

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

<b>Rural Digital Opportunity Fund</b>	)	<b>Docket No. 19-126</b>
	)	
<b>Connect America Fund</b>	)	<b>Docket No. 10-90</b>

**REPLY OF NTCA-THE RURAL BROADBAND ASSOCIATION  
TO PETITION FOR CLARIFICATION OR,  
IN THE ALTERNATIVE, RECONSIDERATION**

To the Commission:

**I. INTRODUCTION**

NTCA-The Rural Broadband Association (NTCA)<sup>1</sup> hereby submits this Reply to the Petition for Reconsideration or, in the Alternative, Reconsideration (Petition) in the above-captioned proceeding. Heartland Telecommunications Company of Iowa d/b/a Premier Communications (Premier or Petitioner) requests the Commission to clarify that price cap areas that have exceeded prior 25/3 Mbps baseline buildout targets will not be foreclosed from eligibility for continued support for those networks in Phase II of the Rural Digital Opportunity Fund (RDOF) or, in the alternative, to reconsider the decision that Phase II funding will be available only in areas lacking 25/3 Mbps broadband service.<sup>2</sup> NTCA notes that no party filed in opposition to the Petition. For the reasons set forth herein, NTCA supports the Petition.

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<sup>1</sup> NTCA represents approximately 850 independent, community-based commercial and cooperative telecommunications providers and more than 400 other firms that support or are themselves engaged in the provision of communications services in the most rural portions of America. All NTCA service provider members are rural voice and broadband providers, and many provide fixed and mobile wireless, video, and other competitive services in rural America as well.

<sup>2</sup> *Rural Digital Opportunity Fund, Connect America Fund: Petition for Clarification or, in the Alternative, Reconsideration of Heartland Telecommunications Company of Iowa d/b/a Premier Communications*, Docket Nos. 19-126, 10-90 (April 9, 2020).

## II. DISCUSSION

### A. THE STATUTE REQUIRES BOTH THE PRESERVATION AND ADVANCEMENT OF UNIVERSAL SERVICE.

As set forth in the Petition, the RDOF Order<sup>3</sup> appears to leave open the question of who will be eligible to participate in Phase II of the RDOF. This is an altogether different question than that posed by other petitioners who seek reconsideration of Phase I issues.<sup>4</sup> To contrast, Premier does not seek further Commission statements on Phase I eligibility. Rather, Premier seeks clarification on issues relating to Phase II, an inquiry that is in fact supported by the Commission's own statement that there will be "an additional opportunity to comment on how best to target Phase II support."<sup>5</sup> NTCA supports the relief sought by Premier, namely, clarification that the list of Phase II excluded areas presented in the RDOF Order is not exclusive, and that price cap areas with access to 25/3 Mbps will not be barred from the prospect of ongoing support merely because the providers in those areas did more than was asked pursuant to prior buildout obligations. Both law and policy support the relief requested in the Petition.

NTCA commends Commission efforts toward further deployment of broadband. Notably, the Commission's recognition that networks must "stand the test of the time"<sup>6</sup> establishes a

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<sup>3</sup> *Rural Digital Opportunity Fund: Report and Order*, Docket No. 19-126, FCC 20-5 (2019) (RDOF Order).

<sup>4</sup> See, *Rural Digital Opportunity Fund, Connect America Fund: Petition for Reconsideration of Illinois Office of Broadband*, Docket Nos. 19-126, 10-90 (April 9, 2020); *Rural Digital Opportunity Fund, Connect America Fund: Petition for Reconsideration of Vermont Department of Public Service*, Docket Nos. 19-126, 10-90 (April 3, 2020).

<sup>5</sup> RDOF Order at para. 9.

<sup>6</sup> *Rural Digital Opportunity Fund: Report and Order*, Docket No. 19-126, FCC 20-5, at para. 2 (2019) (RDOF Order).

hallmark that reflects the statutory mandate aimed at the “preservation and advancement” of universal service.<sup>7</sup> And, inasmuch as Congress defined universal service as “an evolving level” of service,<sup>8</sup> the “test of time” must contemplate not simply durability but *scalability* to meet future needs. Those future needs are informed by projections that in less than three years, the average fixed broadband speed in North America will reach more than 140 Mbps (a 2.5-fold increase from 2018).<sup>9</sup> Accordingly, the RDOF Order, with its minimum capability requirements and preferences for low latency services, stands to fortify a broadband-capable future for the Nation. That goal will be affirmed by granting the relief sought by the Premier, namely, ensuring that areas that warrant support to preserve and advance universal service will not be foreclosed from participating in Phase II.

