to promote broadband deployment and adoption through a number of vehicles such as, among others, supply-side subsidies (*e.g.*, payments directly to broadband providers) and demand-side subsidies (*e.g.*, payments directly to consumers), or some combination thereof. Indeed, each of these tools is or has been used to some degree in voice-centric universal service programs. A particular tool may be suboptimal if used as part of a one-size-fits-all nationwide approach, but that same tool could offer the most cost-efficient and effective means of achieving a particular goal in a specific geographic area. Accordingly, the FCC should have explicit authority to use the full panoply of regulatory tools in order to promote broadband deployment and adoption. Congress also should: (i) avoid statutory amendments that would undermine the FCC's existing authority to conduct reverse auctions; (ii) explicitly provide authority for the FCC to use means testing for supply-side and demand-side broadband subsidies if those tools would promote efficient resource allocation; and, (iii) continue to afford the FCC with authority and flexibility to reform the mechanism for contributing to the universal service fund, as needed.

Build Flexibility into the Statute

Congress should afford the FCC flexibility to optimize the efficiency and effectiveness of the universal service program and facilitate nimble modifications as needed. It is difficult if not impossible to foresee all of the consequences of a specific approach or set of restrictions at the time the approach or restrictions are being crafted. A built-in method for the FCC to adjust its approach would allow it to more effectively accomplish congressional goals and reduce fraud and waste where they begin to appear. Moreover, affording flexibility to the FCC would allow it to increase minimum eligible broadband speeds as technological expectations warrant, and to reduce funding as goals are achieved.

Willingness to experiment is an important element of flexibility and statutory changes should encourage it. Since the Telecommunications Act of 1996, modifications to the federal universal service program have tended to occur as relatively infrequent but massive tectonic-like shifts with potentially severe consequences for consumers and industry alike. More frequent yet smaller changes to the program would lessen sharp-edged effects. One way to accomplish this would be to engage in multiple limited experiments. Earlier this year, the FCC adopted a limited experimental program to test how

tailored economic incentives can advance wireline and wireless broadband networks in rural areas.² In doing so, the FCC hopes to learn more about, among other things, the use of TV white spaces to deliver broadband services to remote and extremely high cost regions, such as Microsoft has done to connect remote schools and anchor institutions in the U.S. and abroad (independent of the universal service program).³ These experiments provide an opportunity to develop a data-driven basis for determining whether a particular approach to universal service has merit for a larger geographic area or population base and to compare the effectiveness of different approaches. Congress should encourage these types of experiments and pilot programs by continuing to provide the FCC with the statutory flexibility to determine whether, how, and where to experiment with broadband universal service solutions.

Strengthen Schools and Expand Support to Anchor Institutions

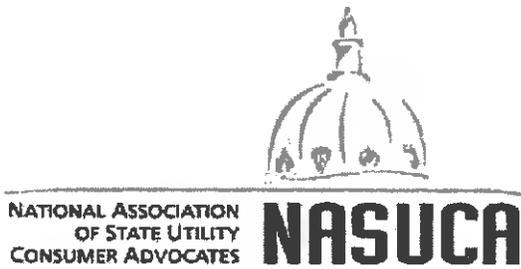
Technology-based educational methods have the potential to empower students like never before, and increasingly the tools that students, teachers, and parents use exist and operate in the cloud. Accordingly, the efficacy of technology-based educational methods depends first and foremost on a level of broadband Internet connectivity commensurate with 21st century usage. E-rate policies must ensure that schools and libraries not only have sufficient broadband connectivity but also have the resources to leverage that connectivity into meaningful usage, such as through campus-wide WiFi, cloud resources, efficient internal network architectures, and other necessary internal equipment for 21st century learning. This year, the FCC reformed the E-rate program to help fund some of those tools.⁴ Microsoft strongly encourages Congress to prioritize these goals and objectives in any reform of its E-rate provisions.

Microsoft thanks the Committee for the opportunity to provide this response to the Committee's white paper, and looks forward to ongoing discussions concerning universal service policy and the role of the FCC. For questions and additional information, please contact Paula Boyd, Director, Government and Regulatory Affairs at Paula.Boyd@microsoft.com or 202.263.5946 or John Sampson, Director Government Affairs at jsampson@microsoft.com or 202.263.5913.

² See *Connect America Fund; ETC Annual Reports and Certifications*, WC Docket Nos. 10-90 and 14-58, Report and Order and Further Notice of Proposed Rulemaking, FCC 14-98 (rel. July 14, 2014).

³ In Kenya, for example, Microsoft, using TV white spaces and solar-powered base stations, participated in a pilot project to deliver wireless high-speed broadband Internet to schools in areas lacking even basic electricity. <http://www.microsoft.com/africa/4afrika/white_spaces_project.aspx>. Closer to home, Microsoft participated in the first U.S. deployment of TV white spaces by connecting Claudville, Virginia's post office, several businesses and homes, and Trinity Christian School to the town's fiber optic backbone under an experimental license granted by the FCC.

⁴ See *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Report and Order and Further Notice of Proposed Rulemaking, FCC 14-99 (rel. July 23, 2014).



September 19, 2014

The Honorable Fred Upton, Chairman
The Honorable Henry Waxman, Ranking Member
Committee on Energy and Commerce
2125 Rayburn HOB, 2322A Rayburn HOB
Washington, D.C. 20515

The Honorable Greg Walden, Chairman
The Honorable Anna Eshoo, Ranking Member
Subcommittee on Communications, Communications Technology & the Internet
2125 Rayburn HOB, 2322A Rayburn HOB
Washington, D.C. 20515 Washington, D.C. 20515

Dear Chairmen Upton and Walden and Ranking Members Waxman and Eshoo:

Enclosed are the National Association of State Utility Consumer Advocates ("NASUCA") comments on the Committee's White Paper #5 on universal service policy. These were e-mailed on September 19, 2014 and we are now sending a hard copy to the committee.

Sincerely,

Charles Acquard, Executive Director
NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910





August 8, 2014

RESPONSE TO HOUSE COMMITTEE ON ENERGY AND COMMERCE
FIFTH WHITE PAPER, ON UNIVERSAL SERVICE POLICY

NASUCA¹ submits these comments to the House Committee on Energy and Commerce (“Committee”) in response to the Committee’s request. NASUCA very much appreciates the opportunity to comment on each of the eight “Questions for Stakeholder Comment” on “Universal Service Policy and the Role of the Federal Communications Commission.”

The assurance of universal service was a bulwark of the 1934 Communications Act, and was enlarged, enhanced and refined in the 1996 Telecom Act.² And the need for service to rural, insular and high cost areas, as well as to low-income customers, was for the customers of large carriers (that were a part of the original AT&T) and customers of the smaller carriers that served where AT&T would not. Since its formation in 1979, NASUCA – whose members represent both the customers intended to benefit from universal service programs and the customers who pay for the programs □ has been intimately involved with universal service issues.³

As White Paper #5 states, “The rapid change in communications technologies, shifts in consumer preferences, and their impact on competition raise fundamental questions for universal service policy.” The current environment shows the need for affordable broadband Internet access service (“broadband”) throughout the Nation, and the tremendous economic and other benefits that would result. So the need for a universal service fund (“USF”) that supports broadband along with traditional robust voice service is clear

¹ NASUCA is a voluntary, national association of consumer advocates in more than forty states and the District of Columbia, organized in 1979. NASUCA’s members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

² See 47 U.S.C. §§254, 241(e).

³ A NASUCA member – currently Elin Katz, Connecticut Consumer Counsel – is a member of the Federal-State Joint Board on universal service. 47 U.S.C. § 254(a)(1).

QUESTIONS FOR STAKEHOLDER COMMENT

1. How should Congress define the goals of the Universal Service Fund? Should Congress alter or eliminate any of the six statutory principles, codify either of the principles adopted by the FCC, or add any new principles in response to changes in technology and consumer behavior?

Congress has already defined the goals of the USF, in § 254(b) and (c)(1). None of the six statutory principles need be altered. The two FCC-created principles are adequate, although NASUCA would note that the eighth principle (“Universal service support should be directed where possible to networks that provide advanced serviced as well as voice services”) would have been much better effectuated if the Commission had not classified broadband as an information service. NASUCA has urged the FCC to perform the reclassification for this and other reasons.⁴

These principles, which represent the core of the “enduring values” referred to by the FCC, need not be added to, in response to the changes in technology and industry structure or in response to the resultant consumer behavior.

2. Universal service was created to fund buildout in areas incapable of economically supporting network investment. How should our policies address the existence of multiple privately funded networks in many parts of the country that currently receive support?

The premise of this question is incorrect: Universal service was created to ensure that consumers in rural, insular and high cost areas, as well as low-income customers, had access to services reasonably comparable to those in urban areas.⁵ So buildout is only one part of universal service; ongoing service responsibilities are paramount.

The networks that sometimes overlies portions of the service area of eligible telecommunications carriers (“ETCs”) do not receive federal universal service funds. But those typically cable company networks are not required to serve all consumers, especially those in the rural areas where the supported telephone company is required to serve.⁶ The carrier of last resort (“COLR”) obligation cannot be lightly dismissed.

⁴ FCC GN Docket No. 14-28, et al., NASUCA Comments (July 15, 2015), accessible at <http://apps.fcc.gov/ecfs/document/view?id=7521480682>; and Reply Comments (September 15, 2014), accessible at <http://nasuca.org/nwp/wp-content/uploads/2014/02/14-28-NASUCA-Reply-9-15-14.pdf>.

⁵ 47 U.S.C. § 254(b)(3).

⁶ In New York and California, Time Warner Cable requested ETC status for the purpose of serving Lifeline customers. See Order Designating Competitive Local Exchange Carriers as Eligible Telecommunications Carriers, Service Areas, and Granting Waivers, NYPSC Case No. 940-C-00095 (Dec. 24, 1997); Decision Granting Request for Eligible Telecommunications Carrier Status, CPUC Docket No. A.13-10-019 (March 27, 2014).

3. What is the appropriate role of states and state commissions with respect to universal service policy?

Both the federal government (though the FCC and other efforts⁷) and the states have responsibility for universal service. State commissions will have the roles determined by state law, just as the federal universal service program is determined by Congress. This principle is fundamental to 47 U.S.C. § 254 and should remain there. States are both literally and figuratively closer to their consumers than officials in D.C.

4. What is the appropriate role of the Federal-State Joint Board on Universal Service in a broadband, IP-enabled, largely interstate world? What is the appropriate role of related joint boards, such as the Federal-State Joint Board on Separations or the Federal-State Conference on Advanced Services?

The role of the Joint Board on Universal Service should be enhanced, to ensure that it acts less at the behest of the FCC, and thus can be more effective in bringing state viewpoints to the Commission's attention.

Yet NASUCA must respectfully differ from the description of the transitioned network as "largely interstate." Regardless of the medium or mode (wireline or wireless, POTS or broadband) over which communication is transmitted, a call that begins in one state and ends in the same state is intrastate.

The roles of the other Joint Boards should also continue, with the same enhanced authority. A consumer representative from among NASUCA members should be authorized to serve on such FCC-State Joint Boards.

5. The Universal Service Fund is one of several federal programs that support buildout of communications facilities. Are current programs at other federal agencies, like the National Telecommunications and Information Administration (which oversaw the Broadband Technology Opportunities Program) or the Rural Utility Service (which oversees lending programs and oversaw the Broadband Initiatives Program) necessary?

Each of these other programs follows its individual statutory directives. A single federal agency should not be given the responsibility for all national universal service efforts.

⁷ E.g., Rural Utility Service ("RUS") loans, NTIA grants (see question 5).

6. How can we ensure that the Universal Service Fund is sufficiently funded to meet its stated goals without growing the fund beyond fiscally responsible levels of spending?

An inequity in the current program is that despite the program's support for broadband networks,⁸ all contributions come from telecom networks. Broadening the contribution base so that broadband services contribute to support for broadband in underserved and unserved areas is consistent with the concept of the 1996 Act's mechanism, which supported only telecommunications at that point.

A more broad-based contribution mechanism would ease the burden on current telecom services. A broader base would ease worries about "fiscally responsible" levels of spending.

That said, it remains to be seen what the full extent of the fallout will be from the Commission's 2011 "Global Transformation Order." There are likely efficiencies to be gotten from each of the four current programs,⁹ but Congressional intervention does not appear necessary at this time.

7. Are all of the funds and mechanisms of the current Universal Service Fund necessary in the modern communications marketplace?

The four funds conform to the statute. Each is, therefore, necessary.

There needs to be a "high cost" fund, to ensure that rates and services in rural, insular and high-cost areas are reasonably comparable to those in urban areas. There needs to be a low-income fund, to extend such protections to low-income consumers. The schools and library program and the rural telemedicine program both provide benefits: the S&L fund to broaden the public broadband infrastructure, and the rural fund to address a chronically-underserved market of great public interest. The programs should remain in place.

8. In lieu of the current support mechanisms, could any of the programs be better managed or made more efficient by conversion to:

- a. A state block grant program;*
- b. A consumer-focused voucher program;*
- c. A technology-neutral reverse auction; or,*
- d. Any other mechanism.*

The current mechanisms have served the public. At this point, more than fifteen years after the four funds were created,¹⁰ a massive rejiggering of any of the four would likely cost more to

⁸ *In re FCC 11-161* (10th Cir. May 22, 2014).

⁹ *Id.*

¹⁰ FCC Docket 96-45, Report and Order, FCC 97-157 (May 8, 1997).

develop and transition than would be gained on an annual basis. NASUCA has, however, frequently commented on the shortcomings of reverse auctions.¹¹

Conclusion

NASUCA again appreciates the opportunity to provide comments to the Committee, particularly on this issue, perhaps the most crucial for American telephone and broadband consumers. As NASUCA has stated in many previous contexts, the public interest is best served when policy-makers are not swayed by the business plans and pecuniary interests of particular companies - or indeed, particular industries. A balanced approach that considers the interests of consumers is best.

Respectfully,

Charles Acquard, Executive Director
NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910



¹¹ See FCC WC Docket No. 05-337, et al., NASUCA Comments (October 10, 2006), accessible at <http://apps.fcc.gov/ecfs/document/view?id=6518525893>.



NATIONAL CONGRESS OF AMERICAN INDIANS

September 19, 2014

The Honorable Fred Upton
Chair
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Marsha Blackburn
Vice Chair
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
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The Honorable Greg Walden
Chair
Subcommittee on Communications
& Technology
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Anna Eshoo
Ranking Member
Subcommittee on Communications
& Technology
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

RE: UNIVERSAL SERVICE POLICY AND THE ROLE OF THE FEDERAL COMMUNICATIONS COMMISSION

Dear Chairman Upton, Vice Chairwoman Blackburn, Chairman Walden, and Ranking Member Eshoo:

On behalf of the National Congress of American Indians (NCAI), I respectfully submit these comments for the record in the matter of *Universal Service Policy and the Role of the Federal Communications Commission*. Established in 1944, NCAI exists as the largest and oldest representative organization of American Indian and Alaska Native tribal governments. NCAI represents the broad interests of tribes and their citizens to advance, and promote the advancement of tribal sovereignty and self-determination. We are pleased to have this opportunity to provide vital input on how reform of Universal Service policies and the role of the Federal Communications Commission (FCC) could support tribal governments and tribal telecommunications providers.

As tribal nations become increasingly aware of the benefits broadband technologies and services offer, it is essential that certain barriers to entry are resolved to include our participation in this Digital Age. NCAI has developed a long-standing relationship with the FCC and has continually participated in vital discussions to bridge the "Digital Divide" on tribal lands. One of our first steps to institutionalize a conduit for tribal leaders and technical experts to develop telecommunications policies was through our establishment of the NCAI Telecommunications Subcommittee in 2001.

Since then, through resolutions adopted by our tribal nation membership, NCAI has advanced telecommunications issues regarding tribal consultation; Universal Service Fund reforms and modernizations; spectrum allocation and regulation; broadcast and media services; public safety communications; creation of the FCC Office of Native Affairs and Policy; and Net Neutrality.

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Kiowa Tribe

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Manuel Heart
Ute Mountain Ute Tribe

WESTERN
Arlan Melendez
Reno Sparks Indian Colony

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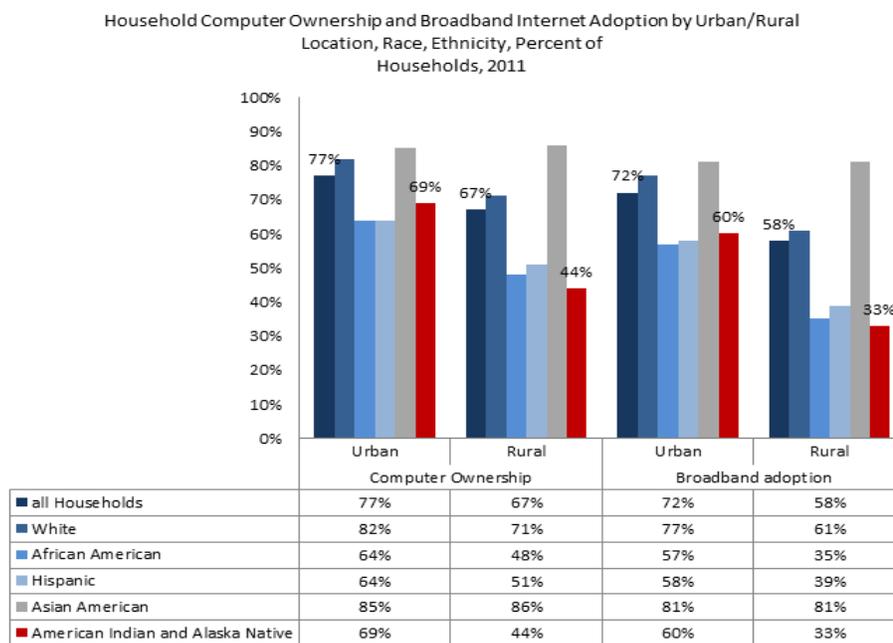
NCAI HEADQUARTERS

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www.ncai.org

QUESTION 1: HOW SHOULD CONGRESS DEFINE THE GOALS OF THE UNIVERSAL SERVICE FUND? SHOULD CONGRESS ALTER OR ELIMINATE ANY OF THE SIX STATUTORY PRINCIPLES, CODIFY EITHER OF THE PRINCIPLES ADOPTED BY THE FCC, OR ADD ANY NEW PRINCIPLES IN RESPONSE TO CHANGES IN TECHNOLOGY AND CONSUMER BEHAVIOR?

While the recognition of tribal sovereignty was excluded from the original 1934 Communications Act, and subsequent amendments in the 1996 Telecommunications Act, the FCC has exercised administrative flexibility to ensure tribal matters are addressed in its rulemakings. The six universal service principles under Section 254(b) of the current law (47 U.S.C. § 254(b)) should be retained, with certain modifications that acknowledge tribal sovereignty and formalize requirements to consult with tribal nations. These modifications are necessary to continue ongoing efforts to address the disparate levels of telecommunications facilities and services on tribal lands. For nearly fifteen years, the FCC has acknowledged these disparities through speeches by various Commissioners and the numerous rulemakings initiated to modify regulations for tribal inclusion. Codification of a universal service principle—among the six existing—to acknowledge tribal sovereignty and government-to-government consultation would further ensure the FCC’s commitment to tribal matters. This formal recognition would codify the FCC’s fiduciary responsibilities to engage tribal nations and bridge the “Digital Divide” on tribal lands. This universal service principle must also recognize the need for deployment of telecommunications services and commitments to the ongoing maintenance and technological advancements of telecommunications infrastructure and services on tribal lands.

Section 245(b)(1) of the current law states that, “quality services should be available at just, reasonable, and affordable rates.” This has been a vital principle in ensuring build out of telecommunications services nationwide, but it has not always upheld the goal of affordability. As illustrated by the graph below, American Indian and Alaska Native people have lower rates of computer ownership and broadband adoption within the household compared to other ethnicities¹:



¹ Source: Exploring the Digital Nation: America’s Emerging Online Experience. June 2013. Department of Commerce, National Telecommunications & Information Administration, and the Economics and Statistics Administration.

NCAI recommends that the Committee consider these disparate adoption rates when addressing this universal service principle. Tribal lands should receive the same high level broadband services at comparable, if not lower, prices that exist in urban and densely populated areas. Due to the high costs associated with deployment of broadband infrastructure in rural and tribal areas, and typically a lack of competition driving affordable price ranges, CAF subsidies should be utilized to deploy high-speed, high-capacity broadband services at affordable rates. Additionally, the use of universal service subsidies should not be designed to encourage the deployment of last-generation technologies, but rather it should invest in network architectures and technologies that support the ever-advancing role of telecommunications.

QUESTION 2: UNIVERSAL SERVICE WAS CREATED TO FUND BUILD-OUT IN AREAS INCAPABLE OF ECONOMICALLY SUPPORTING NETWORK INVESTMENT. HOW SHOULD OUR POLICIES ADDRESS THE EXISTENCE OF MULTIPLE PRIVATELY FUNDED NETWORKS IN MANY PARTS OF THE COUNTRY THAT CURRENTLY RECEIVE SUPPORT?

According to the FCC’s *Eighth Broadband Report*, 29 percent of Americans residing on tribal lands have no access to fixed broadband services at the current FCC speed benchmark—4 Mbps down/1 Mbps up—compared to six percent of all Americans elsewhere.² The *Report* further disaggregates the data to highlight the following broadband disparities:

Americans Residing on Tribal Lands			
Without Access to Fixed Broadband Meeting the Speed Benchmark³			
	(Millions)	Americans Residing on Tribal Lands Without Access (Millions)	Percentage of Americans Residing on Tribal Lands Without Access
All Tribal Lands	3.9	1.1	29.0%
Tribal Lands in the Lower 48 States	1.1	0.5	48.2%
Alaskan Village Areas	0.2	0.1	39.5%
Tribal Statistical Areas	2.5	0.5	20.4%
Hawaiian Home Lands	0.0308	0.0001	0.4%

While six percent of Americans do not have access to broadband services, reports of the disparate levels of access on tribal lands are confounding. Section 214(e) governs the provision of universal service through eligible telecommunications carriers and applicable service areas. NCAI defers to the tribal telecommunications provider(s) commenting on this matter; we are aware that Gila River Telecommunications, Inc.— a telecommunications carrier wholly-owned and operated by the Gila River Indian Community—is submitting comments on this white paper series.

Statutory changes to Section 214(e) could result in unintended consequences resulting in the loss of services in high cost areas, which would adversely affect tribal telecommunications

² See FCC Eighth Broadband Progress Report. GN Docket No. 11-121. *Table 3: Americans Resident on Tribal Lands Without Access to Fixed Broadband Meeting the Speed Benchmark*. Page 30. Released August 21, 2012. Available at <http://www.fcc.gov/reports/eighth-broadband-progress-report>.

³ *Id.* *Table 5: Americans Residing on Tribal Lands Without Access to Fixed Broadband Meeting the Speed Benchmark*. Page 31.

providers and those non-tribal entities serving tribal lands. This is a topic that the FCC and Congress should explore further before making any drastic changes to the provision of universal service to private funded networks.

QUESTION 3: WHAT IS THE APPROPRIATE ROLE OF STATES AND STATE COMMISSIONS WITH RESPECT TO UNIVERSAL SERVICE POLICY?

Specific references to tribal nations and tribal entities—such as but not limited to tribal telecommunications providers or consortiums—were not previously mentioned in the original 1934 Communications Act. During the vast overhaul resulting in the amended 1996 Telecommunications Act, tribes were again not explicitly codified in the law alongside their state counterparts. While this could have led to problematic and exclusionary rules and regulations for tribal lands, advocacy efforts by tribal nations and national tribal organizations like NCAI led to increased awareness regarding this vital oversight. Four years following the 1996 Act, the FCC adopted a 2000 *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*,⁴ to ensure tribal inclusion in all matters before the FCC. Under Section III of the 2000 policy statement, “*Reaffirmation of Principles of Tribal Sovereignty and the Federal Trust Responsibility*”, the FCC stated:

*The Commission recognizes the unique legal relationship that exists between the federal government and Indian Tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive orders, and numerous court decisions... The federal government has a federal trust relationship with Indian Tribes, and this historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Indian Tribes. In this regard, the Commission recognizes that the federal government has a longstanding policy of promoting tribal self-sufficiency and economic development as embodied in various federal statutes... Therefore, as an independent agency of the federal government, the Commission recognizes its own general trust relationship with, and responsibility to, federally-recognized Indian Tribes. The Commission also recognizes the rights of Indian Tribal governments to set up their own communications priorities and goals for the welfare of their membership.*⁵

Following the adoption of its policy statement in 2000, the FCC created a number of Tribal Liaison positions to assist in its outreach and coordination with tribal nations. However, for nearly a decade tribal governments and organizations advocated for the creation of a tribal specific office to further assist with consultation efforts and ensure tribal inclusion in the vast rulemakings undertaken at the FCC. Finally in 2010, through its administrative capabilities, the FCC created the Office of Native Affairs and Policy (FCC-ONAP), but it wasn't until the *Consolidated Appropriations Act of 2014*⁶ that FCC-ONAP received dedicated funds for tribal consultation and training.

In the *Middle Class Tax Relief and Job Creation Act of 2012*, Congress attempted to codify consultation requirements with tribal nations as part of the implementation of the First Responder

⁴ See Federal Communications Commission. *In the Matter of: Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*. FCC 00-207. Released June 23, 2000. Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-00-207A1.pdf.

⁵ *Id.*

⁶ See Pub. L. No. 113-76. 2014. Available at <https://beta.congress.gov/bill/113th-congress/house-bill/3547/text>.

Network Authority (FirstNet).⁷ FirstNet, and independent agency, was created with the goal of allowing police officers, fire fighters, emergency medical service professionals, and other public safety officials to communicate with each other across agencies and jurisdictions on a single nationwide broadband network. When the Act was initially passed, NCAI worked with the Department of Commerce’s National Telecommunications & Information Administration (NTIA) since it was the lead agency with assisting in the creation of the FirstNet Authority. However, NCAI and tribal governments quickly ascertained other constraints the law had in regards to tribal inclusion. While consultation for network deployment included mention of tribal governments, the law designated this consultation to occur through a single state designated officer, or state governmental body assembled by the state Governor.

We continued working with NTIA—and later the FirstNet Authority once it was established—to ensure that tribal matters in the consultation process were not cut off internally at the state level. Since then, NCAI has secured a tribal position on the FirstNet Public Safety Advisory Committee and has provided ongoing assistance in the formation of a Tribal Government Outreach Group. However, any recommendation requesting direct consultation with tribal governments is immediately countered by the language of the law, which unfortunately has established a “trickle-down” system of consultation. Tribal governments—recognized as having a legal relationship with the federal government—have been reduced to “third class” governments. This statutory language has already affected tribal inclusion in FirstNet implementation. Another serious fault with the law dealt with the request for funding proposal (RFP) process of FirstNet. Again, this process designated the Governor of each state or their designee(s) as the sole decision-maker in whether or not to accept funding for FirstNet deployment. The RFP process has not been implemented yet, but it has raised serious concerns regarding the inclusion of tribal lands in upcoming FirstNet deployment efforts.

Another area where tribal sovereignty was altered by law was the passage of the *Library Services and Technology Act* (LSTA). Just months after passage of the 1996 Telecommunications Act, Congress repealed the *Library Services Construction Act* (LSCA) and replaced it with the LSTA. The adoption of the LSTA significantly altered the eligibility of tribal libraries to participate in the Schools & Libraries (E-rate) program. Previously, as recognized by the original passage of the ’96 Telecommunications Act, the LSCA stated:

*Sec. 2. (a) It is the purpose of this Act to assist States in the extension and improvement of public library services to areas and populations of the States which are without such services or to which such services are inadequate and to assist **Indian tribes in planning and developing library services to meet their needs.***⁸

The LSCA recognized tribes on equal footing with States in establishing their own libraries—an explicit recognition of tribal sovereignty. However, when Congress repealed the LSCA and adopted the LSTA, tribal libraries could only be designated as “libraries” through a State Library Administrative Agency (SLA)—this has precluded tribes from exercising inherent sovereignty to designate their own “libraries” as eligible for funding. In turn, this has affected E-rate funding for

⁷ See Pub. L. No. 112-96, § 6206(b)(1). 2012. Available at <http://www.gpo.gov/fdsys/pkg/PLAW-112publ96/pdf/PLAW-112publ96.pdf>.

⁸ See P.L. 98-480. Sec. 102. (a) Section 2(a). Available at <http://www.gpo.gov/fdsys/pkg/STATUTE-98/pdf/STATUTE-98-Pg2236.pdf>. Emphasis added.

tribal libraries since current law requires tribes to receive authorization from an SLA to be designated as a “library” facility eligible for funding.

Any update of the 1934 Communications Act must include explicit recognition of tribal sovereignty and formalize tribal consultation through direct government-to-government interactions with the federal government. This measure was agreed upon at NCAI’s Mid Year Conference in Anchorage, AK in June 2014, through adoption of Resolution #ANC-14-015, *Calling on Congress to Establish Formal Recognition of Tribal Sovereignty and Tribal Consultation in the Communications Act* (attached).

QUESTION 4: WHAT IS THE APPROPRIATE ROLE OF THE FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE IN A BROADBAND, IP-ENABLED, LARGELY INTERSTATE WORLD? WHAT IS THE APPROPRIATE ROLE OF RELATED JOINT BOARDS, SUCH AS THE FEDERAL-STATE JOINT BOARD ON SEPARATIONS OR THE FEDERAL-STATE CONFERENCE ON ADVANCED SERVICES?

The Federal-State Joint Board on Universal Service provides recommendations on how to implement and provide critical USF investments. On June 11, 2010, NCAI sent a letter to Congressman Jay Inslee in support of legislative changes to Section 410 of the Communications Act (enclosed). In that letter, NCAI referenced recommendations from the National Broadband Plan citing, “...Congress should consider amending the Communications Act to establish a Tribal seat on the USF Joint Board.”⁹ On December 16, 2010—during the 111th Congress—legislation was introduced to provide amendments to Sections 254(a) and 410(c) of the Communications Act to create a tribal seat on the Federal-State Joint Board on Universal Service.¹⁰ Following the bill’s introduction, NCAI’s membership adopted Resolution #MKE-11-005, *In support of Tribal Positions on Universal Service Reform* (attached). To the extent that Congress determines the continued use of other Federal-State Joint Boards, tribal interests and representation must be included.

QUESTION 5: THE UNIVERSAL SERVICE FUND IS ONE OF SEVERAL FEDERAL PROGRAMS THAT SUPPORT BUILD OUT OF COMMUNICATIONS FACILITIES. ARE CURRENT PROGRAMS AT OTHER FEDERAL AGENCIES, LIKE THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION (WHICH OVERSAW THE BROADBAND TECHNOLOGY OPPORTUNITIES PROGRAM) OR THE RURAL UTILITY SERVICE (WHICH OVERSEES LENDING PROGRAMS AND OVERSAW THE BROADBAND INITIATIVES PROGRAM) NECESSARY?

Most of, if not all, the tribal telecommunications providers that have eligible telecommunications carrier (ETC) designations utilized the USDA, Rural Utilities Service (RUS) Broadband Loan programs. The low-interest rate loan programs have provided many tribal telecommunications providers and entities with much needed capital to build and sustain network growth and improvements. Preservation of this program and others under RUS are essential to not only tribal lands, but also other rural non-reservation areas. Additionally, the USDA loan and grant

⁹ See the National Broadband Plan. *Chapter 9.7: Coordinating with Tribes on Broadband Issues*. Page 184. Released March 17, 2010. Available at <http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>.

¹⁰ See H.R. 6530, *To amend the Communications Act of 1934 to establish a position for a representative of Indian Tribes on the Joint Board overseeing the implementation of universal service, and for other purposes*. 111th Congress, 2nd Session. Introduced December 16, 2010. Available at <https://www.govtrack.us/congress/bills/111/hr6530>.

programs provide much needed funding for IT services and computers in schools and libraries. Carriers that have obtained ETC status primarily provide broadband services to residential, business, and anchor institutions—not necessarily the hardware and software components necessary to utilize those services (e.g. computers/laptops and software applications). The USF was never meant to emulate the USDA Broadband Loan and grant programs. Instead, the USF was designed to provide incentives and subsidies to encourage deployment to unserved/underserved areas, assistance for low-income customers, support for the nation’s schools and libraries, and subsidies for the delivery of rural healthcare telemedicine services.

The USDA Broadband Initiatives Program and the Broadband Technology Opportunities Program—administered by the National Telecommunications & Information Administration (NTIA)—were one-time investments of capital from the *American Recovery and Reinvestment Act of 2009*. However, NTIA does administer grants that assist in the collection of data regarding broadband availability and adoption across the country. Much of this data has been compiled on the National Broadband Map, and the Native Nations National Broadband Map. Although, it is important to highlight that there have been issues with the accuracy of the data collected, especially regarding the accuracy of broadband services on tribal lands; some aspects of the data collection rely on carriers self-reporting coverage without mechanisms to confirm such claims.

Additionally, one of the recommendations from the National Broadband Plan that Congress has yet to fulfill is the establishment of a Tribal Broadband Fund. Chapter 8.4 provides recommendations to Congress that would provide additional financing solutions beyond RUS programs:

*Recommendation 8.18 Congress should consider establishing a Tribal Broadband Fund to support sustainable broadband deployment and adoption in Tribal lands, and all federal agencies that upgrade connectivity on Tribal lands should coordinate such upgrades with Tribal governments and the Tribal Broadband Fund grant-making process.*¹¹

The National Broadband Plan specified that the creation of a Tribal Broadband Fund would provide grant funding to bring high-capacity broadband services to tribal anchor institutions; conduct feasibility studies, planning and infrastructure deployment; and provide business plan development, implementation, and digital literacy training.¹² In recognition of the low adoption rates prevalent on tribal lands, the National Broadband Plan also recommended that a portion of the Tribal Broadband Fund would provide targeted grant funding for internet access and adoption programs.¹³ While many discussion draft bills have been circulated regarding the creation of the Tribal Broadband Fund, no bill has been formally introduced. NCAI’s membership still supports this initiative as reflected by the adoption of NCAI Resolutions #RAP-10-006, # ABQ-10-061, and #REN-13-064 (attached).¹⁴

¹¹ See the National Broadband Plan. *Chapter 8.4: Other Government Actions to Promote Availability*. Page 152. Released March 17, 2010. Available at <http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>.

¹² *Id.*

¹³ *Id.*

¹⁴ See NCAI Resolution #RAP-10-006, *Call for Congressional Funding of Tribal Broadband Fund and FCC Tribal Programs*. NCAI Resolution #ABQ-10-061, *Congress and Federal Agencies Must Create the Native Broadband Fund, and Devote and Priorities Funding and Resources to Provide Broadband in Native Communities and Include Native Governments in All Native Telecommunications Infrastructure and Broadband Policy Initiatives*. NCAI Resolution #REN-13-064, *Support for the Establishment of a Tribal Broadband Fund and for Other Related Purposes* (attached).

QUESTION 6: HOW CAN WE ENSURE THAT THE UNIVERSAL SERVICE FUND IS SUFFICIENTLY FUNDED TO MEET ITS STATED GOALS WITHOUT GROWING THE FUND BEYOND FISCALLY RESPONSIBLE LEVELS OF SPENDING?

The USF has supported the deployment of telecommunications services across the nation, especially in high-cost areas that would have been overlooked by market forces due to sparse populations, terrain, and other factors. However, the Fund is not without its criticisms, most notably in regards to the Lifeline program. This low-income program has been subject to ever-increasing attacks that have inaccurately portrayed the program as “wasteful spending funded by tax dollars”. Yet, as a low-income program with the objective of providing low-income consumers with access to vital telephone services, the Lifeline program has proven to be a massive success in providing this service to economically disadvantaged tribal citizens.

In recognition of the increasing attacks on the Lifeline program by Congress and the national media, NCAI’s membership adopted Resolution #TUL-13-061, *Request that the Federal Communications Commission Preserve and Protect the Tribal Lifeline & Link-Up Programs* (attached). NCAI’s Resolution recognized and supported efforts by the FCC to implement accountability measures and clarify reporting requirements to eliminate waste, fraud, and abuse of the program. The 2012 Lifeline Reform and Modernization Order adopted a number of reforms designed to save the USF up to \$2 billion in the following three years. On February 12, 2013, the FCC announced that the adopted reforms were on track to eliminate an additional \$400 million in waste fraud, and abuse in 2013, and the reforms were on schedule to save more than \$2 billion by the end of 2014.¹⁵ Futhermore, the FCC announced that the requirement for subscribers to certify their eligibility resulted in 3.3 million subscribers dropping from the Lifeline program.¹⁶

QUESTION 7: ARE ALL OF THE FUNDS AND MECHANISMS OF THE CURRENT UNIVERSAL SERVICE FUND NECESSARY IN THE MODERN COMMUNICATIONS MARKETPLACE?

The universal service priorities currently set forth under Section 245, have served the general public and guided the FCC in deployment of telecommunications services throughout the nation. Preservation of Section 245 should remain in any subsequent update to the 1996 Act as it has provided broad objectives in funding for high-cost areas, low-income consumers, schools and libraries, and rural healthcare facilities. Nonetheless, as technology continues to make advances in hardware and applications, the confines of broadband capacity and speed will continuously expand. Pilot programs that have been initiated by the FCC, such as the Lifeline Broadband Adoption Pilot Program, have been immensely successful in obtaining vital information regarding various aspects of converting USF subsidies to support broadband components. The FCC should continue to have the authority to initiate pilot projects to ascertain responsible avenues of USF investment.

QUESTION 8: IN LIEU OF THE CURRENT SUPPORT MECHANISMS, COULD ANY OF THE PROGRAMS BE BETTER MANAGED OR MADE MORE EFFICIENT BY CONVERSION TO:

- A STATE BLOCK GRANT PROGRAM;
- A CONSUMER-FOCUSED VOUCHER PROGRAM;

¹⁵ See FCC News Release. *FCC Reports: Major Reforms to Lifeline Program on Track to Cut at Least an Additional \$400 Million in Waste, Fraud, and Abuse in 2013; Reforms on Schedule to Save More than \$2 Billion by End of 2014*. Released February 12, 2013. Available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-318892A1.pdf.

¹⁶ *Id.*

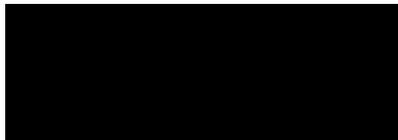
- **A TECHNOLOGY-NEUTRAL REVERSE AUCTION; OR,**
- **ANY OTHER MECHANISM.**

As mentioned in response to Question #3, state block grant programs raise serious concerns for tribal inclusion and participation. Like funding for public education, there have been many instances where funds allocated directly to States have a tendency to “dry up” before reaching tribal entities. This has been both a historical and ongoing issue regarding funding allocations meant for Indian Country. In recognition of the fiduciary trust relationship the federal government has with tribal nations—established by the Constitution, Executive Orders, Acts of Congress, and affirmed by our judicial systems—conversion of funding to a state block grant program would undermine tribal sovereignty and self-determination. The FCC, as an independent agency, has acknowledged its trust relationship with tribal nations in the telecommunications arena. Dissolving that relationship, and/or replacing it with measures that would further complicate and exclude tribal participation and advancement, would be an unfortunate deviation to this country’s goal in becoming a global leader in the Digital Age.

CONCLUSION

The recommendations made in these comments are designed to ensure that all tribal lands, not just the portions most economically desirable for carriers, are connected to robust broadband services. Any consideration to update the Telecommunications Act of 1996 must take into consideration the opportunities for, and barriers against, tribal access and adoption. Tribal governments and telecommunications providers must be afforded the same opportunities and support in the deployment next-generation communications services.

If you have any questions or comments please contact NCAI Legislative Associate, Brian Howard, at bhoward@ncai.org.



Jacqueline Pata
Executive Director
National Congress of American Indians

Attached:

NCAI Resolution #ANC-14-015, Calling on Congress to Establish Formal Recognition of Tribal Sovereignty and Tribal Consultation in the Communications Act.

NCAI Letter to the Honorable Jay Inslee. June 11, 2010. Re: Revision of Communications Act Amendment to Section 410 Composition of USF Joint Board.

