

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
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Report on the Future of Universal Service)	WC Docket No. 21-476
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**COMMENTS OF
NTCA–THE RURAL BROADBAND ASSOCIATION**



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EXECUTIVE SUMMARY

The present inquiry offers a welcome and necessary opportunity to re-evaluate the goals of the essential universal service fund (“USF”) mechanisms overseen by the Federal Communications Commission (the “Commission”). Over the past decade, the high-cost USF programs in particular have been recast in large part as “deployment” initiatives, adopting a nearly singular focus on overcoming availability challenges while to some degree overlooking the broader mission of universal service – that is, the need to both *get* Americans connected and then *keep* them connected. While addressing the needs of the unserved is essential and there is no question that the availability of a robust network is foundational to delivering on the mission of universal service, the job does not end there. As new grant programs come online to help address availability challenges, the call from Congress to initiate this proceeding offers a meaningful chance to refocus upon the question of what is needed to ensure universal service *after* networks are built – what is needed to sustain those networks and to ensure that services keep pace with user demand and remain affordable. In short, it is time to put the “service” back in universal *service* and to consider how the USF programs can return to their original function of not only facilitating construction of networks but also distributing ongoing support so that areas that become served *stay* served in a manner that satisfies long-standing statutory universal service mandates.

Consistent with this perspective, NTCA supports the Commission’s recommended statement of universal service objectives as articulated in the NOI, subject to two amendments. Specifically, NTCA encourages the Commission to define its broadband universal service goals as “universal deployment, affordability, availability, and equitable and sustainable access to broadband throughout the United States, consistent with the universal service principles articulated by Congress in Section 254 of the Communications Act, as amended.”

NTCA further encourages the Commission to engage in interagency coordination with federal (and state) partners by recognizing the unique role that its USF programs play vis-à-vis grant and loan programs administered by these other entities. Indeed, the model for such collaboration already exists. For years, the USF programs worked well in concert with financing programs overseen by the U.S. Department of Agriculture and others, with these other agencies providing loan or grant capital for network construction while the Commission’s USF initiatives helped to make the business case for such upfront financing by enabling recovery over time of both capital and ongoing operating expenses in a way that avoided the need to charge rural consumers “unreasonably incomparable” rates for services in comparison to their urban counterparts. To the extent that the Commission can refocus the USF programs on the broader mission of universal *service* – rather than positioning the USF programs as potentially competing deployment “grant” programs – it can restore the complementary functioning of these various initiatives and better coordinate with other agencies’ efforts to achieve the best possible results in both enabling network construction *and* sustaining those networks and the services offered atop them for the benefit of American consumers.

With the new Infrastructure Act’s directives and initiatives as a backdrop, and with Section 254 as a foundation, the Commission should take several steps to achieve and sustain universal service. First, as noted above, the Commission should cease viewing and referring to the high-cost USF mechanisms as “deployment” initiatives alone. While they *help enable* such efforts, they do so much more – and positioning them as merely tackling “availability” is incomplete, does them a disservice, and creates the potential for needless interagency conflict or confusion. Instead, the Commission should make clear that, rather than creating “buildout commitments,” the high-cost USF programs’ aim is for “service level commitments” that extend beyond the construction phase.

And, along with this shift in perspective and nomenclature, the Commission should expressly recognize in practical terms that this means that USF support must continue to be distributed in some areas after networks are built, such that those who are served *stay* served. Second, the service level commitments for the USF programs should be recalibrated for a sustainable, long-term future. Rather than adopting serial incremental targets for performance as it has over the past decade, the Commission should expect recipients of USF to deliver services capable of meeting not only today's demands but the anticipated needs of consumers over the useful life of those supported networks. Third, the Commission should consider the proper amount of sufficient and predictable support needed to achieve this ongoing mission of universal service.