The statute establishes a clear mandate for both the “preservation” and “advancement” of universal service. The semantic canons of statutory interpretation include the rule against surplusage, specifically, the proposition that every word in the statute is to be accorded meaning and operative effect.<sup>10</sup> Rules must ensure implementation of the *complete* statutory mandate.<sup>11</sup> Accordingly, policy must therefore support both “preservation” and “advancement” of universal

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<sup>7</sup> See, 47 U.S.C. § 254(b).

<sup>8</sup> See, 47 U.S.C. § 254(c)(1).

<sup>9</sup> CISCO Annual Internet Report (2018-2023) at 4 (2020) (<https://www.cisco.com/c/en/us/solutions/collateral/executive-perspectives/annual-internet-report/white-paper-c11-741490.pdf>) (last visited May 22, 2020).

<sup>10</sup> See, *i.e.*, *Bailey v. United States*, 516 U.S. 137, 138-139 (1995) (examining 18 U.S.C. § 924(c)(1) and finding specific meaning for each of the terms, “uses or carries a firearm” during the commission of a violent or drug-related crime, noting that the interpretation must preserve distinct and separate roles for “uses” and “carries”).

<sup>11</sup> See, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2573 (2013) (finding that statutory measures to avoid a family “breakup” would not apply where a child had been abandoned by the biological father prior to birth).

service. Moreover, these goals stand side-by-side without indication that one goal should be elevated above the other; each must be fulfilled.<sup>12</sup> Having then established the distinct and independent need to both preserve and advance universal service, the task of defining those terms must be addressed.

In interpreting the meaning of “preservation” and “advancement,” one relies on the “ordinary meaning” canon, namely, that words are to be understood in their ordinary meaning<sup>13</sup> unless their context indicates that they bear a different specific meaning, or if the plain meaning would suggest an absurd result.<sup>14</sup> In the instant context, it is apparent that the “ordinary meaning” canon applies. To wit, the “evolving definition” of universal service latches neatly to the mandate that orders the “advancement” of universal service. “Advancement” means not only to *extend* deployment to where there is no service, but to also *expand* deployment to meet the “evolving definition.” Finally, Congress recognized communications networks require “care and feeding,” maintenance and upkeep, to preserve their ability to sustain service – and to ensure that such service is reasonably comparable in price and quality to that available in urban areas.<sup>15</sup> Put

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<sup>12</sup> *Cf. Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10<sup>th</sup> Cir. 2001). Section 254(b)(1) provides that the Commission “shall base policies for the preservation *and* advancement of universal service” (emphasis added) on a series of principles. The *Qwest* court distinguished that “each of the principles in § 254(b) internally is phrased in terms of ‘should,’ [which] indicates a recommended course of action, but does not itself imply the obligation associated with ‘shall.’”

<sup>13</sup> *See, i.e., Estate of Cowart vs. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992) (finding a “person entitled to compensation” includes a person with a valid claim even if that person is not receiving compensation or has not had an adjudication in his favor; a valid claim within the context of the statute is sufficient).

<sup>14</sup> *See, Green vs. Bock Laundry Machine Co.*, 490 U.S. 504, 510-11 (1989) (finding the Court would not interpret a rule in manner that would “deny a civil plaintiff the same right to impeach an adversary’s testimony that it grants to a civil defendant”).

<sup>15</sup> For purposes of this discussion, maintenance can be defined to include those costs which are not accounted for as capital expenditures. These may include labor and materials to maintain plant; network operations; and customer service. *See, Rural Broadband Economics: A Review of Rural Subsidies*, Steve G. Parsons, James Stegman, CostQuest Associates, at 7 (2018) (CostQuest) (available at

another way, it is not enough to satisfy the statute to provide support such that a network will merely be built in a given area; the preservation of universal service requires expressly a separate but related assessment of what support is needed to ensure that services on that network will continue to meet the statutory standard of reasonable comparability. In sum, then, the statute presents a clear policy path to meet several objectives: to *preserve and maintain* service where it is deployed; to *extend* service where it is not; and to *expand capabilities* to meet the “evolving definition” of universal service. Complementing Phase I strategies to focus on truly unserved areas with the Phase II clarification sought by the Petition will ensure a comprehensive program that meets the complete statutory mandate of Section 254(b).