NCAI Resolution #MKE-11-005, In Support of Tribal Positions on Universal Service Reform.

NCAI Resolution #RAP-10-006, Call for Congressional Funding of Tribal Broadband Fund and FCC Tribal Programs.

NCAI Resolution #ABQ-10-061, Congress and Federal Agencies Must Create the Native Broadband Fund, and Devote and Priorities Funding and Resources to Provide Broadband in Native Communities and Include Native Governments in All Native Telecommunications Infrastructure and Broadband Policy Initiatives.

NCAI Resolution #REN-13-064, Support for the Establishment of a Tribal Broadband Fund and for Other Related Purposes.

NCAI Resolution #TUL-13-061, Request that the Federal Communications Commission Preserve and Protect the Tribal Lifeline & Link-Up Programs



NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution #ANC-14-015

TITLE: Calling on Congress to Establish Formal Recognition of Tribal Sovereignty and Tribal Consultation in the Communications Act

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Kiowa Tribe of Oklahoma

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Manuel Heart
Ute Mountain Ute Tribe

WESTERN
Arlan Melendez
Reno Sparks Indian Colony

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WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, on December 3, 2013, the House of Representative's Energy and Commerce Committee announced a multi-year plan for the Committee to "examine and update the Communications Act to reflect the Internet era;" and

WHEREAS, by the Communications Act of 1934, Congress first established the universal access goal for communications by charging the Federal Communications Commission (FCC) with ensuring that "all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex" have access to "rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges;" and

WHEREAS, the Communications Act of 1934 did not acknowledge tribal governments, tribal sovereignty, or the federal trust relationship between the FCC and tribal governments, and in updating the Communications Act in 1996, Congress again did not acknowledge tribes; and

WHEREAS, the FCC has recognized that access to basic phone service on tribal lands lags other areas of America, and the percentage of Americans in rural tribal communities without access to fixed broadband is 8 times higher than the national average; and

WHEREAS, the FCC has expressed deep concern for the lack of access to telecommunications services on tribal lands and has sought comment on how to promote access to wireline and wireless services, and radio and TV broadcasting services to preserve tribal cultures and support self-governance, economic opportunity, health, education, public safety, and welfare; and

WHEREAS, in 2010 the FCC formally established the Office of Native Affairs and Policy (ONAP) to promote consultation with tribal nations and native communities as they exercise their sovereignty and self-determination, which has resulted in very positive, tangible benefits; and

WHEREAS, despite these earnest efforts by the FCC, formal recognition of tribes through statutory obligation is the only means to ensuring lasting tribal engagement and consultation to address telecommunications issues in Indian Country.

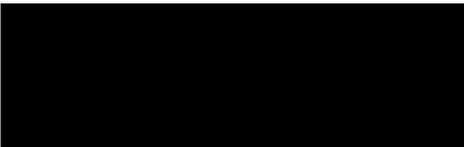
NOW THEREFORE BE IT RESOLVED, that NCAI does hereby urge Congress to address past oversights and include in any Communications Act update and formal acknowledgement of tribal governments, tribal sovereignty, and the federal trust relationship between the FCC and tribal governments; and

BE IT FURTHER RESOLVED, that in the event of a Communications Act update, Congress must address vital issues to eliminate barriers to tribal access and participation in the Digital Age, such as increasing access to spectrum licenses, preservation of tribal components of the Lifeline and Link Up programs, modernization of the E-rate program to support tribal schools and libraries, creation of a Tribal Broadband Fund that provides targeted Universal Service funding for broadband deployment and technical training as referenced in the National Broadband Plan, and addresses issues regarding Intercarrier Compensation, rate floor, and net neutrality mechanisms that have long supported tribal eligible telecommunications carriers; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2014 Mid-Year Session of the National Congress of American Indians, held at the Dena'ina Civic & Convention Center, June 8-11, 2014 in Anchorage, Alaska, with a quorum present.



NATIONAL CONGRESS OF AMERICAN INDIANS

June 11, 2010

Honorable Jay Inslee
403 Cannon House Office Building
Washington, DC 20515-4701

Re: Revision of Communications Act Amendment to Section 410 Composition of USF Joint Board

Dear Representative Inslee:

The National Congress of American Indians (NCAI) appreciates your request for our input on proposed changes to the Universal Service Fund, and specifically, how legislative changes to Section 410 of the Communications Act¹ could be made to better represent the interest of Native Americans in administering the USF to help bring telecommunication services more quickly and equitably to Indian Country.

As the FCC found in the National Broadband Plan:

The United States currently recognizes 565 American Indian tribes and Alaska Native villages (tribes). Tribes are inherently sovereign governments that enjoy a special relationship with the U.S. predicated on the principle of government-to-government interaction. This government-to-government relationship warrants a tailored approach that takes into consideration the unique characteristics of tribal lands in extending the benefits of broadband to everyone.

Any approach to increasing broadband availability and adoption should recognize tribal sovereignty, autonomy and independence, the importance of consultation with tribal leaders, the critical role of tribal anchor institutions, and the community oriented nature of demand aggregation on tribal lands.²

¹ 47 U.S.C. § 410(c) states, in part: "The Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking and, except as provided in section 409 of this title, may refer any other matter, relating to common carrier communications of joint Federal-State concern, to a Federal-State Joint Board. The Joint Board shall possess the same jurisdiction, powers, duties, and obligations as a joint board established under subsection (a) of this section, and shall prepare a recommended decision for prompt review and action by the Commission. In addition, the State members of the Joint Board shall sit with the Commission en banc at any oral argument that may be scheduled in the proceeding. The Commission shall also afford the State members of the Joint Board an opportunity to participate in its deliberations, but not vote, when it has under consideration the recommended decision of the Joint Board or any further decisional action that may be required in the proceeding. The Joint Board shall be composed of three Commissioners of the Commission and of four State commissioners nominated by the national organization of the State commissions and approved by the Commission. The Chairman of the Commission, or another Commissioner designated by the Commission, shall serve as Chairman of the Joint Board."

² *National Broadband Plan*, p. 146.



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Scotts Valley Band of Pomo Indians

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Scott Russell
Crow Tribe

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Archie Lynch
Haliva-Saponi Indian Tribe

SOUTHERN PLAINS

Darrell Flyingman
Cheyenne & Arapaho Tribes

SOUTHWEST

Joe Garcia
Ohkay Owingeh

WESTERN

Irene Cuch
Ute Indian Tribe

EXECUTIVE DIRECTOR

Jacqueline Johnson Pata
Tlingit

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The Commission further concluded that the best way to achieve this government-to-government interaction, as it relates to the Universal Service Fund, would be for Congress to amend Section 410(c) of the Communications Act to establish a seat on the USF Joint Board.³ Amending Section 410(c) would help FCC meet President Obama's call for federal agencies to better consult with Indian tribes as part of developing federal policies.⁴ As the Presidential Memorandum notes: "History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between federal officials and tribal officials has greatly improved federal policy toward Indian tribes. Consultation is a critical component to creating a sound and productive federal-tribal relationship." The federal government must take the lead in coordinating among the various agencies with responsibilities vis-à-vis tribes, and establishing lines of communication with those tribes so that broadband access is available to every person in the United States.

NCAI fully supports amending Section 410(c) to include a tribal seat on the Federal-State USF Joint Board. To this end, NCAI suggests the following amendments to Section 410(a):

The Joint Board shall be composed of three Commissioners of the Commission and of four State commissioners nominated by the national organization of the State commissions and approved by the Commission. In addition, the members of the Commission's FCC-Native Nations Broadband Task Force (or any successor Task Force established by the Commission through the FCC Office of Tribal Affairs having representatives from Native American Tribes) shall appoint a member to the Joint Board, subject to the approval of the Commission, to serve a two-year term on the Joint Board. The Chairman of the Commission, or another Commissioner designated by the Commission, shall serve as Chairman of the Joint Board.

NCAI believes that the FCC's new Office of Tribal Affairs is in the best position to choose a qualified member, with full input from the soon-to-be established FCC-Native Nations Broadband Task Force. Since that entity may not be permanent, to the extent it is abolished, the Office of Tribal Affairs would then look to other appropriate Federal-Tribal task forces or working groups for future appointments to the USF Joint Board.

NCAI also believes that a two-year appointment is both necessary and appropriate. Necessary, because many of the issues dealt with by the USF Joint Board are complex, and it will require any new member a significant amount of time to "come up to speed" on those issues. The two year limitation is appropriate to ensure that no individual tribe or small group of tribes dominates the USF Joint Board. With 565 federally recognized tribes, rotating

³ *Id.* at p. 184.

⁴ See <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>.

the tribal seat every two years would allow equitable representation of Indian Country.

NCAI looks forward to working with you and your staff in forwarding this critical initiative to Indian Country.

Sincerely,



Jacqueline Johnson Pata
Executive Director

NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution # MKE-11-005



TITLE: In support of Tribal Positions on Universal Service Reform

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, a 2006 Government Accountability Office report found that only about 69% of households on tribal lands had telephone service in 2000 compared to the national rate of 98%. The report identifies four specific barriers to deployment: 1) the rural, rugged terrain of tribal lands; 2) limited tribal resources; 3) lack of technically trained tribal people; and, 4) rights of way issues; and

WHEREAS, the Universal Service Fund (USF) currently administers the Link-Up, Lifeline, and High Cost programs which provide much needed telephone discounts to qualified subscribers on tribal lands, and ensures that all consumers have access to affordable pay rates for telecommunications services; and

WHEREAS, in light of a limited regulatory definition of “library” as defined by the FCC, tribal libraries are often ineligible for ‘E-rate’ support as many do not qualify for state library funds, a fact that was specifically noted by the U.S. Government Accounting Report (GAO-06-189), in January 2006. Tribal libraries, serving as community anchor institutions, are frequently the only access point for Internet services in some tribal communities, and the lack of broadband services at these institutions impedes education, individual self-determination, social discourse and participation for tribal membership; and

WHEREAS, there needs to be a tribal seat on the USF Federal-State Joint Board to include an American Indian/Alaskan Native representative to make recommendations on implementing USF programs to provide critical investments and expand telecommunications services on tribal lands.

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NOW THEREFORE BE IT RESOLVED, that the federal government should support tribal sovereignty by removing all regulatory and market barriers, and by supporting all tribal nations' efforts to attain parity of telecommunications service and technology with non-Native communities; and

BE IT FURTHER RESOLVED, that NCAI urges the FCC, the President, and Congress to not take any action on any policy that would harm tribal efforts to serve its own communities, and that the aforementioned should do everything within federal capacity to fund tribal efforts to provide its own regulatory telecommunications solutions; and

BE IT FURTHER RESOLVED, that NCAI urges the FCC, the President, and Congress to support the requirement for direct consultation with tribal governments on federal policies directly impacting tribal lands and communities; and

BE IT FURTHER RESOLVED, that NCAI urges the FCC, the President, and Congress to support the requirement for regulated commercial telecommunications entities to directly consult with tribal governments and Native community organizations on providing full service to tribal communities; and

BE IT FURTHER RESOLVED, that NCAI recognizes the path and the model that tribes have embarked upon to become their own regulatory telecommunications providers to meet the needs of their communities and these efforts should continue to be fully supported by the Connect America Fund and by the revised Universal Service Fund; and

BE IT FURTHER RESOLVED, that the NCAI strongly urges the joint support of the President, the FCC, and Congress create a tribal seat on the USF Federal-State Joint Board to be filled by an American Indian or Alaska Native so that tribes will have representation and effective input regarding the overhaul and future management of the Universal Service Fund; and

BE IT FURTHER RESOLVED, by the NCAI that Indian Country can overcome the digital divide through meaningful collaboration and consultation on USF reform through strong, engaged, and consistent dialogue with the federal government including the FCC Office of Native Affairs and Policy, and the Wireless Telecommunications and Wireline Competition Bureaus; and

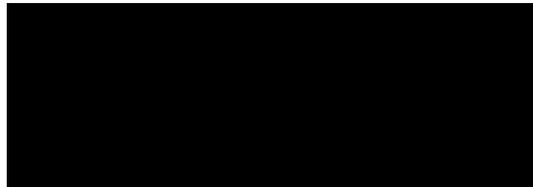
BE IT FURTHER RESOLVED, during the modification of the USF, and transition to the Connect America Fund, that the USF continue to provide the much needed support of legacy technology through the Lifeline, Link-Up, and High Cost programs, which provide telephone discounts to qualified subscribers on tribal lands, ensuring all consumers have access to affordable rates for telecommunications services; and

BE IT FURTHER RESOLVED, that the NCAI strongly urges Congress to direct the FCC to permit tribal governments to determine what constitutes a "library" in Indian Country so that the tribally designated location is eligible for 'E-rate' support; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2011 Mid-Year Session of the National Congress of American Indians, held at the Frontier Airlines Center in Milwaukee, WI on June 13-16, 2011, with a quorum present.





NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution #RAP-10-006

TITLE: Call for Congressional Funding of Tribal Broadband Fund and FCC Tribal Programs

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the residents, both Native and Non-Native, of communities of American Indian Tribes and Alaska Native Villages are the worst served citizens in America with regard to telecommunications and broadcast services; and

WHEREAS, the Communications Act of 1934 and Telecommunications Act of 1996 (Telecom Act), did not recognize the inherent rights and responsibilities of tribes, and left tribal roles, needs and abilities unaddressed, a root cause of why Native Nations lag far behind the rest of the nation in virtually every measure of communications connectivity; and

WHEREAS, the United States shares a unique government-to-government and trust relationship with federally-recognized American Indian Tribes and Alaska Native Villages, to ensure they receive parity of communications services with other American communities; and

WHEREAS, Government-to-Government consultation, predicated on effective and timely coordination, is the proper, legal, and expected means of the U.S. Federal government effectuating policies that will impact federally recognized American Indian Tribes and Alaska Native Villages; and

WHEREAS, the 2000 Federal Communications Commission Statement of Policy on Establishing a Government to Government Relationship with Indian Tribes, recognizes and promotes the “general trust responsibility with, and responsibility to, federally-recognized Indian Tribes” and also “recognizes the rights of Indian Tribal governments to set their own communications priorities and goals for the welfare of their membership;” and

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WHEREAS, the FCC's 2010 National Broadband Plan addresses the unique government-to government trust relationship with federally recognized American Indian Tribes and Alaska Native Villages, in addressing the low broadband penetration rate on Tribal lands nationwide, and to ensure ubiquitous deployment of robust broadband services for all Tribal Entity governments; and

WHEREAS, the FCC has created the new Office of Tribal Affairs a necessary first step to coordinating on many tribal initiatives in the Plan. At its outset, the FCC must ensure the effectiveness of the Office of Tribal Affairs by fully staffing and funding the Office; and

WHEREAS, to be credible and effective, the FCC must give the Office sufficient authority and jurisdiction over communications issues affecting Indian Country. To serve the Commission as a whole, and to coordinate effectively with tribal nations, other federal agencies, and the communications industries, it must be empowered, as the Plan states: "to develop and drive a tribal agenda in coordination with other FCC bureaus and offices and to manage the FCC-Tribal Broadband Task Force;" and

WHEREAS, these Initiatives should become one of the responsibilities of the Office of Tribal Affairs, they can be developed beyond the routine workshops to envision increased direct, face-to-face consultation and diverse types of training opportunities through new methods of tribal outreach and coordination. Additionally, we support funding that will allow tribal representatives to participate; and

WHEREAS, the Plan indicates in Section 8.4, the Tribal Broadband Fund should be created to support these and "a variety of purposes, including bringing high-end capacity connectivity to tribal headquarters or other anchor institutions, deployment planning, infrastructure build out, feasibility studies, technical assistance, business plan development and implementation, digital literacy and outreach", as well as "small, targeted grants on an expedited basis for Internet access and adoption programs;"

WHEREAS, the FCC through the new office of Tribal Affairs, must remain directly involved in the development of the Tribal Broadband Fund. Only a flexible, "tribal-centric" planning approach to administering such a fund will allow it to succeed. The FCC must continue to consult with tribal nations and their institutions, and work with Congress, to refine this figure, develop proposed legislative provisions, and ensure the successful implementation of the Tribal Broadband Fund.

NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby applaud the FCC for establishing the long awaited and needed Office of Tribal Affairs; and

BE IT FURTHER RESOLVED, that the NCAI does hereby request that the FCC through its newly established Tribal Office hold appropriate Broadband consultations sessions with Tribal Leaders aimed at the successful implementation of the National Broadband Plan programs on Tribal lands nationwide; and

BE IT FURTHER RESOLVED, that NCAI calls upon the FCC--consistent with the Commission's trust responsibility, stated policy and regulatory precedent, applicable constitutional rational basis justification--to take certain proactive actions to spur the deployment of robust broadband networks on Tribal lands; and

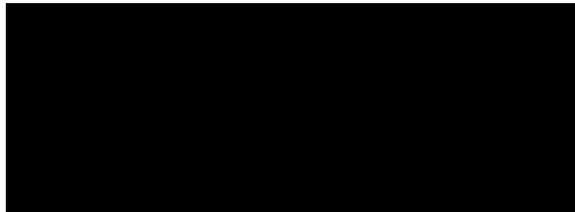
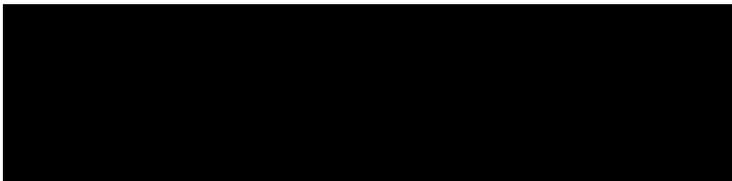
BE IT FURTHER RESOLVED, that NCAI urges Congress to fulfill the promise of the National Broadband Plan and create a Tribal Broadband Fund as a new, separate fund that will ensure that broadband is deployed in Indian Country; and

BE IT FURTHER RESOLVED, that NCAI urges Congress to ensure the effectiveness and future success of the new Office of Tribal Affairs by providing additional funding to the FCC to support the annual operations of the Office and its programs; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2010 Mid-Year Session of the National Congress of American Indians, held at the Rushmore Plaza Civic Center in Rapid City, South Dakota on June 20-23, 2010, with a quorum present.





NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution #ABQ-10-061

TITLE: Congress and Federal Agencies Must Create the Native Broadband Fund, and Devote and Prioritize Funding and Resources to Provide Broadband in Native Communities and Include Native Governments in All Native Telecommunications Infrastructure and Broadband Policy Initiatives

EXECUTIVE COMMITTEE

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Chickasaw Nation

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Pauma Band – Mission Indians

RECORDING SECRETARY
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Pokagon Band of Potawatomi

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WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the Broadband Initiatives Program (BIP), administered by the Department of Agriculture's Rural Utilities Service, and the Department of Commerce's National Telecommunications and Information Administration's Broadband Technology Opportunities Programs (BTOP) was established in the American Recovery and Reinvestment Act of 2009 (Recovery Act) has failed to provide a meaningful assistance to help tribal and native communities; and

WHEREAS, access to broadband service in poorly served areas will help bridge the technological divide, increase economic growth, and improve education, health care and the quality of life in these areas; and

WHEREAS, tribal areas are the most underserved and un-served communities in America with regard to telecommunications services with a telephone penetration rate lower than 70% and a broadband penetration rate less than 10%; and

WHEREAS, Native communities are the worst connected communities in America infrastructure and broadband capacity; and

WHEREAS, incumbent mobility providers have failed to serve to Native communities in parity with urban and non-Native communities; and

WHEREAS, incumbent wireless mobility providers have cherry-picked service only to the most populated rural, ignoring the mobility needs of less populated communities that remain unconnected; and

WHEREAS, the potential \$300 million Broadband Mobility Fund will be derived from the Universal Service Fund, that has the mandate to reach all communities, particularly those not being served in parity with urban or with other rural communities; and

WHEREAS, incumbent mobility services are deployed in a haphazard and often illegal manner on Native lands (regarding rights of way permission. Business and other permitting requirements, and failure to use Native labor); and

WHEREAS, the FCC has already adopted a policy to prioritize tribal nations for mass media licenses out of recognition of tribal sovereignty and tribal lack of public information access; and

WHEREAS, high speed wireless broadband capacity can be an essential safety-net for emergency service access in tribal broadband and infrastructure deprived regions; and

WHEREAS, the Federal Communications Commission recognizes that Native communities could be an important beneficiary for Broadband Mobility funds because of the unique circumstances of Native communities; and

WHEREAS, the federal government of the United States has a trust responsibility to tribal communities to ensure that they receive parity of infrastructure services with other American communities, and current market forces and governmental programs are not meeting the infrastructure needs of tribal communities; and

WHEREAS, the National Broadband Plan states that “Congress should consider additional annual funding for the FCC to expand the Indian Telecommunications Initiatives, Tribal workshops and roundtables to include sessions on education, technical support and assistance with broadband initiatives.

NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby strongly urge the FCC to preserve the underlying principles of support for high cost areas of providing vital infrastructure and broadband service; and

BE IT FURTHER RESOLVED, that NCAI oppose provisions of Broadband Mobility Funds to any entity that is not in compliance with tribal authority and federal law regarding siting permits, tribal employment and other such laws as may apply; and

BE IT FURTHER RESOLVED, that the NCAI supports that the National Broadband Plan must contain methods, resources, and specific priority for helping tribal and native communities attain connectivity and advanced technology in parity with non-tribal and non-native communities; and

BE IT FURTHER RESOLVED, that the NCAI supports that the FCC, Department of Agriculture, Department of Commerce and Congress must provide sufficient funding and technical assistance in a Tribal Broadband Fund and any Connect America Funds to help Indian nations attain broadband parity with non-native communities; and

BE IT FURTHER RESOLVED, that the NCAI recommends that the FCC and Congress preserve and expand the Enhanced Tribal Lands Lifeline and Linkup Program for remote infrastructure and broadband service to low income consumers in Indian Country; and

BE IT FURTHER RESOLVED, that NCAI urges the FCC to set aside a sufficient amount of the Broadband Mobility Fund to deploy an essential safety-net 4G mobility network in underserved Native lands and communities; and

BE IT FURTHER RESOLVED, that the FCC should set aside sufficient frequency bandwidth to support the deployment of a 4G Native Safety-Net wireless broadband network to assist with communities emergencies and with community public service needs; and

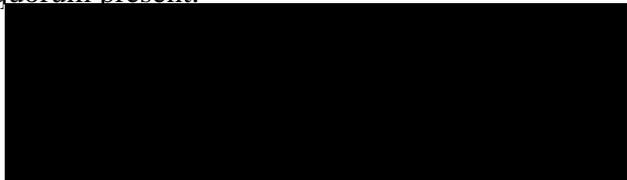
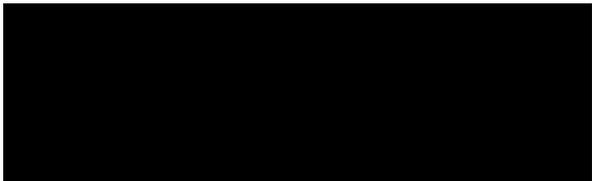
BE IT FURTHER RESOLVED, that NCAI urges the FCC to consult with the Native communities being targeted to ensure consumers' and subscribers' access needs and service concerns are being appropriately addressed; and

BE IT FURTHER RESOLVED, that the NCAI urges Congress to allocate and increase the amount of funding for federal initiatives to assist tribal telecommunications service, including the Department of Agriculture's Substantially Underserved Trust Area program; the Department of Commerce's Broadband Opportunity Program, and its Economic Development Administration funding program; the FCC's Office of Native Affairs and Policy and its Indian Telecommunications Initiatives Program; and its Department of Interior funding and assistance programs that can be used to assist broadband expansion in Native communities; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2010 Annual Convention of the National Congress of American Indians, held at the Albuquerque Convention Center in Albuquerque, NM on November 14-19, 2010, with a quorum present.





NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution #REN-13-064

TITLE: Support for the Establishment of a Tribal Broadband Fund and for Other Related Purposes

EXECUTIVE COMMITTEE

PRESIDENT

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Chickasaw Nation

FIRST VICE-PRESIDENT

Juana Majel Dixon
Paumotu Band of Mission Indians

RECORDING SECRETARY

Edward Thomas
Central Council of Tlingit & Haida Indian Tribes of Alaska

TREASURER

W. Ron Allen
Jamestown S'Klallam Tribe

REGIONAL VICE-PRESIDENTS

ALASKA

Mike Williams
Akiak Native Community

EASTERN OKLAHOMA

S. Joe Crittenden
Cherokee Nation

GREAT PLAINS

Robert Shepherd
Sisseton Wahpeton

MIDWEST

Matthew Wesaw
Pokagon Band of Potawatomi

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Shinnecock Indian Nation

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Fawn Sharp
Quinalt Indian Nation

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Soots Valley Band of Pomo Indians

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Ivan Posey
Shoshone Tribe

SOUTHEAST

Larry Townsend
Lumbee Tribe

SOUTHERN PLAINS

George Thurman
Sac and Fox Nation

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Joe Garcia
Ohkay Owingeb

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WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, tribal communities face significant obstacles to the deployment of broadband infrastructure, including high build-out costs, sparsely-populated areas, limited financial resources that deter investment by commercial providers, and a shortage of technically trained tribal members who can assist tribes in broadband deployment and broadband adoption planning in these areas; and

WHEREAS, decades of geographic isolation on tribal lands and related income disparity are real barriers that prohibit the adoption of broadband, quality of life enhancements, and deterrence of economic opportunities that are available to other Americans, which led to the adoption of the National Broadband Plan (NBP) by the Federal Communications Commission (FCC) in April of 2010, thereby affirming the sovereign rights of tribal governments to construct broadband networks, wireline and wireless, on tribal lands, and recommended that Congress establish a Tribal Broadband Fund to incentivize and support sustainable broadband deployment and acceptable broadband adoption levels on tribal lands; and

WHEREAS, the NBP acknowledges the low broadband penetration rate in tribal communities and states unequivocally that, "tribes need substantially greater financial support than is presently available to them, and accelerating tribal broadband deployment will require increased funding"; and

WHEREAS, the NCAI adopted previous Resolutions, RAP-10-006 and ABQ-10-061, calling upon Congress to create a Tribal Broadband Fund; and

WHEREAS, the FCC *Universal Service Fund/Intercarrier Compensation Transformation Order* (Order) is intended to spur wired and wireless broadband build-out to rural Americans; and

WHEREAS, the Order fails to provide sufficient and predictable support mechanisms for tribes or tribally-owned telecommunications providers to deploy, maintain and improve broadband communications infrastructure and to conduct maintenance, engineering and other related and necessary functions in tribal communities; and

WHEREAS, the adverse impacts of the Order have led to unfortunate results in which some tribes and tribally-owned telecommunications providers have had to halt plans to build-out broadband capable networks, cease upgrades on existing networks and reduce workforce; and

WHEREAS, tribes and tribally-owned telecommunications providers may not be eligible to participate in the FCC Tribal Mobility Fund, and future Mobility Fund, auctions because certain requirements for the Tribal Mobility Fund and Mobility Fund are too restrictive, thereby limiting support available to tribes and tribally-owned telecommunications providers for mobile voice and broadband services on tribal lands; and

WHEREAS, on June 6, 2013, the President announced the ConnectED initiative to bring high-speed broadband and wireless service to 99 percent of America's students within five years, and directs the FCC modernize and leverage funding for the Universal Service Fund E-Rate program.

NOW THEREFORE BE IT RESOLVED, that the promulgation of new regulations at the FCC requires an updated tribal telecommunications policy stance on these issues, and that NCAI urges the Congress, the FCC, and other relevant federal agencies to consult with tribal governments and tribally-owned and operated carriers regarding issues with access to spectrum, irrevocable letters of credit, Census block determinations, data produced in studies that illustrate inaccurate coverage on tribal lands, to ensure accurate mapping on tribal lands, or to consider waivers of certain requirements to increase tribal opportunities for participation in future Tribal Mobility Fund and Mobility Fund auctions; and

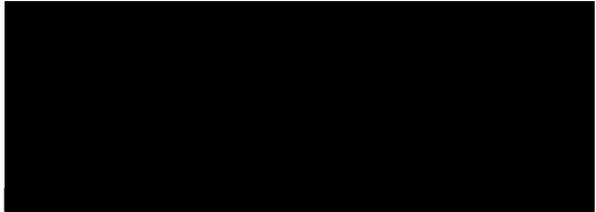
BE IT FURTHER RESOLVED, that the FCC must, 1) Establish alternative mechanisms so that tribes and tribally-owned telecommunications providers can participate fully in the Tribal Mobility Fund and Mobility Fund auctions, 2) Enhance current Lifeline programs to make broadband services more affordable to low-income households in tribal communities, and 3) To call upon the FCC, and relevant federal agencies participating in the President's ConnectED initiative, that the highest priority should be given to tribal schools and libraries, and any efforts to modernize the E-Rate program should not adversely affect funding levels for current and future tribal participation; and

BE IT FURTHER RESOLVED, that the Congress must support legislation to establish a Tribal Broadband Fund to support sustainable broadband deployment and acceptable broadband service adoption levels in tribal communities; and

BE IT FURTHER RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2013 Midyear Session of the National Congress of American Indians, held at the Atlantis Casino from June 24 - 27, 2013 in Reno, Nevada with a quorum present.





NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution #TUL-13-061

TITLE: Request that the Federal Communications Commission Preserve and Protect the Tribal Lifeline & Link-Up Programs

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WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the Tribal Lifeline and Link-Up Programs were created to provide low-income tribal individuals vital access to communications services; and

WHEREAS, the Tribal lifeline Program was created to provide a discount to Native individuals on their monthly landline phone bill and later expanded to include mobile wireless services, and the Tribal Link-Up Program was created to cover one-time, build-out costs and activation charges to connect vital anchor institutions and housing on tribal lands; and

WHEREAS, on January 31, 2012, the Federal Communications Commission (FCC) adopted a Report & Order and Further Notice of Proposed Rulemaking regarding Lifeline and Link-Up Reform and Modernization (2012 Reform and Modernization Order); and

WHEREAS, in the 2012 Reform and Modernization Order included the establishment of a National Lifeline Accountability Database, establishing a national eligibility criteria, clarification of reporting requirements, and the phase out of Link Up support except for recipients on tribal lands; and

WHEREAS, these reforms were meant to eliminate waste, fraud, and abuse in the Program and were estimated to save the USF up to \$2 billion over the following three years since the 2012 Reform and Modernization Order was adopted; and

WHEREAS, on February 12, 2013 the FCC stated in a News Release that the Lifeline Program reforms were on track to eliminate an additional \$400 million in waste, fraud, and abuse in 2013 and that reforms were on schedule to save more than \$2 billion by the end of 2014, exceeding the estimated savings mentioned in the 2012 Reform and Modernization Order; and

WHEREAS, the USF was established by the 1996 Telecommunications Act to ensure access to telecommunications services for all schools, libraries, and low-income households, and close the Digital Divide; and

WHEREAS, the USF is funded by all telecommunications consumers in a monthly fee assessed by all telecommunications carriers; and

WHEREAS, the 2012 Reform and Modernization Order is met and will potentially exceed the previous projections in savings to the USF, however, the Program has come under ever-increasing attacks from some Members of Congress and national media outlets that have inaccurately claimed that the entire Program is ‘wasteful spending’ funded by tax dollars; and

WHEREAS, tribal citizens in many tribal communities do not have access to basic telephone services nor broadband services; and

WHEREAS, the FCC has initiated Broadband Adoption Lifeline Pilot Programs to establish baseline data to support further modernization of the Lifeline Program expanding to broadband technologies; and

WHEREAS, the Lifeline Program has been one of the most influential programs supporting tribal citizens living in rural and underserved tribal lands to receive basic telephone service and access to an analog safety-net, and without Lifeline, tribal lands will remain excluded from telecommunications services; and

WHEREAS, in recognition of the disproportionately low telephone subscribership levels in tribal areas, the FCC has adopted rules to make enhanced Lifeline support available for low-income residents residing on tribal lands; and

WHEREAS, the FCC, as the primary agency point-of-contact regarding all matters related to the USF and its programs, should continue to work with Members of Congress and the Administration to ensure that vital Lifeline and Link-Up services are not eliminated, and that current and future funding levels should be preserved and increased for tribal lands due to the low penetration rates of telephone and broadband services.

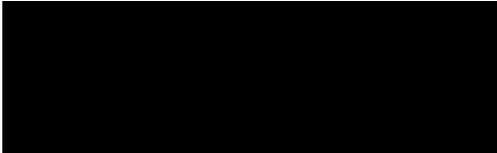
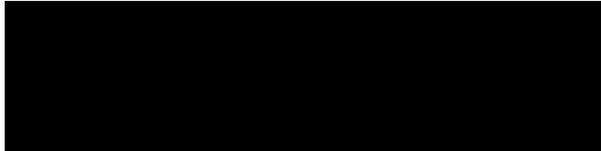
NOW THEREFORE BE IT RESOLVED, NCAI requests the FCC, Congress, and the Administration to preserve the continuation of the Tribal Lifeline and Link-Up Programs for tribal lands and all Native peoples; and

BE IT FURTHER RESOLVED, that the FCC, Congress, and the Administration increase current and future funding levels for the Tribal Lifeline and Link-Up Programs to continue vital telecommunications deployment on tribal lands; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2013 Annual Session of the National Congress of American Indians, held at the Cox Business Center from October 13 - 18, 2013 in Tulsa, Oklahoma with a quorum present.



**Universal Service Policy and the Role of the Federal Communications Commission
Questions from the House Committee on Energy and Commerce**

Responses of the National Cable & Telecommunications Association

Question 1: “How should Congress define the goals of the Universal Service Fund? Should Congress alter or eliminate any of the six statutory principles, codify either of the principles adopted by the FCC, or add any new principles in response to changes in technology and consumer behavior?”

Response 1: Congress should update the goals of the Universal Service Fund to make clear that broadband services are to be supported. The principles should be amended, where necessary, to make clear that support is not limited to telecommunications services or carriers. To be consistent with this principle, Congress also should eliminate the restriction limiting universal service support only to eligible telecommunications carriers. In addition, Congress should codify in the statute the two universal service principles adopted by the FCC: the principle that universal service support should be awarded on a competitively neutral basis and that universal service support should be spent on networks that provide advanced services. The competitive neutrality principle should explicitly state that it is not competitively neutral to award support in any area where service is provided over a privately funded network.

Question 2: “Universal service was created to fund buildout in areas incapable of economically supporting network investment. How should our policies address the existence of multiple privately funded networks in many parts of the country that currently receive support?”

Response 2: As noted above, the statute should prohibit universal service support from being spent in areas that are served by privately funded networks. The FCC adopted this principle in 2011, but has not yet enacted it in all parts of the country.

Question 3: “What is the appropriate role of states and state commissions with respect to universal service policy?”

Response 3: NCTA does not have a position on this issue.

Question 4: “What is the appropriate role of the Federal-State Joint Board on Universal Service in a broadband, IP-enabled, largely interstate world? What is the appropriate role of related joint boards, such as the Federal-State Joint Board on Separations or the Federal-State Conference on Advanced Services?”

Response 4: NCTA does not have a position on this issue.

Question 5: “The Universal Service Fund is one of several federal programs that support buildout of communications facilities. Are current programs at other federal agencies, like the National Telecommunications and Information Administration (which oversaw the Broadband Technology Opportunities Program) or the Rural Utility Service (which oversees lending programs and oversaw the Broadband Initiatives Program) necessary?”

Response 5: The federal government should have a coordinated approach to broadband subsidies. Congress should make clear that principles applicable to universal service support, such as competitive neutrality, also apply to other federal support programs, such as RUS loans. It is particularly important that RUS be required to coordinate with the FCC before making any loans that depend on long-term receipt of universal service support for repayment. Furthermore, Congress should require the agencies that oversee these programs to make easily accessible and publicly available on their websites information about how much money is being spent, in what areas it is spent, which companies are receiving it, and when consumers who live in unserved areas can expect to receive broadband as a result of these expenditures.

Question 6: “How can we ensure that the Universal Service Fund is sufficiently funded to meet its stated goals without growing the fund beyond fiscally responsible levels of spending?”

Response 6: The overall size of the Universal Service Fund should be capped to ensure that consumers are not burdened with an ever-increasing contribution amount. The FCC could work within the specified budget to balance the competing policy goals of supporting services to schools, libraries, rural health care institutions, low-income individuals, and consumers in high-cost areas of the country.

Question 7: “Are all of the funds and mechanisms of the current Universal Service Fund necessary in the modern communications marketplace?”

Response 7: It is unnecessary and wasteful for the FCC to continue providing high-cost universal service support to incumbent phone companies in areas where privately-funded providers offer service to consumers. Congress should require the elimination of this support.

Question 8: “In lieu of the current support mechanisms, could any of the programs be better managed or made more efficient by conversion to:

- a. A state block grant program;
- b. A consumer-focused voucher program;
- c. A technology-neutral reverse auction; or,
- d. Any other mechanism.”

Response 8: In its Connect America Fund (CAF) high-cost program, the FCC has indicated a preference for distributing support through a technology-neutral reverse auction, but has adopted a non-neutral right-of-first-refusal for incumbent phone companies before such auctions will be held. This will allow incumbent phone companies the exclusive right to claim all support in a state where the amount of available support exceeds the costs of providing service, ensuring that the Universal Service Fund is overcharged in those areas, while opting to wait to participate in an auction in states where the costs are higher. Congress should make clear that high-cost support must be made available on a technologically- and competitively-neutral manner, allowing all interested providers a chance to compete for support, rather than favoring incumbent phone companies. Such an approach will award support to the most efficient provider, rather than discouraging the entrance of new, more innovative providers by putting a government thumb on the scale on behalf of incumbent phone companies.



September 19, 2014

The Honorable Fred Upton
Chairman
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US House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Henry Waxman
Ranking Member
Committee on Energy and Commerce
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The Honorable Greg Walden
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The Honorable Anna Eshoo
Ranking Member
Subcommittee on Communications and
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Dear Chairmen and Ranking Members:

Thank you for the opportunity to submit comments as you examine the communications industry and the Communications Act in the #CommActUpdate effort. The National Rural Electric Cooperative Association (NRECA) is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to over 42 million people in 47 states or 12 percent of electric customers. Electric cooperatives are private, independent electric utilities, owned by the members they serve. Electric cooperatives own and maintain 2.5 million miles or 42 percent of the nation's electric distribution lines, covering 75 percent of the U.S. landmass. Co-ops serve an average of 7.4 consumers per mile of line and employ 70,000 people in the United States. In Congressional Districts served by members of the Committee on Energy and Commerce, electric cooperatives serve over 6.2 million consumer owners and employ 17,308 people.

The Universal Service Fund (USF) was created to bring telephone service to all corners of the country. Today, we must ensure that the guiding principles of USF apply to bridging the digital divide that separates rural America from urban America. Consumers in rural America deserve to have access to the same levels of advanced telecommunications services that their urban counterparts have. To achieve universal access to advanced telecommunications services all providers should still be required to make equitable and non-discriminatory contributions to preserve the fund and we must continue to have specific, predictable and sufficient federal and state mechanisms in place to bring this vital service to all consumers regardless of income or location. In addition, all forms of support must remain competitively neutral to allow all willing providers the opportunity to put forth effective solutions to bridge the digital divide.

Significant gaps in the availability of broadband in rural America strand NRECA's members on the wrong side of the digital divide. Without robust access to broadband, these Americans cannot take advantage of the educational opportunities or employment prospects that most Americans now take for granted. Our members are clamoring for access to the same level of broadband access as urban Americans. Rural electric cooperatives serve the lowest population density by mile.¹ Electric cooperatives grew out of a need to serve communities where no other utilities saw adequate financial incentive. We are closely connected to our members and we leverage that relationship to be as responsive as possible to their needs. Today, our members tell us that need is broadband.

Many electric cooperatives are pursuing and implementing plans to deploy broadband to rural America. The FCC is poised to finalize phase II of the Connect America Fund to support the high cost areas served by the price cap companies. This is a once in a generation opportunity to deploy broadband in rural communities who deserve to be full participants in our modern economy. We urge Congress to encourage the FCC to create an inclusive environment where all eligible providers have an opportunity to compete for support with the goal of closing the gap between broadband available in urban and rural areas.