In addition, NTCA recommends that the Commission reinvigorate the Lifeline program by providing consumers with flexibility in how they use that support. Specifically, Lifeline subscribers should be able to apply the subsidy to the communications service of their choosing – whether voice or broadband – as a complement to and coordinated with the Affordable Connectivity Program. NTCA likewise recommends that the Commission promote coordination in administering the E-Rate and Rural Health Care programs, focusing these initiatives on their central missions of enabling critical community anchor institutions to obtain robust services where available while permitting these programs to be used to fill discrete service gaps only where other programs are not already working to do so.

Finally, NTCA offers several suggestions as to how the Commission can promote the sustainability of and greater equity within the USF contribution mechanism. Specifically, NTCA notes the broad consensus to include fixed and mobile broadband Internet access service revenues within the contribution base and explains herein how doing so is in the public interest and well within the Commission's existing legal authority. At the same time, NTCA supports Commission

and congressional efforts to require contributions as well from large firms whose video streaming and other Internet-based businesses depend substantially on the availability and affordability of robust broadband services throughout the country. Although it supports both of these efforts equally, there is no need to defer action on one for the other – even as Congress considers granting the authority needed to expand the base to include these other entities, the Commission can and should act consistent with its existing authority to shore up the foundation of universal service by including broadband revenues within the contribution base.

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**COMMENTS OF
NTCA–THE RURAL BROADBAND ASSOCIATION**

NTCA–The Rural Broadband Association (“NTCA”)¹ hereby submits these Comments in response to the Notice of Inquiry² released by the Federal Communications Commission (the “Commission”) in the above-captioned proceeding. NTCA is appreciative of the call by Congress to take stock of the Commission’s specific universal service initiatives and broader statutory mandates to promote universal service in the wake of the creation of new grant programs to finance broadband deployment. As discussed herein, this proceeding presents a welcome and necessary opportunity for the Commission to consider more closely the full scope of the statutory mission of universal service and to recalibrate its essential programs to carry out that mission even after networks are built. The Commission’s efforts remain as critical as ever for the ultimate objectives of universal service, and NTCA hopes that this proceeding serves as a springboard to refocus more specifically on those goals and to prompt reforms that will enable the Commission’s programs to perform even more effectively in promoting and sustaining universal service.

¹ NTCA represents approximately 850 independent, community-based companies and cooperatives that provide advanced communications services in rural America and more than 400 other firms that support or are themselves engaged in the provision of such services.

² *Report on the Future of Universal Service*, WC Docket No. 21-476, Notice of Inquiry (rel. Dec. 15, 2021) (“*NOR*”).

I. NETWORK DEPLOYMENT IS AN ESSENTIAL PREREQUISITE TO ACHIEVING UNIVERSAL SERVICE, BUT NETWORK DEPLOYMENT ALONE IS NOT THE ENDGAME OF UNIVERSAL SERVICE – THE ULTIMATE STATUTORY OBJECTIVE IN RURAL AMERICA IS TO ENSURE REASONABLY COMPARABLE SERVICES AT REASONABLY COMPARABLE RATES NOW AND INTO THE FUTURE.

The concept of universal service pre-dates the Telecommunications Act of 1996 (the “1996 Act”), with perhaps one of its earliest appearances in the form of the 1913 Kingsbury Commitment which ensured that telephone systems owned and operated by independent entities could interconnect with AT&T’s long-distance network.³ While implemented via physical interconnection of networks, this commitment was not, however, aimed at this end alone. Rather, the ultimate purpose of the Kingsbury Commitment was to enable Americans throughout the country, regardless of their telephone company, to be able to communicate with one another. Put another way and of particular relevance for this discussion, while addressing network concerns was a prerequisite to achieving the goal, the practical objective of the Kingsbury Commitment was to ensure that communications services were available equally to all Americans.