**B. THE COMMISSION HAS RECOGNIZED THE DUAL MANDATES TO BOTH PRESERVE AND ADVANCE UNIVERSAL SERVICE.**

The Commission has previously recognized ongoing costs of “preserving” networks. By way of example, when the Commission extended model based support to rate-of-return carriers through A-CAM funding, the Commission offered that support to carriers whose networks exceeded then-current standards of 10/1.<sup>16</sup> Although the Commission excluded some areas from eligibility in that auction, it clarified that its approach “in no indicates a belief that once networks are deployed, they no longer require support.”<sup>17</sup> Rather, the Commission noted that carriers excluded from A-CAM could continue to obtain non-model support through so-called legacy

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[https://www.ntca.org/sites/default/files/documents/2018-07/CQA-RuralBroadbandEconomics-AReviewofRuralSubsidies\\_FinalV07112018.pdf](https://www.ntca.org/sites/default/files/documents/2018-07/CQA-RuralBroadbandEconomics-AReviewofRuralSubsidies_FinalV07112018.pdf) (last visited May 26, 2020).

<sup>16</sup> *Connect America Fund; ETC Annual Reports and Certifications; Developing a Unified Intercarrier Compensation Regime: Report and Order Developing a Unified Intercarrier Compensation Regime: Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking*, Docket Nos. 10-90, 14-58, 01-92, FCC 16-33, at para. 56 (2016).

<sup>17</sup> *Id.*

mechanisms.<sup>18</sup> The Commission reiterated this approach when second A-CAM offers were made several years later, explaining its “recogni[tion] that areas partially or fully-deployed fiber-to-the-premises may still require high-cost support to maintain existing service.”<sup>19</sup> Accordingly, it is clear that the Commission indeed recognizes the need for ongoing support to preserve universal service in areas even after networks have been deployed.

While discrete elements of a policy initiative may each respectively address only partial elements of a multi-faceted statutory framework, fulfillment of the overall mandate is achieved only when those separate elements combine to form a comprehensive framework. In Phase I, the Commission has crafted a balanced strategy aimed at advancing universal service by (a) focusing on areas where broadband is not yet deployed and (b) establishing a minimum capability threshold that reflects increased demand for broadband speeds. Clarification that price cap areas will be eligible to participate in Phase II where support is found to be necessary to sustain existing networks that may exceed 25/3 Mbps will complete that strategy by ensuring those areas can “preserve” universal service where it exists today.<sup>20</sup> In these regards, clarification that the Commission will consider in RDOF Phase II the need for continued support in areas that may have service at or above 25/3 Mbps but nonetheless still require support to sustain such service

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<sup>18</sup> *Id.*

<sup>19</sup> *Connect America Fund; ETC Annual Reports and Certifications; Establishing Just and Reasonable Rates for Local Exchange Carriers; Developing a Unified Inter-carrier Compensation Regime: Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration*, Docket Nos. 10-90, 14-58, 07-135, 01-92, FCC 18-176, at para. 45 (2018) (ACAM II).

<sup>20</sup> NTCA notes, as well, that proper leveraging of assets should also permit “advancement” in those areas, as resources that would otherwise be allocated toward maintenance can be redirected toward building network capabilities.

levels at reasonably comparable rates will complete a comprehensive regulatory strategy to preserve and advance universal service in adherence to each element of the statute.

**C. PHASE II ELIGIBILITY DOES NOT COMPEL A BINARY DECISION.**

Phase II of the RDOF does not present a binary choice to elevate advancement over preservation. Rather, the Commission was clear that Phase I of the RDOF will prioritize unserved areas, thereby meeting a critical “advancement” element of the statute by bringing the defined level of service to where it does not yet exist. And, even as Phase II carries that mandate forward by continuing to provide opportunities for additional unserved locations, it would likewise fulfill the mandate of preserving universal service by clarifying that preservation of universal service is a co-equal goal under the statute. In fact, it has been estimated that non-cap ex, operational costs for rural broadband networks account for more than 50% of provider costs on an annual basis.<sup>21</sup> As recognized by the Commission, networks require on-going maintenance and support.<sup>22</sup>

The risks of declaring “mission accomplished” merely because a network offers service in excess of 25/3 Mbps, without any further consideration of the sustainability of that network, are brought sharply into focus when the consumer impact is considered. Recent months have demonstrated the sea change in broadband usage for education, telework and health care. As of May 15, 2020, 48 states, four U.S. territories and the District of Columbia had “ordered or recommended school building closures . . . affecting more than 50 million public school

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<sup>21</sup> See, CostQuest at fig.1, p.9.

<sup>22</sup> See, ACAM II, n.20, *supra*, and accompanying text.

students” (that number does not include private school students).<sup>23</sup> According to Pew Research, by late March 2020, the same share of American workers who are estimated to have jobs that can be “teleworked” (40%) indeed reported that they had worked from home after COVID 19-related closures.<sup>24</sup> And, the Commission, acting upon Congressional action in the CARES Act, is rapidly implementing a COVID 19 telehealth program.<sup>25</sup> Critically, the spotlight on these applications is not anticipated to fade even as coronavirus concerns decrease.<sup>26</sup> It can be expected that demand for and use of broadband-enabled applications for these and other needs will be higher than before the current crisis.