The committee's white paper *Universal Service Policy and the Role of the Federal Communications Commission* raised several questions seeking stakeholder input. In response to those questions, we ask the Committee to keep the need for broadband access in rural areas as a top priority when considering reforms to the Communications Act.

Questions for Stakeholder Comment

- 1. How should Congress define the goals of the Universal Service Fund? Should Congress alter or eliminate any of the six statutory principles, codify either of the principles adopted by the FCC, or add any new principles in response to changes in technology and consumer behavior?***

We recommend that Congress add one goal for the Universal Fund to achieve. In our experience, as the FCC and other agencies work to close the digital divide, the divide is not truly being closed. As performance improves for urban areas of high population density, rural areas continue to lag behind. At a recent broadband summit in Idaho, several presenters commented that rural populations should be "happy" when they receive service at 4 Mbps, when most of urban America is experiencing much higher speeds and the FCC is considering raising the minimum speed to qualify for Connect America Funding. Unfortunately, this viewpoint is heard too often in the discussion of appropriate speed levels moving forward. If the minimum required broadband speed for rural America remains at 4 Mbps it will

¹ Cooperatives serve an average of 7.4 members per mile compared to Municipal electric companies who serve 48 customers per mile and Investor-Owned Utilities that serve an average of 34 customers per mile.

perpetuate the current digital divide and serve to relegate consumers in rural areas to second class service.

Therefore an additional goal should be to provide quality services and advanced telecommunications at the same rate of development and improvements to all areas of the country.

- 2. Universal service was created to fund buildout in areas incapable of economically supporting network investment. How should our policies address the existence of multiple privately funded networks in many parts of the country that currently receive support?***

In general we oppose providing duplicative support. But we suggest that, before Congress takes on this issue in legislation, it consider correcting and updating the maps on which providers and the FCC rely to determine where service exists, and where it is supported. Our experience, though anecdotal at the moment, shows that current service providers may claim to serve areas where we know service does not exist. In addition, there are instances when very few locations in a census block have access to service but the census block is considered served on the map. We are not suggesting that the providers are being dishonest in their reporting, but the issues with the map are well known. With an accurate map, duplicative support can be avoided. In areas where duplicative support does exist, we suggest a process of backing out of the duplication in phases so that supported providers are not exposed to regulatory and investment risk.

- 5. The Universal Service Fund is one of several federal programs that support buildout of communications facilities. Are current programs at other federal agencies, like the National Telecommunications and Information Administration (which oversaw the Broadband Technology Opportunities Program) or the Rural Utility(sic) Service (which oversees lending programs and oversaw the Broadband Initiatives Program) necessary?***

While initially the concept of one source of funding is appealing, the programs listed in the question all serve different purposes but all support the goal of providing universal service. The Rural Utilities Service has well recognized expertise in managing loan programs that support the programs and communities in rural America. Low interest loans are a very different form of support than Universal Service or Connect America subsidy programs. We would observe that RUS does not today have expertise in running reverse auctions and that the FCC today does not have expertise in managing loan programs. A goal that Congress should consider is to encourage the agencies that are involved in building out rural broadband continue to coordinate and communicate.

6. *How can we ensure that the Universal Service Fund is sufficiently funded to meet its stated goals without growing the fund beyond fiscally responsible levels of spending?*

One way that Congress can ensure that universal service goals are met is to continue to support not only direct subsidies (universal service and Connect America Fund) but also loan programs such as those offered by the Rural Utilities Service. We also urge Congress to support the concept that all telecommunications providers should continue to pay into the fund.

7. *Are all of the funds and mechanisms of the current Universal Service Fund necessary in the modern communications marketplace?*

NRECA generally believes that the funds and mechanisms in the current Universal Service Fund are still necessary in the modern communications marketplace. In particular the High-Cost Program, the Schools and Libraries program and the rural healthcare program help rural America access needed services. Access to advanced telecommunications services can provide rural school districts and healthcare providers a wealth of opportunities that would not otherwise be available to them.

The right of first refusal provided to incumbent price-cap carriers is a feature of the Connect America Fund process that raises some concern for our members. We believe that a more inclusive competitive process could serve to more effectively allocate limited CAF II funds. By removing the right of first refusal, the Commission would enable multiple participants to participate in the competitive bidding process for model-based support for that area. This process should drive down cost, making the most effective use of scarce universal service funds. Competing for a chance to provide voice and broadband services in unserved and underserved locations is a once in a generation opportunity for entities such as electric cooperatives to close the digital divide. A more inclusive approach to solving this issue will allow for a better allocation of scarce universal serve funds at relatively higher broadband service performance levels.

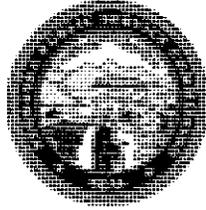
Very truly yours,



Tammy K. Embrey
Senior Legislative Advisor

Nebraska Public Service Commission

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September 24, 2014

The Honorable Fred Upton
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The Honorable Henry Waxman
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The Honorable Greg Walden
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The Honorable Anna Eshoo
Ranking Member
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Re: Nebraska Public Service Commission Comments to House Energy & Commerce Committee White Paper #5 - "Universal Service Policy and the Role of the Federal Communications Commission."

Dear Chairmen Upton, Walden and Ranking Members Waxman, Eshoo:

The Nebraska Public Service Commission (NPSC) appreciates the opportunity to submit these comments in response to the whitepaper on Universal Service Policy for your consideration.

If you have questions about any of the responses, please do not hesitate to contact the undersigned at (402) 471-3101.


Frank E. Landis
Chairman

House E&C Telecom Act Update Whitepaper #5 Universal Service Policy: Questions for Stakeholder Comment

Introduction

The promise of universal service continues to be vital for economic welfare, education and the quality of life for American consumers. To be relevant, Congress must ensure the appropriate framework is in place so that universal service programs are adaptable to keep pace with changes in consumer needs. Universal service is not about a specific technology; it is about making sure that consumers in all regions of our country have comparable access to services to keep them connected with one another and to share in the global economy.

Background

For over a decade the NPSC has supplemented the federal universal service support mechanisms based on a similar grant of authority from our legislature. The universal service principles mirror those in the Telecommunications Act of 1996.

Our universal service programs have evolved over the years adapting to changes in consumer expectations. However, we are now faced with doing more with less. Contribution levels have decreased. Consumers want more and more bandwidth. To compound these challenges, federal universal service fund support provided in Nebraska has decreased. If Congress' goal is to ensure all consumers have affordable and reasonably comparable access to telecommunications and information service, it must make sure state and federal partners have the necessary tools to accomplish this task.

Questions for Stakeholder Comment

1. How should Congress define the goals of the Universal Service Fund? Should Congress alter or eliminate any of the six statutory principles, codify either of the principles adopted by the FCC, or add any new principles in response to change in technology and consumer behavior?

The first three core principles remain entirely relevant in today's marketplace. Consumers in all regions of the state should have access to

telecommunications and information services that are available at just, reasonable and affordable rates. The fact that the technology used by consumers to access telecommunications and information services has changed does not mean that consumers' basic needs have changed. Most consumers don't view their technology as being an intrastate or interstate service. They don't use regulatory distinctions separating "telecommunications" from "information" service. Consumers simply want a reliable and affordable way to communicate.

In order to keep universal service policy rational and its programs sustainable, Congress needs to modify principle No. 4 to include contributions for all communications services, including broadband services that are required to be offered in order to receive federal support. Expanding the contribution base to include access to broadband service is necessary to ensure the sustainability of both federal and state programs. Absent contribution reform, voice customers will continue to suffer the entire burden of maintaining universal service, and support for new broadband services will diminish. Above all, the contribution mechanism must be sustainable and it must be fair.

2. Universal service was created to fund buildout in areas incapable of economically supporting network investment. How should our policies address the existence of multiple privately funded networks in many parts of the country that currently receive support?

We agree with the proposition that universal service support should be carefully crafted to avoid duplicative support in a given area. However, some services are still seen as complementary services, such as wireline and wireless broadband services. Maintaining existing networks in rural areas also requires a commitment of ongoing support.

Additionally, broadband networks do not follow easily determined exchange boundary lines. Determining single network support in a broadband centric environment is complex. Accordingly, a data-driven process is crucial. States have been collecting broadband data for the last five years under the State Broadband and Data Development Initiative. State commissions continue to be in the best position to know what broadband services are being provided and where universal service support is really needed.

Further, it may be necessary to consider a particular carrier's network configuration in the calculation for support rather than using a one size fits all mechanism to determine eligible support areas. A carrier's network may need to be

upgraded in an urban area in order to extend needed broadband services out to fringe communities. Rather than denying support to these areas, the FCC should consider developing an allocation so that the areas outside the city limits can have reasonably comparable access to broadband service.

3. What is the appropriate role of state and state commissions with respect to universal service policy?

State commissions are a crucial component of universal service policy. Roughly twenty states have their own universal service programs dedicated to providing high-cost support. Some states, like Nebraska, provide explicit funding for broadband investment. Over the last three years, the NPSC has provided explicit support for 107 broadband capital improvement projects bringing new or faster broadband service to over 43,000 Nebraska consumers.

Generally speaking, state universal service programs help supplement and reduce the burden on the federal fund. Congress needs to create greater incentives for recipient states to supplement federal support through state universal service programs. The FCC's policies do little to encourage some very rural states to support their high-cost areas leaving an unfair burden on the federal fund and the states that have implemented high-cost support mechanisms.

4. What is the appropriate role of the Federal-State Joint Board on Universal Service in a broadband, IP-enabled, largely interstate world? What is the appropriate role of related joint boards, such as the Federal-State Joint Board on Separations or the Federal-State Conference on Advanced Services?

The role of the Federal-State Joint Board on Universal Service is as important as ever in a broadband, IP-enabled world. State partners are intimately aware of the communications landscape, local economic pressures, the digital divides, and the needs of our constituents. Even though technology changes constantly, consumer expectations of their state commissions have not. The joint boards should be preserved as a meaningful way to communicate these needs and formulate recommendations to the FCC so that our consumers are heard.

In addition, states have been a laboratory for implementing changes in universal service policy for years. State commissions can more quickly adapt to changes in the marketplace. In many cases states were first to create programs studying broadband availability, and explicitly funding wireless and broadband

deployment. The joint board process is a way for state and federal regulators to discuss what has worked and what has not. We encourage our Congressional leaders to preserve the important role that the joint boards play in shaping communications policy.

6. How can we ensure that the Universal Service Fund is sufficiently funded to meet its stated goals without growing the fund beyond fiscally responsible levels of spending?

The question should be whether we are building an information superhighway or a gravel road. Support must be sufficient to build the type of network(s) that will move our global standing forward. Congress has the ability to move us forward by changing the statutory framework so that the obligation of all providers to contribute on an equitable and nondiscriminatory basis is clear. The contribution base must be broadened to include access to information services.

Beyond that, Congress has the power and authority to measure and monitor the actions of the FCC including universal service fund spending. The FCC should be required to continually report to Congress on specific universal service fund metrics and spending. Reasonable Congressional oversight will ensure that the universal service fund is maintained in a fiscally responsible manner.

7. Are all of the funds and mechanism of the current Universal Service Fund necessary in the modern communications marketplace?

The programs and mechanisms for achieving the statutory principles are just as necessary in the modern communications marketplace. Consumers continue to expect affordable access to quality voice and broadband service. At the same time, the funds and mechanism should not be etched in stone. Universal service programs must be constantly measured and adaptable to changes in the marketplace.

8. In lieu of the current support mechanisms, could any of the programs be better managed or made more efficient by conversion to:

- a. A state block grant program
- b. A consumer-focused voucher program;
- c. A technology-neutral reverse auction; or,
- d. Any other mechanism.

The NPSC has previously supported a state block grant program for distributing high-cost support. We continue to believe that with specific federal guidelines in place, states are in the best position to know the needs of consumers within our respective borders. We are familiar with the providers and their service offerings. We know from experience where broadband services exist and where they are lacking.

State commissions are also keenly aware of the challenges faced by providers in our respective states including but not limited to:

- a. financial needs and constraints;
- b. terrain and climate issues;
- c. competitive pressures; and
- d. population trends.

In the alternative, the NPSC believes a cost model would be best suited to distribute high-cost fund support on an equitable and competitively neutral basis. The support mechanisms should be open, transparent, and based on reality-tested cost factors.

Congress should also require the FCC to make more frequent adjustments that are in line with today's economy. Rate-of-return caps should be reviewed and adjusted periodically as the economy changes. Reasonable benchmarks must be established to ensure carriers receive the needed support in the truly high-cost areas without recovering too much support from other sources of funding.

Moreover, the FCC should be required to consider the competitive pressures faced by price cap carriers in urban areas that may prevent the carriers from making needed investments in rural areas. Price cap carriers in Nebraska serve a significant number of rural areas while at the same time must invest in their urban markets to stay competitive. Those pressures drive investment decisions which more often than not favor the urban consumers. Their rural areas may need to be considered and modeled separately. Investments must track the support received to ensure that rural consumers receive the benefit of the support.

The focus of universal service should be on the consumer. Accordingly, in terms of distributing low-income support, we believe that the program should be modernized to include affordable access to broadband service. The NPSC currently

has an open proceeding to investigate whether to supplement the existing Lifeline program with a state-supported discount on broadband service to qualifying low-income consumers. Likewise, we believe a federal consumer voucher program would advance universal service by providing affordable advanced services to consumers in need.

Irrespective of the funding mechanisms used, state commissions must be given the opportunity to provide meaningful input. Advancing universal service in a competitive and ever-changing market is a challenge best handled through a cooperative partnership.



**NTCA–The Rural Broadband Association
Comments in Response to U. S. House of
Representatives Energy & Commerce
Committee White Paper 5: Universal Service
Policy and the Role of the Federal
Communications Commission
(Released August 22, 2014)**

September 19, 2014

I. INTRODUCTION

NTCA–The Rural Broadband Association (NTCA) hereby submits comments on the House Energy & Commerce Committee “Universal Service” white paper.¹ NTCA represents nearly 900 small, rate-of-return rural telecommunications providers (commonly called RLECs). RLECs serve less than 5 percent of the U.S. population but roughly 40 percent of the country’s landmass. These companies operate in areas long ago left behind by larger providers because the markets were too high-cost – too sparsely populated, too far from larger towns and cities, and/or too challenging to serve in terms of topography or terrain. As anchors in the communities in which they live and serve, these small businesses create jobs, drive the economy, and connect rural Americans to the world. Moreover, these rural network operators have been at the forefront of the broadband and Internet Protocol (IP) evolution for years, executing innovative efforts to deploy advanced wireline and wireless networks that respond to consumer and business demand for cutting-edge services while extracting greater efficiencies from network operations in the face of operating in hard-to-serve areas. Given the importance of effective universal service policy to the mission of these small, community-based providers, NTCA appreciates the Committee’s focus on the issues presented and welcomes the opportunity to provide input through these comments.

¹ *Universal Service Policy and the Role of the Federal Communications Commission*, Energy and Commerce Committee, U.S. House of Representatives (available at <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140822White%20Paper-USF.pdf>).

II. DISCUSSION

1. ***How should Congress define the goals of the Universal Service Fund? Should Congress alter or eliminate any of the six statutory principles, codify either of the principles adopted by the FCC, or add any new principles in response to changes in technology and consumer behavior?***

Summary: *The principles of universal service as articulated in the Telecommunications Act of 1996² remain relevant and continue to be essential in establishing timeless objectives of universal service policy. They are intended to promote: quality services at just, reasonable, and affordable rates; access to advanced services; access in rural and high cost areas; equitable and non-discriminatory contributions; specific and predictable support mechanisms; access to advanced telecommunications services for schools, health care, and libraries; and additional principles as the Federal-State Joint Board on Universal Service and the Federal Communications Commission (FCC) may determine necessary and appropriate.³ Each of these timeless principles remains necessary to ensure National progress in deploying and sustaining affordable access to advanced communications networks. While specifics of the individual programs that are implemented pursuant to these principles certainly require continuous review and updating, the statutory provisions and principles themselves generally continue to provide clear and effective guideposts for our National universal service policies – although as described below, the specific reference in one of the principles to building support funding only from telecommunications revenues⁴ should be examined for targeted updating to ensure the sustainability of universal service in the long-run.*

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as “the Act,” and all references to the Act will be to the Act as it is codified in the United States Code.

³ 47 U.S.C. 254(b).

⁴ 47 U.S.C. 254 (b)(4).

Further Answer: Combined Federal and state universal service policies have worked in parallel to enable a 95 percent telephone penetration rate in the United States.⁵ Furthermore, RLECs have leveraged a mix of high-cost universal service fund (USF) support, intercarrier compensation revenues, private capital, and public-private partnerships such as Rural Utilities Service programs to deploy and then provide high-quality affordable broadband throughout rural America; in a recent NTCA survey, 100 percent of respondents offer broadband to some part of their customer bases.⁶ Even several years ago, when the objective of universal broadband was still nascent, a forward-looking collection of policymakers on the Federal-State Joint Board on Universal Service noted the “commendable job” of RLECs in deploying broadband to high-cost areas.⁷ RLECs have embraced the challenge of deploying broadband-capable networks and offering cutting-edge services, once again leveraging a critical mix of entrepreneurial spirit and USF support to jump to an early lead in the “IP transition.” NTCA’s most recent Broadband Internet Access Survey indicates that 29 percent of RLEC customers are now served by fiber-to-the-premises, with another 24 percent served via either fiber-to-the-node or cable modem technologies. Nearly 80 percent of RLEC consumers can obtain broadband at speeds of 6 Mbps

⁵ *Telephone Subscribership in the United States (Data Through July 2011)*, Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, p. 6 (rel. Dec. 2011) (http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-311523A1.pdf).

⁶ *See*, NTCA 2013 Broadband/Internet Availability Report, May 2014, at 3 (available at <http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2013ntcabroadbandsurveyreport.pdf>) (NTCA Broadband Survey).

⁷ High-Cost Universal Service Support, Federal-State Joint Board on Universal Service: Recommended Decision, WC Docket No. 05-337, CC Docket No. 96-45, FCC 07J-4, at para. 39 (2007).

downstream or greater.⁸ Fifty-one percent of RLECs have converted to IP-enabled softswitches already, and another four percent are planning to make such a migration in 2014.⁹

These accomplishments are particularly impressive because RLECs operate almost entirely in areas in which the inherent capital-intensive costs of communications networks are compounded by the geographic distance over which facilities must be deployed and the relatively small number of users (as compared to more densely populated urban areas) from whom related costs can be recovered. And, yet, much more must be done to ensure that rural broadband both becomes *and then remains* reasonably comparable to services available in urban areas. Already, the FCC is considering increasing target broadband speeds for universal service to 10 Mbps based upon typical usage in urban areas.¹⁰ This is an appropriate examination – one that is necessary to ensure that universal service evolves over time so that rural areas keep pace – but it also highlights the *ongoing* challenge of preserving and advancing universal service that goes beyond one-time network construction efforts. It further underscores the need to ensure that sufficient and predictable universal service support is available – on an ongoing basis – and appropriately sized for that challenge.

Rural broadband cannot be done and sustained “on the cheap,” and even with efficiency gains, it is not at all clear that 2011-based USF budgets are realistic or right-sized for rural

⁸ NTCA Broadband Survey, at 6.

⁹ *Trends: A Report on Rural Telecom Technology*, National Exchange Carrier Association, at 11 (Sep. 2014).

¹⁰ *Connect America Fund; Universal Service Reform – Mobility Fund; ETC Annual Reports and Certification; Establishing Just and Reasonable Rates for Local Exchange Carriers; Developing a Unified Intercarrier Compensation Regime: Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking*, Docket Nos. 10-90, 10-208, 14-58, 07-135, 01-92, FCC 14-54, at para. 140 (2014).

broadband challenges in 2020 and beyond. Rural areas comprise, depending upon various Federal government definitions, 84 percent to 97.5 percent of the land mass of the United States.¹¹ Rough terrain in some rural areas causes additional deployment and maintenance costs not encountered in urban areas. Often, a “large” town in an area served by RLECs might have a few thousand residents – indeed, many of the areas served by RLECs contain no more than a few thousand consumers. In sum, the provision of communications services in rural areas has inherent per-user costs that are higher than those encountered in urban areas, and it will require greater effort and resources to build and sustain broadband in those regions.

To compensate for higher costs and the fewer consumers from which to recover them, network deployment and ongoing provision of services in rural areas rely on a combination of fees paid by subscribers, privately-sourced capital, and revenues derived from government-administered support programs. The latter include (a) user-funded programs, including the Federal USF; (b) loan opportunities administered by the U.S. Department of Agriculture (USDA) under the aegis of the Rural Utilities Service (RUS); and (c) periodic grant programs administered by the RUS and the National Telecommunications Information Administration (NTIA – an office within the U.S. Department of Commerce). Another regulatory-related revenue stream that has played, at least in the past, an important role in enabling rural network deployment arises out of compensation arrangements among telecommunications carriers (intercarrier compensation, or ICC). Collectively, the government administered programs (which in certain instances are paired with

¹¹ Reynnells, Louise, and John, Patricia LaCaille. “What is Rural?,” Rural Information Center, National Agricultural Library, U.S. Department of Agriculture, Beltsville, MD (2008) (http://www.nal.usda.gov/ric/ricpubs/what_is_rural.shtml#intro) (last viewed Apr. 25, 2012 14:38).

state-level programs) are consistent with long-standing National policy to ensure that everyone in the Nation has reasonably comparable access to communications services.¹²

As broadband is sought and adopted by increasing numbers of individuals and businesses, Federal policy-makers have undertaken revisions to existing rural support programs to facilitate deployment of broadband networks throughout the United States.¹³ The underlying universal service principles upon which current achievements have been based, however, must not be compromised, and the mere act of deployment and the mere fact of current availability – at speeds sufficient for today’s but not necessarily tomorrow’s needs – must not be taken as the sole objective of universal service. Indeed, when one considers the underlying principles of universal service presently captured in the Act, it becomes clear that their focus is not just on the presence of networks in the first instance, but the sustainability of those networks over time. That is, a sustainable universal service policy should at a minimum: (1) focus on the evolving nature of communications networks and services and consumer demand; (2) allow for upgrading of networks over time to meet that evolution; and (3) ensure “reasonable comparability” in rates and service quality is maintained over the long-term life of those supported networks. On the other hand, a focus on deployment only, without a concomitant focus on such sustainability, will result

¹² Specifically, the Communications Act of 1934, as amended (47 U.S.C. § 151, *et seq*) (the Act) requires that users in rural and insular parts of the Nation have access to services that are reasonably comparable to those that are available in urban areas, and at reasonably comparable rates (47 U.S.C. § 254(b)(3)).

¹³ A major iteration of this process occurred in November 2011. *See, Connect America Fund; A National Broadband Plan for Our Future; Establishing J.U.S.t and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform: Mobility Fund: Report and Order and Further Notice of Proposed Rulemaking*, Federal Communications Commission Docket Nos. 10-90, 09-51, 07-135, 05-337, 01-92, 96-45, 03-109, 10-208, 26 FCC Rcd 17663, FCC 11-161 (2011).

in rural consumers falling behind their urban brethren in terms of access to affordable, high-quality broadband networks.

By and large, the statutory principles are flexible, timeless, and technology-agnostic. They look to fill the gaps in service availability and affordability in a variety of ways – regardless of whether communications access is being denied because of income or geography – while recognizing that support must be both sufficient and predictable if such access is to be sustainable. Thus, the principles established by Congress in 1996 are just as relevant today in a “broadband world” as they were then, and they should remain guideposts for universal service policymaking going forward.

Yet even as the principles themselves may be timeless, the programs promulgated pursuant to these principles are in need of review and updating. For example, the FCC has undertaken reforms in recent years to update the high-cost USF program to better facilitate the deployment of broadband. While a worthwhile goal, much remains to be done to realize this objective. The long-term Connect America Fund for the thirteen largest carriers in the United States remains a work in progress nearly two years after it was supposed to be in place, and for the hundreds of smaller carriers that serve even more rural and remote areas, their USF support mechanisms remain tied to the purchase of “plain old telephone service” (POTS) by consumers – meaning that those consumers face the prospect of precipitous price increases for broadband if and when they choose to “cut the cord” on legacy voice services. The existing principles and statutory provisions governing universal service provide the FCC with sufficient authority to address these issues, but there is a need for Congress to remain actively engaged in ensuring that the FCC does so promptly and effectively.

Finally, one principle of universal service that could benefit from targeted congressional review is 47 U.S.C. 254(b)(4). This principle is narrowly limited to “telecommunications services”

alone,¹⁴ and thus fails to capture fundamental shifts in the communications marketplace since 1996. A narrowly-crafted update to reflect better the use of and demand for networks would make good sense in coordinating support for broadband via support from broadband. In fact, the fund faces serious risk of insolvency – putting our National universal service policy in jeopardy – if contributions in support of services needed and wanted remain tied to services that consumers increasingly leave behind.

Indeed, principle (b)(4) is self-contradictory, in that contributions cannot be “equitable and nondiscriminatory” if made only by providers of telecommunications services. Although much important work remains to fully transform the fund to explicitly support broadband in all rural areas (and in RLEC areas, in particular), the FCC has at least started taking steps to reorient its USF distribution programs for a broadband world. It is time to match the mechanisms of USF funding with its purpose through a more sensible, updated contribution principle. All service providers and users that benefit from the network should contribute to its deployment, maintenance, and sustainability. *(Please see the response to Question Six for greater detail.)*

¹⁴ 47 U.S.C. 254(b)(4).

2. ***Universal service was created to fund buildout in areas incapable of economically supporting network investment. How should our policies address the existence of multiple privately funded networks in many parts of the country that currently receive support?***

Summary: *Support for universal service in rural and insular areas remains necessary as technologies evolve. In some instances, firms may provide competitive services in limited portions of high-cost areas. However, before identifying those companies as “unsubsidized competitors,” policy-makers must determine that they provide the same level of service to all locations within the service area, and are capable of delivering the same levels of universal service (in terms of quality and price) expected of supported carriers. Support in high-cost areas is tendered precisely because no business model to sustain a privately-funded company exists across broad rural geographies. Thus, to ensure that universal service is sustainable, a careful consideration of “facts on the ground” is required – and this fact-specific examination is one that Federal and state agencies are already performing and are better equipped than Congress to undertake.*

Further Answer: Universal service is defined as “an evolving level of telecommunications services that the Commission shall establish periodically . . . taking into account advances in telecommunications and information technologies and services.”¹⁵ The repeated references to “services” within this definition are key, rightly focusing universal service policy on the consumer’s experience. While broadband-capable networks are an essential prerequisite to the offering of services, federal universal service policy is not (at least until recently) and otherwise has never merely been about funding network build-outs. Rather, universal service support, by definition, has always been focused on ensuring that consumers have reasonably comparable services at reasonably comparable rates atop the networks USF helps to support. That mission requires far more than one-time construction; it requires the ongoing operation and maintenance

¹⁵ 47 U.S.C. § 254(c)(1).

of such networks and the ongoing provision of affordable, high-quality services to the consumer.¹⁶ Unfortunately, the former objective (construction) appears to have consumed policy makers' attention in recent years, while the latter (ongoing network operation and provision of affordable, high-quality services) has become perhaps too much of an afterthought. It is essential that Congress and all policymakers take heed of the need to ensure *sustainability* of networks built using universal service support.

Indeed, sustainability must be seen as a linchpin of universal service policy. Universal service dollars are at risk of going to waste and consumers at risk of being left behind if the program's focus shifts too heavily toward one-time construction costs. World-class networks that are insufficiently maintained will become woefully outdated. The statutory objective of "reasonable comparability" must be met not only on the day a network is built, but for years to come. Therefore, NTCA urges Congress to hold paramount the sustainability of both underlying networks and the services provided atop them as it reviews the purposes of universal service and the potential for any updates to USF programs.

Sustainability is an important consideration too when identifying whether certain rural markets might function in the absence of explicit USF support. Policymakers must establish a basic

¹⁶ In fact, as discussed further in response to Question Five, universal service has traditionally *not* been used directly to pay for the deployment of networks. Rather, a mix of private capital (whether from company cash flows and/or private lenders) and loans or grants from the Rural Utilities Service has been the primary source of funds for build-out of rural networks. Universal service support then helps to address the fact that rural consumer rates would be astronomical if those consumers were required to pay the cost of deployment (including repayment of financing) and operation of the networks once built. In short, universal service has traditionally *not* served as a construction program; instead, in those rural areas where broadband has in fact best been deployed, universal service support provides a means of ensuring affordability for consumer service and helping providers make the business case for putting their own equity or debt financing into the construction of networks. To date, this is the only model that has worked to deliver universal service on a widespread basis in rural areas – this is the symbiotic relationship between universal service support and private financing or public-private partnerships that allowed RLECs to achieve their "commendable" progress in deploying rural broadband.

set of standards that reflect “reasonably comparable services,” and then ensure that any would-be competitor is capable of actually meeting those standards (at reasonably comparable rates) prior to revoking or reducing USF support in a given area. The mere presence of a privately-funded network in a given rural area says nothing about the availability or sustainability of universal service as defined by a baseline set of standards and expectations in the absence of explicit USF support; rather, a more careful, granular look is required to ensure that “the market” is capable of delivering “true” universal service such that explicit USF support is no longer required to do so.

Addressing the presence of multiple providers in a single service area is necessarily a fact-specific examination. To be considered an “unsubsidized competitor” that can truly fulfill the mission of universal service without the need for USF support, a firm should be required to provide that level of service defined by the FCC and/or state commissions to all residential and business locations in a given area. In short, any firm seeking classification as an “unsubsidized competitor” should be required to make an affirmative showing that it meets speed, latency, capacity, and performance criteria at all locations within the area served by the incumbent. If it does not, then its presence as a privately funded network should have no bearing on the USF support accorded to the carrier bound by both service area and service quality obligations. Because this requires a detailed assessment of localized conditions, Congress should defer to the FCC and the states as they are already undertaking consideration and implementation of such policies based upon “facts on the ground,” rather than attempting to address such issues through a statutory drafting effort.

In determining the contours and characteristics of where “the market” can fulfill universal service on its own, the data relied upon by the FCC or states must be accurate and verifiable; self-reported data without corroborative evidence sets the stage for hazardous reductions in support to Carriers of Last Resort (COLRs) that would result, ultimately, in degraded service to consumers. These negative impacts would manifest not only upon those consumers who are not served by the alternative provider, but also upon those who could end up receiving service from the alternative

provider that is not “reasonably comparable” in quality and rates to that which is available in urban areas.

And even as a determination might be made that a competitor exists, a one-time “snapshot” of a competitor’s capabilities and service offerings does not equate to sustainable universal service for the consumers in that area. An alternative provider, for purposes of being deemed an “unsubsidized competitor,” should be subject to robust service monitoring and other accountability requirements. If the competitor is going to claim that the market is working to fulfill universal service without the need for explicit USF support, consistent once again with the need for sustainability, the competitor should be required to show that the market continues to do so on an ongoing basis. Failure to do so is likely to result in consumers months or years later facing higher rates or lower-quality services, in defiance of a statutory universal service policy that demands reasonably comparable services at reasonably comparable rates.

Moreover, although principles of technological neutrality are important to encourage the development of new and innovative offerings, policymakers must not equate “neutrality” with “blind equivalence.” For example, there is substantial question as to whether satellite-based communications can provide sufficiently robust capacity in the face of increasing consumer demand to support both voice *and* broadband service offerings that meet latency and other important performance and pricing requirements.¹⁷ Policy-makers presumably do not want a situation in which consumers cannot access 911 emergency services in the midst of heavy rain or snow simply because a given technology does not function reliably during bad weather. Similarly, while mobile services are a useful and highly desirable complement to fixed broadband, it is clear

¹⁷ See, e.g., Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket No. 10-90 (filed Nov. 7, 2013), attaching Vantage Point study (NTCA November 7, 2013 Letter); Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket No. 10-90 (Dec. 18, 2013).

that such services are not a substitute for, fixed broadband.¹⁸ It is also important for policymakers to recognize the technical necessity of wireline facilities in making alternative technologies, such as 3G or 4G mobile broadband services, a reality in rural areas.¹⁹

Finally, in order to determine that a given market is self-sustaining and not in need of explicit high-cost USF support, a would-be “unsubsidized competitor” should neither cross-subsidize its operations in that geographic area nor should that would-be “unsubsidized competitor” receive high-cost USF support or other distributions from federal or state support programs such as E-Rate, Rural Health Care, or Mobility funding (Tribal or Mobility Phase I and II support) in connection with its operations in that area. Such a definition of “unsubsidized competitor” is required to ensure that policies properly distinguish between those markets that are truly “economic” to serve of their own accord and those uneconomic areas where a purportedly “unsubsidized” competitor is in fact propping its operations up through subsidies or other support mechanisms.

¹⁸ See, e.g., Letter from Jodie Griffin, Public Knowledge and Regina Costa, The Utility Reform Network to Marlene H. Dortch, FCC, GN Docket No. 12-353 et al., at (filed May 12, 2014). Indeed, comments filed in the FCC’s Open Internet proceeding by mobile service providers themselves make clear that they believe these services lack the technical capabilities of landline in delivering broadband services, and that differing standards and expectations should thus apply to mobile broadband networks and services. See, e.g., <http://mobilefuture.org/wp-content/uploads/2014/07/MFOpenInternetCommentsJuly2014.pdf>.

¹⁹ See, e.g., *Rural Associations’ February 17, 2012 Reply Comments* at 14. See also Letter from Larry Thompson, Vantage Point, to Marlene H. Dortch, FCC, WC Docket No. 10-90 (filed Oct. 2, 2013) ; “The Truth About Wireless Broadband: The Myths and Challenges of Wireless Technology in Rural America,” jointly developed for the Foundation of Rural Service by John Staurulakis, Inc, Monte R. Lee and Company, and Palmetto Engineering and Consulting, July 2011, at 6, <http://www.palmettoeng.com/sites/default/files/truth.pdf> (last visited Aug. 6, 2014); “Updated Capital Spending Data Show Rising Broadband Investment in Nation’s Information Infrastructure” Patrick Brogan, Vice President of Industry Analysis, USTelecom, November 2014, at 3, (<http://www.U.S.telecom.org/sites/default/files/documents/103113-capex-research-brief-v2.pdf>) (last visited Aug.6, 2014).

Policy-makers must recognize that no matter the technology, unprofitable areas will remain unprofitable and unattractive to providers, and some mixture of carrier of last resort obligations and commitments that transcend fiduciary duty to shareholders will be necessary to assure build-out and, just as importantly, the sustainable provision of high-quality services to consumers at affordable rates. Because, however, these issues turn upon fact-specific examination of conditions in specific markets and geographies, these are necessarily questions that should be left to individual Federal and state agencies to examine, rather than attempting to address them through sweeping statutory revisions.

3. *What is the appropriate role of states and state commissions with respect to universal service policy?*
4. *What is the appropriate role of the Federal-State Joint Board on Universal Service in a broadband, IP-enabled, largely interstate world? What is the appropriate role of related joint boards, such as the Federal-State Joint Board on Separations or the Federal-State Conference on Advanced Services?*

Summary: *The states and state commissions play a critical role with respect to universal policy. State bodies are closest to the actual conditions, concerns, and circumstances of the local marketplace, and are therefore best positioned to contribute to the formulation of National policies that will generate local impacts. Accordingly, revisions or updates to the Act should incorporate opportunities for state involvement in the creation and implementation of universal service policies. Moreover, the Federal-State Joint Board on Universal Service is positioned uniquely to form a comprehensive universal service structure that considers critical National policies and discrete local conditions. Properly formed and implemented, the Federal-State Joint Board is an intellectual clearinghouse within which vital National policies can be debated and tested against the anticipated “real world” impacts at the local levels where implementation takes hold.*

Further Answer: The states play, and should continue to play, a critical role with respect to universal service policy. In apparent recognition of their proximity to consumers and ability to assess the viability and quality of providers, Congress rightly afforded state commissions the power to certify eligible telecommunications carriers (ETCs) that are eligible to obtain USF support. Moreover, Congress recognized wisely that state commissions are best positioned to adjudge the special circumstances needed to balance the public policy objectives of competitive entry and universal service in areas where it is clear that the market can at best perhaps support only one provider.²⁰

²⁰ See, e.g., Sen. Rep. 104-23 at 22 (“The Committee intends that the FCC or a State shall, consistent with the protection of consumers and allowing for competition, use this authority to create a level playing field, particularly when a company or carrier to which this subsection applies

Universal service, while serving national goals, also implicates concerns that are informed by local experience. These include, but are not limited to, consumer protection, public safety, rates, and affordability. An opportunity for state participation must be assured if these concerns are to be fully addressed.

The Act in its current iteration does not simply envision but rather mandates a collaborative interaction among the state and Federal agencies. The Congressionally-mandated Federal-State Joint Board on Universal Service is perhaps the clearest example of the importance Congress accorded to state participation in these matters. As policies are referred to the Federal-State Joint Board for Universal Service, the FCC establishes a process through which a proposed National policy, informed by an aggregate of individual state positions, can be measured against the whole woven fabric of collective states' needs. This approach ensures that a federal perspective does not impose a "one size fits all" approach, but rather constructs a mechanism that accounts for the many variables present in individual states.

Moreover, the overriding public policy principles of access; consumer protection; availability of reasonably comparable services; and assurance of networks that facilitate public welfare and safety do not change in the face of any "technology transition" within underlying communications networks. The numerous consumer protections that are part and parcel of COLR and/or ETC obligations must therefore be recognized, even within the context of a broadband-

faces competition from a telecommunications carrier that is a large global or nationwide entity that has financial or technological resources that are significantly greater than the resources of the company or the carrier"); 142 Cong. Rec. S 709 (Feb. 1, 1996) (Comments of Sen. Daschle of South Dakota) ("The bill before us also recognizes the important role that must be played by Public Utilities Commissions (PUCs) in rural States. PUC's are the best entities to judge whether a given market within their State can support competition. That's not a judgment we should make from Washington. Nor is it something we can or should leave to the unbridled, unspecified judgment of the private sector. Those who have taken the risks and made investments to extend cable or phone services to smaller rural communities should not be placed at risk of being overwhelmed by larger, better-financed companies.")

capable, IP-enabled world. Even if some updating of these obligations is required, such measures provide the best – and perhaps the only – means of ensuring accountability within the USF program; certainly, parties should not expect access to USF dollars without adherence to at least some basic licensing regime that ensures “strings are attached” to the use of those funds. Those who would seek to minimize the importance of these duties (or to eliminate them altogether) fail to understand that these obligations serve the interest of the consumer, first and foremost, including both those who receive supported services and also those who contribute to USF and should expect effective, responsible use of those funds.

NTCA also notes that local-jurisdiction regulators possess extensive knowledge of local conditions and should continue to play an important role even as networks evolve to “IP” and consumer preferences shift to “interstate” service offerings. Giving state and local regulators a clearly defined complementary role in matters such as consumer protection and the need for universal service in individual “markets” would seem well-advised and consistent with current successful public policies.

5. ***The Universal Service Fund is one of several federal programs that support buildout of communications facilities. Are current programs at other federal agencies, like the National Telecommunications and Information Administration (which oversaw the Broadband Technology Opportunities Program) or the Rural Utility Service (which oversees lending programs and oversaw the Broadband Initiatives Program) necessary?***

Summary: *Federal policy has created different programs to address distinct needs that are encountered in the deployment of communications networks in rural areas. These programs are funded differently; administered by separate arms of the government; and overseen by officials with distinct expertise that lends itself to resolution of the particular challenges each program was created to confront. Inasmuch as, for example, RUS loans serve a different purpose than USF, both programs warrant continuation. Moreover, transitory programs such as the Broadband Technologies Opportunity Program (BTOP) and the Broadband Investment Program (BIP), which arose out of the American Recovery and Reinvestment Act (the “Stimulus Act”),²¹ should be viewed as time-constrained, complementary programming that do not affect long-standing programs established to promote timeless principles of universal service.*

Further Answer: Traditional RUS financing and one-time capital-focused programs such as BTOP and BIP on the one hand, together with USF programs on the other hand, play complementary roles in supporting the deployment and sustainability of broadband-capable networks in rural areas. Much like a commercial lender, RUS (and NTIA in the context of BTOP) provide reasonable access to capital – but unlike many commercial lenders, these agencies have been willing to do so (and charged by statute to do so) in some of the most challenging reaches of the United States. Moreover, many years ago, RUS adopted a forward-looking policy of ensuring that the networks it financed – given that they would be in place and the costs of them recovered over decades to come – should be broadband-capable, thereby representing an “early adoption” of

²¹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 516 (Feb. 19, 2009).

focusing deployment on future-proof networks on which consumers could receive advanced services.