This focus on ensuring availability of service for every American informed universal service policy for decades thereafter. In recent years, however, the “service” in universal *service* has to some degree become an afterthought in national debates over how best to promote the deployment of broadband networks more specifically. This focus on fundamental availability is somewhat understandable – as the Kingsbury Commitment highlighted early on, one of course cannot achieve universal service without connectivity in place to deliver it. But, starting over a decade ago with the National Broadband Plan (“NBP”) and related “broadband stimulus” efforts, the pendulum in public debates swung far to the side of solving immediate availability concerns

³ See https://en.wikipedia.org/wiki/Kingsbury_Commitment.

in unserved areas without considering necessarily the long-term implications of what it means to operate and maintain broadband-capable networks or deliver services over them after they are constructed. To be clear, the NBP also addressed questions related to adoption and utilization, but it largely treated those issues as discrete matters – while focusing more specifically on questions related to availability in rural markets and expressly declining to address longer-term concerns about the sustainability of networks and services in rural America. Indeed, the NBP openly acknowledged its narrowed focus, stating:

The plan does not estimate the amount of support that may be necessary to sustain broadband service in those areas where it already is available. The estimates focus on the investment gap to make broadband capable of delivering high-quality voice universally available in unserved areas. While the FCC will initially target CAF funding toward unserved areas, the objective over time is to develop a mechanism that supports the provision of affordable broadband and voice in all areas, both served and unserved, where governmental funding is necessary.⁴

Unfortunately, this admonition tucked into the NBP has been far too often overlooked in the ensuing years. Instead, the focus of debates ensuing from the NBP and then in a number of USF reform orders (but not all) from this Commission since 2011 has been on the narrower question of *how to get broadband out there* without considering fully *how to keep broadband out there* – and, just as importantly, how to keep services affordable and in step with consumer demand. Even as auctions and grant programs and the like have become all the rage, the fact is such initiatives are aimed primarily at helping broadband networks get built in unserved areas, and it is not clear whether any of them is necessarily sufficient on its own (as the NBP expressly

⁴ National Broadband Plan at 151 (available at: <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>).

acknowledged) to address the more important sustainability and use issues that are the ultimate concern of universal *service*.

This proceeding therefore offers a meaningful and timely opportunity to return to this often-overlooked notion left open by the NBP – that is, what is needed to ensure ongoing robust and affordable universal service *after* networks are built? (And, relatedly, what is the proper and most effective role of USF programs in helping networks *get* built in the first instance as compared to what loan and grant programs do?) To address such questions, the best place to begin is the law. While, as discussed below, the new Infrastructure Investment and Jobs Act (the “Infrastructure Act”) has certain things to say on such matters, the Commission’s ultimate charge from Congress with respect to universal service appears and remains unaltered in Section 254 of the Communications Act of 1934, as amended (the “Communications Act”). Three subsections of the latter statute are perhaps most relevant to taking stock of what universal service in rural areas specifically means:

- 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 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.⁵
- Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services—

⁵ 47 U.S.C. § 254(b)(3).

- (A) are essential to education, public health, or public safety;
 - (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;
 - (C) are being deployed in public telecommunications networks by telecommunications carriers; and
 - (D) are consistent with the public interest, convenience, and necessity.⁶
- After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.⁷

Several directives flow from the interplay of these statutory provisions and should inform any consideration of “the future of universal service.” These include:

- Universal service is defined first and foremost as access to 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.” **In other words, Congress has defined universal service not merely as network availability, but as reasonable comparability in the quality and price of *services* between urban and rural areas.**
- While network deployment is clearly an essential prerequisite to achieving this mission of universal service, it is equally clear that the aim of universal service is not network deployment alone. Indeed, the word “networks” appears only once in the statutory provisions quoted above, and even there it is used only to help describe the kinds of *services* that will ultimately be supported by USF.
- The term “facilities” is also used once in the provisions above – indicating again the essential nature of supporting networks as an underpinning to universal service – but here too this term is tethered to *services*. Moreover, even where the word “facilities” is used, Congress did not stop at deployment alone in describing how those facilities should be supported. Rather, the law describes USF support being used specifically for “the provision, maintenance, and upgrading” of facilities and services. In other words, Congress rightly contemplated that support for facilities does not end when they are built.