Excluding areas served by 25/3 Mbps from Phase II will lead to inefficient incentives. In a such a regime, carriers that deployed the bare minimum would retain eligibility to access additional funding, while providers that leverage high-cost support to deploy more advanced networks would be left in the unenviable position of hitting “pause” not only on the opportunity to build networks that “will stand the test of time” but also an ability to maintain that which has

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<sup>23</sup> “Map: Coronavirus and School Closures,” Education Week, May 19, 2020 (<https://www.edweek.org/ew/section/multimedia/map-coronavirus-and-school-closures.html>) (last visited May 19, 2020).

<sup>24</sup> “Telework May Save U.S. Jobs in COVID-19 Downturn, Especially Among College Graduates,” Rakesh Kochhar, Jeffrey S. Passel, Pew Research Center (May 6, 2020) (<https://www.pewresearch.org/fact-tank/2020/05/06/telework-may-save-u-s-jobs-in-covid-19-downturn-especially-among-college-graduates/>) (last visited May 19, 2020).

<sup>25</sup> See, *Promoting Telehealth for Low-Income Consumers, COVID-19 Telehealth Program: Report and Order*, Docket Nos. 18-213, 20-89 (FCC 20-44) (2020).

<sup>26</sup> See, “How Will COVID-19 Change Our Schools in the Long Run?” Douglas N. Harris, Brookings (Apr. 24, 2020) (<https://www.brookings.edu/blog/brown-center-chalkboard/2020/04/24/how-will-covid-19-change-our-schools-in-the-long-run/>) (last visited May 19, 2020); “When It’s Time to Go Back to the Office, Will It Still be There?” Dana Mattioli, Konrad Putzier, Wall Street Journal (May 16, 2020) (<https://www.wsj.com/articles/when-its-time-to-go-back-to-the-office-will-it-still-be-there-11589601618>) (last visited May 19, 2020); “Doctors Discover Telehealth’s Silver Lining in the COVID-19 Crisis,” Rujuta Saxena, StatNews (Apr. 19, 2020) (<https://www.statnews.com/2020/04/19/telehealth-silver-lining-discovered-covid-19-crisis/>) (last visited May 19, 2020).

been built. The very fact that some carriers have seized the tools of high-cost support and deployed beyond expectations evidences the potential and promise of the program. To then exclude these more efficient providers from future support would not only fail to capitalize on future gains but could encourage other providers to deploy only the bare minimum necessary to avoid the loss of support going forward. Incentives to do “just enough” would render those networks effectively obsolete as market and consumer demands outpace the various cycles that govern network deployment, namely, planning, building, and related regulatory support. In contrast, eligibility for continued support as providers now plan for the future will drive investment strategies to empower more robust investment and more powerful networks aimed at keeping pace with evolving demands, enabling broader and more resilient fulfilment of the statutory mandate to preserve and advance universal service. As noted above, industry reports and the Commission have predicted steadily increasing demand.<sup>27</sup> Logic and experience instruct the practice to “build it right the first time” by building toward anticipated future capacity. High-cost areas should not be left behind in the future because networks were built only for the needs of today.

NTCA does not propose that areas with 25/3 Mbps should necessarily rank above unserved areas in Phase II, or that unserved areas enjoy priority over those with current broadband access. Rather, NTCA submits that the language of the statute that establishes the mandate to both preserve and advance universal service proscribes any approach that binds the process to a single-oriented approach – a look *only* at unserved areas or *only* at those that are

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<sup>27</sup> See, *supra* n.10 and accompanying text. See, also, The Broadband Availability Gap: OBI Technical Paper No. 1, Federal Communications Commission, Washington, D.C., at 90 (2010) (<https://transition.fcc.gov/national-broadband-plan/broadband-availability-gap-paper.pdf>) (last visited May 26, 2020).

served but require continued support to sustain reasonable comparability. Rather, the overall regulatory regime must serve both arms of the mandate. And, inasmuch as Phase I clearly prioritizes unserved areas over served areas, it follows that Phase II must *at the least* strive to provide sustaining support necessary to preserve universal service where it exists today. The relative advancement of technology and consumer demand will mean that any static network will simply fall behind.

### III. CONCLUSION

WHEREFORE the reasons set forth herein and above, NTCA supports the Petition and commends the Commission to confirm that final Phase II eligibility requirements will be determined as that auction draws closer. As providers' current investment strategies contemplate future build out requirements, this measure should encourage more robust investment and enable broader and deeper fulfilment of the statutory mandate to preserve and advance universal service.

Respectfully submitted,

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DATED: May 26, 2020