The high-cost USF program, in turn, helps to ensure that consumers can pay “reasonably comparable” rates for “reasonably comparable” services on the networks that RUS (and only a small handful of other commercial lenders) help to finance in the first instance. In this regard, it is once again important to recall that USF is much more – by law – than an “availability” program; instead, the high-cost USF program is in many respects an “adoption” program, helping to ensure that rates for services on networks in rural areas are not unaffordable. USF also effectively provides “the business case” to help justify obtaining RUS or other loan financing or to put equity to work in connection with rural broadband deployment; USF does not itself fund the network build-out in most cases, but rather it helps fill the gaps by supporting costs that could not possibly be recovered for loan repayment and network operation through “reasonably comparable” rates.

Thus, the RUS financing programs (and NTIA’s BTOP effort) on the one hand and the high-cost USF program on the other play two very different, but complementary and very important, cost-effective, roles in promoting and sustaining rural broadband. In fact, the RUS traditional telecommunications loan program is what is commonly known as a “super program.” It is one of the few government programs that actually pays down the deficit by returning funds to the US Treasury when loans are repaid. Meanwhile, the high-cost USF program overall had a slightly declining “budget” for several years *even before the FCC reforms in 2011*,²² and the portion of high-cost support received by smaller carriers was increasing by only 3% per year on

²² *High-Cost Universal Service Support; Federal-State Board on Universal Service; Alltel Communications, Inc., et al., Petitions for Designation as Eligible Telecommunications Carriers; RCC Minnesota, Inc., and RCC Atlantic, Inc., New Hampshire ETC Designation Amendment: Order*, Docket Nos. 05-337, 96-45, FCC 08-122, at 6 (2008).

average leading up to those reforms even as these rural providers edged out broadband to more than 92% of their consumers.

Thus, both RUS and NTIA programs on the one hand and the high-cost USF program on the other have traditionally worked in tandem to achieve a rare and remarkable policy success – yielding funds back to the American taxpayer while promoting broadband investment (in the form of the RUS programs and BTOP) and helping to justify such investments and the ongoing provision of affordable rates for broadband to consumers (in the form of the high-cost USF programs). Of course, the RUS BIP and the NTIA BTOP were one-time initiatives that are no longer injecting new capital into broadband deployment, but the other RUS programs remain critical in enabling long-term financing of networks in hard-to-serve reaches of the United States, and high-cost USF remains a separate and essential piece of the puzzle in making the business case to build such networks, promoting the sustainability of those networks once built, and ensuring the affordability of services offered over them.

6. ***How can we ensure that the Universal Service Fund is sufficiently funded to meet its stated goals without growing the fund beyond fiscally responsible levels of spending?***

Summary: *Sufficient funding of the USF is necessary to ensure that vital public policies are achieved. The standards by which that fund are built, however, cannot be sustained in the current and anticipated future market. Therefore, industrious review must be given to the establishment of a new funding structure that rests upon a single logical, equitable, and fundamentally fair principle: those who utilize and rely upon the network shall contribute to its costs.*

Further Answer: The sustainability and very success of our nation's universal service policy will be called into question if USF continues to be funded only through assessments on telecommunications services. Due to evolving technology and shifts in consumer behavior and market demand, the pool of assessable telecommunications services revenues is shrinking even as demand for telecommunications and other communications-related services (and, consequently, the networks upon which they rely) increase. Moreover, shoring up the USF contribution base by imposing assessments on certain services on a "one-off" basis through permissive authority under the Act offers little promise in the long-run – not unlike putting fingers in a leaky regulatory dike, it is at once inefficient as an administrative matter, and it ultimately cannot hope to keep up with and capture all the ways in which those making use of underlying networks might do so now or in the future.

As a result, the USF program effectively has an artificial funding ceiling that lowers a bit each day due to the failure to broaden the contribution base and the incentives (and abilities) in place today for entities to skew the marketplace and avoid contribution obligations.²³ This

²³ Consider for example, a consumer's purchase of "private line" or special access services as compared to dedicated Internet access (DIA). Both offer capacity to connect to the provider's network and ultimately to other networks, albeit through different protocols. And while one may be perceived as more advanced than the other, the fact is that one might obtain a private line with capacity far in excess of the Internet port and link obtained via DIA. Yet the arbitrary and artificial

shrinking cap on the USF program will handicap severely our nation's ability to fulfill its universal service mandate unless changes are made. While the statute today may provide flexibility to assess such services, nothing would help more in breaking a decade-long logjam than a clear Congressional mandate that all those who use our nation's networks – by whatever technology or service – are responsible to contribute to its universal well-being and availability on an equitable and nondiscriminatory basis. Indeed, broadening the contribution base to include the advanced services that USF already supports has recently received bipartisan backing in House of Representatives.²⁴

To this end, our federal telecommunications policies need to move away from “vertical service silos” that allow entities to pick and choose their mode of regulatory arbitrage. Any legislative update should avoid tying contributions to artificial and likely-to-be-soon-outdated service classifications and should instead “future-proof” the USF system by simply providing that any end user's procurement of a connection to a network – whether in TDM, IP, ATM, Frame Relay, or whatever technology may be the fancy of the moment – must contribute to the health of American networks and services as a whole and thus will be assessable for USF purposes.

As the basis of contributions is reformed and the “supply” side is recalibrated more properly, policymakers must also pay heed to the “demand” side. By way of example, the FCC is engaged in attempting to resolve a “gap between schools' and libraries' current connectivity and

classification of these functional equivalents skews regulatory outcomes and marketplace behavior in ways that should be deemed unacceptable in an efficient and effective market. Specifically, the customer buying a private line pays contributions in excess of 15 percent to USF simply because the capacity being procured has been classified as a “telecommunications service,” while another customer buying precisely the same amount of capacity as DIA pays no USF contribution. Fixing such market-skewing disparities and eliminating such arbitrary distinctions while making sure always to serve core principles of consumer protection, competition, and universal service should be seen as a priority of any legislative review and update.

²⁴ See H.R. 5828 § 102(a), 111th Cong., 2d Sess. (2010).

the specific connectivity targets²⁵ adopted in the *E-rate Modernization Order*. NTCA has noted its concurrence in efforts to ensure that schools and libraries that are lacking in robust physical connections such as fiber have the ability to access those connections. But, as NTCA has related to the FCC, reform of the E-rate mechanism must account for the unique need that each individual school or library has in the first instance (whether that be a connection to the facility in the first place, a more robust connection, an affordable connection, or internal connections). It would be an inefficient use of USF resources to deploy an E-rate supported network facility to a location that is already connected by fiber – and it would be all the more troubling if that existing fiber was already supported by the high-cost USF program. Thus, an essential condition precedent to reaching any conclusions on further reform and expansion of any budgets must be a gathering of data that can be used to assess and validate the connectivity needs at each institution. The sum of these concerns is similar to what is noted in response to Question Two, above, namely, that the determination of factual issues must be made upon the basis of sound processes and accurate and verifiable data. Those methodologies should ultimately be aimed at ensuring that duplicative facilities are not deployed. Rather, existing networks must be leveraged in order to obtain efficient use of resources.

²⁵ *Modernization of the Schools and Libraries “E-Rate” Program: Further Notice of Proposed Rulemaking*, Docket No. 13-184, FCC 14-99, at para. 3 (2014).

7. *Are all of the funds and mechanisms of the current Universal Service Fund necessary in the modern communications marketplace?*

Summary: *Regulatory mechanisms aimed at achieving the various public policy goals that underpin current Universal Service Fund programs today will remain necessary in the modern communications marketplace. Regardless of the technology deployed in National communications networks, some areas will remain high-cost; education will remain an imperative of public policy; health care reliance on advanced communications facilities is only expected to increase; and the needs of low-income users must be noticed. Therefore, the principles espoused by the various programs of the current USF remain relevant, and the programs, or updated iterations of them, are warranted in each case – although better coordination between the components of the USF umbrella would be useful to ensure more effective achievement of USF objectives and more efficient use of USF resources.*

Further Answer:

High Cost

The transition from TDM to IP mirrors the Nation’s increased reliance on and demand for broadband services. To be sure, as commercial functions rely increasingly on broadband availability, the drive to build *and* sustain networks throughout the Nation must be affirmed and invigorated. Any failure of a region to “keep pace” with technology that enables advanced applications results in that region’s inability to compete with other areas and to attract new residents. The sum of those conditions is a prescription for, at best, stagnation, and at worse, decline. Thus, high-cost support remains as necessary today as it was in a telephone era; indeed, as explained earlier in this paper, even the “commendable” progress made to date by RLECs in delivering the promise of broadband in rural areas is attributable to, and predicated upon, the availability of predictable and sufficient support. That progress cannot be sustained, and we will

be unable to reach areas still in need of broadband access, without an effective high-cost mechanism.

E-Rate

The Schools and Libraries program, often referred to as “E-rate,” is another important part of the comprehensive USF fabric. Working together but in tailored ways, all of the vital USF programs should be aimed at ensuring consumers of different kinds can obtain affordable access to critical communications services. In rural areas in particular, the E-rate program and the high-cost program are important complements to one another in achieving the broader, more comprehensive universal service mission.

As NTCA has specifically noted in comments both in the context of the Connect America Fund and the E-rate program, however, greater coordination between the two mechanisms is essential to leverage the best aspects of both and maximize the use of USF resources.²⁶ Similarly, expansion of one USF mechanism without consideration of the impacts on other USF programs could do long-lasting damage to the broader concept of universal service, to the detriment of the residents, businesses, and also schools and libraries and the many other community anchor institutions that are beneficiaries of these critical programs – especially in rural areas. As the data provided by NTCA in FCC filings demonstrate,²⁷ NTCA members have made fiber-based

²⁶ See, Comments of NTCA, WTA, ERTA, and NECA, *et al.* (Rural Associations), WC Docket No. 10-90, *et al.* (fil. Aug. 8, 2014), pp. 40-41 (stating that all would-be eligible telecommunications carriers and unsubsidized competitors should be required to offer robust connectivity to community anchor institutions and that the Commission should carefully coordinate the E-rate mechanism and the High-Cost program to enable them to be successful in their respective missions); Comments of NTCA and WTA, WC Docket No. 13-184 (fil. Sept. 16, 2013), p. 9 (stating that a modernized E-Rate program must be coordinated with, rather than compete against, other important and complementary federal Initiatives, including the high-cost USF program).

²⁷ See, Comments of NTCA, WC Docket No. 13-184 (fil. Sep. 16, 2013 (discussing a member survey which found that of the 1,208 K-12 schools identified by NTCA members as located within their serving areas, 75% of those are already connected by Fiber-to-the-Premises (FTTP) and

connections available to a large number of the schools and libraries in the areas they serve, and most importantly this has been done in accordance with demand and what individual school and library budgets dictate. These results support the proposition that community-minded providers can take good and efficient advantage of their “already deployed” networks, often supported by the high-cost USF program, to advance services to schools and libraries. The locally-owned providers’ use of these various programs to create a result that serves multiple public policy principles is a model that should inform further development and use of these programs.

Low-Income

Policy-makers are to be applauded for their commitment to ensuring that low-income consumers can participate in a communications revolution. The prevalence of “on-line” job applications, for example, is but one illustration of how critical access to advanced services is for citizens, including low-income populations. Moreover, the accessibility of educational and health-care resources can be of particular benefit to persons who may be otherwise unable to access those services at traditional facilities where the actual cost of use may be higher than the supported broadband subscription rate. Indeed, a number of NTCA members have participated in the FCC’s Broadband Lifeline pilot project, and many others are engaged in all kinds of efforts to promote adoption by rural consumers. Thus, the Lifeline program remains an important aspect of our National universal service policy.

another 11% are connected by Fiber-to-the-Node (FTTN). The fiber connectivity numbers for libraries were 46% for FTTP and 13% for FTTN. Of those connected schools, NTCA members reported offering maximum speeds of 912 Mbps (mean) and 100 Mbps (median), while the average speed purchased is 128 Mbps (mean) and 20 Mbps (median). Of those connected libraries, NTCA members reported offering maximum speeds of 248 Mbps (mean) and 40 Mbps (median), while the average speed purchased is 13 Mbps (mean) and 6 Mbps (median). *See also*, letter from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket No. 13-184 (fil. Jul. 7, 2014) (providing survey from a June 2014 survey of NTCA’s members, which found a similar percentage of schools and libraries connected to fiber).

This being said, it is important once again to coordinate efforts among the various components of the USF. Rampant growth in the Lifeline program in recent years calls into question the sustainability of the program – and puts all of the USF programs at risk to the extent this one program’s growth consumes resources needed for other aspects of the universal service mission. The FCC has taken steps to address such concerns, but it remains to be seen whether such measures will help in the long-run to better reconcile growth in this one program with the needs and challenges of the other USF components.

Health Care

Rural health care remains both a challenge and vital need, and efforts to ensure the availability of affordable services to rural medical facilities through the Rural Health Care program should therefore remain an aspect of the USF umbrella. But, as with E-rate, there is a need to ensure that this program is coordinated with the high-cost USF programs that are focused on building networks *throughout* rural areas and communities to residences, businesses, and anchor institutions alike. Using programs like E-rate and Rural Health Care to address affordability in the first instance (by supporting sizeable discounts on high-capacity broadband services) and then secondarily to fill gaps in connectivity would produce a more coordinated and cohesive universal service policy – and a more effective and efficient use of valuable USF resources – than having these programs compete against one another in the construction of networks, particularly in areas where the “market” may not even support a single network without explicit USF support.

8. *In lieu of the current support mechanisms, could any of the programs be better managed or made more efficient by conversion to:*

- a. A state block grant program;*
- b. A consumer-focused voucher program;*
- c. A technology-neutral reverse auction; or,*
- d. Any other mechanism.*

Summary: *Each of the distinct alternatives noted in this question presents substantial risks with respect to the achievement and sustainability of universal service. Congress should focus upon giving the FCC directions and tools needed to update existing USF mechanisms for an IP-enabled, broadband-capable world, rather than seeking to remake the ways in which USF is distributed.*

Further Answer: The alternatives to current support mechanisms listed in parts (a), (b) and (c) all raise serious questions with respect to the linchpin objective of sustainability, because each fails to account for how rural areas become and remain served; each would jeopardize universal service in the longer-term by elevating short-term cost savings over the Act's principles of ensuring access to advanced services for all Americans. The Nation's economy and the Federal treasury would pay dearly for any short-term savings realized via such mechanisms through lost opportunities for lack of robust broadband in many areas and the inevitable clamor to quickly "right the ship" when it becomes apparent that the new mechanisms are leaving rural areas behind.

Addressing the specific proposals offered by the Committee, state block grant programs can be a healthy way to introduce network deployment in high-cost areas, but unlike FCC-administered USF programs, they cannot and do not address the critical need to maintain networks once they are built. This characteristic warrants close attention in rural areas where the opportunity to obtain revenues sufficient to cover both the cost of the existing network and its ongoing sustainability and development are constrained. Moreover, the ability of current IP networks to transmit ever-increasing amounts of data relies upon the upgrading of electronic facilities over time. And, even as providers must upgrade their networks, they must also undertake standard

maintenance that sustains their everyday use – unlike in Washington, DC, where a repair truck might only roll a few miles to handle multiple repairs, in places like rural Arizona or South Dakota, consumers may be located hours away from the nearest technician (and repair calls may be located dozens of miles away from one another). To the extent state block grant programs do not fully support operating costs of this kind, Federal USF or similar programs remain necessary.

In a similar vein, consumer vouchers do not support network builds, maintenance, or upgrades. Consumer vouchers have the effect of risking the spread of limited resources among more providers than a market can realistically support. Any area in which high-cost support is applied is, by definition, an area in which ordinary market forces are unable to support even a single provider. It defies logic, common sense, and sound business practices to embark upon a course that would seek to provide too-little resources to too-many providers, resulting in *no* provider being able to build, maintain, or upgrade a network. The mirage of consumer vouchers as a solution for high-cost areas should be set aside.

Reverse auctions similarly should be rejected as a matter of congressional prescription. Reverse auctions reward the candidate that promises to deploy the cheapest network. This “race to the bottom” is wholly inconsistent with the Act’s demand for “reasonably comparable” services. Moreover, a reverse auction that establishes the total funding level at the beginning of the term limits severely the provider’s ability to upgrade or invest in future technologies. The lock-down funding amount can also encourage providers to slow investment toward the end of the auction term, since there is no inherent incentive to spend money for a benefit that may not be obtained until after the auction term expires. This result runs inapposite to universal service principles. The distortion of investment cycles based on funding that is predetermined a decade in advance must be considered. On the one hand, it is necessary to view communications networks as a long-term investment. On the other hand, however, it would be dangerous to assume that funding levels determined sufficient in 2004 would be suitable today, or, by extension, that funding levels

determined sufficient today will be suitable in 2024 – three Presidential elections and five Olympic games from now. In addition to contemplating the raw financial costs of investments, the auction must contemplate regulatory changes that occur from time to time and which may have the effect of changing cost structures. Will carriers be required to fund cyber or other network security initiatives? What sort of services might be added to the list of “evolving” universal services that providers must support? What type of applications for government, industry, and consumers will emerge as critical while a provider is sidelined by auction receipts determined a half-decade before? For these reasons, there should be no prescription for the use of reverse auctions in high-cost areas.

As for part (d), small, independent carriers are in fact seeking a new, more efficient alternative – or more appropriately stated, an update – to the current system of deploying broadband with support from a legacy telephone program that effectively forces rural consumers to purchase voice service in order to receive affordable broadband. As noted in response to Question 1, current USF rules require customers to subscribe to plain old telephone service (POTS) in order to render the subscribed line eligible for universal service support. This requirement has the potential effect of depressing demand and adoption for innovative broadband-only offerings since it steers consumers toward POTS. Although the supported POTS subscription may include a broadband component, the current rules limit the ability of RLECs to effectively market broadband-only services since those subscribed lines, as they are not eligible for universal service support, would necessarily be sold at a far higher rate. This structure effectively discourages broadband-only sales, subscriptions, and adoptions, and flies in the face of the National interest in encouraging broadband. Thus, rather than restructuring the means of distribution of USF within any given program, Congress should focus on giving the FCC specific direction and carefully crafted tools to update the existing USF mechanisms for an IP-enabled, broadband-capable world.

**RESPONSE OF THE OREGON TELECOMMUNICATIONS
ASSOCIATION (OTA) TO HOUSE ENERGY AND
COMMERCE COMMITTEE**

**Modernizing the Communications Act
UNIVERSAL SERVICE POLICY AND THE ROLE OF THE
FEDERAL COMMUNICATIONS COMMISSION**

QUESTIONS FOR STAKEHOLDER COMMENT

Due Date of September 19, 2014

We offer responses to the questions posed by the Committee by addressing each of the eight questions in order for this fifth white paper focusing on universal service policy issues as shown below.

We appreciate the opportunity to offer input on these universal service issues and look forward to the additional white papers that the Committee intends to release during the 2014 – 2015 time period.

Q1. How should Congress define the goals of the Universal Service Fund? Should Congress alter or eliminate any of the six statutory principles, codify either of the principles adopted by the FCC, or add any new principles in response to changes in technology and consumer behavior?

The six statutory principles and two non-statutory principles continue to provide a strong foundation for federal USF policy. Congress had great foresight with its six statutory principles included in Section 254(b). To review, these USF principles include:

- 1 – Quality services should be available at just, reasonable, and affordable rates;*
- 2 – Access to advanced telecommunications and information services should be provided in all regions of the nation;*
- 3 – Consumers in all corners of the country, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas;*
- 4 – All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service;*
- 5 – There should be specific, predictable and sufficient federal and state mechanisms to preserve and advance universal service;*
- 6 – Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services;*
- 7 – Universal service support mechanisms and rules should be competitively neutral; and*
- 8 – Universal service support should be directed where possible to networks that provide advanced services as well as voice services.*

Universal service principles for legacy USF mechanisms have concentrated on addressing challenges posed by distance, density and demographics. Principles 1 and 3 address important rate issues for the consumer. Principle 5 language of “specific, predictable and sufficient” is key for rural service territory. Principles 2, 3, 6 and 8 deal with the need for access to changes in technology such as broadband. An additional issue related to USF principles is the continued lack of telecom services on unserved or underserved tribal areas.

Q2. Universal service was created to fund buildout in areas incapable of economically supporting network investment. How should our policies address the existence of multiple privately funded networks in many parts of the country that currently receive support?

Relevant to White Paper 5 Q 2 is that some key facts have been set aside based in large part on the National Broadband Plan and the resultant Transformation Reform Order (TRO) over-reliance on wireless technology to meet rural service metrics. These facts are that there are significant differences between wireline and wireless platforms, as evidenced by the filings that wireless carriers themselves have made indicating that a single strand of fiber can carry 1,000 times more bits per second as compared to an enormous 10 GHz wide radio channel. We continue to believe that the broadband future for our country must sustain both wireless mobility AND a strong foundation of a fiber backbone network.

Q3. What is the appropriate role of states and state commissions with respect to universal service policy?

From Q1, Principle 5 states that: *There should be specific, predictable and sufficient federal and state mechanisms to preserve and advance universal service.* Oregon is one of the 24 states¹ that currently have operational state USF funds. Intrastate USF funds are important and will remain so in terms of funding rural infrastructure.

¹ United States Government Accountability Office, Report to Congressional Requesters, July 2014, Telecommunications – FCC Should Improve the Accountability and Transparency of High-Cost Funding, page 6 (GAO-14-587).

States have a role in at least two other aspects of universal service. States can and should continue to play an important role in preventing issues² such as the deliberate lack of completion of calling known as “rural call completion.”

A second aspect of universal service where the state has a potential positive role is in the issue of where and how many interconnection points should be present in the US in the brave new broadband world. In a January 24, 2014 ex parte³ with the FCC, AT&T suggests that the model for both Tier 1 IP voice and peering interconnection is 5 to 8 interconnection points in total for the entire country. Under this proposed scenario, the use of fewer interconnection points covering much larger geographic areas would result in a significant increase in costs on rural ISPs and ultimately rural consumers and business customers. This increase is caused by the smaller providers having the full responsibility for transporting traffic to interconnection points a great distance from their facilities in such a proposed arrangement, in many cases over facilities owned by large carriers such as AT&T.

We respectfully suggest to this Committee that underlying networks are not “free” in an IP-enabled paradigm any more than they are in a TDM world. Small or rural ISPs possess little or in most cases no bargaining power with respect to negotiating interconnection terms with large national operators. Without “rules for the IP road” in

² Question 4 in the fourth HEC white paper focused on the troubling issue of rural call completion. Several Oregon carriers have experienced the consequence of the fact that the FCC has been reluctant to bring to an immediate END the problem of rural call completion. It has been over three years since the FCC was made aware of the magnitude of this problem in a series of ex parte letters, and reports from operating companies indicate the problem persists. The very fact that the problem is still not solved despite FCC attempts to enforce existing rules is instructive for this Committee inquiry. Put simply, the “market” is not producing an equitable solution for rural customers in the nation. Even with rules in place, problems persist.

³ AT&T’s Director – Federal Regulatory filed an ex parte letter in GN Docket No. 13-5, WC Docket Nos. 13-97 and 10-90 that showed the essence of its proposal at presentation slide 11.

place, such cost shifts will not be borne equitably across the networks and such an outcome will serve to drastically impact the goal of universal service in our emerging broadband world.

We also believe that state regulators should participate in the establishment of a baseline set of service performance metrics in order to gauge provider performance regarding the performance of universal service obligations.

Q4. What is the appropriate role of the Federal-State Joint Board on Universal Service in a broadband, IP-enabled, largely interstate world? What is the appropriate role of related joint boards, such as the Federal-State Joint Board on Separations or the Federal-State Conference on Advanced Services?

The answer to this question is relatively simple. National policy should take advantage of the boots on the ground knowledge found in each state capitol, as was contributed in the past by Oregon PUC Commissioner Ray Baum and Oregon staff member Cynthia Van Landuyt. Will the regulatory process seek the input from state stakeholders in a collegial Joint Board forum or will the approach be to dictate from Washington, D.C. what is best for a country that is diverse in terms of geography and customer demographics?

Q5. The Universal Service Fund is one of several federal programs that support buildout of communications facilities. Are current programs at other federal agencies, like the National Telecommunications and Information Administration (which oversaw the Broadband Technology Opportunity Program) or the Rural Utility Service (which oversees lending programs and oversaw the Broadband Initiatives Program) necessary?

Both the RUS and NTIA continue to serve a useful purpose. The Rural Utility Service provides an affordable source of borrowing capacity for rural carriers. RUS loans have been an important factor in the deployment of rural network infrastructure. The USF programs have been instrumental in assisting rural carriers meet the loan obligations

they have undertaken with RUS. But the first step in the network process is the actual building of the network and access to affordable capital is prerequisite to construction.

Is the job of deploying infrastructure complete in Oregon? We would answer no, there is still a need for major rural carrier infrastructure deployment and thus the RUS loan program remains relevant and vital.

Q6. How can we ensure that the Universal Service Fund is sufficiently funded to meet its stated goals without growing the fund beyond fiscally responsible levels of spending?

An initial important step would be to determine what should be considered “fiscally responsible” levels of spending. While the current FCC has established some hard USF budget caps through 2017, the reason for the FCC’s November, 2011 Transformation Reform Order was the National Broadband Plan that forecasted significant costs would be required if the national policy objective is to achieve a broadband plan that is truly national in scope. We respectfully submit that the current budget caps will need to increase if Oregon customers hope to be a part of an ongoing and evolving broadband revolution.

In addition, the USF should include an appropriate inflation factor. The majority of other federal programs recognize that annual operating expenses are impacted by inflation. Even the FCC’s own internal operating budget seeks increases for changes from inflation.

Q7. Are all of the funds and mechanisms of the current Universal Service Fund necessary in the modern communications marketplace?

The goals and principles of the current funds are necessary, but what is needed now is a transition from the legacy funds to a broadband-based funding mechanism.

The current high cost fund for rural carriers serves as the foundation of network deployment and thus becomes the backbone for all other funds, as it enables infrastructure to be placed in service that is required for programs such as the Rural Health Care Program and the Schools and Libraries Program. Without the access to anchor institutions, these other USF efforts would be ineffectual.

The network backbone also plays a key role in assuring the functionality of important public safety programs. Without this network, one would have to ask the question as to whether the provider is able to sustain acceptable performance levels⁴ for public safety.

8. In lieu of the current support mechanisms, could any of the programs be better managed or made more efficient by conversion to:

a. A state block grant program;

This issue has been around for well over a decade and is familiar to key staff members of this Committee. In a July 20, 2005 ex parte⁵ with Ray Baum, when he was an Oregon Public Utility Commissioner in Salem, Oregon, the following issues regarding the deficiencies of state block programs were discussed. While the dates noted below in the July, 2005 ex parte excerpt are now out of synch, the problems with state block grants are timeless and continue today and in the future.

⁴ At a minimum, compliance should be achieved for access to 911 or enhanced 911 network requirements; call completion requirements (as rural customers not being able to receive calls will in some cases be a safety issue); Communications Assistance for Law Enforcement Act (CALEA) responsiveness; and Customer Proprietary Network Information (CPNI) requirements.

⁵ FCC ex parte filed by Jeffrey H. Smith, GVNW Consulting, for meeting with Oregon PUC Commissioner Ray Baum.

ISSUES CONCERNING PROPOSAL TO DISTRIBUTE UNIVERSAL SERVICE FUNDS UNDER A STATE ALLOCATION MECHANISM (July, 2005 ex parte)

NARUC has proposed that federal universal service funds be provided to individual states via a “block grant” basis (State Allocation Mechanism – SAM) for distribution to carriers based on decisions rendered by the state commission. The current block grant proposal offered by the NARUC in its Version 7 proposal raises several important issues.

Predictability. First and foremost, Section 254 mandates that universal service support be “specific, predictable, and sufficient.” Implementing a block grant approach to distributing federal universal service funding allows state commissions with such a large degree of discretion so as to render the achievement of the “predictable” tenet impossible.

In its June 14, 2005 Universal Service NPRM, the FCC is evaluating the use of “formulaic” methods to distribute schools and libraries funds to eliminate certain problems experienced in those programs. The current high-cost fund process is already “formulaic,” and thus not prone to arbitrary decision-making.

Sufficiency. Similarly, the metric of “sufficiency” may well not be achieved. In order for RLECs to continue to deploy rural infrastructure in the highest-cost areas, reliable access to support funding must continue **throughout the investment cycle**. The arbitrary nature of even a well-intended block grant program could severely retard investment in rural areas as lenders will not provide capital, and carriers will be unwilling to assume the degree of uncertainty that would result from block grant funding decisions. Capping the funding at the 2004 level will not promote the deployment of broadband infrastructure in rural areas.

Administration. There are examples of block grant administration that could be problematic if replicated in distributing monies that would otherwise be used for rural infrastructure deployment. For example, in Alaska there are programs related to mothers and children that spend nearly 25% of its funds on administration before any monies reach the intended recipients. State legislatures may be tempted to use support funds to meet operating budgets for state utility commissions.

Jurisdiction. The block grant issue is further complicated with the challenges that would be placed on state regulators in states where the PUC has no or limited authority over certain carriers. In these cases, a conflict would arise between the properly enacted state statutes and the state commission’s desire to review certain operating company data that prior to the implementation of a block grant program would not have been subject to state commission review.

b. A consumer-focused voucher program;

Voucher-based programs do not work well at all to incent investment in long-lived infrastructure assets with 20-30 year payoff cycles. Implementing a voucher based program would result in an immediate halt to the vast majority of rural infrastructure deployment.

c. A technology-neutral reverse auction; or,

Reverse auctions provide no incentive for any carrier to invest near the end of the award cycle. The incentive instead is to underbid to be the “winner.” In that scenario, the loser is the rural consumer, who will be poorly served if they end up having any service at all.

Implementing a reverse auction for rural USF would be a way for federal regulators to signal that the “race to the bottom” has commenced.

d. Any other mechanism. No answer will be provided for 8.d.

Comments To The U.S. House Committee On Energy And Commerce On Universal Service Policy From The Rural Broadband Alliance September 19, 2014

Introduction

The U.S. House Committee on Energy and Commerce has embarked on a rewrite of the nation's communications laws by seeking public input on a series of "white papers" on critical telecommunications policy issues. Released on August 22, 2014, the Committee's white paper on universal service begins a review of current universal service policy. Universal service has been the bedrock of the nation's telecommunications policy since 1934. The national commitment to universal service has enabled many Americans – in all regions of the country – to enjoy access to telecommunications services that, otherwise, would not have been possible.

Today, the national commitment to universal service has been extended to broadband in recognition that all Americans have an investment in ensuring that consumers have access to the latest communications technology. This is consistent with the basic principle of universal service first set forth in the Communications Act of 1934.

The digital era has brought enormous changes to the communications marketplace and revolutionized how consumers communicate. Broadband access is not a luxury, but a basic necessity for all Americans in an information-driven global economy. The demands of the global economy do not tolerate a "digital divide" between urban and rural America. Yet, this also creates new pressures on the funding mechanisms that are a critical component of providing universal service. Many of these pressures have been highlighted over the last six years as the

FCC has initiated controversial reforms to the Universal Service Fund (USF) that are still being debated today.

The Rural Broadband Alliance (RBA) is uniquely positioned to advise on the nation's universal service needs.

The RBA is a coalition of rural incumbent local exchange carriers that operates as a public interest think-tank to advance sensible, evidence-based policies for the deployment and adoption of broadband services for all of the nation's citizens, including consumers and businesses residing in rural, insular, and high cost-to-serve areas of the nation.

The RBA was established in 2010 subsequent to the development of the National Broadband Plan that had been commissioned by the U.S. Congress. That Plan called for a major overhaul in the rules and regulations for rate-of-return carriers regarding both universal service funding and intercarrier compensation. RBA organizers were among those within the rural rate-of-return carrier industry that had long called for reform of the intercarrier compensation and USF rules in order to meet the changing operational conditions resulting from the evolution of broadband.

Recognizing the need for reform of the existing universal service and intercarrier compensation mechanisms in order to achieve the goals of the National Broadband Plan and universal service policy as outlined by Congress in the statute, RBA was charged with the task of developing sensible, evidence-based universal service mechanisms that would foster deployment and adoption of broadband services for all of the nation's citizens, including consumers and businesses residing in rural, insular, and high cost-to-serve areas of the nation.

The RBA is committed to working with rural telecommunications associations and is supportive of their efforts to develop long-term solutions to address needed reform of the universal service funding mechanisms, including the USF and intercarrier compensation.

We welcome this opportunity to submit these initial comments to the Committee at this early stage of the Committee's review of the nation's communications laws. We recognize the Committee has undertaken an extensive review of the 1996 Act, but also that the Committee has not yet outlined the full scope of its plans for a rewrite of the nation's communications laws.

Accordingly, the RBA views this as an initial opportunity to provide feedback to the Committee and looks forward to working closely with the Committee as this process evolves.

As part of any rewrite of the nation's communications laws, the U.S. government should renew its commitment to the nation's universal service policies and create new opportunities to ensure the USF is structured and funded in a way to advance the nation's universal service goals. RBA believes that any review of universal service policy by the Congress should lead to language that (1) ensures that the USF is sufficient to meet the nation's universal service needs, and (2) requires the FCC to demonstrate how regulations promote the universal service goals consistent with the statute.

In conducting its review of the nation's communications laws, especially the nation's universal service policy, Congress should be mindful of its dual responsibility for legislating and conducting oversight – and that Congress does not need to enact legislation to meet policy objectives that can be achieved through oversight. The Committee should be applauded for examining the FCC's management and processes and its commitment to ensure that the FCC operates within the bounds of the law. Oversight is the tool that Congress has determined is the

appropriate vehicle for ensuring that regulations are consistent both with the intent and the language of current law.

However, we think the record of USF reform suggests a need for broader oversight by Congress to ensure that the FCC's implementation of universal service policy is consistent with statute.

1. Universal Service Continues To Successfully Expand Service Delivery Throughout The Nation.

As the House Committee begins these efforts to rewrite the 1996 Telecommunications Act, it is our hope the Committee will be mindful of the demonstrated success of the nation's universal service program. The U.S. leads the world in its commitment to universal service. The universal service program is credited with successfully expanding overall telecommunications service in the U.S. and has served as a model for other nations as they, too, struggle to find ways to make communications technology accessible to all their citizens. This commitment to universal service also has helped to expand the national economy and created new economic opportunities in many parts of rural America producing benefits for the nation as a whole.

As the Committee's white paper indicates, the nation's universal service program is about more than providing basic telephone service to consumers and has far reaching impact on all areas of life that require communications, including the nation's schools, libraries, and health care facilities.

Given RBA's focus, our comments at this time will focus primarily on the high cost program. The goal of the program is to ensure telecommunications service is affordable for customers in areas where, absent the support, telecommunications service would be dramatically more expensive than the national average or not available at all.

RBA's comments are guided by the fundamental belief that a rewrite of the provisions of the Act regarding universal service should preserve the overall objectives of ensuring (1) that consumers in rural, insular, and high-cost areas have access to reasonably comparable services at reasonable rates comparable to consumers living in low-cost areas, and (2) that the carriers providing these services are able to receive support for voice and broadband-capable networks in these areas when – without support – no business case can be made for providing such services.

2. Congressional Oversight Is Required To Ensure That The Establishment And Utilization Of The USF Budget Is Consistent With Congressionally-Mandated Universal Service Policy.

Today's evolution of the broadband marketplace results in both growing demands from consumers for service and changes in the consumer's utilization of existing networks. As a result, there is a clear and imperative need to ensure that universal service mechanisms are structured in a manner consistent with the existing statutory mandate. That mandate requires a specific, sustainable and predictable mechanism to provide funding sufficient to ensure the provision of universal service to rural consumers at service levels and rates reasonably comparable to those available to urban consumers.

Because technology is evolving and will continue to evolve in a digital era, universal service policy cannot be fulfilled without regularly evaluating and quantifying the financial requirements for universal service support. It is foolhardy to think that long-term universal service objectives can be achieved in the absence of a fact-driven evidence-based review of universal service costs and the resulting funding requirements and budget needs. It is not sufficient to simply establish a budget to achieve universal service without considering how much of the budget is required to support existing network costs and how much is needed to allow for additional investment in rural infrastructure.

The most critical aspect for the Committee's review is whether statute mandates a process to determine how the USF should be adequately sized to meet the nation's communications objectives. As USF has evolved to include broadband services, the pressure on the size of the Fund can only be expected to grow because evolving technology will require more network enhancements and upgrades. Access to basic service, alone, is no longer adequate to ensure universal service. Access to the latest high-speed connections will be critical for all consumers without regard to where they live. The reliance and dependence on broadband makes speed a factor in the nation's universal service policies. In rural areas, speeds will determine whether rural industries, including farming, will be globally competitive and meet the nation's long term economic and commercial interests. Without access to global markets – made possible today largely through access to high-speed broadband services – no business can survive in today's rapidly changing world.

These pressures are also coming at a time when the nation recommits to ensuring that schools, libraries, and rural health care facilities have access to high speed broadband services to provide critical education and health services in a broadband world. The expectation is that additional support-investments will help create economies of scale for our educational and health care institutions reducing consumer costs for education and health care.

It is essential for the FCC to identify and report on a regular basis the costs and funding needs to achieve real universal service in the U.S. as part of its regulatory function – and report this information to Congress. Irrespective of the size of the annual USF budget, the FCC should compile and report on the costs of achieving universal service. The USF budget should be correlated to the costs and a time frame for achieving universal service benchmarks.

For example, if the FCC retained a \$4.5 billion USF budget, there should be a clear understanding of the expectations for utilization of the funding to achieve specific universal service objectives and the timeframe within which the objectives will be met. The FCC, Congress, and all stakeholders should have a clear understanding of what can be achieved with the budget and what the impact of increases or reductions in the budget would be to both the objectives and the timeframe for achieving the objective.

Consequently, RBA recommends that Congress require the FCC to report to Congress on an annual or bi-annual basis on the nation's progress in meeting universal service objectives. This report should identify what can be achieved over a ten year period to ensure universal service under current budgetary figures in place. The report also should include information on and what size budget would be required to achieve real universal service over a ten year period. This would ensure that the nation's expectations for universal service are matched by an understanding of costs.

Although the nation has made a commitment to universal service, the Congress and the FCC have required no financial analysis to determine whether the funds committed to achieve universal service are adequate. Instead, USF policy has focused on arbitrary caps without a full understanding of the short- and long-term implications of the caps on achieving the nation's universal service goals. RBA suggests that statute and congressional oversight ensure a process that would allow Congress and the FCC to bring universal service expectations in line with resources –a fundamental planning tool that any organization or business – or family – must use as part of their daily routine.

There is also no doubt that reforming the USF contributions system is long overdue to ensure that all who benefit from universal service also pay their fair share for the network that

enables Americans to be universally connected. Under the current contribution formulas, only certain classes of uses of the network are assessed based on legacy methodology that relied primarily on assessment of long distance voice usage. As a result, consumers of those services are assessed inordinately and increasingly burdened with growing assessments as other consumers migrate to alternative services that are assessed at a lower level, if at all.

RBA believes that it is imperative to correct this inequity expediently by requiring the same level of assessment for USF funding on all two-way communications usage, including both traditional voice and data services and broadband access. New statutory language may not be necessary to bring about reforms that ensure more fairness in the contributions system. The FCC recently has initiated a process to reform the contributions process, but such reforms are long overdue. It would seem more appropriate for Congress to perform its oversight function to ensure such reforms take place – and maybe even help shape those reforms – rather than rewrite the statute to achieve these objectives.

3. Congress Should Require The FCC To Demonstrate How Regulations Promote Universal Service And Promote FCC Transparency And Accountability.