⁶ *Id.* at § 254(c)(1).

⁷ *Id.* at § 254(e).

None of this is to argue that supporting network deployment or capital expenses falls outside of the purview of universal service policy or funding needs. To the contrary, as discussed above and as a matter of law and practicality, networks *must* be in place and supported for universal service to be achieved. Indeed, without USF structured in a manner that supports *both the initial deployment and ongoing availability of networks throughout rural areas* (rather than merely targeting individual consumers⁸), universal service across such areas would be unachievable. At the same time, we cannot as a nation – as has too often been the case for too many over the past decade – declare “mission accomplished” simply because networks are built (or, even more prematurely, simply because auctions have been conducted that might result in networks being built later). Instead, universal service is an ongoing (or, as the statute aptly puts it, “evolving”) concept. Every day, every month, and every year, universal service must be achieved, and periodically reevaluated as well to determine if “reasonable comparability” is being maintained. Put another way, supporting initial network availability is an essential consideration of universal service, but it is hardly the only consideration and the job does not end when the network is built.

Moreover, it is important to note that while USF supports network deployment and sustainability, it does not *finance* them. Far too many have referred to Connect America Fund (“CAF”) Phase II or Rural Digital Opportunity Fund (“RDOF”) auction awards, for example, as “grants” – implying that these programs somehow pay upfront for the networks that will be built. This, however, is an inaccurate, incomplete, and frankly unhelpful characterization of how USF works or what these funds do. USF does not provide funds *upfront* to build a network. USF does not provide capital grants for construction. Rather, USF has historically provided (and even today

⁸ See, e.g., Comments of NTCA, WC Docket No. 10-90, *et al.* (filed May 25, 2018), at 60-63 (discussing economic and public policy considerations with supporting services throughout rural areas as compared to tying support to individual customer locations).

continues to provide) support funds over a period of time to help recover a portion of *both* the capital costs of deploying networks *and* the ongoing costs of operating them and delivering and upgrading services for rural Americans that are reasonably comparable in quality and price to those available in urban areas. (Of course, it must be noted as well that USF does not provide *complete* recovery of such costs.)

Indeed, even as the Commission has focused in many respects in recent years on creating USF auctions aimed at addressing “unserved” areas, it astutely observed in a unanimous 2018 decision that the work of supporting networks and services is not done when construction crews go home: “[T]he Commission has previously recognized that areas with partially or fully-deployed fiber-to-the-premises may still require high-cost support to maintain existing service. The cost module of the model does not distinguish between those areas that have or have not had 25/3 Mbps service, and the model fairly estimates the costs of providing service even if that service has already been deployed.”⁹ Furthermore, it is far too often lost that the high-cost USF program is an affordability initiative as well, helping to “solve for the difference” between what the rates for rural consumers would need to be in the absence of USF support as compared to rates in urban markets.¹⁰

⁹ *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, 33 FCC Rcd 11893, 11907 (2018) (“*2018 Order*”), at ¶ 45.

¹⁰ Although some may think that the high-cost USF program is focused exclusively on availability while Lifeline and now the Affordable Connectivity Program (“ACP”) represent the Commission’s “affordability” initiatives, this is an overly simplistic view of how the high-cost USF program works. Once again, the goal of the high-cost USF program is to ensure that rates for rural consumers are “reasonably comparable” to those assessed on urban users for similar services. Thus, the high-cost USF program (at least in theory) aims to make up the difference between the rates that would need to be charged to rural users in a given area to recover costs of serving them and what an urban user would pay for such service, with Lifeline and ACP then helping low-income consumers (both rural and urban alike) overcome additional affordability

In short, USF is essential to enable making the business case for rural network deployment in the first instance by providing support for a portion of capital and operating costs that cannot be recovered from end users without charging “unreasonably incomparable” rates, *but USF does not actually itself pay upfront for network deployment*. Recipients of high-cost USF must still find the initial capital elsewhere – whether through their own cash on hand, equity investments, loans, or grants – to pay for the construction of networks. This is essential to keep in mind as one considers “the future of universal service” in the wake of the new Infrastructure Act grants and other similar initiatives at the federal and state level. As described elsewhere herein, for decades USF was seen as *complementary to* rather than *competitive with* financing programs like those administered by the Rural Utilities Service (“RUS”), and it was only in recent years when some began to reposition USF as a “quasi-grant” program that confusion and conflict ensued.