In recent years, the FCC's efforts to "reform" the USF have dominated most of the policy discussions surrounding universal service. A recent white paper, "***A Framework To Assess The FCC's 2011 Report and Order on Universal Service and Intercarrier Compensation,***" by Harold Furchtgott-Roth, the former FCC Commissioner and a noted economist who specializes in assessing the impact of regulation on businesses, and Kathleen Wallman, former White House Economic Adviser and FCC Bureau Chief, published last year and underwritten in part by the RBA, can offer valuable insights to the Committee to assess the proper role of the FCC in implementation of universal service policy. (*The report is attached to these comments.*)

In retrospect, as that report demonstrated, the so-called reform measures were not intended to assess the adequacy of existing regulations that promote universal service policy. Instead, the “reforms” were focused on re-engineering the business marketplace that the FCC hoped would lead to the deployment of new broadband systems in rural America and trigger economic growth. However, the FCC’s reforms soured the investment climate for small telecommunications businesses and, in doing so, have failed to deliver on the promise of universal availability of broadband service.

Although the courts have largely applied the legal principle of deference to “expert agencies” in upholding the FCC on matters, including the FCC’s interpretation of the statute to uphold its USF reforms, many aspects of these FCC-engineered marketplace adjustments seem inconsistent with the intent of existing communications laws enacted by the U.S. Congress. This is evident with respect to the initial USF rule changes that targeted one small segment of the rural telecommunications industry – the rural rate-of-return industry – and the consumers of those companies. Consumers continue to learn of new consequences of the “reform” initiatives, including an increase in their telephone rates based in large part on the FCC’s narrow view of what constitutes universal service for purposes of establishing rate “comparability” for consumers residing in high-cost-to-serve areas of the nation.

Again, congressional oversight may be a more effective tool to address these shortcomings in the implementation of current law rather than making wholesale changes in the statute.

Although the Committee is focused on the future of universal service policy, it is important for informing future policy making to understand the history of universal service and how the principles of universal service have evolved. It is equally important for U.S. policy

makers to maintain and even expand on the nation's historic commitment to universal service by recognizing its application also to mobile communications and other evolving technologies – perhaps technologies that have yet to be imagined.

Historically, the nation's universal service policies have been successful in achieving the goals of connecting more Americans and ensuring that areas traditionally unserved by the larger carriers had access to communications services. There is no more effective federal-state partnership than the nation's universal service system. Today, the nation's commitment to universal service goes beyond Plain Old Telephone Service (POTS) as the digital age has taken root and now also includes a commitment to provide quality broadband services at prices that are reasonable and affordable to all consumers.

Recently, FCC Chairman Tom Wheeler's description of the FCC's broadband standard as "yesterday's speeds" highlights the challenges confronting the Committee in evaluating the nation's universal service policies. Wheeler's comments also establish the goals of rural telecommunications service providers as they work to find the means to make the speeds of yesterday, today, and tomorrow accessible to their consumers. Universal service policy and the USF will play a critical role in making that possible.

4. The Nation's Commitment To Universal Service Dates To 1934.

Although the roots of universal service can be traced back to 19th century England, universal service was established as U.S. national telecommunications policy by the Communications Act of 1934. The preamble of the Communications Act of 1934 declared that its purpose was "to make available, so far as possible, to all the people of the United States, a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate

facilities at reasonable charges.” If this was being written today, the word “broadband” would appear in this definition of purpose.

The Communications Act of 1934 also established a new Federal Communications Commission with new regulatory authority over both radio and wire communications to achieve this purpose.

The language in the preamble is particularly significant in that it states clearly that ensuring the availability of services and facilities – in the current day scenario, high-speed broadband service – is only half of the equation. The preamble stresses also that all communications services are to be provided “at reasonable charges.” This is the fundamental objective of universal service: services at reasonable charges. This statutory language also suggests that the authors of the 1934 Act believed that ensuring universal service should be the core mission of the Commission. As first codified in the 1934 Act, this fundamental commitment to universal service – that consumers have access to communications services at reasonable rates – must continue to be preserved today – in our technology-driven society – as the bedrock of the nation’s communications laws.

The nation’s telecommunications laws were updated in 1996 when the U.S. Congress approved a new Telecommunications Act. To implement the nation’s universal service policy in accordance with the 1996 Act, the FCC moved in 1997 to modify the high cost USF that had been established originally in 1984.

The overall goal of the update was to address new challenges and opportunities of the digital information age with the goal of promoting an economic environment that encouraged new private investment and the growth of new information technology.

The '96 Act further defined the meaning of universal service. The Act called for the creation of a Federal-State Joint Board on Universal Service to make recommendations to the FCC on defining federal universal services and regulations. The Joint Board requirement in the Act ensured that federal officials would consult with state officials on issues that have a direct impact on the ability of all consumers – without regard to where they live – to receive quality telecommunications services. Facilitating coordination between federal and state officials is one of the most critical aspects of universal service policy and this consultative relationship should be maintained, if not strengthened, in the rewrite of the nation's communications laws.

The 1996 Telecommunications Act also mandated the creation of mechanisms to support universal service into which all telecommunications providers are required to contribute a percentage of their interstate and international end-user telecommunications revenues. The Act called for “specific, predictable, and sufficient” federal and state mechanisms to preserve and advance universal service and also established a set of priorities and goals.

The continuing evolution of the mechanism utilized to achieve and maintain universal service, however, has been anchored consistently in the preamble to the Communications Act: “to make available, so far as possible, to all the people of the United States, a rapid, efficient, nationwide, and worldwide wire and radio communications service with adequate facilities at reasonable charges.” While the FCC should be commended for initiating rule changes to ensure achievement of the objective of making “rapid, efficient” broadband connectivity available, the efforts thus far only address half of the objectives of the Communications Act: that being, the availability and adequacy of broadband services and facilities.

The Commission has not addressed whether all Americans have access to those services “at reasonable charges.” The RBA recommends that the FCC – consistent with its fundamental

purpose – should conduct an assessment of whether high speed broadband services are available to all Americans “at reasonable charges” and should report the results of its assessment, including an explanation of the methodology it utilizes, to Congress.

5. Existing Universal Service Goals Should Be Maintained.

The RBA encourages the preservation of the universal service goals outlined in existing statute which include:

- Promoting the availability of quality services at just, reasonable, and affordable rates;
- Increasing access to advanced telecommunications services throughout the nation;
- Advancing the availability of such services to all consumers, including those in low income, rural, insular, and high-cost areas at rates that are reasonably comparable to those charges in urban areas;
- Ensuring that there be specific, predictable, and sufficient federal and state mechanisms to preserve and advance universal service; and
- Providing equitable and non-discriminatory contributions from all providers of telecommunications services to the Fund supporting universal service programs.

Congress should preserve this national commitment to these fundamental universal service goals as part of its rewrite of the nation’s communications laws.

It is critically important for the Committee also to recognize that many small, rural carriers rely on the USF revenues that support operations in their high-cost service areas to demonstrate the feasibility of loans for new investment – private and public – including loans from the Rural Utilities Service (RUS), a special loan program offered to telecommunications carriers by the U.S. Department of Agriculture (USDA). The goal of the RUS loan program is to

encourage new broadband investment in rural communities. Without RUS, many of the investments made by small rural carriers would not be possible.

The recent “reform” initiatives of the FCC, in fact, showcased the important role that RUS plays in the rural communications marketplace. According to congressional testimony, RUS officials warned then-FCC Chairman Julius Genachowski that the Commission’s FCC reforms were undermining the objectives of the RUS. RUS officials’ warnings proved to be prophetic as the new regulations created so much business uncertainty that carriers were unable to commit to new investments, so that fewer companies applied for RUS loans – despite the critical ongoing need among all carriers for new investments.

There is no statutory requirement for closer coordination in policy making between the FCC and RUS. Different congressional committees have oversight of the agencies which offers no incentive for coordination. The Committee should consider legislative language that ensures that FCC regulations do not undermine existing, successful loan programs offered by RUS.

On the other hand, new statutory language could ensure closer coordination between the FCC and other federal agencies that offer grants or loans for broadband investments to promote universal service.

In short, the principles of universal service outlined in current statute do not need to be changed, but oversight language may be required to ensure the FCC adheres to those principles. Any rewrite of universal service policy should adhere to the fundamental objectives that follow:

- Consumers have access to reasonable quality basic services at reasonable rates;
- Consumers have access to advanced services;
- Consumers in rural and high cost areas should have access to services that are comparable to those that are available in urban areas;

- All providers of communications services, including all broadband transmission providers, should contribute to the Fund in an equitable and nondiscriminatory way; and
- Support mechanisms for carriers should be specific and predictable to encourage and incent new investment.

6. RBA Responds To Other Questions In Committee's White Paper.

RBA's response to some of the Committee's specific questions are as follows:

a. Should the principles and goals for Universal Service be altered?

RBA believes it is critically important that the FCC be required – either by statute or oversight – to specifically define universal service and quantify the costs and funding needs to achieve universal service goals and objectives. The statute should require the FCC to report to Congress on an annual or bi-annual basis what can be achieved over a specific ten year time frame under various sized budgets. This will promote greater transparency and accountability by the FCC. Moreover, universal service goals should clearly specify that universal service includes consumer access to mobile services for all consumers and high-speed broadband connections available to all locations. Support is needed both for consumer access to mobile and high speed fixed access at all locations. Wireless stand-alone broadband may have limitations, but wireless devices can be utilized in conjunction with high speed fixed connectivity.

b. What is the appropriate role of states and state commissions with respect to universal service policy?

The Congress should retain language in Section 254(f) of the current statute that requires the FCC to establish a sufficient and predictable mechanism to achieve universal service. The language also should encourage states to establish separate state mechanisms and federal statute

should not limit states from taking steps to do more to ensure universal service is achieved within state borders. Likewise, carriers should not be penalized at the federal level if the states where they provide services have more ambitious programs to ensure universal service objectives are met in the state.

c. Are other programs, like the Rural Utility Service (RUS) or the Broadband Technology Opportunities Program (BTOP) necessary?

Yes. The high cost support program established by the FCC is separate and operated functionally separate from other government programs, but all programs could be better coordinated. Finance programs, like RUS low interest loans, offset the costs of universal service – which would be significantly higher in the absence of such a low cost loan program.

Additionally, BTOP could offset universal service fund support needs through the provision of equity infusions from grants.

d. How can we ensure USF is sufficiently funded?

Statutory language should mandate a proper assessment of universal service costs and a better understanding within the FCC and Congress about what universal service objectives can be achieved over specific time frames and within specific budget levels.

7. Conclusion

In conclusion, the nation's communications laws have proven remarkably resilient over the years allowing for technology to evolve in ways that could never have been anticipated. The nation's commitment to universal service, as embodied in the 1996 Act, has helped trigger a communications revolution in this nation and created more opportunities for Americans to connect to one another.

The House Committee has suggested that the evolution of technology – best reflected in the growing reliance and dependence on broadband connections – requires a review of the nation’s communications laws. The Committee should recognize those aspects of current law that have triggered industry growth and the resulting economic growth experienced by nearly all Americans.

With this increased reliance and dependence on broadband, new challenges emerge: the most critical being (1) how to establish a budget and timeline for achieving ever-evolving universal service objectives without overburdening consumers with the assessments required to fund the nationwide connected network available to all users, and (2) how to promote transparency and accountability of the FCC in implementing universal service policy mandated by statute.

RBA recommends the following:

1. Recommit to the existing principles of universal service – recognizing its potential as an economic engine – and do no harm to a program that has served as a global model for deployment of services to unserved and underserved consumers;
2. Ensure that the nation’s universal service policy recognizes that consumers require and utilize both mobile service and fixed high-speed connections with a further understanding that (a) fixed networks cannot do mobility, and (b) mobile networks cannot provide the capacity of optic networks required to meet consumer demand from streaming video and other high usage applications;
3. Ensure that Congress – through its oversight responsibilities – requires that FCC regulations recognize – and not undermine – the statutory responsibilities of other related agencies, like the RUS, whose programs are designed to help achieve the

- goals of universal service; and improves coordination among the FCC and the related agencies;
4. Require the FCC to file a report to Congress on an annual or bi-annual basis assessing the costs to achieve universal service over a 10-year period;
 5. Ensure that universal service funding mechanisms are predictable and sufficient to meet the nation's universal service goals; and
 6. Require the FCC to demonstrate how its regulations promote the nation's universal service goals and specifically require the FCC – consistent with its fundamental purpose – to assess and report on whether the charges for broadband services available to all Americans are “reasonable.”

Thank you for the opportunity to offer these comments.

Attachment: *A Framework To Assess The FCC's 2011 Report And Order On Universal Service And Intercarrier Compensation* by Harold Furchtgott-Roth and Kathleen Wallman, 2013.

**A Framework to Assess the FCC's 2011 Report and Order on Universal
Service and Intercarrier Compensation**

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November 2013

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I. Executive Summary and Introduction

In this paper, we propose a framework to assess the successes or shortcomings of the Federal Communications Commission's ("FCC" or "the Commission") 2011 Report and Order on Universal Service and Intercarrier Compensation ("2011 Report and Order") in achieving universal service policy, in comporting with basic principles of administrative law, and in meeting its own stated goals.¹ It contains one of the largest recent additions to FCC regulation, on net adding dozens of new or modified rules and approximately 76 new pages of regulations to the *Code of Federal Regulations*.² The 2011 Report and Order was not launched as a review of the adequacy and efficiency of either the existing access charge regulations or the existing universal service regulations. Rather, it was based primarily on entirely different considerations, hoped-for changes in the deployment of broadband and new communications systems in rural America and associated economic growth.

Not long after its adoption, the 2011 Report and Order was challenged in various courts by a wide range of affected parties — states, private companies, and others. Altogether dozens of parties challenged the 2011 Report and Order in federal court. The federal court challenges are consolidated in the 10th Circuit.³ The 10th Circuit in the coming years will decide whether the many new rules in the 2011 Report and Order adhere to federal law. We offer no views about the 10th Circuit case.

Instead, we address different questions: Is the 2011 Report and Order good policy? Has it met its many promises? These are timely questions to ask in 2013 because, as we will explain in more detail below, the FCC stated in the 2011 Report and Order that it would periodically review the great progress for which the 2011 Report and Order aimed. Nearly two years later, the Commission has not yet undertaken such a review, nor has evidence of progress toward the goals of the 2011 Report and Order vaulted into view from other sources. To the contrary, from various quarters, both inside and outside government, the view has emerged that the rules and policies adopted in the 2011 Report and Order are not working well. In anticipation of the Commission's evaluation of its own work, we have written this paper.

Our paper has four sections. The beginning is a review of the pre-existing federal universal service and intercarrier compensation programs that governed before the 2011 Report and Order. The second section examines the adoption of the 2011 Report and Order and the lofty aspirations voiced within it. Notable among these promises is the Commission's expression of conviction that the regulatory changes would cause broadband growth. This promise embraces a significant reversal of the Commission's prior interpretation of the statute by which the Commission found that broadband is not a telecommunication service that is or can be supported under the statutory provisions governing universal service.

The third section is an assessment of the 2011 Report and Order. We examine three areas:

1. Consistency with statutory requirements and objectives particularly for universal service;⁴

¹ FCC, Report and Order and Further Notice of Proposed Rulemaking, ("2011 Report and Order"), released November 18, 2011, FCC Rcd 177663 – 18414.

² *Ibid.*, at Appendix A. See FCC 11-161 for the page count.

³ In Re: FCC 11-161, No. 11-9900, (10th Cir.).

⁴ Although the Commission may reasonably adopt its own objectives for various rules, it is difficult to see how it can either ignore or embellish the statutory principles of universal service. See 47 U.S.C. 254(b).

2. Consistency with administrative law and common sense approaches to efficient regulation; and
3. Consistency with the stated objectives of promoting broadband deployment in rural America.

The fourth section, our conclusion, summarizes our findings as well as previews our next paper evaluating how the FCC's promises of extraordinary new investment and economic growth as a result of the 2011 Report and Order have played out based upon forthcoming empirical data. In this paper, generally, we find that the 2011 Report and Order and the rules adopted under it do not follow closely the statutory principles of universal service. Indeed, the 2011 Report and Order is often inconsistent with the statutory premises. Moreover, an important part of any regulatory change is establishing measurements by which the efficacy of the change can be judged after it is implemented. While the evaluative procedures that the Commission observed in the 2011 Report and Order to establish benchmarks might pass the minimal standards of court scrutiny, we believe the FCC can and should do much better than those minimal standards. The Commission could have adopted, as it promised to adopt, and is required by law to adopt, clear benchmarks to evaluate the 2011 Report and Order going forward.

II. Federal universal service and intercarrier compensation programs before 2011

Local telephone companies provide regulated telephone service in a local area as well as regulated access to long-distance services.⁵ These telephone companies have a few sources of revenues to meet the costs of providing such regulated services. Among these revenues are: (1) local customer rates, often regulated by the state government; (2) fees for the use of a local network and switching equipment by a different telephone company—often called exchange access charges;⁶ (3) other fees for the use of a local network and local transportation of telecommunications traffic by a different telephone company—often called special access charges; (4) a federal subscriber line charge according to a federal formula;⁷ and (5) for companies serving high-cost areas, a federal program called the universal service fund.⁸ Exchange access charges and universal service revenues have historically been particularly important revenue sources for hundreds of small telephone companies around America due to the particularly high costs associated with serving rural and remote areas.

A. Early Origins and Policy Foundations

The Commission's 2011 Report and Order changed FCC rules for intercarrier compensation, particularly exchange access, and universal service. Intercarrier compensation and universal service are built upon a long history of law, regulation and policy. The two concepts can be distinguished as follows:

Intercarrier compensation historically has been a sharing of long-distance revenues between (1) long-distance companies for providing telecommunications services between two different local exchanges and (2) local companies for providing originating and terminating services. In the old Bell System, the Long-Lines ("long-distance") company shared revenues with local companies in each state in recognition of the value of the local networks and interconnection. With the advent of long-distance competition in the 1970s and the judicially mandated and supervised break-up of the Bell system in the 1980s, the FCC formalized rules on intercarrier compensation through a system of access charges.⁹ The FCC recognized charges for two forms of access by long-distance carriers to a local exchange carrier: (1) exchange access, or access to local customers through the switches of the local exchange; and (2) special access, other forms of access to the network and customers and network of a local exchange. For many years, the FCC did not regulate the exact price that local non-price cap companies could charge for most forms of exchange access, that is, the price that local wireline companies could charge for a customer's dial tone and access to the long-distance switched network and other services. Rate-of-return carriers could opt into the NECA tariff, which placed carriers into specific rate categories, or rate-of-return carriers could opt out of the NECA tariff and charge a cost-justified rate. In either case, the exact charge for exchange access was not set by the FCC itself. Without exchange access, telephone company customers would have no choice of providers for long-distance and other services.

⁵ In addition to regulated telecommunications services, many telephone companies also provide services that are subject to less or no regulation, such as broadband or video. The costs of these unregulated services are allocated under federal rules. 47 CFR 64.

⁶ Access charge rules are codified in 47 CFR 69, and tariffs for those charges are codified in 47 CFR 61.

⁷ See 47 CFR 61.39, and 69.152.

⁸ Universal service is codified in statute in 47 USC 254 and in federal rules, 47 CFR 54.

⁹ FCC access charge rules are contained in 47 CFR 69, and tariffs for those charges are contained in 47 CFR 61.

The FCC regulated telephone companies as common carriers, entities that made available to the public their services on a non-discriminatory basis. Common carriers are usually commercial enterprises or cooperatives that make their services available to the public on a non-discriminatory basis for a profit, or certainly not for a loss. For exchange access, the FCC required local exchange carriers to make available to other telephone companies access to their networks and exchanges on a non-discriminatory basis through tariffs. These tariffs had to comply with FCC rules, but, at least until 2011, the FCC had never required carriers to offer exchange access services for a loss, much less to charge nothing at all for the service.

Similarly, the universal service concept originated within the telephone industry over a century ago, when it was dominated by the Bell System, as a system of revenue sharing among telephone companies for the benefit of a national interconnected network. These inter-company revenue shifts were designed to support interconnection and the costs of operating local exchanges, especially in rural areas where construction and operational costs per customer were more expensive and would make retail prices high in the absence of such shifts.

Here again, the judicial break-up of the AT&T-run Bell System in the 1980s caused the FCC to become more involved in universal service policy as a public policy effort. One of the economic rationales for such involvement and for supporting universal service – articulated in the public policy sphere as the goal that as many households as possible should have access to telephone service – is the “network effect.” The network effect demonstrates that a network becomes more valuable to everyone who has access to it as more people gain access to the network. In other words, the more people whom one user can call on the telephone network, the more valuable the network is to that user and to all other users. The social policy spur of the rationale for government involvement and for supporting universal service is equally fundamental, related partly to the agrarian roots of the United States and the enduring debt that its prosperity owes to rural areas.

The Commission adopted explicit policies and programs to support universal service, based on the broadly worded authority of Section 1 of the 1934 Communications Act, stating the purpose of the statute:

For the purpose of regulating interstate and foreign commerce in communications so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide and world-wide wire and radio communication service with adequate facilities at reasonable charges.

In furtherance of these goals, the Commission before 1996, in cooperation with state regulators, implemented the precursor to the Universal Service Fund and other mechanisms to deliver assistance to carriers with unusually high infrastructure costs necessary to serve rural customers. All of this informal assistance was accomplished by shifting revenues among carriers; no tax funds were appropriated for these purposes. Many states adopted parallel universal service programs to provide additional support for companies serving rural customers.

By the mid-1990s, prior to the passage of the Telecommunications Act of 1996¹⁰, the informal universal service program was showing signs of strain as the need for support to serve rural customers drove growth in the size of the fund. Then as now, the funds to pay for universal service came from subscribers’ bills, so policymakers were concerned about overburdening consumers. The FCC took steps to cap the fund while Congress worked toward restructuring universal service to make it sustainable.

¹⁰ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, February 8, 1996.

B. The Telecommunications Act of 1996

The Telecommunications Act of 1996 included the first explicit and detailed statutory provisions on universal service and directed that the Commission work in partnership with state regulators to make the foundational decisions about universal service. Section 254 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the “Act”), describes the new universal service program.¹¹ Section 214(e) specifies that only eligible telecommunications carriers may receive universal service support, thus limiting support to entities engaged in providing telecommunications services.¹²

By its very definition, “universal service is an evolving level of telecommunications services,”¹³ not an information service or a different form of service. This statutory restriction potentially brings much of universal service under FCC Title II regulation and potentially excludes many services, such as broadband, which the FCC has designated as not being a telecommunications service. The FCC is given more discretion for an expansive definition of universal service, but only for schools, libraries, and health care providers.¹⁴

Section 254(a) of the Act directed the formation of a federal-state Joint Board to determine “the definition of the services that are supported by Federal universal service support mechanism.”¹⁵ Policymakers were to take into account whether particular services should be included based on a variety of factors, such as whether the service is “essential to education, public health, or public safety”¹⁶ and whether the service has “been subscribed to by a substantial majority of residential customers.”¹⁷ Policymakers were to review and periodically update the definition of covered services based on “advances in telecommunications and information technology.”¹⁸

In its initial definition of universal service, the Commission decided that voice grade network access and related services such as access to emergency services, operator services and directory assistance should be eligible for support. The Commission declined to declare that broadband should be eligible for support. The Commission decided that high-speed transmission services were not “necessary for the public health and safety” and that they had not been adopted by a “substantial majority of residential customers.”

Section 254 also directed that the rules and mechanisms that the Commission implemented, after due consideration by the federal-state Joint Board, must take into account several key principles. Among the highlights were the following:

1. Customers in rural, insular and high cost areas should have access to services that are reasonably comparable to those available in urban areas and prices that are reasonably comparable to prices in urban areas.
2. Universal service mechanisms should be specific, predictable and sufficient to support universal service.

¹¹ 47 U.S.C. 254.

¹² 47 U.S.C. 214(e).

¹³ 47 U.S.C. 254(c).

¹⁴ 47 U.S.C. 254(c)(3).

¹⁵ 47 U.S.C. 254(a).

¹⁶ 47 U.S.C. 254(c).

¹⁷ *Ibid.*

¹⁸ *Ibid.*

3. All providers of telecommunications services should make equitable and nondiscriminatory contributions to support universal service.
4. All regions of the country should have access to advanced telecommunications and information services.

In the late 1990s, the Commission issued a series of new rules on universal service including rules for support of carriers in high-cost areas. The new rules provided some degree of certainty about the level of future universal service support. This revenue certainty, in turn, allowed greater certainty for planning future investments and borrowing from commercial and government lenders.

A key element was allowing carriers that wanted to compete with existing rural carriers to draw on universal service support. For the first time, areas that had long been served by one rural carrier covering both the towns and the less densely populated parts of a service area were facing competition from other carriers, some of which were interested in serving only the more profitable, densely-populated towns in the service area. These new competitive carriers, including wireless carriers, received universal support on the same per-line basis as the rural carrier that had historically served the area. Paying two or more carriers to serve at least part — but not necessarily all — of the same area increased the strain on the universal service mechanisms.

C. 1997-2011: Federal programs struggling along

Between 1997 and 2011, the FCC through its rules authorized the collection annually of billions of dollars of fees in total from carrier of interstate telecommunications. These fees funded the federal Universal Service Fund, which by 2011 was more than \$8 billion annually. The federal Universal Service Fund, again operating under FCC rules, distributed these funds into four categories: schools and libraries, low income programs, rural health care, and high cost programs.

The high cost universal service rules were modified occasionally between 1997 and 2011. Like those for most government programs, the high-cost universal service rules were not perfect. They were costly to administer, both for the FCC and for carriers seeking support under the program. The rules did not always lead to common sense results. By 2010, the various high-cost programs cost a total of \$4.267 billion.¹⁹ Most of that amount, however, did not go to small companies that served exclusively rural areas, but rather to larger companies that served both rural and non-rural areas.²⁰ Hundreds of firms, both large and small, received funds under the high-cost program.

Over the years, the FCC's federal universal service program was challenged many times in court on a wide range of issues including consistency with federal communications law, consistency with federal procedures law, and even consistency with the constitution. The court challenges were largely unsuccessful, not because the federal universal service program was perfect in every respect. It was far from that. Courts, however, tended to give the Commission deference in interpreting the universal service

¹⁹ FCC, USF Monitoring Report, 2011, Table 2.14, at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-311775A1.pdf

²⁰ Ibid. In 2010, some high cost support mechanisms, such as more than \$500 million in interstate access support, were not available to rate-of-return carriers. The top 13 recipients of high-cost support in 2010 received \$2.072 billion, or roughly half of the total amount. These companies are AT&T, Verizon, Century Link, TDS, Frontier, Windstream, America Movil, Telapex, Qwest, ACS Holdings, Sprint, GCI, and Fairpoint. The remaining amount was divided among hundreds of smaller companies, many of which were not primarily rural companies. Rate-of-return carriers received less than \$2 billion. See 2011 Report and Order, at 26.

section of the Communications Act, and in balancing the universal service provisions with other parts of communications law. The courts also found that Commission procedures on universal service met minimal standards, although not necessarily the highest standards.

We believe that two salient interpretations emerge from the court opinions of challenges to the FCC's universal service rules. First, the universal service rules in place as of 2011 had withstood many court challenges and, from a legal perspective, were not in need of substantial revisions. Any changes to the universal service rules were made out of policy preferences rather than legal necessity.

Second, the courts gave the Commission deference in interpreting Section 254 and the Communications Act, but not in ignoring it.

Separately, since the 1980s the FCC has coordinated tariffs of exchange access services offered by local LECs. Under the federal tariffs, LECs offered interstate exchange access services to IXCs carrying traffic between local exchanges. Under the federal tariffs, IXCs paid fees or access charges for those services. Practically all LECs and IXCs participated in the market for exchange access services. Although many carriers faced various forms of profit regulation under federal rules, the value of tariffed rates for exchange access services were not directly dictated by regulators. As of 2011, the tariffed rates for exchange access services were rarely if ever zero.

As with universal service, the FCC's exchange access tariff structure was often challenged in court. Most court challenges failed. Again, the survival of the inter-carrier compensation structure was not based on its perfection but on deference to the Commission in interpreting the Communications Act and minimal sufficiency of FCC procedures.

In the years leading up to 2011, many observers reasonably called for the FCC's high-cost universal service and intercarrier compensation rules to be updated. The reasons primarily were based on the high administrative costs of the system, rather than any failure to deploy broadband in rural America. Indeed, until 2010, the FCC's annual Section 706 report on broadband consistently found broadband deployment to be timely without any specific exception drawn for rural America.²¹ Even the FCC's 2010 Section 706 report did not identify the existing universal service program as the cause of any delay in the deployment of broadband in rural areas of the United States.²²

D. The National Broadband Plan: Radicalizing Intercarrier Compensation and Universal Service

Congress, in the American Recovery and Reinvestment Act of 2009, directed the FCC to frame a National Broadband Plan.²³ The National Broadband Plan ("NBP") was published in 2010, sent to Congress on March 16, 2010,²⁴ and presaged an inflection point for companies that serve rural customers.²⁵ The NBP adopted a vision of U.S. networks' migration from voice grade service to IP-based transmission

²¹ See FCC, Section 706, Fifth Report, released June 12, 2008, particularly at paragraph 36, which finds deployment of broadband in rural America timely. In contrast, the Sixth Report, particularly at paragraph 24, released July 20, 2010, finds broadband deployment not timely, particularly in rural areas.

²² FCC, Sixth Report, released July 20, 2010.

²³ PL 111-5, Division A, Title II; Section 6001(k).

²⁴ FCC, "FCC Sends National Broadband Plan to Congress," News Release, March 16, 2010, at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296880A1.pdf.

²⁵ Connecting America, The National Broadband Plan, released 2010, at <http://www.broadband.gov/plan/>.

supporting numerous services, including voice. It advanced recommendations to rewrite completely the rules of the road for rural telecommunications companies.²⁶

While recognizing that several billion dollars would still be required to preserve rural carriers' continued quality of service of existing facilities, the NBP recommended the eventual end of all legacy high-cost support for rural telecommunications companies.²⁷ It also recommended the radical federal price regulation of intercarrier compensation, both for interstate and intrastate services, the jurisdiction of states rather than the federal government. Interstate and intrastate access charges previously provided billions of dollars of revenues to support the higher costs that rural exchanges bear to continue and extend operations.²⁸ Federal exchange access service charges generated a total of \$3.331 billion in per-minute charges for all filers in 2009, the most recent year for which data are available.²⁹ Of this amount, \$1.443 billion were generated outside of the five largest holding companies.³⁰ Similarly, intrastate exchange access service charges generated \$4.041 billion in per-minute charges.³¹ Of this amount, \$2.203 billion were generated outside of the five largest holding companies.³² Under the NBP proposal, rate-of-return regulation for exchange access services would end, and rural telecommunications companies would be required to come under a price-cap regime in which charges would be capped and the rate of return earned on investment would not be supported.³³

With respect to intercarrier compensation, the NBP recommended a price-regulated downward glide path to zero for both interstate and intrastate charges that telecommunications carriers, including rural telecommunications companies, collect when other carriers use their facilities to terminate their customers' calls.³⁴ The NBP recognized that rural telecommunications companies would still need some sources of revenues to support the costs for which they would no longer collect terminating access charges. The NBP recommended that these sources should include increased flat charges on customer bills and those rural telecommunications companies that currently offer their subscribers "artificially low" rates should raise those rates.³⁵

In sum, the NBP recommended several radical changes in the current universal service and intercarrier compensation:

- elimination of terminating access payments;
- elimination of the existing High Cost support mechanism;
- freezing of existing universal service payments to support voice service;
- switching the universal service mission undergirding rural telecommunications services to supporting broadband to unserved areas; and
- a ban on the growth of the universal service fund beyond 2010 levels on grounds of affordability.

²⁶ Ibid., at Chapter 8.

²⁷ Ibid.

²⁸ Ibid.

²⁹ See FCC, "Telecommunications Industry Revenue, 2009," released May 2011, at Table 5. At http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-306567A1.pdf.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Connecting America, The National Broadband Plan, at Chapter 8.

³⁴ Ibid.

³⁵ Ibid.

The NBP was published as a report of the FCC’s staff; it received no vote of the Commission and had no force of law. Nevertheless, it was a congressionally mandated report and, having been prepared by a staff that reported ultimately to the office of the Commission’s chairman, received considerable attention as a presumed harbinger of the Commission’s intended direction on universal service and intercarrier compensation. The chairman of the FCC and other Commission officials often cited the NBP, and a link to the NBP was prominently visible at the FCC website.

III. The FCC’s 2011 Report and Order on Universal Service and Intercarrier Compensation

Just six weeks after sending the National Broadband Plan to Congress, the FCC opened a Notice of Inquiry (“NOI”) and a Notice of Proposed Rulemaking (“NPRM”) that presaged the 2011 Report and Order.³⁶ This document referred to the National Broadband Plan more than 100 times. In contrast, other than the ordering clauses authorizing the issuance of the Notice of Inquiry and the NPRM, the document does not mention Section 254 of the Act — the very enabling statute that establishes principles for establishment of universal service — at all.

The FCC considered other NPRMs in addition to the 2010 NOI and NPRM. As a result, the FCC promulgated sweeping new rules for universal service and intercarrier compensation — particularly access charges — for telecommunications services in its 2011 Report and Order. The 2011 Report and Order was not based on a detailed analysis of the Communications Act or a careful review of the adequacy and efficiency of either the existing federal access charge regulations or the existing federal universal service regulations. Nor was it based on a carefully calculated, narrow modification of existing rules where those were found to be deficient. Rather, it was based primarily on entirely different considerations, hoped-for changes in the deployment of broadband and new communications systems in rural America and associated economic growth.

In the 2011 Report and Order, the FCC adopted many of the NBP’s recommendations. It established a firm budget for high cost support. The FCC set an annual cap of \$4.5 billion for high cost support through 2017, which can only be changed by another vote of the Commission.³⁷ Less than half of that amount, \$2 billion is designated to support universal service in areas served by the smallest rural rate-of-return carriers.³⁸

The FCC acknowledged that this amount is roughly equal to 2011 funding levels,³⁹ but added as a condition of receiving continued funding a new “public interest obligation” to offer and deploy broadband to subscribers.⁴⁰ In effect, small rural carriers were informed that in order to receive funding, they would have to do much more, with vanishing access charges, with uncertain federal universal service funding

³⁶ FCC, *Connect America Fund: A National Broadband Plan for Our Future High-Cost Universal Service Support*, Notice of Inquiry and a Notice of Proposed Rulemaking, released April 21, 2010. (“2010 NOI and NPRM”)

³⁷ 2011 Report and Order, at 18. The FCC has capped in the past parts of the universal service fund such as High Cost Loop.

³⁸ *Ibid.*, at 26.

³⁹ Although the USF stayed at the same level, ICC would diminish substantially.

⁴⁰ 2011 Report and Order, at 19, 22, 76-114.

mechanisms, with no additional federal universal service funding, and that the frozen universal service funding itself would shrink over time.

Compounding the arbitrary limitation in high cost support, the FCC also introduced a transition to incentive regulation for terminating exchange access services and office switching services that will eventually lead to no terminating exchange access charge revenue for both interstate services and intrastate services and substantially less office switching revenue.⁴¹ The FCC refers to payments of exchange access services as “intercarrier compensation” (“ICC”). Particularly for rural carriers, ICC was also an important revenue stream used for investment and maintaining and operating the network. As noted above, more than \$3.6 billion annually in interstate and intrastate access charges, both originating and terminating, were collected in 2009 outside of the largest five holding companies and reported just before the 2011 Report and Order was released.⁴² The 2011 Report and Order proposes to phase out and ultimately eliminate the terminating charges both for interstate and intrastate services, leaving carriers with far fewer financial resources to build broadband networks.

This dramatic reversal of Commission policy changed from not regulating the incremental prices of access services to setting prices. Furthermore, prices were set at the same level nationwide, regardless of the particular carrier’s cost. Even the FCC itself recognized that substantial shift in policy that it was adopting: “As a result, we now abandon the calling-party-network-pays model that dominated ICC regimes of the last century.”⁴³

The funding caps for universal service were directly based on existing levels of support. The FCC mentioned concerns about the affordability of the federal universal service fund (“USF”) for consumers, but the FCC provided no analysis of whether the existing universal service programs were affordable, nor did it examine: (1) the degree to which high-cost support provided to small carriers was actually contributing to the affordability (or lack thereof) of universal service for American consumers; or (2) whether existing programs were meeting, exceeding, or falling short of statutory requirements or statutory principles in the context of voice services alone,⁴⁴ including sufficiency of funding to meet statutory requirements.⁴⁵ It is surprising that the Commission would omit such analyses. Further, it is surprising that the Commission would extend universal service to additional and costly services, broadband, under the existing budget cap, again without considering whether the budget caps for voice services met statutory principles and requirements for broadband as well.

In other key decisions embodied in the 2011 Report and Order, the Commission –

- Established the CAF to support broadband deployment, with a view to the eventual elimination of all other high cost support mechanisms.⁴⁶
- Declared some rural telephone bills to be “artificially low” and imposed a dollar-for-dollar reduction in high costs support if the rates are not increased to an “urban floor”

⁴¹ Ibid., at 34-35, and 736-846.

⁴² FCC, “Telecommunications Industry Revenue, 2009,” released May 2011, at Table 5. At http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-306567A1.pdf.

⁴³ 2011 Report and Order, at 34.

⁴⁴ 47 U.S.C. 254(b).

⁴⁵ 47 U.S.C. 254(b)(5).

⁴⁶ 2011 Report and Order, at 18-28.

price set by the FCC.⁴⁷ This marked the first time that the FCC delved into local rate setting.

- Declared that most if not all telecommunications services were interstate in nature, placing in doubt the meaning of state laws governing intrastate telecommunications services as well as the repeated references to such services in the federal Communications Act.⁴⁸

The 2011 Report and Order promises substantial economic results and consumer benefits:

Our actions today will benefit consumers. In rural communities throughout the country our reforms will expand broadband and mobility significantly, providing access to critical employment, public safety, educational, and health care opportunities to millions of Americans for the first time.⁴⁹

Likewise:

We expect that today's ICC actions will have similar pro-consumer, pro-innovation results, providing over \$1.5 billion annually in benefits for wireless and all long-distance customers. These benefits may take many forms, including cost savings, more robust wireless service, and more innovative IP-based communications offerings. Given these effects, we project that the average consumer benefits of our reforms outweigh any costs by at least 3 to 1 — and of course, by much more for the millions of consumers that will get broadband for the first time.⁵⁰

The 2011 Report and Order also claimed to help expand investment in rural telecommunications and broadband:

We have taken a series of significant steps to better enable the private sector to deploy broadband facilities to all Americans. The Commission has provided the tools to promote both wired and wireless solutions by offering new opportunities to access and use spectrum, removing barriers to infrastructure investment, and developing better and more complete broadband and spectrum data.⁵¹

Specifically with respect to rate-of-return carriers, the 2011 Report and Order claimed to support continued investments: “We reform our rules for rate-of-return companies in order to support continued broadband investment.”⁵² Yet the 2011 Report and Order provided no analysis or explanation of how its new rules would likely affect broadband investment by rate-of-return companies, or why the effect would be “continued broadband investment.”

⁴⁷ Ibid., at 22 and 27.

⁴⁸ Ibid., at 35.

⁴⁹ Ibid. at 14.

⁵⁰ Ibid.

⁵¹ Ibid., at 5.

⁵² Ibid., 26.

The 2011 Report and Order made many positive claims about the effects of the new rules and policies, but it does not assess or even acknowledge the possibility that the new rules may have consequences of reduced investments, greater uncertainty, higher prices, or stagnant levels of broadband availability. The 2011 Report and Order does not even hint at the possibility that, partly as a result of the new rules, vast portions of rural America might fall further behind urban America in broadband availability and service.

Of great significance was the FCC's reversal of its position on including broadband as a supported universal service. For more than a decade, the FCC has excluded broadband services from the definition of telecommunications services. By statute, universal service is limited to telecommunications services.⁵³ In the 2011 Report and Order, the Commission adds broadband as an objective of universal service but never directly addresses how, under the statute, to include broadband under universal service.

It is possible that, despite the complexity of the 2011 Report and Order, some of these statements are true for some rural communities and some telecommunications carriers. But it is also likely that for many rural communities and many rural carriers, some or all of the promises made in the 2011 Report and Order will not be met. Unstated in the 2011 Report and Order is how to determine whether changes were needed, and how to determine whether the complex of new programs are effective at meeting any new goals.

IV. Assessing the effectiveness of the new Commission rules

The Commission promised much with the 2011 Report and Order, but has it delivered? Is the direct result of the 2011 Report and Order to advance the goal of achieving “robust, affordable voice and broadband service, both fixed and mobile, available to Americans throughout the nation”? Have any or all of the other claims and promises been met? At the very least, have the new Commission rules moved the country in the direction promised? Has the Commission at least made measurable progress towards meeting any of the promises?

The 2011 Report and Order promulgated many rule changes, both for universal service and for intercarrier compensation. Some of these rules may have moved the communications sector in the United States towards the objectives of the *2011 Report and Order*; others may have had little or no effect; and still others may have had the unintended consequence of moving in the opposite direction.

Surprisingly, the Commission established no comprehensive performance measurements in the 2011 Report and Order for even one of the rule changes, much less for all of them. Since the Order's release, the Commission has made no periodic report of progress towards meeting any of the goals, nor has the Commission publicly evaluated the effectiveness of any of its rule changes.

Two years after the adoption of the 2011 Report and Order, the FCC has yet to issue either any review of the effectiveness of the new rules including those for universal service or intercarrier compensation. The omission of evaluations of the program is surprising given the FCC noted the importance of such assessments⁵⁴ and other statutory requirements for such reviews.⁵⁵

⁵³ 47 USC 254.

⁵⁴ For required assessments under the Government Performance and Results Act of 1993 (“GPRA”), see 2011 First Report and Order, footnotes 27 and 55. Independent of GPRA, the FCC is obligated to review its rules under Section 11 of the Communications Act.

⁵⁵ Independent of GPRA, the FCC is obligated to review its rules under Section 11 of the Communications Act.

In this paper, we propose a framework by which to assess the progress of services affected by the 2011 Report and Order. We divide these standards into three groups:

1. Consistency with statutory requirements and objectives particularly for universal service;⁵⁶
2. Consistency with administrative law and common sense approaches to efficient regulation; and
3. Consistency with the stated objectives of promoting broadband deployment in rural America.

A. Consistency with statutory requirements and objectives of universal service

Every agency of the federal government is required to operate within the boundaries of its foundational statutes, and the FCC is no different. The FCC went to great lengths in the text of the order to explain how its authorizing statutes supported its actions.⁵⁷ The FCC relied on an amalgamation of Sections 254 of the Act and 706 of the Telecommunications Act of 1996 and language in the 2008 Farm Bill to explain its authority.⁵⁸ It concluded that even though Section 254 mentions supporting telecommunications services, not informational services such as broadband, the FCC could nevertheless support “the facilities” upon which broadband services were offered.⁵⁹ It concluded that, even though Section 706 directs the FCC to remove regulatory obstacles to broadband deployment, it also authorized the FCC to establish universal support for broadband.⁶⁰ Section 706 also authorized the FCC, according to the 2011 Report and Order, to impose new regulations through a public interest obligation on carriers receiving support to build out broadband facilities to remotely situated customers,⁶¹ an ironic interpretation given that Section 706 is widely viewed as having been a *deregulatory* section of the Telecommunications Act of 1996.

The Telecommunications Act of 1996⁶² included the first explicit and detailed statutory provisions on universal service and directed that the Commission work in partnership with state regulators to make the foundational decisions about universal service. Section 254 describes the new universal service program.⁶³ Section 214(e) specifies that only eligible telecommunications carriers may receive universal service support, thus limiting support to entities engaged in providing telecommunications services.⁶⁴

Section 254(a) of the Act directed the formation of a federal-state Joint Board to determine “the definition of the services that are supported by Federal universal service support mechanism.”⁶⁵ Policymakers were to take into account whether particular services should be included based on a variety of factors, such as

⁵⁶ Although the Commission may reasonably adopt its own objectives for various rules, it is difficult to see how it can either ignore or embellish the statutory principles of universal service. See 47 U.S.C. 254(b).

⁵⁷ See, e.g., 2011 Report and Order, at 60-73.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, at 64.

⁶⁰ *Ibid.*, at 60.

⁶¹ *Ibid.*, fn 81.

⁶² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, February 8, 1996.

⁶³ 47 U.S.C. 254.

⁶⁴ 47 U.S.C. 214(e).

⁶⁵ 47 U.S.C. 254(a).

whether the service is “essential to education, public health, or public safety”⁶⁶ and whether the service has “been subscribed to by a substantial majority of residential customers.”⁶⁷ Policymakers were to review and periodically update the definition of covered services based on “advances in telecommunications and information technology.”⁶⁸

In its initial definition of universal service, the Commission decided that voice grade network access and related services such as access to emergency services, operator services and directory assistance should be eligible for support. The Commission declined to declare that broadband should be eligible for support. The Commission decided that high-speed transmission services were not “necessary for the public health and safety” and that they had not been adopted by a “substantial majority of residential customers.”⁶⁹

Section 254(b) also directed that the rules and mechanisms that the Commission implemented, after due consideration by the federal-state Joint Board, must take into account several principles.⁷⁰ The statutory principles themselves suggest a way of evaluating the effectiveness of the 2011 Report and Order:

1. With respect to each principle, had it already been met or accomplished as of 2011 consistent with the statute?
2. Did the Commission detect and document in the record particular deficiencies in the ways that the existing rules were working toward meeting or accomplishing the statutory principles?
3. Were the new rules targeted to remedy those deficiencies, and were they themselves consistent with the statute?

Below, we examine how the Commission’s assessment of the statutory principles in the 2011 Report and Order squares with these fundamental questions. We address the first three principles in a summary fashion and the last two in greater detail.

1. The Commission’s Treatment of the Statutory Principles

Section 254 (b) of the statute specifies in relevant part as follows:

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) **Quality and rates**

Quality services should be available at just, reasonable, and affordable rates.

(2) **Access to advanced services**

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) **Access in rural and high cost areas**

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that

⁶⁶ 47 U.S.C. 254(c).

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ 47 U.S.C. 254(c)(1).

⁷⁰ See also 2011 Report and Order, at 61.

are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

With respect to the first three principles, the Commission offered no baseline measurement to establish how far short the then-current rules had fallen from achieving the principle. Moreover, the FCC did not involve the Joint Board in its deliberations. The statute contemplates that the Joint Board must be involved not only in developing the initial slate of covered services, but also in recommending alterations and modifications to the list.⁷¹ Nor did it point to any specific universal service rules that had been responsible for the asserted failure to achieve the unmeasured principle. Nor does the 2011 Report and Order, or any other Commission document that we have been able to find, provide any performance measures for the Section 254 principles; there is no benchmark of existing quality, rates, availability of services, consumer access to advanced telecommunications and information services or comparability of rates and services against which to measure whether the new rules are better than the previous rules at meeting the principles in Section 254.

While the Commission intended to effectuate improvements in the rules to increase the propagation of broadband, it is equally plausible that some aspects of the 2011 Report and Order may have the opposite unintended consequence. For example:

- a. The many changes to the rules for universal service and intercarrier compensation could, other factors remaining unchanged, substantially reduce federal revenues for some carriers. The reasonable market response to those changes by a carrier may be to reduce the quality of service, seek higher rates, or both. These changes could adversely affect accomplishment of the quality of services and rates principle expressed in Section 254(b)(1).
- b. The new rules set the price of exchange access charges, which is traditionally set in the context of a commercial tariff available to other carriers, to the regulatory rate of zero.⁷² Carriers are allowed to partially recover the lost access revenue with an Access Recovery Charge (ARC), as a line-item on customers' bills.⁷³ The shift will not allow carriers in rural areas, with a less dense customer base, to recover revenues from as many customers as carriers in more densely populated areas. Rural carriers, more so than carriers serving more densely populated areas, may find that they need to raise overall customer rates. Thus, the effect of the new access charge rules is more likely to raise rates in low-density, high-cost networks than high-density, low-cost networks. This, too, appears adverse to the

⁷¹ 47 U.S.C. 254(c)(1)-(2).

⁷² 2011 Report and Order at 34-39.

⁷³ Ibid. at 36-39.

aims expressed in Section 254(b)(1) as to rates and (b)(3) as to comparability of services and rates between rural and non-rural areas.

2. Equitable and Nondiscriminatory Contributions by Carriers

The Commission's handling of the equitable and nondiscriminatory contributions principle of Section 254(b)(4) is especially noteworthy. This principle does not appear to have been central to the Commission's deliberations. The 2011 Report and Order does not cite Section 254(b)(4) on its own, and mentions it only twice elsewhere in the context of other issues.⁷⁴

The absence of thoughtful exploration of Section 254(b)(4) is paradoxical for two reasons: (1) the budgetary concerns that turned out to be central to the structure of the Commission's decision; and (2) the necessity, as the Commission realized, of subsidizing lost access revenue with universal service funds at least on a transitional basis.

a) Budgetary concerns

In the 2011 Report and Order, the Commission repeatedly states that it will cap the High-Cost Universal Service Fund at \$4.5 billion, the high-cost amount in 2011, for budgetary reasons.⁷⁵ As the Commission said:

This will provide for more predictable funding for carriers and will protect consumers and businesses that ultimately pay for the fund through fees on their communications bills. We are today taking important steps to control costs and improve accountability in USF, and our estimates of the funding necessary for components of the Connect America Fund (CAF) and legacy high-cost mechanisms represent our predictive judgment as to how best to allocate limited resources at this time.⁷⁶

Less than half of the capped amount, \$2 billion, is designated to support consumers located in the areas served by the smallest rural rate-of-return carriers, who tend to serve the most costly areas of the country.⁷⁷

Budget issues in universal service funding have both a spending component and a contribution component. Imposing a budgetary cap presents an obvious opportunity to explain the shortcomings of the existing rules promulgated under the equitable and nondiscriminatory principle adequately to support universal service or the desired propagation of broadband. The FCC could have tied the budget more directly into the universal service principle of Section 254(b)(4), but did not.

b) Subsidization of lost access revenue with universal service funds

⁷⁴ 2011 Report and Order, fn 315, and fn 33 of Appendix F.

⁷⁵ *Ibid.*, e.g., at 18 and 122.

⁷⁶ *Ibid.*, at 18.

⁷⁷ *Ibid.*, at 26.

In the past, the FCC explicitly used federal universal service fund programs to offset lost access revenue.⁷⁸ In the 2011 Report and Order, the FCC allows carriers to charge customers an Access Recovery Charge (ARC) to partially recover lost access charge revenue.⁷⁹ The Commission specifically observes that some access recovery will be through the universal service CAF.⁸⁰

The use of federal universal service funds raises the issue of whether the principle in Section 254(b)(4) is being met. The shift from access charges, in which all carriers of interstate services participate, to a line-item on customer bills, in which only LECs participate, raises substantial issues under Section 254(b)(4). The ARC, even if portrayed as a federal charge, ultimately affects the prices that consumers pay – and thus the affordability – of local (intrastate) services. On these issues, the FCC is silent.

For these and other reasons, both the 2011 Report and Order and the rules adopted in it do not entirely reflect the aims of Section 254(b)(4).

3. Specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

The 2011 Report and Order specifically refers to Section 254(b)(5) in connection with several issues: defense of a high cost budget cap;⁸¹ defense of a floor on local rates;⁸² defense of new rules against claims of constitutional takings;⁸³ and defense against claims that an auction of universal service funding violates the “predictable” provision.⁸⁴

As with respect to the first three statutory principles, the 2011 Report and Order provides no performance measures for any part of Section 254(b)(5); there is no benchmark against which to measure whether the principle was met in any year for any service in any particular geographical area in 2011 or earlier. Thus, there is no clear foundation in the 2011 Report and Order to determine that the rules then in place failed to meet the principle of Section 254(b)(5). Nor does the 2011 Report and Order examine whether and how each of the many new rules adopted in the Order are consistent with Section 254(b)(5).

We have reviewed the 2011 Report and Order and find little if any analysis of the new rules in the context of Section 254(b)(5). In particular, we find little analysis of the following conditions: (a) specific, (b) predictable, and (c) sufficient. We review each below.

a) Specific Federal and State mechanisms to preserve and advance universal service

⁷⁸ The Commission established access charge replacement mechanisms in the 2000 CALLS proceeding. CALLS Order, *15 FCC Rcd* 12962 (2000).

⁷⁹ 2011 Report and Order, at 36-39.

⁸⁰ *Ibid.*, at 38-39.

⁸¹ *Ibid.*, at fn 195.

⁸² *Ibid.*, at fn 382.

⁸³ *Ibid.*, at fn 483.

⁸⁴ *Ibid.*, at 310.

Several aspects of the 2011 Report and Order are at odds with providing “specific Federal and State mechanisms” for universal service. Fundamentally, the 2011 Report and Order departs from decades long precedent in intermingling the access charge regime with universal service. The conflation of exchange access and universal service by the FCC raises several troubling questions. Is exchange access part of universal service, but not specific and explicit, inconsistent with Sections 254(b)(5) and 254(e)? To the extent exchange access is part of universal service, why should the recovery mechanism be split in three ways: (1) USF recovery mechanism; (2) ARC line-item outside of USF; and (3) no recovery? To the extent exchange access is part of universal service, how can the FCC set its price to zero without violating Section 254(b)(1), the “just, reasonable and affordable” provision when the lost support is not replaced in full (or at least analyzed to ensure that any shortfall in recovery does not result in insufficient support)? To the extent exchange access services are not part of universal service, how can the FCC use USF mechanisms to fund it?

The 2011 Report and Order also attempts to assert federal jurisdiction over various intrastate services such as exchange access.⁸⁵ How can the assertion of federal jurisdiction over intrastate services avoid undermining “specific State mechanisms to preserve and advance universal service?”

b) *Predictable Federal and State mechanisms to preserve and advance universal service*

Several aspects of the 2011 Report and Order are at odds with providing “predictable Federal and State mechanisms” for universal service. Courts and others have noted the ambiguous nature of the word “predictable” in Section 254(b)(5), particularly in the context of whether predictable refers to rules or actual funding levels,⁸⁶ but it is difficult to see that the 2011 Report and Order and its implementation meets any plausible standard of “predictable.” No one reading the 2011 Report and Order could possibly divine exactly what the funding mechanism rules — much less specific funding levels — for universal service would be; many of the detailed decisions were delegated to FCC bureaus.

Nor has the passage of time clarified the crystal ball of discerning the Commission rules for allocating universal service. As of mid-2013, nearly two years after the adoption of the 2011 Report and Order, the Commission has issued more than 200 documents in Docket 10-90, the Connect America Fund alone. Yet participants still have no clear idea of the exact final rules or interpretations. Nearly two years after the adoption of the 2011 Report and Order, little here appears to meet any plausible standard of “predictable.”

Other government agencies appear to be mystified as well. In February 2013, Secretary Vilsack and RUS Administrator John Padalino met again with Chairman Genachowski. According to the public summary of the meeting, the USDA officials confirmed that “[c]urrent and prospective RUS borrowers have communicated their hesitation to increase their outstanding debt and move forward with planned construction due to the recently implemented reductions in USF support and Inter-Carrier Compensation (ICC) payments.”⁸⁷

The harmful consequences of the FCC’s new universal service program are also documented in the President’s 2014 Budget. As the Department of Agriculture’s Budget states:

⁸⁵ 2011 Report and Order at 34-35.

⁸⁶ See, e.g., *See Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620-21 (5th Cir. 2000).

⁸⁷ FCC, WC Docket 10-90, GN Docket 09-51, WC Docket 07-135, WC Docket 05-337, CC Docket 01-92, CC Docket 96-45, WT Docket 10-208, Ex parte of Department of Agriculture, Rural Utilities Service, February 8, 2013.

The reduction in performance in 2012 is directly attributed to lower obligations resulting from uncertainty in the telecommunications industry as revisions are underway to the Universal Service Fund fee structure. USDA continues to work with FCC to ensure the impact to rural communities is minimal.⁸⁸

c) *Sufficient Federal and State mechanisms to preserve and advance universal service*

In the 2011 Report and Order, the Commission acknowledged the responsibility conferred by Section 254(b)(5),⁸⁹ yet it locked in place a capped budget for available universal support through 2017 and eliminated terminating access charges, an important source of cost recovery. The 2011 Report and Order furnished no quantitative analysis to ensure that the budgeted amount would be sufficient to achieve the specific universal service objectives specified in the 1996 Telecom Act.

The Commission asserted that its reforms to control costs and move towards incentive regulation might reduce the sufficiency threshold.⁹⁰ But the Commission cannot mandate lower carrier costs; it can only mandate that less of a carrier's costs are recoverable through universal service and intercarrier compensation. That, of course, is not the same thing.

The principle in Section 245(b)(5) appears to be focused on sufficient funding, not inadequate, and not excessive. The 2011 Report and Order mentions that funding should not be excessive,⁹¹ but it does not address inadequate funding nor does it assess whether the current level of funding is adequate.

The 2011 Report and Order provides no discussion of whether the funding for any universal service program in any region or for any set of requirements falls into any of these categories. Moreover, the 2011 Report and Order does not even address how to determine whether funding for a program is inadequate, sufficient, or excessive. There is no benchmark against which to measure whether a specific universal service program in a particular geographical area was inadequately, sufficiently, or excessively funded prior to 2011 or in 2011 itself. Thus, there is no clear foundation in the 2011 Report and Order to determine whether either the rule or the specific funding level—or any other concept the Commission might articulate—met any standard of “sufficient.” Thus the 2011 Report and Order provides no foundation to determine whether any universal program under the prior rules had “sufficient” or other levels of funding. Nor does the 2011 Report and Order examine whether and how each of the many new rules adopted in the Order would meet any current or future standard of “sufficient” funding or other levels of funding. Nor does the 2011 Report and Order provide a basis to determine in 2013, or in any subsequent year, whether the funding for a specific universal service program is “sufficient” or not.

The FCC acknowledged that the capped amount is roughly equal to 2011 funding levels, but added as a condition of receiving continued funding a new “public interest obligation” to offer and deploy broadband to subscribers and also ultimately reduces terminating access charges, an important revenue, to zero.⁹² In

⁸⁸ FY 2014, USDA, Budget Summary and Performance Plan, at 45, released April 2013. At <http://www.obpa.usda.gov/budsum/FY14budsum.pdf>.

⁸⁹ 2011 Report and Order at 123.

⁹⁰ *Ibid.*, at 195 and 219.

⁹¹ *Ibid.*, at fn 315.

⁹² *Ibid.*, at 15.

effect, small rural carriers were informed that in order to receive funding, they would have to do much more, with vanishing terminating access charges, with uncertain federal universal service funding mechanisms, and with no additional federal universal service funding.

We do not see that the Commission's language of "reasonable request" as a precondition for building out broadband will likely limit the cost structure for building out service.⁹³ "Reasonable request" refers to the demand for service, not the cost of providing it. Although a circumstance may arise where a carrier is capable of building out service but elects not to do so because no customer ever requested it, we believe the opposite will be far more common: a customer demands broadband service and the carrier does not have the resources to provide it.

In the end, the Commission gave controlling weight to its view that a capped budget is necessary to control costs and keep consumers' bills from rising, regardless of the statutory obligation to ensure "sufficient" funding. Without considering changes to the funding base, the Commission reasoned that higher bills might deter broadband adoption among the public and be counterproductive to what it regarded as the overall thrust of Sections 254 and 706 to ensure increased availability and affordability of broadband. The Commission apparently based its budget on the existing contribution mechanism, which is designed to support consumers' usage of the voice-grade network, but not broadband. Further, the Commission made the contribution base subject to the new constriction of reduced interstate revenue due to the glide path to zero for interstate terminating tariff rates.

4. Including broadband in universal service principles

Section 254(b) is silent on broadband thus conferring no specific authority on the Commission to pursue broadband as a universal service objective. The FCC partially remedies this situation by adding a new universal service principle to include broadband as a principle under Section 254(b)(7). Properly, the FCC did not attempt to change the definition of universal service under Section 254(c) which is largely limited to telecommunications services. As we discuss elsewhere, the FCC has repeatedly stated that broadband services are not telecommunications services; rather they are information services. To finesse this issue, the Commission requires universal service fund recipients to continue to offer voice services, but, through "public interest" obligations, to also offer broadband services.⁹⁴

This tactic may have a noble purpose, but this use of the public interest in combination with Section 254 has no natural limit. If the Commission in 2011 can require recipients of universal service to offer a service outside the legal definition of universal service, what limits the range of services the FCC can require be offered? Does the Congress through specific statutory language limit the services offered under universal service, or does the FCC have authority to expand the list of covered services, even when the FCC has gone to great lengths to decide that broadband is not a form of telecommunications services? This elastic structure of funding raises not only troubling questions about the extent of the FCC's discretionary authority, it also raises questions about whether the expanded universal service program meets the "specific" mechanisms principle of Section 254(b)(5).

As discussed above, the actual language of Section 254(b), as reviewed above, does not correspond well to the 2011 Report and Order. Perhaps as a result, the FCC constructs an entirely new set of principles or goals, loosely but not exactly corresponding to the statutory language. The stated universal service aims of the FCC's 2011 Report and Order are not taken directly from the statutory principles of 254(b) or the

⁹³ Ibid., at 26, 208.

⁹⁴ Ibid., at 19.

definitions of 254(c) but rather are a new set of statements, loosely derived from the statute. The new, non-statutory goals are:

- (1) preserve and advance universal availability of voice service;
- (2) ensure universal availability of modern networks capable of providing voice and broadband service to homes, businesses, and community anchor institutions;
- (3) ensure universal availability of modern networks capable of providing advanced mobile voice and broadband service;
- (4) ensure that rates for broadband services and rates for voice services are reasonably comparable in all regions of the nation; and
- (5) minimize the universal service contribution burden on consumers and businesses.⁹⁵

It is not clear why the Commission needed to rewrite the statutory principles and definitions of universal service as a new set of goals. The FCC provides some discussion of these new goals.⁹⁶ Although the FCC discusses “performance measures” for each of the goals, few if any have a meaningful measurement.⁹⁷

Consistent with Section 254(b)(7), the FCC also adopts a specific new universal service principle involving broadband:

Support for Advanced Services – Universal service support should be directed where possible to networks that provide advanced services, as well as voice services.⁹⁸

No doubt, the statutory principles and definitions of universal service are not easily implemented. But the new goals established by the FCC and the new principle do not make compliance any easier or predictable. Nor do the many rules promulgated by the FCC make compliance easier. Indeed, the 2011 Report and Order shifts part of the burden of compliance with universal service principles and definitions from the FCC to telecommunications carriers.

For example, in preserving support for the successes of current rural telephony while stretching to ensure build-out of broadly available broadband networks, the 2011 Report and Order demands a great deal from rural carriers. Rural carriers must now maintain their existing networks with reduced universal service funding and declining intercarrier compensation revenues *and*, as a condition of receiving continued universal service support, build out broadband facilities. Construction costs may be recovered in a limited way from remotely situated customers.

It is not at all clear that rural carriers will be able to solve the puzzle that the FCC has laid at their doorstep of doing more with much less. In some respects, it seems that the FCC has mainly accomplished dodging the blame for higher universal service fees while putting carriers in the position of having to ask their customers to pay more.

⁹⁵ *Ibid.*, at 17.

⁹⁶ *Ibid.*, at 48-59.

⁹⁷ *Ibid.*, at 50. For example, the performance measure for the first goal is voice penetration; a measure that the Commission concedes has little meaning.

⁹⁸ *Ibid.*, at 45.

B. Consistency with administrative law requirements and common sense approaches to efficient regulation

Common sense dictates that the economic benefits of a new rule should exceed its cost. Individuals make decisions daily that ultimately are premised on the notion that the benefits exceed the costs. Government agencies believe they are doing the same, but they are not always careful in documenting their reasoning. Three examples of current federal laws that require the FCC to consider the costs and benefits of regulations include:

1. Section 11 of the Communications Act;
2. The Regulatory Flexibility Act in preparing initial and final regulatory flexibility analyses; and
3. The Government Performance and Results Act (“GPRA”).

1. Section 11

Many laws require government agencies to make reasoned judgments about regulations and to document that reasoning. Other laws require agencies to periodically review their rules to ensure that benefits exceed the costs. The FCC is subject to such laws. Indeed, the Communications Act itself requires periodic review of the Commission’s rules under Section 11.⁹⁹ Such a review would include the benefits and costs of the program. The Commission has not apparently conducted such a complete review of either its universal service or its exchange access rules, and the 2011 Report and Order refers to no such review. Had the FCC conducted a Section 11 review of those programs over the years, it would have been in a position to document more clearly the strengths and weaknesses of those programs and to establish benchmarks for any programs to replace them. No such information was available for the 2011 Report and Order.

2. Regulatory Flexibility Act

In addition, the Final Regulatory Flexibility Analysis (FRFA) for the 2011 Report and Order is deficient.¹⁰⁰ The single FRFA is for all of the dozens of rule changes in 76 pages of final rules in the 2011 Report and Order.¹⁰¹ Remarkably, the FRFA cites not a single rule change but instead cites to sections of the 2011 Report and Order. No separate FRFA is provided for the Part 0 rule changes,¹⁰² the Part 1 rule changes,¹⁰³ the Part 20 rule changes,¹⁰⁴ the Part 36 rule changes,¹⁰⁵ the Part 51 rule changes,¹⁰⁶

⁹⁹ 47 U.S.C. 161.

¹⁰⁰ 2011 Report and Order, Appendix O.

¹⁰¹ *Ibid.*, at Appendix A, pp. 492-567.

¹⁰² By our count, there are three rule changes to the Part 0 rules. Appendix O, at 492.

¹⁰³ By our count, there are one rule change and five new rules in Part 1 rules. Appendix O at 492-496.

¹⁰⁴ By our count, there are two rule changes to Part 20 rules. Appendix O at 496.

¹⁰⁵ By our count, there are 11 rule changes and additions to Part 36 rules and one rule is removed. Appendix O at 496-500.

¹⁰⁶ By our count, there are 9 rule changes, 10 new rules, and 2 rules deleted to Part 51 rules. Appendix O at 500-535.

the Part 54 rule changes,¹⁰⁷ the Part 61 rule changes,¹⁰⁸ the Part 64 rule changes,¹⁰⁹ and the Part 69 rule changes.¹¹⁰ They are not collectively identified nor are they separately identified, much less examined.

Section 604 of the Regulatory Flexibility Act, which prescribes the requirements for Final Regulatory Flexibility Analysis, refers to “rule” in the singular, not a collection of rules.¹¹¹ The single FRFA provided in the 2011 Report and Order fails to meet each of the five requirements for a FRFA under Section 604¹¹² for each “rule.”¹¹³ For example, with respect to changing the many regulations in the 2011 Report and Order, the FRFA does not review alternatives, as required by Section 604, including the obvious alternative of not changing rules.

3. GPRA

The Commission has substantial authority, even an obligation, to review its programs both for consistency with statutory authority and for effectiveness.¹¹⁴ The 2011 Report and Order does not refer to the Commission’s obligations to review its rules under the Communications Act but instead focuses, repeatedly, on the Government Performance and Results Act of 1993 (“GPRA”).

¹⁰⁷ By our count, there are 13 rule changes, 20 new rules, and 3 rules deleted to Part 54 rules. Appendix O at 535-561.

¹⁰⁸ By our count, there are two rule changes and two new rules to Part 61 rules. Appendix O at 561-564.

¹⁰⁹ By our count, there are two rule changes and one new rule for Part 64 rules. Appendix O at 564-565.

¹¹⁰ By our count, there are two rule changes and one new rule for Part 69 rules. Appendix O at 565-567.

¹¹¹ RFA Section 604. The term “rule” under the RFA is defined 601(a) as “the term ‘rule’ means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title.” The definition does not say that a “rule” is a collection of rules for which an NPRM is published. Presumably, a rule is singular, and an NPRM and a final Order may contain several rules, as does the 2011 Report and Order. Section 605 permits agencies to “perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections,” but it does not authorize agencies to fail to perform analyses on an individual rule.

¹¹² According to Section 604, Each final regulatory flexibility analysis shall contain —

- (1) a succinct statement of the need for, and objectives of, the rule;
- (2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- (3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
- (4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

¹¹³ The 2011 Report and Order also fails to satisfy practically all of the guidelines set forth by the Small Business Administration for assessing a rule’s impact on small businesses. Small Business Administration, “A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act,” June 2010, at <http://archive.sba.gov/advo/laws/rfaguide.pdf>.

¹¹⁴ See, e.g., Section 11 for the periodic review of FCC rules under competition and public interest standards.

Under GPRA, the FCC might be expected to have clear annual measures of performance and progress. As the Commission notes, “Federal agencies must develop strategic plans with long-term, outcome related goals and objectives, develop annual goals linked to the long-term goals, and measure progress toward the achievement of those goals in *annual* performance plans and report *annually* on their progress in program performance reports.”¹¹⁵ Yet the Commission has provided no annual performance report under GPRA for the new universal service or intercarrier compensation rules.

This omission is surprising given that the Commission frequently mentions “goals” in the *2011 Report and Order*. The Commission states that the goals

will enable the Commission to determine not just whether federal funding is used for the intended purposes, but whether that funding is accomplishing the intended results—including our objectives of preserving and advancing voice, broadband, and advanced mobility for all Americans. Moreover, performance goals and measures may assist in identifying areas where additional action by state regulators, Tribal governments, or other entities is necessary to achieve universal service. Performance goals and measures should also improve participant accountability.¹¹⁶

Even the FCC’s new universal service goals, discussed above, are amorphous and immeasurable.¹¹⁷ Many if not all of these goals are not met today, and thus it is unclear how the Commission could “ensure” something that does not yet exist. Although the Commission adopted these goals, it provided no meaningful measure of progress for any of them, particularly in a small geographic area. As an example, the Commission claims that the “telephone penetration rate” is a measure of goal (1).¹¹⁸ Yet the FCC publication that the 2011 Report and Order cites is based on state-level information collected by the Census Bureau in the Current Population Survey,¹¹⁹ which includes both wireline and wireless voice service availability. This information is not dispositive about changes in availability or subscribership to voice services at smaller geographic levels.

4. Common sense approaches to assessing the effect of the 2011 Report and Order

Stepping back from the analysis of whether the 2011 Report and Order conforms to Section 254 and other statutory obligations of the Commission, we turn to reviewing three examples of counterproductive aspects of the Commission’s decision. These are (i) setting prices to zero; (ii) unnecessarily setting other prices; and (iii) interfering with the programs of another federal agency.

a) i. *Setting prices to zero*

¹¹⁵ 2011 Report and Order, at fn 27. Emphasis added by the authors in italics.

¹¹⁶ 2011 Report and Order, at 46. Footnotes omitted.

¹¹⁷ *Ibid.*, at 47.

¹¹⁸ *Ibid.*, at 50.

¹¹⁹ See FCC, Telephone Subscribership in the United States, released December 2011, at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-311523A1.pdf.

In the 2011 Report and Order, the Commission set terminating access rates on a glide path to zero as part of a “transition.”¹²⁰ The Commission never explains, however, exactly why it needs to set rates to zero, or why setting rates to zero furthers any purpose of the Act, including the deployment of broadband. Indeed, the entire section on the access charge transition is devoid of any statutory reference, or explanation of why zero rates have any economic meaning.¹²¹

For rural carriers, the gist of the Commission’s treatment of terminating access fees – the fees that rural carriers charge other carriers to complete calls over rural networks – is that these fees will disappear over a transitional period ending in 2020, if not sooner. Rural carriers will no longer charge other carriers for use of the rural carriers’ networks, even though such usage will continue. Instead, all carriers, including the smallest rural carriers, will bill their own customers and keep the revenues collected. This regime is called bill and keep.

Bill and keep could potentially make economic sense, and would likely be negotiated between parties, when both of two conditions exist: roughly balanced traffic in both directions, and roughly comparable cost structures in both networks. Under these circumstances, two network operators could save administrative costs by simply moving to bill and keep. Such conditions likely hold between some carriers, but not others. Indeed, many carriers, particularly wireless carriers, have negotiated bill-and-keep arrangements without the 2011 Report and Order.

Leaving aside the issue of balance of traffic, most rural telephone carriers have different and more costly network structures per customer than do carriers serving higher density areas. It is not surprising, therefore, that few if any rural carriers have voluntarily negotiated bill-and-keep arrangements with larger, more densely populated carriers.

Bill and keep is not the natural market outcome in all network industries. In many network industries, businesses commonly charge usage fees to customers that originate activities on other networks or that are direct customers of another network. Thus, for example, airlines charge connecting passengers for their services, trucking companies do not carry cargo without compensation, banks charge other banks’ customers for use of their ATMs, and medical providers charge different and higher rates for patients from outside their practice or medical network.

Even in unregulated, competitive markets for telecommunications services in the United States, bill and keep does not necessarily prevail. Long-distance carriers, for example, have a vibrant wholesale market to carry traffic, known as least cost routing. Under least cost routing, carriers that carry traffic are compensated not on a bill-and-keep basis but on contractual rates.

In each of these and many other examples, bill and keep would not be the natural economic outcome between providers in a network industry. Although some firms in these industries might benefit from a bill-and-keep arrangement, others would not, and bill and keep is not negotiated with the unwilling parties. Bill and keep is neither the necessary nor the sufficient condition for an economically efficient network. In the context of high-cost rural networks, bill and keep will likely lead to a reduction in local revenues and a consequent reduction in investments.

Currently, rural carriers establish their charges for terminating access by filing tariffs with the FCC and the state commissions. The tariff serves as public notice to all carriers of the going rate that the rural carrier will expect and accept for use of its network, and the rural carrier must offer it without discrimination to similarly situated carriers.

¹²⁰ See, e.g., 2011 Report and Order, at 798-808.

¹²¹ Ibid.

The FCC's Order recognizes the necessity of avoiding disruption of "well-established relationships" among carriers based on tariffs and acknowledges the benefit of predictability that tariffs afford to rural carriers. It states that continued general reliance on tariffs is in the public interest.¹²² Nevertheless, the FCC's 2011 Report and Order explicitly pushes carriers away from tariffing to the regulatory construct of a glide path to zero compensation for terminating access. While negotiated arrangements between rural carriers and other carriers during the transition period when rural carriers are still permitted to collect terminating access charges remain possible, as envisioned by the FCC, it seems unlikely that negotiations would produce a result that either side would regard as better from their separate perspectives than the glide path.¹²³ The Order mandates that these tariffs will disappear altogether at the end of the transition period and be replaced by negotiated agreements, if any carriers find utility in negotiations, or, presumably, bill and keep. The natural advantage in any such negotiations is likely to favor carriers that would benefit from bill and keep rather than those that would not.

The Commission has observed a long tradition of letting carriers, consistent with either rate-of-return regulation or price cap regulations, set the rates for services and network usage for retail customers and for carriers who are also wholesale customers in the sense that they use the rural carrier's network. The advent of competition since the implementation of the 1996 Act has added the policing effect of the marketplace to govern carrier prices. The Commission has statutory authority to challenge rates that are unjust and unreasonable, but this authority is invoked only exceptionally, as in the event of a specific complaint from a customer or another carrier.

With respect to terminating access charges to other carriers, the FCC mandated a downward glide path specifying what rural carriers may charge in each year of the transition period through 2020. The Commission, while maintaining rate-of-return regulation for rural carriers, has long expressed its preference for incentive-based regulation that permits carriers even greater flexibility to set rates. In the 2011 Report and Order, the Commission permits rural carriers neither to establish rates based on rate of return nor to set market rates under price caps; the FCC dictated the glide path to 0.

The 2011 Report and Order observes as follows:

The intercarrier compensation (ICC) system is similarly outdated, designed for an era of separate long-distance companies and high per-minute charges, and established long before competition emerged among telephone companies, cable companies, and wireless providers for bundles of local and long distance phone service and other services.¹²⁴

Prices in 2011 for access were at least partly falling as a result of competition; sudden government intervention in markets was not necessary. The then-existing intercarrier compensation rules were not based on prices set by the Commission but rather based on rate-of-return formulas established in FCC rules or based on market-based rates set by price-cap carriers. In both instances, LECs had rates that varied and were reflected in filed tariffs; the rates were not set for all carriers by the FCC. Over the past 20 years, access charges and other intercarrier compensation rates, such as for special access, have generally declined, not as the result of new Commission rules, but as the result of competition, from other similarly situated carriers as well as from new technologies such as wireless and the internet. Without

¹²² Ibid., at 1322.

¹²³ Ibid., at 812.

¹²⁴ Ibid. at 9.

additional government regulation, intercarrier compensation would likely, in response to market forces, continue to decline.

Especially troubling is that the FCC established these benchmarks with some quantitative analysis, but with no explanation of how it calculated the benchmarks in light of the comparability requirement of Section 254.

b) *Unnecessarily setting other rates*

Over the past 25 years, the FCC has generally moved away from rate regulation unless it deems it unavoidable. In the 2011 Report and Order, the FCC stepped away from this trend, not only for terminating access but for other services as well. For example, with respect to subscriber rates, the FCC declared that some monthly service rates are “artificially low” and must be raised to national benchmarks that it will establish;¹²⁵ otherwise, the carrier will be subjected to a dollar-for-dollar reduction in high cost support to reflect how far the rate is below the FCC’s benchmark. This declaration is an extraordinary precedent for the FCC, implicitly setting local rates, an action historically reserved for state rather than federal regulation.

c) *Interfering with the programs of another federal agency*

The federal government operates programs in addition to the FCC’s universal service mechanisms to support and promote the availability of telecommunications services to rural Americans. Most notably, the Rural Utilities Service (“RUS”), a unit of the Department of Agriculture (“USDA”), lends money to rural carriers for network build out. At the time of 2011 Report and Order, its loan portfolio was approximately \$4.267 billion, including approximately \$500 million in broadband loans under the American Recovery and Reinvestment Act of 2009 with loans outstanding to hundreds of borrowers.¹²⁶

RUS and USDA openly disagreed with the FCC on the effect of its changes as the contours of the forthcoming order began to emerge in 2011. In the summer of 2011, for example, Jonathan Adelstein, RUS Administrator and a former FCC Commissioner, met with FCC staff. According to the publicly filed summary of the meetings, the RUS officials expressed vivid concerns that the changes in the rules will jeopardize the ability of many of its borrowers to repay their loans.¹²⁷ The RUS officials also expressed concern that the changes would discourage RUS borrowers’ capital investment in broadband networks.

The FCC’s retort to these concerns, in the 2011 Report and Order that was released three months later was, in part, that RUS was failing to take into account the additional revenues that the rural carriers could

¹²⁵ Ibid., at 22.

¹²⁶ Rural Utilities Service, “Overview of the RUS Telecommunications and Broadband Loan and Grant Programs,” attachment to ex parte letter, Docket 10-90, from J. Adelstein to FCC, July 29, 2011, at 11. See <http://apps.fcc.gov/ecfs/document/view?id=7021699801>. See also “Overview of the RUS Loan and Grant Program,” J. Zufolo, Deputy Administrator RUS, Presentation to NARUC Telecommunications Staff Subcommittee, July 2011, at http://www.narucmeetings.org/Presentations/Zufolo_7-2011.pdf.

¹²⁷ Ex parte letter from Jonathan Adelstein, Rural Utilities Service, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, *et al*, Attach. (July 29, 2011). See also 1 Ex parte letter from Jonathan Adelstein, Rural Utilities Service, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, *et al*, (October 20, 2011).

extract from their customers for various unregulated services.¹²⁸ The FCC asserted that the transformations mandated in its 2011 Report and Order will not undermine the work of RUS.