This proceeding therefore provides an ideal opportunity, and comes at an ideal time, to recalibrate and reaffirm the long-standing but recently overlooked notion that USF operates in “a different lane” from other federal and state agencies’ network financing loan and grant programs. Indeed, Congress was prescient – and sending important signals at the same time to the Commission as discussed further *infra* – in calling for this inquiry and including other provisions in the Infrastructure Act regarding the interplay of USF and other initiatives. When closely examined, it is clear that the high-cost USF plays a unique and multi-faceted role distinct from any other program by: (a) enabling the business case for rural network deployment by justifying access to and use of capital *from other sources*; (b) helping to sustain those rural networks once built by

challenges they face individually to procure service. At bottom, without the high-cost USF program helping to recover the higher costs of facilities and services in rural areas, rural consumers of all incomes would pay materially higher rates for service – thereby defeating the objective of universal service and underscoring how high-cost USF is itself an “affordability program” as much as it enables availability as well.

providing recovery thereafter of a portion of *both* that initial capital (if not a grant) *and* ongoing expenses where they are higher than seen in urban areas; and (c) helping to deliver services in rural America that are and will stay comparable in quality and price to those in urban markets. These are all functions that are complementary to the various grant and loan financing programs now in place or soon to be implemented, but very different from and far broader in scope and purpose than what those programs aim for and achieve.¹¹ **In practical terms, this means that USF support should not be limited to facilitating construction of networks in unserved areas, but it must also continue to be distributed in some areas even after networks are deployed – areas that become served must *stay* served in a way that satisfies the principles and directives of Section 254.**

With this as backdrop, as discussed further herein, the Commission should therefore use this proceeding as a much-needed opportunity to recalibrate and return its USF programs “to their roots,” refocusing these initiatives on how they can best enable availability, promote sustainability, and ensure reasonable comparability in rates and service levels in lieu of being positioned as single-purpose deployment or availability programs.

¹¹ The Commission expressly recognized this distinction between financing and support in 2016: “We recognize that carriers that are fully deployed in some cases have taken out loans to finance such expansion and therefore may have significant loan repayment obligations for years to come.” *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087 (2016) (“*2016 Order*”), at 3113, ¶ 66; *see also id.* at 3109, ¶ 56 (citing *Ex Parte* Letter from Michael R. Romano, Senior Vice President, NTCA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90, at 5 (filed Dec. 22, 2015)) (recognizing that even as the Commission had decided that initial cost model offers to small carriers should focus on unserved customers, census blocks where networks were already deployed “require ongoing funding both to maintain existing service and in some cases to repay loans incurred to complete network deployments”).

II. THE INFRASTRUCTURE ACT OFFERS THE OPPORTUNITY FOR – AND IN FACT DIRECTS – AN IMPORTANT “RESET” IN REALIGNING USE AND OTHER BROADBAND-FOCUSED PROGRAMS.

As the Commission notes, the Infrastructure Act directs the Commission to submit a report to Congress describing options for “improving [the] effectiveness in achieving the universal service goals for broadband.”¹² More specifically, the report must identify methods of achieving the universal service goals established by Section 706 of the 1996 Act for advanced telecommunications.¹³ In turn, the Commission proposes in the NOI to define universal service goals pursuant to Section 706 as “universal deployment, affordability, adoption, availability, and equitable access to broadband throughout the United States.”¹⁴ NTCA supports wholeheartedly this holistic statement of universal service objectives, subject to two suggested amendments.