In August 2012, many months after the issuance of the Order, the National Telecommunications Cooperative Association (“NTCA”) wrote to President Obama to highlight the same concerns of which the USDA and RUS had warned a year earlier. Speaking of the universal service and intercarrier compensation mechanisms, NTCA said:

Recent FCC decisions to modify these mechanisms, however, are generating uncertainty among small rural network operators and threatening their ability to continue delivering high-quality, cutting-edge technologies to consumers and other businesses in the country’s hardest-to-serve areas. These changes also put the repayment of public and private loans, including stimulus awards, at risk. Indeed, in the face of these changes, it is NTCA’s understanding that some small rural providers are already “turning back in” stimulus awards and/or slowing deployment of projects that were intended as engines of job creation and retention.¹²⁹

The harmful consequences of the FCC’s new universal service program are also documented in the President’s 2014 Budget. As the Department of Agriculture’s Budget states:

The reduction in performance in 2012 is directly attributed to lower obligations resulting from uncertainty in the telecommunications industry as revisions are underway to the Universal Service Fund fee structure. USDA continues to work with FCC to ensure the impact to rural communities is minimal.¹³⁰

5. Consistency with the stated objectives of promoting broadband deployment in rural America.

Although the FCC does not specifically identify broadband services as a telecommunications service for purposes of universal service or intercarrier compensation,¹³¹ in the remainder of the report we assume that the FCC intended in the 2011 Report and Order to spur broadband investment, particularly in rural America.¹³²

¹²⁸ 2011 Report and Order at 285 – 292.

¹²⁹ NTCA, letter to President Barack Obama, August 23, 2012, at http://www.ntca.org/images/stories/Documents/Press_Center/2012_Releases/ntca_letter_082312.pdf.

¹³⁰ FY 2014, USDA, Budget Summary and Performance Plan, at 45, released April 2013. At <http://www.obpa.usda.gov/budsum/FY14budsum.pdf>.

¹³¹ The FCC identifies broadband services as important, but does not specifically label broadband services as a telecommunications service for purposes of universal service.

¹³² 2011 Report and Order, at 1-10.

In approving the 2011 Report and Order, the FCC emphasized the importance of evaluating the progress and effectiveness of new programs going forward,¹³³ but the Commission failed to examine the effectiveness, or the statutory requirements, of existing universal service or intercarrier compensation programs. The Commission claimed that the 2011 Report and Order had taken decisive steps that actually would “ensure” universal availability of “broadband service, both fixed and mobile.” The Commission stated:

Today the Commission comprehensively reforms and modernizes the universal service and intercarrier compensation systems to ensure that robust, affordable voice and broadband service, both fixed and mobile, are available to Americans throughout the nation.¹³⁴

The Commission spoke boldly in the present tense that its actions would “ensure” its objectives. Universal availability of broadband was not merely an aspirational goal, it was a target that the 2011 Report and Order was to “ensure” is reached.

Yet, in the fall of 2011, having concluded that the extensive dockets preceding the 2011 Report and Order had documented that broadband services were not universally available in America,¹³⁵ the Commission effectively conceded that it had no way of verifying the extent to which its actions would actually do what the Commission claimed it would do to fix the problem. As the Commission stated:

Approximately 18 million Americans live in areas where there is no access to robust fixed broadband networks. And millions of Americans live, work, or travel in areas without access to advanced mobile services.¹³⁶

The Commission’s 2011 assessment that 18 million Americans, or approximately 5 percent of the population, were without access to fixed broadband services was based on speeds of at least 3 Mbps download and 768 Kbps upstream from December 2010 data.¹³⁷ As of the most recent Commission data from June 2012, the percentage of Americans without access to specified broadband speeds had fallen from 3.3% to 1.8%, but broadband was still not universally available, as shown in Table 1.¹³⁸

¹³³ *Ibid.*, at 46-59. Much of the Commission’s discussion of assessment is in the context of the Government Performance and Results Act (“GPRA”). For a review of GPRA-related materials, see <http://www.whitehouse.gov/omb/mgmt-gpra/index-gpra>.

¹³⁴ 2011 Report and Order, at 1.

¹³⁵ *Ibid.*, at 4.

¹³⁶ *Ibid.*, footnotes omitted.

¹³⁷ *Ibid.*, fn. 3.

¹³⁸ Much of the information in Table 1 is from the Broadband Map project of the FCC and NTIA. In this report, we do not address issues related to the accuracy of this information.

Table 1

Percentages of the American Population with Access to Broadband
Speeds of At least 3 Mbps Downlink and 768Kbps Uplink
Based on Various Technologies

Technology	Dec-10	Jun-12	Change
Any Technology	96.72%	98.18%	1.46%
Wireline	92.18%	93.41%	1.23%
DSL	80.83%	73.51%	-7.32%
Asymmetric	80.56%	72.93%	-7.63%
Symmetric	10.83%	16.10%	5.27%
Copper	27.65%	43.25%	15.60%
Cable	83.13%	86.92%	3.79%
DOCSIS 3	38.55%	78.55%	40.00%
Other Cable	50.45%	11.44%	-39.01%
Fiber	14.42%	20.20%	5.78%
BPL	0.01%	0.00%	-0.01%
Any Wireless	88.54%	93.89%	5.35%
Terrestrial Fixed	25.55%	34.33%	8.78%
Unlicensed	22.26%	29.61%	7.35%
Licensed	9.79%	12.36%	2.57%
Terrestrial Mobile	86.74%	91.81%	5.07%

Sources: Broadband Map, Broadband Statistics Report, released September 2011 and January 2013, at 3.

On the surface, the data presented in Table 1 generally show improvement in the availability of broadband services in the United States on a nationwide basis between December 2010 and June 2012; the June 2012 data would not reflect, of course, the effect of the 2011 Report and Order.¹³⁹ Still,

¹³⁹ We have not, however, been able to reconstruct exactly the source of the Commission's statement of 18 million Americans without fixed broadband service in December 2010, and thus we cannot compare that statistic exactly with a change through June 2012.

universal availability of broadband services, both fixed and mobile, remains elusive. According to the data, although more than 98% of Americans had access to some form of broadband service in June 2012, less than 94% of Americans had access to wireline broadband service, and fewer than 92% of Americans had access to wireless mobile broadband services. If one examines a higher speed threshold than 3 Mbps downstream, the percentage of Americans without broadband services rises.¹⁴⁰

V. A framework for assessing the FCC's new rules

For purposes of assessing the effectiveness of the rules of the 2011 Report and Order in reaching its broadband goals, several salient questions remain unanswered:

- (1) What level of service or service characteristics of broadband service should universal service rules and policy embrace?
- (2) Are there geographic disparities in the availability of broadband services?
- (3) What effect, if any, did the rule changes in the 2011 Report and Order have on changes in the availability of broadband services?
- (4) Did the rule changes lead to greater investment in communications in rural areas?
- (5) Did the rule changes lead to greater employment in rural areas?
- (6) Did the rule changes lead to greater economic activity in rural areas?

We review each of these questions below.

A. What level of service or service characteristics of broadband service should universal service rules and policy embrace?

No definition of the threshold of broadband is universally accepted. The 2011 Report and Order suggests various measures including 3 Mbps downstream and 768 Kbps upstream¹⁴¹ as well as 4 Mbps downstream and 1 Mbps upstream,¹⁴² and at other times 6 Mbps downstream and 1.5 Mbps upstream.¹⁴³ The Commission has adopted slower thresholds in the past. In contrast, some observers suggest speeds of 100 Mbps as the proper threshold.¹⁴⁴ Akamai, which publishes quarterly with international comparisons of Internet access speeds,¹⁴⁵ uses 4 Mbps as the boundary for broadband and 10 Mbps as the boundary for high-speed internet access, which includes most 4G wireless services.

Even if one could define the threshold of broadband service, there are dramatically different measures of such a service. The statutory definition of universal service uses the words “available” and “provided.” The Broadband Map project focuses on “availability” and finds that relatively few Americans have

¹⁴⁰ January 2013 Broadband Maps reports.

¹⁴¹ 2011 Report and Order, at fn 3.

¹⁴² *Ibid.*, at 22.

¹⁴³ *Ibid.*, at Figure 1.

¹⁴⁴ See S. Crawford, *CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE 1* (Yale University Press 2013).

¹⁴⁵ See Akamai, *The State of the Internet*, 3RD QUARTER 2012 REPORT, at 12 (Jan. 2013).

“access” to no broadband service. In contrast Akamai focuses on “connectivity” and finds that only 62% of Americans in 2012 were actually connected to broadband services of 4 Mbps or greater.¹⁴⁶ Akamai also examines the substantial differences between maximum burst speeds and average speeds. Not surprisingly, all parts of America have substantially more broadband “availability” than actual “connectivity” and higher burst speeds than average speeds.

We believe the statute provides guidance in establishing a baseline of broadband service, to the extent it is part of universal service. Under 254(c), relevant criteria for telecommunications services to be included in universal service include those services that:

(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

By extension, broadband as part of universal service should be measured at speeds “subscribed to by a substantial majority of residential customers.” Similarly, Section 254(b)(3) may provide some guidance on “reasonably comparable” services between urban and rural areas.

B. Are there geographic disparities in the availability of broadband services?

Table 1, above, presents *nationwide* information on the availability of broadband services by different technologies. Although more than 90% of Americans are reported to have access to either wireline broadband, wireless broadband, or both, in some geographic areas, the availability of broadband is substantially less. For example, *Broadband Maps* lists at least three USF study areas with no broadband availability.¹⁴⁷ The broadband availability in many rural areas is substantially less than the national average.

To the extent broadband is defined to be part of universal service, the problems of geographic disparity become more pronounced. Section 254(b)(2) states the importance of access in all geographic areas. This principle is one of the central themes of the Order. The term “in all regions of the Nation” is mentioned numerous times. Enabling greater access to advanced services in different regions is central to the Commission’s decision to adopt the Connect America Fund as well as the adoption of the seventh principle mentioned above. Although the 2011 Report and Order repeatedly finds that substantial numbers of Americans do not have access to advanced broadband services,¹⁴⁸ the Order does not specifically examine, much less find, that then-existing rules were a direct cause of a lack of access to advanced services in any particular region of the Nation.

Section 254(b)(3) emphasizes not only access but also *comparability* of quality and rates:

(3) ACCESS IN RURAL AND HIGH COST AREAS.— Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and

¹⁴⁶ Ibid., at 15.

¹⁴⁷ Based on 3 Mbps downstream and 768 Kbps upstream.

¹⁴⁸ 2011 Report and Order, at 4.

information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

Section 254(b)(3) is one of the central themes in the 2011 Report and Order. At the core of this principle is the dual concept of “reasonably comparable” services and “reasonably comparable” rates. The term “reasonably comparable” is mentioned over 100 times in the 2011 Report and Order. The usage in the 2011 Report and Order is not always entirely consistent with the statutory language, but the Commission clearly focuses on the comparison between high cost and other areas. The 2011 Report and Order does not specifically examine, much less find, exactly which regions of the country had “reasonably comparable” services or prices to urban areas and which did not. Nor did the 2011 Report and Order examine or determine whether the then-existing rules were a direct cause of any lack of “reasonably comparable” services or prices in any particular region of the Nation.

The 2011 Report and Order develops performance measures for broadband for purposes of universal service,¹⁴⁹ but, inexplicably, does not invoke Section 254(b)(3), much less discuss “reasonably comparable” levels of service. Instead, the Commission develops an absolute, not a “comparable,” measure of broadband service, 4 Mbps downstream, and 1 Mbps upstream.¹⁵⁰ Much of the discussion of this standard does not rely on any analysis of Section 254 or even information collected specifically for this proceeding, but rather an earlier report never formally reviewed or approved by the Commission.¹⁵¹ The Commission does not discuss whether this 4 Mbps downstream is comparable to specific services available in urban areas.

C. What effect, if any, did the rule changes in the 2011 Report and Order have on changes in the availability of broadband services?

The *Broadband Maps* project provides a wealth of information on the availability of various broadband services in different geographical areas such as FCC study areas and counties. Information from Broadband Maps can help assess changes in broadband availability in rural areas over time.

Of course, even without the 2011 Report and Order, broadband was being deployed in rural America and would likely have continued to be deployed in rural America. Is it possible to assess the specific effect of the 2011 Report and Order on changes in broadband deployment patterns?

We believe that one way to assess the effectiveness of the 2011 Report and Order is to examine broadband deployment in the context of 254(b)(3). To the extent the discrepancy in the availability of broadband services is shrinking — or at least not getting larger — over time, then rules in place may be deemed effective, at least from the perspective of universal service. If, on

¹⁴⁹ Ibid., at 90-108.

¹⁵⁰ Ibid., at 93-95.

¹⁵¹ The National Broadband Plan. This report is mentioned 64 times in the 2011 Report and Order.

the other hand, deployment of advanced services is accelerating more rapidly outside rural America rather than inside, the rules in place are not effective, even if more broadband services are available in rural America than before.

One might also examine the related question of whether the rules contained in the 2011 Report and Order made broadband more or less affordable. It is difficult to see how the expansion of costly rules could have made broadband more affordable.

D. Did the rule changes lead to greater investment in communications in rural areas?

The 2011 Report and Order makes dramatic claims about the positive effect new rules will have on investment in rural telecommunications. Are those claims accurate?

There are few public sources of information on investments in communications equipment at a national level, and fewer still in small geographic areas of rural America. One exception is the information on universal service for rate-of-return carriers compiled by NECA and available at the FCC website.¹⁵² This information can measure changes in network capital and total capital for various telecommunications carriers in FCC study areas. For example, for the years 2008 - 2011, Table 2 presents the changes in total "Telecommunications Plant in service" for the 716 carriers reporting in both the 2008 and 2011 NECA databases. The interpretation is that 6% of those carriers had less than 60% as much plant in service in 2011 as in 2008, while 12% of carriers had more plant in service than in 2008.

Table 2

Share of rate-of-return carriers in NECA database reporting changes in "Telecommunications Plant in Service" Between 2008 and 2011

	Between 60% and 75%	Between 75% and 90%	Between 90% and 100%	>100%
<60%	6%	12%	33%	36%
				12%

Source: NECA database USF 2012

Table 3 shows information similar to Table 2, but for central office equipment. As with plant, most of carriers in the NECA database were disinvesting, but 28% showed an increase in central office equipment between 2008 and 2011.

¹⁵² See <http://transition.fcc.gov/wcb/iatd/neca.html>.

Table 3

Share of rate-of-return carriers in NECA database reporting changes in "Total Central Office Equipment" Between 2008 and 2011

	Between 60% and 75%	Between 75% and 90%	Between 90% and 100%	>100%
<60%	3%	10%	32%	26%
>100%				28%

Source: NECA database USF 2012

The 2011 Report and Order became effective during the summer of 2012. The first possible assessment of the Order on investment would be with the 2012 NECA data. The firms in the NECA database were, on average, disinvesting between 2008 and 2011. Will the 2012 information reflect a continuation of that disinvestment or a change in direction? With some care, it should be possible to assess whether the 2012 information is similar to, or dramatically different, from prior trends. Also, it would be useful to compare these patterns for investment by rural telecommunications carriers with patterns of investment by broader industry categories.

E. Did the rule changes lead to greater employment in rural areas?

The 2011 Report and Order has dramatic claims about the effect of the new rules on employment in rural America. Are these claims accurate? Although employment by FCC study area is not available, such information is available on a county level from the Bureau of Labor Statistics.¹⁵³ Associated with each USF study area is one or more counties. One could test whether counties with rural telephone companies had different patterns of employment changes relative to similar counties without rural telephone companies.

F. Did the rule changes lead to greater activity in rural areas?

The 2011 Report and Order has dramatic claims about the effect of the new rules on economic activity in rural America. Are these claims accurate? Although economic activity by FCC study area is not available, such information is available on a county level from the Bureau of Labor Statistics (“BLS”) with respect to wages.¹⁵⁴ Associated with each USF study area is one or more counties. One could test whether counties with rural telephone companies had different patterns of economic activity relative to similar counties without rural telephone companies.

¹⁵³ See <http://data.bls.gov/cgi-bin/dsrv>.

¹⁵⁴ See <http://data.bls.gov/cgi-bin/dsrv>.

VI. Conclusion

Based on available information, we have found that the 2011 Report and Order and the rules promulgated by it are not consistent with statutory language particularly for universal service. Nor are they consistent with administrative laws and common sense requiring consideration of the benefits and costs of new regulations. The 2011 Report and Order promised ongoing evaluations of the effectiveness of the new rules; such regulatory evaluations have not been forthcoming.

Finally, we evaluate whether the 2011 Report and Order has met any of its many promises of greater investment in broadband and economic growth. A full quantitative analysis of the effect on broadband of the FCC's 2011 Report and Order must await forthcoming data. But a comparison of the 2011 Report and Order to its aims gives foundation to concerns about whether the regime launched by the Report and Order can foster the broadband vision that it articulates for rural America. In our next report, we hope to discover whether the 2011 Report and Order has nurtured a new broadband-focused universal service policy, or has achieved the opposite – a withering of incentives for deployment by the companies best positioned to deliver it.



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**Comments To The U.S. House Committee On Energy
And Commerce On Universal Service Policy
From The Rural Independent Competitive Alliance (RICA)
September 19, 2014**

The U.S. House Committee on Energy and Commerce has embarked on a rewrite of the nation's communications laws and is seeking public input on a series of "white papers" on critical telecommunications policy issues. Released on August 22, 2014, the Committee's white paper on the universal service program begins a review of current universal service policy.

RICA believes that current and future universal policy should be guided by the fundamental principle that Americans – in all regions of the country – must be assured access to high quality services, including broadband, at levels and prices reasonably comparable to that available in urban areas.

The Rural Independent Competitive Alliance (RICA) is an association of small, competitive local exchange carriers (CLECs) affiliated with rural incumbent local exchange carriers (ILECs) that provide competitive communications services in rural areas long ignored and underserved by the large ILECs. RICA members are on the frontlines of promoting competitive choice in rural telecommunications service delivery. As such, RICA believes the

nation's universal service policy should help to promote the fair and competitive marketplace for service delivery in rural America envisaged by the Telecommunications Act of 1996 but largely ignored by the FCC. The principles of the Act, as enumerated in the Committee's universal service white paper, and the principle of "competitive neutrality, adopted but subsequently ignored by the FCC, remain valid and should be retained in any update of the Act.

RICA urges the Committee to examine the shortcomings of existing FCC policies and regulations related to the universal service program, particularly as they relate to the ability of competitive carriers to improve service for rural consumers and move forward with additional statutory language that protects the interests of all rural consumers. RICA's response to some of the Committee's specific questions are as follows:

a. *Should the principles and goals for Universal Service be redefined?*

The existing goals and principles remain valid; however, RICA recommends codification of the principle of competitive neutrality and direction to the FCC that it cannot ignore one principle to advance another. By their nature, implementation of the principles requires some balancing; not all can be maximized. With the blessing of the Court of Appeals, however, the FCC adopted rules granting a five year monopoly on eligibility for Universal Service support to the Price Cap carriers in their service areas. This use of the Universal Service Fund to give incumbent carriers a competitive advantage was precisely the result Congress wanted to avoid when it adopted the 1996 Act. The Act euphemistically acknowledged that this monopoly for incumbents was not "strictly" competitively neutral in order to claim it was merely "balancing" principles; but, in reality, it was not neutral in any legitimate

sense of the word. In revising the Act, Congress should make clear that such protection of incumbents is not allowed.

- b. *USF created to fund buildout, what should policy be with respect to multiple networks?*

The term “buildout” carries with it the connotation of one-time capital funding grants. RICA suggests that the term “deployment” more accurately conveys the concept that in areas incapable of supporting networks without Universal Service Support, that such support is needed for both operating and capital costs. Further, especially for an industry with rapidly changing technology and demand features, continued capital investment is required or else a system becomes rapidly obsolete and does not remain “comparable.”

With respect to the multiple provider issue, RICA recognizes that multiple support of duplicate networks is generally not feasible nor desirable, especially as initially implemented by the FCC. RICA long opposed the FCC’s identical support rule which resulted in multiple support for duplicative wireless carriers and little or no support for wireline carriers that would have provided improved service.

Two points must be made, however. First, separate support mechanisms for mobile and fixed networks are needed because, despite some substitutability, such networks have distinct capabilities. Fixed networks cannot do mobility; mobile networks cannot provide the capacity of fiber optic networks that is required to meet consumer demand for streaming video and other high usage applications. Second, a simple “reverse auction” method of choosing among competitive applicants for support will necessarily result in a “race to the bottom” with support being wasted on

non-sustainable projects that ultimately fail to provide rural areas with comparable service. Instead, RICA advocates a selection mechanism that evaluates all relevant factors, including demonstrated commitment to serving rural areas.

c. *What should be the role of states and state commissions?*

RICA believes that while the present Act's assignment of ETC designation to the states (where they have jurisdiction) is appropriate, other areas of the Act need clarification as to state responsibilities and their relation to federal USF.

d. *What should be the role of Joint Boards?*

The advice provided the FCC by joint boards is useful because of the additional perspective provided; however, clarification is needed as to the ongoing rights and responsibilities of the Universal Service Joint Board as well as its relation to Section 410(c) separations joint board. The latter is important because the FCC has obscured the origin of Universal Service as a separations rule and muddied the boundaries between interstate and intra-state revenues and expenses.

e. *Are other programs, such as RUS necessary?*

Yes. The distinction between the use of Universal Service support to assist in recovery of a carrier's operating and capital costs, and the provision of *capital* by a lending program has worked well in the past and should be maintained. The problems of recent origin are the result of the failure and refusal of the FCC to coordinate with the RUS and to understand the effect of potential policy changes on the ability of RUS to supply capital.

f. *How to ensure that the USF is sufficiently funded?*

The FCC's failure to revise its contribution rules while mandating that carriers provide broadband services threatens the viability of its broadband program while dramatically increasing the inequity and discrimination against contributors, in violation of the principle expressed in Section 254(b)(4). By limiting collection of contribution to revenues raised from end users of interstate telecommunications service, and declining pool, and exempting revenues raised from the provision of broadband services that carriers are required to provide, the FCC system is dangerously out of balance. The FCC has finally asked for a Joint Board recommendation, but is unlikely to act on that before 2016. Congress should require reform of contributions in no more than six months' time.

g. *Conversion of present mechanisms to grant programs, vouchers, reverse auctions?*

For reasons stated above, RICA does not recommend grant programs on either the state or federal levels. Consumer vouchers only make sense when there is something to pay for, e.g. food in grocery stores. Where a capital intensive service does not exist because no entity has invested in the necessary plant and operations, vouchers are of no value. The problem with "reverse" auctions, as opposed to properly managed competitive bidding, have been described above.

The current FCC CAF mechanisms remain so much in flux that it is difficult to recommend what should be changed. RICA can point out, however, that carriers receiving universal service support should be required – as a condition of receiving such support – to provide services to all homes and businesses in their service areas. Some have argued that carriers should receive an exemption to serve customers if providing service to all customers is not economically viable. However, that is the

point of universal service funding – that is, to subsidize carriers for providing services to areas where such service is not economically viable. Section 214(e) should make it clear that carriers receiving universal service support to provide universal service cannot “cherry pick” who they serve to maximize their profit.

As the Committee begins its work to rewrite the 1996 Act, the scope of the issues the Committee will consider will become more apparent. The intent of these comments is not to provide a comprehensive platform of ideas and concepts for the nation’s universal service policy, but rather to highlight issues that uniquely impact RICA members and our consumers. We anticipate more dialogue with the Committee as the process begins to evolve next year.

In the meantime, RICA would remind the Committee that the nation’s universal service policies have been effective in expanding and enhancing telecommunications service delivery to rural America. The 1996 Act also helped to trigger a major economic expansion and technology revolution. The FCC’s efforts to “reform” USF in the form of the 2011 USF Transformation Order have resulted in slowing, if not curtailing, investment by many carriers in rural America. Numerous studies have shown these policies have had a direct negative impact on local economies in rural communities across the country. RICA has argued and continues to argue that measures included in the 2011 Transformation Order, as they applied to RICA members, are inconsistent with the 1996 Act.

Consequently, RICA also believes that the Committee should consider incorporating language in the statute that promotes more transparency and accountability by the FCC to the Congress. As the Committee with oversight of the FCC, the House Energy and Commerce Committee may also want to consider requiring the FCC to report periodically on the progress it is making to ensure that consumers in rural areas are receiving comparable services at

comparable rates and to provide an annual assessment of costs to provide universal service – based on current FCC standards – throughout the U.S.

Thank you for this opportunity to comment.



September 19, 2014

Mr. David Redl
Chief Counsel – Communications and Technology
US House Committee on Energy and Commerce
2125 Rayburn HOB
Washington, DC 20515

Dear Mr. Redl:

On December 3, 2013, Chairman Upton and Chairman Walden announced their panels would embark on a year-long initiative to review and ultimately update federal telecommunications policy. On behalf of the Alaska Rural Coalition, CalCom Small Company Committee and Idaho Telecom Alliance (Rural State Association Group – RSAG), GVNW¹ submits the attached comments in response to the fifth white paper universal service questions from the Committee on Modernizing the Communication Act.

Alaska Rural Coalition. The companies of the ARC that are participating in this filing² serve customers in some of the most extreme regions of the United States. Alaska is a uniquely high cost area within which to provide any telecommunications, whether traditional telephony, mobile or broadband. Much of remote Alaska lacks even the basic infrastructure critical to most telecommunications deployment, such as a road system and an intertied power grid.

CalCom Small Company Committee. The California Communications Association (CalCom) is a statewide non-profit trade association with a rich heritage that dates back to 1917. Its small company members³ are committed to the effort to build state of the art networks across California.

Idaho Telecom Alliance. The companies in the Idaho Telecom Alliance⁴ work collectively to support the advancement of their members and promote services to rural telecommunications subscribers throughout the rugged terrain of Idaho.

¹ GVNW is a management consulting firm that provides regulatory and legislative advocacy support for communications carriers in rural America.

² The ARC members in this filing include Arctic Slope Telephone Association Cooperative, Inc.; Bettles Telephone, Inc.; Bristol Bay Telephone Cooperative, Inc.; Bush-Tell, Inc.; Copper Valley Telephone Cooperative, Inc.; OTZ Telephone Cooperative, Inc.; Alaska Telephone Company; and North Country Telephone, Inc.

³ TDS is not participating in this White Paper 5 response.

⁴ Fremont Communications is not participating in this White Paper 5 response.

The challenge facing the Committee as it seeks to rewrite federal telecommunications law is to enable broadband to truly be embedded in the national infrastructure while creating a framework of rates so that service and cost are reasonably comparable. This will require universal service provisions to continue to be an important part of any rewrite effort.

In closing, we express our appreciation to Chairman Upton and Chairman Walden for initiating this important review of our federal telecommunications law. The legislative action related to this effort will impact every customer in each of the states.

Please call me on 503-612-4409 or contact me at jsmith@gvnw.com if you have any questions.

Regards,

s/JHS 9/19/14

Jeffrey H. Smith
President and CEO

Copy to
Chairman Fred Upton, House Energy and Commerce Committee
Ranking Member Henry Waxman
Chairman Greg Walden, Communications and Technology Subcommittee
Ranking Member Anna G. Eshoo

Mr. Ray Baum

**RESPONSE OF THE RURAL STATE ASSOCIATION
GROUP (RSAG) TO HOUSE ENERGY AND COMMERCE
COMMITTEE**

**Modernizing the Communications Act
UNIVERSAL SERVICE POLICY AND THE ROLE OF THE
FEDERAL COMMUNICATIONS COMMISSION**

QUESTIONS FOR STAKEHOLDER COMMENT

Due Date of September 19, 2014

We offer responses to the questions posed by the Committee after sharing an initial overview section. We address each of the eight questions in order for this fifth white paper focusing on universal service policy issues as shown below.

We appreciate the opportunity to offer input on these universal service issues and look forward to any remaining white papers that the Committee intends to release during the 2014 – 2015 time period.

THE ROLE FOR THE FCC IS TO FOCUS ON ENABLING SUSTAINABLE NETWORKS

This section of our response addresses an important end objective for the FCC. As a preface to this section, we share the foundational public policy principles¹ of the Rural State Association Group that guide our responses in every House Energy and Commerce white paper filing:

- 1 – Affordable broadband should be available to all Americans**
- 2 – Federal universal service support should be sufficient and predictable**
- 3 – Policies should promote competition while protecting consumers**
- 4 – Public safety and national security should continue to be a priority**
- 5 – Comparable rates for comparable services**

The Committee must determine in its effort to modernize the Communications Act whether the desire to meet the statutory requirement of universal service in a broadband paradigm is still a relevant public policy concept. We respectfully submit that it remains an important cornerstone for any attempt to enact a forward-looking **national** public policy that will serve the needs of both urban and rural America.

While voice is becoming an “application”, all applications must traverse some form of a network to reach the end user – *it does not happen magically*. Networks provide the infrastructure to deliver services and applications, whereas vouchers are the means to pay for such applications. Without an underlying network, a voucher is a worthless piece of paper.

¹ We included the first 4 principles in our response to the first white paper and added the fifth in the third White Paper.

In order to ensure sustainable networks, we support the concept that networks will be supported by universal service policy. We further assert that networks will 1) be interconnected on just and reasonable terms; 2) that the FCC has the clear and unquestionable ability to step in when those networks do not interconnect seamlessly, and 3) that the important public policy goals of consumer protection, universal service, competition, and public safety are not threatened by the unjust and unreasonable acts or omissions of any given network operator.

Q1. How should Congress define the goals of the Universal Service Fund? Should Congress alter or eliminate any of the six statutory principles, codify either of the principles adopted by the FCC, or add any new principles in response to changes in technology and consumer behavior?

The six statutory principles and two non-statutory principles continue to provide a strong foundation for federal USF policy. Congress hit the mark with its six statutory principles included in Section 254(b). To review, these eight principles include:

- 1 – Quality services should be available at just, reasonable, and affordable rates;*
- 2 – Access to advanced telecommunications and information services should be provided in all regions of the nation;*
- 3 – Consumers in all corners of the country, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas;*
- 4 – All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service;*
- 5 – There should be specific, predictable and sufficient federal and state mechanisms to preserve and advance universal service;*
- 6 – Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services;*
- 7 – Universal service support mechanisms and rules should be competitively neutral; and*
- 8 – Universal service support should be directed where possible to networks that provide advanced services as well as voice services.*

Universal service principles have historically been focused to challenges posed by distance, density and demographics. Principles 1 and 3 address important rate issues for the consumer. Principle 5 language of “specific, predictable and sufficient” is key for rural service territory. Principles 2, 3, 6 and 8 deal with the need for access to changes in technology.

The Committee may wish to consider interjecting the term “broadband” at appropriate junctures in the language for principle number 3.

Q2. Universal service was created to fund buildout in areas incapable of economically supporting network investment. How should our policies address the existence of multiple privately funded networks in many parts of the country that currently receive support?

Relevant to Q2 in this fifth White Paper is that for over at least the past five years, some key facts have been ignored based in large part on the National Broadband Plan and the resultant Transformation Reform Order (TRO) over-reliance on wireless technology to meet rural service metrics. These facts are that there are significant differences between wireline and wireless platforms, as evidenced by the filings that **wireless carriers themselves** have made indicating that a single strand of fiber can carry 1,000 times more bits per second as compared to an enormous 10 GHz wide radio channel. We respectfully submit that the broadband future for our country must sustain both wireless mobility AND a strong foundation of a fiber backbone network. Even the operators within the wireless sector recognize the limitations of the laws of physics. In comments in the FCC's Open Internet docket (GN Docket No. 14-28) filed July 15, 2014, Mobile Future states in part: *"Mobile broadband providers continue to face spectrum limitations – in terms of availability and capacity. A single strand of fiber can carry 1,000 times more bits per second as compared to an enormous 10 GHz wide radio channel . . . spectrum remains a finite resource. The measures taken now to address spectrum limitations will not be sufficient to meet exploding demand caused by more data-intensive applications."* (Mobile Future cited as the basis for the 1,000 times more capacity statistic in footnote 36 of their July, 2014 filing an article from the May 27, 2014 issue of Fierce Wireless by Peter Rysavy entitled: *How will 5G compare to fiber, cable, or DSL?*)

Q3. What is the appropriate role of states and state commissions with respect to universal service policy?

From Q1, Principle 5 states that: *There should be specific, predictable and sufficient federal and state mechanisms to preserve and advance universal service.*

The three states involved with RSAG – Alaska, California, and Idaho – are three of the 24 states² that currently have operational state USF funds. Intrastate USF funds are important and will remain so in terms of funding rural infrastructure.

States have a role in at least two other aspects of universal service. States can and should continue to play an important role in preventing issues³ such as the deliberate lack of completion of calling known as “rural call completion.”

A second aspect of universal service where the state has a potential positive role is in the issue of where and how many interconnection points should be present in the US in the brave new broadband world. In a January 24, 2014 ex parte⁴ with the FCC, AT&T suggests that the model for both Tier 1 IP voice and peering interconnection is 5 to 8 interconnection points in total for the entire country. Under this proposed scenario, the

² United States Government Accountability Office, Report to Congressional Requesters, July 2014, Telecommunications – FCC Should Improve the Accountability and Transparency of High-Cost Funding, page 6 (GAO-14-587).

³ Question 4 in the fourth HEC white paper focused on the troubling issue of rural call completion. At the end of the background section of the 4th White Paper, the Committee offers the observation that “*the federal government has been reluctant to engage in disputes regarding IP interconnection.*” The FCC has been reluctant to bring to an immediate END the problem of rural call completion. It has been over three years since the FCC was made aware of the magnitude of this problem in a series of ex parte letters, and reports from operating companies indicate the problem persists. The very fact that the problem is still not solved despite FCC attempts to enforce existing rules is instructive for this Committee inquiry. Put simply, the “market” is not producing an equitable solution for rural customers in the nation. A need remains for targeted and reasonable regulation to protect both the rural consumer experience as well as promote universal service and public safety. Even with rules in place, problems persist. Removing basic rules would lead on a path to even larger problems and serve to thwart progress to achieving a truly national broadband platform.

⁴ AT&T’s Director – Federal Regulatory filed an ex parte letter in GN Docket No. 13-5, WC Docket Nos. 13-97 and 10-90 that showed the essence of its proposal at presentation slide 11.

use of fewer interconnection points covering much larger geographic areas would result in a significant increase in costs on rural ISPs and ultimately rural consumers and business customers. This increase is caused by the smaller providers having the full responsibility for transporting traffic to interconnection points a great distance from their facilities in such a proposed arrangement, in many cases over facilities owned⁵ by large carriers such as AT&T.

We respectfully suggest to this Committee that underlying networks are not “free” in an IP-enabled paradigm any more than they are in a TDM world. Small or rural ISPs possess little or most likely NO bargaining power with respect to negotiating interconnection terms with large national operators. Without something resembling “rules for the IP road” in place, such cost shifts will not be borne equitably across the networks and such an outcome will serve to drastically impact the goal of universal service in our emerging broadband world. One solution is that it may be necessary to distinguish⁶ between large and small companies.

We also believe that state regulators should participate in the establishment of a baseline set of service performance metrics in order to gauge provider performance regarding the performance of universal service obligations.

⁵ Perhaps this helps explain why AT&T’s July 15, 2014 presentation entitled “The Internet Interconnection Ecosystem” stresses at pages 15-18 that the carriage of traffic is not without cost and that there are cost implications of carrying additional traffic. It is interesting that AT&T has now discovered that bill and keep methodologies may not be universally applicable.

⁶ In the RSAG response to the first White Paper, we offered a recommendation that regulation be bifurcated for large companies and small companies. Specifically, we stated on page 12 of our response to the first White Paper that: *Changes to FCC structure would necessarily follow with decisions made to the platform used to regulate carriers. For example, if the decision is made to shift from regulation of services to regulation by size of entity, then the Bureau designations at the FCC might well change to Large Company Oversight Bureau (LCOB) and Small Company Oversight Bureau (SCOB).*

Q4. What is the appropriate role of the Federal-State Joint Board on Universal Service in a broadband, IP-enabled, largely interstate world? What is the appropriate role of related joint boards, such as the Federal-State Joint Board on Separations or the Federal-State Conference on Advanced Services?

The answer to this question is relatively simple and straightforward. Will national policy take advantage of the boots on the ground knowledge found in each state capitol and seek the input from state stakeholders in a collegial Joint Board forum or will the approach be to dictate from Washington, D.C. what is best for a country that is diverse in terms of geography and customer demographics?

Recent scholarly research⁷ indicates “*the peculiar character of knowledge, which does not, unlike other commodities, get used up as it is consumed and which can be therefore spread widely without losing its value.*” Regulatory knowledge is not unique to Washington, D.C.

Q5. The Universal Service Fund is one of several federal programs that support buildout of communications facilities. Are current programs at other federal agencies, like the National Telecommunications and Information Administration (which oversaw the Broadband Technology Opportunity Program) or the Rural Utility Service (which oversees lending programs and oversaw the Broadband Initiatives Program) necessary?

Both the RUS and NTIA continue to serve a useful purpose. The Rural Utility Service provides an affordable source of borrowing capacity for rural carriers. RUS loans have been an important factor in the deployment of rural network infrastructure. The USF programs have been instrumental in assisting rural carriers meet the loan obligations they have undertaken with RUS. But the first step in the network process is the actual building of the network and access to affordable capital is prerequisite to construction.

⁷ James Surowiecki, *The Wisdom of Crowds*, pages 166-167.

Is the job of deploying infrastructure complete? We would answer no, there is still a need for major rural carrier infrastructure deployment and thus the RUS loan program remains relevant and vital.

As the President's principal adviser on telecommunications and information policy, NTIA has a much broader role than posed in Q5 above with respect to the BTOP program. Engaged in a broad range of efforts to increase broadband penetration, NTIA also conducts economic research and is involved in national spectrum issues.

Q6. How can we ensure that the Universal Service Fund is sufficiently funded to meet its stated goals without growing the fund beyond fiscally responsible levels of spending?

An initial important step would be to determine what should be considered "fiscally responsible levels of spending." While the current FCC has established some hard USF budget caps through 2017, the genesis for the FCC's November, 2011 Transformation Reform Order was the National Broadband Plan that forecasted significant costs would be required if the national policy objective is to achieve a broadband plan that is truly national in scope. We respectfully submit that the current budget caps will need to increase if the customers in our three states hope to be a part of an ongoing and evolving broadband revolution.

In addition, the USF should include an appropriate inflation factor. The majority of other federal programs recognize that annual operating expenses are impacted by inflation. Even the FCC's own internal operating budget seeks increases for changes from inflation.

Q7. Are all of the funds and mechanisms of the current Universal Service Fund necessary in the modern communications marketplace?

The goals and principles of the current funds are necessary, but what is needed now is a transition from the legacy funds to a broadband-based funding mechanism.

The current high cost fund for rural carriers serves as the foundation of network deployment and thus becomes the backbone for all other funds, as it puts infrastructure in place that is required for programs such as the Rural Health Care Program and the Schools and Libraries Program. Without the access to anchor institutions, these other USF efforts would be ineffectual.

The backbone also supports programs such as Lifeline service.

The network backbone also plays a key role in assuring the functionality of important public safety programs. Without this network, one would have to ask the question as to whether the provider is able to sustain performance metrics⁸ for public safety.

⁸ At a minimum, compliance should be achieved for access to 911 or enhanced 911 network requirements; call completion requirements (as rural customers not being able to receive calls will in some cases be a safety issue); Communications Assistance for Law Enforcement Act (CALEA) responsiveness; and Customer Proprietary Network Information (CPNI) requirements.

8. In lieu of the current support mechanisms, could any of the programs be better managed or made more efficient by conversion to:

a. A state block grant program;

This issue has been around for well over a decade and is familiar to key staff members of this Committee. In a July 20, 2005 ex parte⁹ with Ray Baum, the following issues regarding the deficiencies of state block programs were discussed. While the dates noted below in the July, 2005 ex parte excerpt are now out of synch, the problems with state block grants are timeless and continue today and in the future.

ISSUES CONCERNING PROPOSAL TO DISTRIBUTE UNIVERSAL SERVICE FUNDS UNDER A STATE ALLOCATION MECHANISM (July, 2005 ex parte)

NARUC has proposed that federal universal service funds be provided to individual states via a “block grant” basis (State Allocation Mechanism – SAM) for distribution to carriers based on decisions rendered by the state commission. The current block grant proposal offered by the NARUC in its Version 7 proposal raises several important issues.

Predictability. First and foremost, Section 254 mandates that universal service support be “specific, predictable, and sufficient.” Implementing a block grant approach to distributing federal universal service funding allows state commissions with such a large degree of discretion so as to render the achievement of the “predictable” tenet impossible.

In its June 14, 2005 Universal Service NPRM, the FCC is evaluating the use of “formulaic” methods to distribute schools and libraries funds to eliminate certain problems experienced in those programs. The current high-cost fund process is already “formulaic,” and thus not prone to arbitrary decision-making.

Sufficiency. Similarly, the metric of “sufficiency” may well not be achieved. In order for RLECs to continue to deploy rural infrastructure in the highest-cost areas, reliable access to support funding must continue **throughout the investment cycle**. The arbitrary nature of even a well-intended block grant program could severely retard investment in rural areas as lenders will not provide capital, and carriers will be unwilling to assume the degree of uncertainty that would result from block grant funding decisions. Capping the funding at the 2004 level will not promote the deployment of broadband infrastructure in rural areas.

⁹ FCC ex parte filed by Jeffrey H. Smith, GVNW Consulting, for meeting with Oregon PUC Commissioner Ray Baum.

Administration. There are examples of block grant administration that could be problematic if replicated in distributing monies that would otherwise be used for rural infrastructure deployment. For example, in Alaska there are programs related to mothers and children that spend nearly 25% of its funds on administration before any monies reach the intended recipients. State legislatures may be tempted to use support funds to meet operating budgets for state utility commissions.

Jurisdiction. The block grant issue is further complicated with the challenges that would be placed on state regulators in states where the PUC has no or limited authority over certain carriers. In these cases, a conflict would arise between the properly enacted state statutes and the state commission's desire to review certain operating company data that prior to the implementation of a block grant program would not have been subject to state commission review.

b. A consumer-focused voucher program;

Voucher-based programs do not work well at all to incent investment in long-lived infrastructure assets with 20-30 year payoff cycles. Implementing a voucher based program would result in an immediate halt to the vast majority of rural infrastructure deployment.

c. A technology-neutral reverse auction; or,

Reverse auctions provide no incentive for any carrier to invest near the end of the award cycle. The incentive instead is to underbid. And the ultimate loser in that type of scenario is the rural consumer, who will be poorly served if at all.

Implementing a reverse auction for rural USF would be to signal that the starting gun for the "race to the bottom" has been fired.

d. Any other mechanism. No answer will be provided for 8.d. at this time.

As the Committee seeks to modernize the Communications Act, we respectfully request that public safety and universal service issues not be a secondary thought.



September 19, 2014

Electronically Filed Via E-mail

The Honorable Fred Upton
Chairman
U.S. House of Representatives
Committee on Energy & Commerce

2125 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Greg Walden
Chairman
U.S. House of Representatives
Subcommittee on Communications and
Technology

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Re: *Comments of the Rural Wireless Association, Inc. in response to White Paper #5:
Universal Service Policy and the Role of the Federal Communications Commission*

Dear Chairman Upton and Chairman Walden:

The Rural Wireless Association, Inc. (“RWA”),¹ by its attorneys, hereby submits its comments in response to the U.S. House of Representatives Committee on Energy & Commerce (“Committee”) White Paper #5: Universal Service Policy and the Role of the Federal Communications Commission (“FCC” or “Commission”).² RWA appreciates the opportunity to share its views on Universal Service Fund (“USF”) policy as the Committee’s work to update the Communications Act of 1934, as amended, (“the Act”) continues.

¹ The Rural Wireless Association, Inc. is a 501(c)(6) trade association dedicated to promoting wireless opportunities for rural wireless companies who serve rural consumers and those consumers traveling to rural America. RWA’s members are small businesses serving or seeking to serve secondary, tertiary, and rural markets. RWA’s members are comprised of both independent wireless carriers and wireless carriers that are affiliated with rural telephone companies. Each of RWA’s member companies serves fewer than 100,000 subscribers.

² U.S. House of Representatives Committee on Energy & Commerce, *White Paper #5: Universal Service Policy and the Role of the Federal Communications Commission* (rel. Aug. 22, 2014), available at

<http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140822White%20Paper-USF.pdf>.

I. RESPONSES TO WHITE PAPER QUESTIONS

- **How should Congress define the goals of the Universal Service Fund? Should Congress alter or eliminate any of the six statutory principles, codify either of the principles adopted by the FCC, or add any new principles in response to changes in technology and consumer behavior?**

RWA generally agrees with the eight principles on which universal service policy is based,³ but recommends that the statutory principle requiring “[a]ll providers of telecommunications services” to “make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service” found in Section 254(b)(4) of the Act be amended to expand the USF contributor base to include broadband Internet access providers.⁴ The National Broadband Plan recognized that communications services and technologies are converging, and the nation’s communications system will soon be a broadband network which

³ These principles (which include the six statutory principles referenced in the White Paper’s question) include: (1) quality services should be available at just, reasonable, and affordable rates; (2) access to advanced telecommunications and information services should be provided in all regions of the nation; (3) consumers in all corners of the country, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas; (4) all providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service; (5) there should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service; (6) elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services; (7) universal service support mechanisms and rules should be competitively neutral; and (8) universal service support should be directed where possible to networks that provide advanced services as well as voice services. *See* 47 U.S.C. § 254(b).

⁴ 47 U.S.C. § 254(b)(4). The requirement is currently limited only to “providers of *telecommunications services*.” Similarly, section 254(d) of the Act provides that “[e]very *telecommunications carrier* that provides interstate telecommunications services [must] contribute, on an equitable and nondiscriminatory basis, to the...mechanisms...[that] preserve and advance universal service” [emphasis added].

provides multiple Internet Protocol (“IP”)-based services, including voice, data and video.⁵ In the *USF-ICC Transformation Order*, the Commission adopted a new universal service principle regarding “support for advanced services,” and stated that “providing support for broadband networks would further” other statutory goals of USF.⁶ However, the Commission did not shift its contribution methodology to further this new universal service principle. The current USF contribution methodology is not only unsustainable, but also outdated, and should be reformed to include a broader base of contributors. Those that benefit from universal service, including broadband service users, should support USF by covering their fair share of the costs associated with universal service. If broadband services are funded through USF, it is only natural that broadband users be required to support this effort.

- **Universal service was created to fund buildout in areas incapable of economically supporting network investment. How should our policies address the existence of multiple privately funded networks in many parts of the country that currently receive support?**

RWA supports targeting USF support in order to preserve and extend service in those areas that will not be served by the market without governmental support, and has supported the Commission’s USF reform work to that end. However, the existence of a privately funded network adjacent to or nearby an area that receives support does not necessarily indicate that the entire area is economically capable of supporting network investment. Physical networks in rural areas can overlap without being redundant because national carriers often serve only the

⁵ Federal Communications Commission, *Connecting America: The National Broadband Plan* (2010), at p. 59 (“National Broadband Plan”).

⁶ *Connect America Fund et al.*, WC Docket No. 10-90 WC Docket No. 10-90; GN Docket No. 09-51; GN Docket No. 09-51, WC Docket No. 07-135; WC Docket No. 05-337; CC Docket No. 01-92; CC Docket No. 96-45; WC Docket No. 03-109; WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶¶ 43-45 (Nov. 18, 2011) (“*USF/ICC Transformation Order*”)

interstate highways and large population areas and fail to serve more rural and remote populations.

Across the country, rural wireless carriers, supported by USF, provide services to consumers located in or near sparsely populated regions, rural roads and highways, and outdoor recreation areas. In addition to those that live and work in these areas, hundreds of thousands of Americans travel to or through these regions every year and they depend on the infrastructure deployed by these rural wireless carriers for ubiquitous service, which is particularly important when consumers need to contact emergency services. Without universal service support, wireless carriers covering these rural areas that are off the beaten path and often difficult to reach – areas where nationwide carriers serve only the most-traveled highways – will not be able to sustain operations. This loss of universal service funding would significantly harm both competition and public safety operations in these areas.

In addition, universal service support provides access to advanced technologies which is vital to economic development in rural areas. Data-hungry industries like telehealth, farming, ranching, smart grid monitoring, solar and wind farms, and oil and gas development are almost exclusively rural. Because of the costs associated with deploying new technologies like Long Term Evolution (“LTE”) service in rural America, such services have historically been launched first in urban and suburban markets. Without universal service support, rural communities will be left to wait until nationwide, non-subsidized carriers deploy those services and residents will be forced to wait an even longer, indeterminate amount of time for the next cycle of wireless broadband innovation. This lag time will impair economic growth, innovation, and job creation.

The presence of unsubsidized competition in *portions* of a rural carrier’s service area does not and should not negate that carrier’s need for ongoing USF support. Denying USF

support to a rural carrier because a large, national carrier is able to offset the high costs of providing service in portions of a particular rural market and provide service without universal service support would have a detrimental effect on that rural carrier's entire network and the customers it serves. Communications networks in rural, sparsely populated areas are built, maintained and financed differently than those in urban and suburban markets. Most rural networks can be characterized by the 80/20 rule – 80 percent of a rural carrier's customers utilize 20 percent of the network. This leaves 20 percent of the customer base to support 80 percent of the network. It is much easier to recoup advanced network deployment costs when you have 25,000 (or even 5,000) people per square mile in urban and suburban markets, but much more difficult to do so in rural markets that have 100 (or even 5 or 10) people per square mile. Even after 30 years of providing wireless services, the “Big Four” national carriers all depend on roaming and rural LTE build out partners to ensure that their customers have service in sparsely populated regions.⁷ Universal service support is necessary to ensure that service will be available to consumers located in areas in which it would otherwise not be economically viable.

- **The Universal Service Fund is one of several federal programs that support buildout of communications facilities. Are current programs at other federal agencies, like the National Telecommunications and Information Administration (which oversaw the Broadband Technology Opportunities Program) or the Rural Utility Service (which oversees lending programs and oversaw the Broadband Initiatives Program), necessary?**

The U.S. Department of Agriculture's (“USDA”) Rural Utilities Service (“RUS”) plays a crucial role in rural broadband deployment through its telecom loan portfolio that finances

⁷ See “LTE in Rural America,” Verizon Wireless News Center, available at <https://www.verizonwireless.com/aboutus/technology/network.html> (last viewed September 18, 2014); see also Marguerite Reardon, *Sprint Pushes Farther Into Rural America*, CNET (March 26, 2014) (stating that, under a strategic partnership, rural network operators would use Sprint's spectrum to build 4G LTE wireless networks that connect to Sprint's own network)..

network upgrades and deployments in rural areas. The USDA's three RUS programs that support broadband deployment include: the Rural Broadband Access Loan and Loan Guarantee Program, the Community Connect Grant Program, and the Telecommunications Infrastructure Loan Program. The USDA provided over \$7 billion in grants and loans for broadband projects from 2008 through 2012.⁸ RUS's experience in financing broadband projects in rural areas is arguably unparalleled. Its grant and loan programs have been a primary source of funding for small rural, independent telecommunications providers going back to the days of its predecessor, the Rural Electrification Administration. Decades of experience give RUS data which can be used to test assumptions, compare models to reality and validate ideas.

Providing wireless service to consumers located in rural and remote areas, particularly those located in areas with difficult terrain and/or extreme weather conditions, is an expensive endeavor, and rural carriers need access to capital in order to expand and maintain their networks. RUS programs have helped rural providers deploy modern networks in many rural areas where the market simply would not support investment. Reliable access to capital helps rural carriers meet the broadband needs of rural consumers at affordable rates. RUS loans and loan guarantees are an efficient and effective means to expand broadband networks in rural areas. The RUS Broadband Access Loan program and the traditional Telecommunication Infrastructure Loan program are funded with loans that must be paid back with interest – a win/win situation for rural consumers and taxpayers.

USF is inextricably linked to RUS lending. The RUS Telecommunications Infrastructure and Broadband Loan programs finance telecommunications and broadband network construction

⁸ United States Government Accountability Office, *Telecommunications: Projects and Policies Related to Deploying Broadband in Unserved and Underserved Areas*, GAO 14-409 (April 2014).

in some of the most remote and economically distressed regions of the country – high-cost areas. In fact, USF support is a factor in virtually every RUS loan. 99.2% of RUS Telecommunications Infrastructure borrowers receive high-cost USF support.⁹ Rural carriers use universal service funds to repay RUS loans, and consumers in high cost areas reap the benefits of both programs.

Though the programs have completed the phase in which new funds are awarded, the USDA’s Broadband Initiatives Program (“BIP”) and the National Telecommunications and Information Administration’s (“NTIA”) Broadband Technology Opportunities Program (“BTOP”) have been incredibly important to rural America. With the funds that were made available, rural businesses have been able to continue to modernize, launch new services, and expand broadband access to millions of citizens.¹⁰ The BIP program alone is expected to provide broadband access to 2.8 million households, 364,000 businesses, and 32,000 anchor institutions across more than 300,000 square miles. These projects overlap with 31 tribal areas and 125 counties that deal with persistent poverty.¹¹ Numbers like these are impressive on a national

⁹ See Statement on behalf of NTCA – The Rural Broadband Association Before the United States House of Representatives Committee on Agriculture Subcommittee on Livestock, Rural Development, and Credit, *Coordinating Future Investment in Broadband* (July 29, 2014). This figure has remained the same since 2010, when then-RUS Administrator (and former FCC Commissioner) Jonathan Adelstein reported that 476 out of 480 active borrowers in the RUS Telecommunications Infrastructure loan program at that time received high-cost USF support. See Letter from Jonathan Adelstein, Rural Utilities Service Administrator, to The Honorable Julius Genachowski, Chairman, Federal Communications Commission (November 9, 2010) (“Adelstein Letter”).

¹⁰ See e.g. “Success Story: Gervais Telephone Company in Oregon,” USDA, Broadband Initiatives Program Report March 2014, *available at* http://www.rurdev.usda.gov/Reports/RUS_BIPStatusReport_Q1_2014.pdf; “Success Story: Monroe Telephone Company in Oregon, USDA, *available at* <http://www.rurdev.usda.gov/STELPRD4013066.html>; “Merit Network and Bloomingdale Communications Collaborate on BTOP-funded Network in Southwest Michigan,” Merit, *available at* http://www.merit.edu/news/newsarchive/article.php?article=20110927_Bloomingdale.

¹¹ “About the Recovery Act BIP,” USDA, *available at* http://www.rurdev.usda.gov/utp_bip.html (last visited November 18, 2014).

scale, but BIP and BTOP funds are positively impacting hundreds of communities across the country. For example, Bloomingdale Communications, Inc., headquartered in Bloomingdale, MI – with a 2010 U.S. Census population of approximately 3,100 – received more than \$5.6 million in BTOP infrastructure funding. The company has completed its project, and now offers broadband speeds of up to 100 Mbps to 33 community anchor institutions throughout its service area as a result of BTOP funds.¹² The BIP and BTOP programs are making a real difference in rural America by providing homes, hospitals, and schools with the broadband access necessary for modern life.

- **Are all of the funds and mechanisms of the current Universal Service Fund necessary in the modern communications marketplace?**

As noted in the Committee’s White Paper, the USF distributes funding to four programs: (1) the high-cost program, also known as the Connect America Fund (“CAF”); (2) the low-income program, also known as Lifeline; (3) the schools and libraries (“E-Rate”) program; and (4) the rural healthcare program. RWA supports the mission of each of these programs, and the impact that they have in the lives of rural and/or low-income Americans. Each program addresses key issues: high cost of network deployment; access to telecommunications services for individuals who cannot afford service; and access to adequate healthcare and educational resources which would otherwise be subpar due to remote locations and provider shortages.

While USF reforms are necessary (and ongoing),¹³ the wholesale removal of one or more USF program would be detrimental to consumers and possibly fatal to rural carriers that have

¹² Bloomingdale Communications, Inc., 2013 Annual Performance Progress Report for Broadband Infrastructure Projects, *available at* http://www2.ntia.doc.gov/files/grantees/nt10bix5570099_apr2013.pdf.

¹³ *See, e.g., In the Matter of Modernizing the E-rate Program for Schools and Libraries*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 13-184, FCC 14-99 (rel. July 23, 2014).

deployed network resources based on their current understanding of what USF programs would look like for the foreseeable future. One of the single most important USF principles for rural carriers seeking to deploy new services and upgrade existing services is the requirement that USF include “specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.”¹⁴ Rural carriers need predictability to formulate the business decisions that allow them to continue providing services and deploy new services to high-cost areas. Rural carriers plan their equipment purchases and service deployments years in advance and base these business decisions on specific funding they expect to receive through USF. If USF support is not specific and predictable, rural carriers will be hesitant (and in some instances unable) to plan the appropriate maintenance of existing facilities, purchase equipment, and/or deploy new services due to the possibility that the costs may not be supported.

Of particular importance to RWA are plans for the Mobility Fund portion of the CAF. The results of the upcoming Mobility Fund Phase II auction will have a lasting impact on the rural wireless landscape. The Mobility Fund is critical to meeting the wireless needs of rural Americans, and RWA welcomes the Committee’s support of the Mobility Fund when the Committee considers updating the Act.

II. CONCLUSION

Rural wireless carriers provide essential services to consumers located in sparsely populated and remote areas, many of which are prone to severe weather and situated on difficult terrain – the very areas the Universal Service Fund was designed to support. Universal service support is vital to ensuring that our nation’s rural residents have access to the latest technologies at affordable prices, and that America’s communications networks can support economic

¹⁴ 47 U.S.C. § 254(b)(5).

development, education, public health, and emergency services throughout the country. RWA appreciates the work that Committee members and staff have completed thus far to update the Act, and stands ready to assist the Committee with these efforts.

Respectfully submitted,

RURAL WIRELESS ASSOCIATION, INC.

By: */s/ Daryl A. Zakov*

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September 19, 2014

September 19, 2014

Comments Concerning Universal Service Policy and the Role of the Federal Communications Commission (“White Paper”)

The Small Company Coalition (SCC) appreciates Congress’s outreach in matters concerning Universal Service reform and the current interest in refurbishing the 1996 Telecommunications Act in order to better address the realities of modern technology; specifically, broadband Internet.

The SCC is a national group of telecommunications carriers and vendors, and has been involved in the process of USF reform on various levels, including Congressional testimony¹, participation in public proceedings at the Federal Communications Commission (“FCC” or “Commission”)², as well as developing and proposing alternative solutions to some of the problems arising from the Commission’s USF/ICC Transformation Order—solutions which have been grounded in the founding principles of Congress’s 1934 and 1996 Acts, as well as the American Recovery and Reinvestment Act of 2009, which called for the FCC to form a national broadband plan.

The SCC would like to submit for consideration the following responses to Congress’s questions posed in the White Paper.

1. How should Congress define the goals of the Universal Service Fund? Should Congress alter or eliminate any of the six statutory principles, codify either of the principles adopted by the FCC, or add any new principles in response to changes in technology and consumer behavior?

The original precepts of the Universal Service Fund (USF), established by Congress more than a decade and a half ago, bear as much relevance today as they did upon inception. While

¹ Available at the SCC’s website at www.smallcompanycoalition.com.

² Also available at the SCC’s website.

technology is ever-evolving, the necessity for such technology to be commonly available to all Americans remains constant.

Though the USF has not been immune to criticism since its implementation, by and large, the fund has been highly effective in fulfilling Congress's mandate to provide communications technology to all corners of our country.

With this in mind, Congress would be well-advised to retain the current goals of the USF, as they have proven to be effective and prudent as a whole. As noted in the White Paper itself, certain components of the USF have been subject to abuse; however, these aberrations are more indicative of faulty administration than flawed foundation.

In response to the inquiry as to whether or not Congress should codify the two principles proposed by the FCC, it is the SCC's general position that directing universal service support to networks that provide advanced services as well as voice services is a worthy endeavor. Naturally, though, the manner in which this non-voice support is distributed, as well as the matter of which parties will contribute to its funding, will necessitate further discussion once specific proposals are made in the future.

In any case, the directives issued by Congress would be well-served to stress the value of communications *networks*. While forms of communication rapidly change—voice, data, etc.—the networks that carry this information remain largely intact from one technological leap to the next. Even wireless technology, which is often perceived as being the technology of the future, ultimately relies on landline facilities; the same facilities, though updated and upgraded over time, that continue to provide traditional telephone service as well as VoIP technology.

In prescribing the underlying ideology which will fund continued communications build-out across the country, it is imperative that such policy be prudent, but not preclusive. In other words, implementing caps to such funds (as the FCC has done with the transition of uncapped USF to the capped Connect America Fund—“CAF”) laudably encourages responsible spending. However, as a general precaution, if such capping mechanisms adopted by the Commission presumptively disallow investment on the part of private enterprises due to arbitrary benchmarks, then the purpose of universal service is, in effect, stillborn.

To this end, the SCC encourages Congress to consider exercising greater oversight over the FCC to ensure that the specific programs implemented by the Commission do not preemptively stifle private entities’ efforts to provide all Americans with high-quality communications services.

2. Universal service was created to fund build-out in areas incapable of economically supporting network investment. How should our policies address the existence of multiple privately-funded networks in many parts of the country that currently receive support?

The issue of overlap among carriers must be addressed, but at the same time, Carrier-of-Last-Resort (“CoLR”) obligations must be taken into consideration. In many cases, larger carriers may indeed serve *portions* of territories also served by smaller carriers who receive USF support; however, these smaller carriers often serve customers in higher-cost, less-accessible portions of the territory—in other words, locations for which there is no justifiable business case for service absent USF.

This practice by the larger carrier of “cherry-picking” which customers are worth serving and which are not becomes problematic when funding for the smaller carrier—who uses said funding to serve less accessible customers—is categorically eliminated on the basis that there is *some* overlap within the given territory.

As also mentioned, CoLR obligations—which require the carrier to “furnish basic local exchange telecommunications service within a reasonable time period to any person requesting such service within the company’s territory”—are often held by the smaller carrier. Eliminating support for the smaller carrier leaves no other provider in the territory with these obligations and presumably renders more remote/higher-cost customers without basic voice service, as there is no business case—and no obligation—for the larger carrier to serve them.

Finally, the SCC recommends that Congress explore further the definition of “overlap” in regard to “multiple privately-funded carriers serving a territory that also receives subsidized support.” As alluded to in the previous paragraph, the current definition declares an area to be in “overlap” even if a competing carrier serves only one customer in the area.

3. What is the appropriate role of states and state commissions with respect to universal service policy?

There is a necessity for states to indeed play a role in administering universal service policy, as a degree of localization—as opposed to the one-size-fits-all federal approach—which is generally beneficial to independent rural carriers. Along these lines, the states are in a better position to understand the unique geographical, socio-economical, and other challenges encountered by small companies charged with the task of building and maintaining the broadband network in the rural territories they serve. The states are also in a better position to assess the need for broadband services by their rural citizens and then take the appropriate action to help ensure that those needs are being met.

4. What is the appropriate role of the Federal-State Joint Board on Universal Service in a broadband, IP-enabled, largely interstate world? What is the appropriate role of related joint boards, such as the Federal-State Joint Board on Separations or the Federal-State Conference on Advanced Services?

The Federal-State Joint Board on Universal Service was established to make recommendations to implement the universal service provisions of the Telecommunications Act of 1996 (the “Act”). The Joint Board, which is comprised of FCC Commissioners, State Utility Commissioners, and a consumer advocate representative, should continue to play a role in providing recommendations concerning the universal service contribution methodology. While there have been many technological changes since the Act became law, the underlying business concepts and the importance of the universal service program remain the same. As mentioned in the previous response, it is important that the FCC work very closely with the states to develop solutions that address the unique circumstances of each state.

5. The Universal Service Fund is one of several federal programs that support buildout of communications facilities. Are current programs at other federal agencies, like the National Telecommunications and Information Administration (which oversaw the Broadband Technology Opportunities Program) or the Rural Utility Service (which oversees lending programs and oversaw the Broadband Initiatives Program) necessary?

Rural Utility Service (“RUS”) programs are particularly vital to Tribal companies, as their status as sovereign nations, and subsequently disallowing collateralization of land, prevents them from borrowing from traditional banks. Furthermore, in addition to being “necessary,” RUS lending programs have been particularly successful, with a default rate of less than 1%³. These loans are paid back with interest, and as such, have provided revenue for the federal government.

6. How can we ensure that the Universal Service Fund is sufficiently funded to meet its stated goals without growing the fund beyond fiscally responsible levels of spending?

This quandary may best be addressed by considering the concept of “trigger” mechanisms, which have been suggested to the FCC on numerous occasions. The premise of these “triggers” is to offer benchmarks for further review if a carrier’s costs appear to be

³ See remarks by Tom Vilsack, Secretary of the U.S. Department of Agriculture (USDA) and Jonathan S. Adelstein, Administrator, RUS, USDA, at: www.usda.gov/wps/portal/usda/usdahome?contentid=2010/08/0396.xml.

excessive; however, these costs are not presumptively disallowed by a hard, arbitrary cap. Such rigid capping mechanisms are a danger to build-out investment.

Additionally, this question touches upon the beginnings of contribution reform—that is to say, who contributes to universal service—and the SCC believes that all users of the network should pay for such usage. In bringing new entities into the contributions pool, the threat of irresponsible levels of spending is reduced.

7. Are all of the funds and mechanisms of the current Universal Service Fund necessary in the modern communications marketplace?

The focus of any universal service funding mechanism must be placed on the desired end result, which is to help ensure that all Americans, regardless of where they may live, have access to high-quality communications services at affordable rates. The concept of Universal Service originates from the 1934 Communications Act, which states, in part, the goal of “regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges...” The founding of the FCC may also be found therein, under the obligation to “execute and enforce the provisions of this Act.”

The Act provides the first major overhaul of the initial 1934 Act and explicitly establishes the USF as a means of facilitating telecommunications and Internet expansion to reach rural and hard-to-serve Americans.

The FCC’s Order on USF/Intercarrier Compensation (ICC) Transformation, initially introduced in November of 2011, executes a phase-down and elimination process of USF programs, while transitioning to the new Connect America Fund (CAF). The explicit mechanisms contained in the USF are not replaced by similar cost recovery mechanisms in the

CAF, resulting in a net loss for rural-serving carriers previously receiving this vital support. Additionally, the utter lack of any grandfather clause to foster prior obligations held by these carriers jeopardizes both their ability to remain in business and the continuation of telecommunications and Internet service provided to rural and “hard-to-reach” consumers.

With the above in mind, any re-write of the Act should take into consideration the following:

- In purest theoretical terms and in practical application, the USF is not a tax, nor is it Congressionally-appropriated federal money, but a user fee. As the implement of an executive agency (the FCC), which does not possess constitutional authority to tax, the USF is a federally-*managed* pool of money.
- *Texas Public Utility Counsel, et al vs. FCC (1997)* voiced many of the initial, fundamental objections to the explicit USF, partially based upon these constitutional objections. On this matter, the 5th Circuit Court ruled in favor of the FCC, thereby establishing the mechanism as a user fee—*not* a tax. In a convenient reversal of ideology, the Commission has adopted a view of USF as “federal money,” which fuels the many calls for “accountability and transparency” one may find scattered about the USF/ICC Transformation Order. Note that the industry is not disputing the requirement for accountability and transparency, which has been in place since the beginning of the fund.
- Unlike taxpayer dollars, Universal Service funding is not and *cannot* be used for general purposes; neither does it contribute to or offset the national deficit. It is collected entirely from users of the national telecommunications and broadband network. It is directly reinvested into the continued expansion and maintenance of the network, with particular

emphasis on reaching those Americans who live in areas that would never be served (due to lack of a sound business case) without USF support.

- Contrary to the argument that some are making, eliminating this program will not reduce “government spending”. It will simply and effectively cripple small carriers across the nation, leaving Americans in rural high-cost, low-density areas hoping for urban-centered larger carriers to invest in the abandoned areas with no chance for cost recovery. In the improbable event that such charity may occur, one would reasonably expect service standards to hover at regulated minimums.
- The Universal Service precept directly answers the constitutional directive to “provide for the common Defence and general Welfare.” Similar to the interstate highway system, all Americans benefit individually or collectively from the national connectivity established through USF-driven development. However, unlike federal roadways, for which some money is taxed from the people whether or not they own an automobile, the USF is funded *entirely* by communications (Internet and telephone) users and providers.
- Telephones (cellular or landline) and internet modems are worthless without the network within which they operate. Therefore, purchasing a phone or modem entails paying for construction and maintenance of the existing network that gives value to such phone or modem. The federally-managed USF is the system of ensuring that payments are made for the appropriate availability and use of this network.
- As opposed to the misconception that urban customers “subsidize” the service of rural customers, the reality is that all consumers pay for a nationally-connected network. This network is available for originating or receiving calls (or enjoying Internet connection) to and from areas that, absent USF, would otherwise be unavailable. The economic

implications are tremendous, as it facilitates the interdependence between rural and urban America. While rural regions account for only 16% of the population, they produce our food, fiber, domestic energy and 88% of our renewable water resources. Our parks and forests are predominantly rural as well. The military gets 44% of its members from rural America. Add to this the individual benefits all Americans experience as a result of national connectivity, such as Internet/telecommunications capabilities while traveling or vacationing, as well as the ability to engage in interstate commerce, and the necessity for continued USF support is undeniable.

8. In lieu of the current support mechanisms, could any of the programs be better managed or made more efficient by conversion to:

- a. A state block grant program;*
- b. A consumer-focused voucher program;*
- c. A technology-neutral reverse auction; or,*
- d. Any other mechanism.*

To the extent possible, the USF support mechanisms should be based on sound business principles and should avoid artificial incentives such as state block grants, consumer vouchers, and reverse auctions. Simply stated, in order to help alleviate pressure on the universal service funding mechanism, consideration should be given to implementing a methodology whereby the carriers responsible for building and maintaining the rural broadband network receive some form of compensation from all users of such network. Stated another way, the Universal Service funding mechanisms should be based on the sound business concept that all users of the broadband network pay a user-fee based on the benefit derived from such use.

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September 19, 2014

Via Email

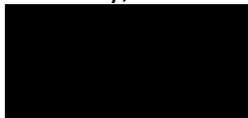
Mr. David Redl
U.S. House of Representatives
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Re: White Paper #5
Universal Service

Dear Mr. Redl:

On behalf of Smith Bagley, Inc., d/b/a Cellular One of Northeast Arizona, I have attached responses to White Paper #5, released August 22, 2014. Should you have any questions or wish to have the company provide data for your record, please contact me directly.

Sincerely,

A black rectangular redaction box covering the signature of David LaFuria.

David LaFuria

cc: Justin E. Hinkle, President

Smith Bagley, Inc., d/b/a Cellular One of Northeast Arizona Response to White Paper #5

1. How should Congress define the goals of the Universal Service Fund? Should Congress alter or eliminate any of the six statutory principles, codify either of the principles adopted by the FCC, or add any new principles in response to changes in technology and consumer behavior?

At the outset, it is important for the Committee to understand that for nearly 25 years, SBI has provided commercial mobile wireless services to some of the most remote areas in the United States. SBI serves the Navajo Nation, the Ramah Navajo, the White Mountain Apache, the Pueblo of Zuni, and the Hopi Nation. The Navajo Nation alone is roughly the size of West Virginia, with most areas having less than 5 people per square mile. Many areas lack basic services and according to the U.S. Census, the demographic statistics for poverty (roughly 50%), unemployment (roughly 30%), and access to basic services are among the most difficult in the nation. Serving these areas requires diligence, creativity and commitment.

It is critical that Congress retain the principle that “Consumers in all corners of the country, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.”

SBI asks Congress to eliminate the anachronistic distinction between telecommunications and information services, which is necessary as the nation makes the transition to all-IP networks.

The FCC’s principle that support mechanisms should be competitively neutral should be codified and made mandatory. Specifically, all support mechanisms must be competitively and technologically neutral, so that no class of carrier or technology is disadvantaged.

Over the years, the FCC has made significant efforts to improve the quality of services available on our nation’s Tribal Lands. SBI favors a new principle that directs the FCC to specifically ensure that universal service mechanisms support high-quality telecommunications networks on tribal lands, as well as promoting access by low-income tribal citizens.

2. Universal service was created to fund buildout in areas incapable of economically supporting network investment. How should our policies address the existence of multiple privately funded networks in many parts of the country that currently receive support?

The 1996 Act, passed on a bipartisan basis, by a Republican Congress, and signed by a Democratic president, was uniformly a pro-competitive statute. By allowing the FCC and states to designate multiple ETCs, and by making support for consumers and not for individual classes of carrier, Congress set up a mechanism that had a dual purpose: (1) to preserve and advance universal service and (2) to promote competition. Before 1996, only ILECs had access to universal service support, and as a result there was virtually no competitive service on the Tribal Lands SBI serves, or in most of the nation's rural areas.

Unfortunately, the statute did not provide the FCC with sufficient direction, and some began to define universal service as *only* for the provision of funds to build a single network. The 2011 CAF Order served to cement the incumbent ILECs into place by greatly limiting the opportunity for competitors to access Connect America Fund ("CAF") support, some 15 years after the Act's adoption.

SBI supports a voucher system for high-cost support. The FCC would be directed to identify high-cost areas with some reasonable granularity and then determine the amount of support needed in such area for a connection to the broadband network, as defined by the FCC. Consumers would be given a credit, which could be applied to any provider's invoice.

Under this mechanism, any carrier investing in network facilities could compete for the customer. The amount of support in any area would be fixed, and all carriers would be treated as carriers of last resort, i.e., having to respond to all reasonable requests for service. The amount of support would be set at a level sufficient to enable regulators to fund service to all locations within a supported area.

This mechanism would have the advantage of promoting efficient and competitive entry by those with lower cost structures, better customer service, or new technologies that consumers prefer.

3. What is the appropriate role of states and state commissions with respect to universal service policy?

Today, the FCC and a number of states have high cost universal service funds. Some state funds limit support to a so-called “access replacement” mechanism that is manifestly contrary to the 1996 Act. Such mechanisms are not competitively neutral or portable to competing carriers, and do nothing more than limit competition by subsidizing landline carrier rates to artificially low levels.

If universal service is to be a cooperative federal and state responsibility, then Congress should strengthen Section 253, which currently requires all state universal service mechanisms to be competitively neutral. Congress should require state mechanisms to be made available to consumers, not to companies, so that states do not stifle competitive entry or confer artificial subsidies to any class of carrier.

6. How can we ensure that the Universal Service Fund is sufficiently funded to meet its stated goals without growing the fund beyond fiscally responsible levels of spending?

There should be a budget for achieving the stated Congressional goals, and a timeline for action within a reasonable time frame. Ideally, all users of the network would contribute on an equitable basis. Indeed, that is what Congress stated in Section 254 (d) of the current statute, "Every telecommunications carrier that provides interstate telecommunications services shall contribute, **on an equitable and nondiscriminatory basis**, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." (emphasis added).

SBI does not view that portion of universal service that invests in our nation's infrastructure as spending. High quality telecommunications networks are quickly becoming a vital component of our ability as a nation to educate the population, deliver health care, and foster economic development, much the same as our roads or electrical grid. Funds spent on towers, and fiber and radios are investments that deliver a significant multiplier effect in our economy, increasing business opportunities, jobs, and public safety.

Accordingly, SBI respectfully asks Congress to use every tool within its power to determine what it will cost to deliver high-quality mobile broadband throughout the areas where our citizens live, work and travel, and then decide how long it should take to accomplish that task. Only then will the size of the universal service fund become apparent, and only then can Congress think about whether the current mechanism is up to the task, or can be reformed. With a fulsome record, Congress can also make the important public policy decision whether a temporarily large fund should be developed to accelerate rural infrastructure deployment, or whether the current state of affairs is sufficient to permit investment at a lower level.

7. Are all of the funds and mechanisms of the current Universal Service Fund necessary in the modern communications marketplace?

SBI participates in the Mobility Fund (formerly, high-cost program), the Lifeline Program, and the Schools and Libraries Program. It does not participate in the Rural Health Care Program. If allowed, SBI would participate in the Connect America Fund (CAF).

On Tribal Lands, it has been conclusively proven that the high-cost support mechanism, which has now been divided into the CAF and Mobility Fund, as well as the Lifeline Program, are essential. When SBI began providing service to Tribal Lands, well before 2000, less than half of the households on The Navajo Nation and the Hopi Nation had access to telephone service of any kind. With the help of federal high-cost funding and Lifeline Fund support, the 2010 Census reveals that household telephone penetration is now approaching 80%, with almost all of that gain due to wireless deployment.

SBI has used high-cost support to construct facilities in areas that would not otherwise have received investment. SBI's ability to offer Lifeline and Link-up discounts to low-income citizens on Tribal Lands has been critical to increasing telephone penetration. In areas where SBI serves, most low-income households do not have a checking account, a credit card, and have no other banking relationship. They operate 100% in cash.

In large portions of SBI's tribal service area, there is no United States Postal delivery service. Many citizens use share a post office box, which is often located many miles from home.

A number of residential locations lack access to basic services, such as electricity. In such areas, the only way to recharge a cell phone is a solar device or an automobile charger. In some situations, an elderly person depends upon a younger relative to change out cell phone batteries on a regular basis.

It is important for the Committee to understand that, in the earliest days of cellular telephony, SBI offered a phone plan at a \$10 price point, in order to promote safety for citizens of tribal lands living in remote areas. Unfortunately, the service was unsuccessful, because the number of Tribal households able to afford \$10 per month was very small.

In response to extraordinarily low telephone penetration rates, the FCC in 2001 increased basic Lifeline and Linkup support on Tribal Lands, a policy that remains in place today. Increased Lifeline and Linkup on Tribal Lands has been critical to providing access for thousands of tribal households that would not otherwise receive service.

SBI understands that Tribal Lands have been defined by the FCC to include all of Alaska and all but seven counties in Oklahoma. Congress does have authority to define Tribal Lands for purposes of the Lifeline program, and SBI asks the Committee to look carefully at this issue, to be sure that tribal Lifeline support continues to be directed at the areas where it is most needed.

SBI also urges Congress to make clear that both high-cost and Lifeline support mechanisms are used to promote broadband and other advanced services on Tribal Lands. There is tremendous need for broadband inside tribal homes, on roads where people travel, and in anchor institutions such as schools, libraries, and chapter houses.

SBI has also participated in the FCC's Schools and Libraries Program, and it hopes to continue to into the future. It is possible for wireless carriers such as SBI to build high quality connections to schools, libraries, and anchor institutions, and the FCC's rules currently permit SBI to compete to provide such services. Participation by carriers such as SBI ensures competition for services and stretches program dollars farther. In SBI's experience, each of the programs have gone a long way to solving some of the most intractable issues on Tribal Lands that it serves.

In sum, traditional business models do not work on tribal lands that SBI serves. The bulk of SBI's towers and infrastructure would not have been built without these federal programs. The FCC's decision to drastically reduce high-cost support on Tribal Lands has reduced SBI's ability to construct new towers and threatens to decommission cell sites built in remote areas that depend on some support to continue operating. New towers, especially those served by fiber, are an anchor facility that enable tremendous public safety, economic development, and educational opportunities. SBI's experience with three of the four mechanisms reveal them to be critical to its ability to offer high-quality services on Tribal Lands.

8. In lieu of the current support mechanisms, could any of the programs be better managed or made more efficient by conversion to:
- a. A state block grant program;
 - b. A consumer-focused voucher program;
 - c. A technology-neutral reverse auction; or,
 - d. Any other mechanism.

As stated above, SBI believes that a consumer-focused voucher program is a viable option for the future of high-cost support. In order to provide an incentive for carriers to extend their networks into areas where service is needed, the universal service mechanism can be structured so that consumers in underserved areas receive a voucher that can be used to purchase basic telephone service, or broadband. Empowering consumers to choose will provide carriers with a market-based incentive to build networks, to deliver high quality service, in order to capture customers and any associated support.

Whatever Congress decides, SBI strongly endorses competitive and technological neutrality, to empower consumers to choose the services that best suit their needs. For many decades, competitors have been placed at a distinct disadvantage by federal and state policies protecting incumbents from competitive entry. We are reaching a tipping point, where competitive networks have developed sufficiently to provide many rural citizens with access to competitive voice and broadband services. Any mechanism that enables consumers living in underserved areas to have access to one competitive provider, or choose their service provider from among several providers, will deliver lower prices and higher service quality.

Finally, SBI asks Congress to recognize that Tribal Lands such as those served by SBI are special cases that require special attention to improve critical infrastructure. The company is available to assist the Committee by providing substantial record evidence to demonstrate the need for a robust universal service mechanism for Tribal Lands.

We thank you for the opportunity to provide these comments.