First, as noted in the preceding section, Congress has already set goals for universal service: these can be found in Section 254 of the Communications Act. Nothing in the Infrastructure Act or Section 706 overrides or obviates Section 254. Thus, while the Infrastructure Act directs the Commission to look to Section 706 in defining goals for universal broadband, to borrow phrasing from another part of the Infrastructure Act, a proper legal perspective indicates that these broadband-specific goals should “supplement, and not supplant” the core principles of universal service contained and unchanged within Section 254. For these reasons, even as the goal above for example speaks to “affordability,” this should be viewed through the prism of Section 254(b), which requires access to services at “just, reasonable, and affordable rates” and that services in rural areas be available at rates that are “reasonably comparable” to those charged in

¹² Infrastructure Act § 60104(c).

¹³ *Id.*

¹⁴ *NOI*, at ¶ 18.

urban areas. Similarly, when the definition above speaks to “availability,” this should be read consistent with Section 254(b) to compel services that are “reasonably comparable” in quality in rural and urban areas alike¹⁵ – and also in accordance with Section 254(c), which looks to an “evolving level” of service quality in determining availability.¹⁶ In short, Section 254’s congressionally directed principles for universal service should inform assessment of whether the Commission has in fact fulfilled the universal service goals for broadband established through this proceeding.

Second, consistent again with the discussion in Section I, *supra*, NTCA proposes adding one term to the proposed definition of Section 706’s universal broadband goals as articulated in the NOI. Specifically, universal service is never “accomplished” – it is a continuing proposition that involves keeping networks upgraded and operating once built and services relevant and affordable for consumers, businesses, and anchor institutions on an ongoing basis. To achieve these objectives in an enduring manner, “sustainability” should be seen as an essential aim of universal service goals. So too, as discussed further in Section IV.D.1, *infra*, the mechanism that *supports* ongoing achievement of these universal service goals must itself be sustainable – if providers cannot depend upon USF to help make the business case for network investment or if support “dries up” for consumers who need it to afford services, then the universal service goals established through this proceeding will not be fulfilled.

¹⁵ 47 U.S.C. § 254(b)(1) and (3).

¹⁶ *Id.* at § 254(c)(1).

For these reasons, NTCA proposes two changes to the Commission’s proposed definition of “universal service goals for broadband,” tethering the goals developed here to those set forth by law and taking account of the need for a lasting commitment to universal service that requires more than the one-time act of deploying a network or initially selling a service. Specifically, NTCA recommends the Commission define the broadband universal service goals here as “universal deployment, affordability, adoption, availability, and equitable *and sustainable* access to broadband throughout the United States, consistent with the universal service principles articulated by Congress in Section 254 of the Communications Act of 1934, as amended.”

Congress went a step further in the Infrastructure Act, however, not only broadly directing development of goals but specifically articulating how USF programs should be viewed in light of the Broadband Equity, Access, and Deployment (“BEAD”) Program grants also made available through that law. In particular, the Infrastructure Act indicates that the grants authorized pursuant to the BEAD Program should be seen as complementary to, rather than duplicative of, existing efforts. Section 60102(l) of the Infrastructure Act, for example, provides that grant funds awarded to states “shall be used to supplement, and not supplant” other funding mechanisms.¹⁷ Section 60104 further indicates that the report prepared through this proceeding shall not “in any way reduce the congressional mandate for universal service” and encourages the Commission to consider “recommendations to expand the universal service goals for broadband” where in the public interest.¹⁸ This proceeding offers an important opportunity to orient the various USF programs in a way that complements the funding vehicles in the Infrastructure Act, focusing upon discrete needs and gaps – such as promoting the sustainability of infrastructure deployed

¹⁷ Infrastructure Act § 60102(l).

¹⁸ *Id.* at § 60104(c)(3).

leveraging BEAD funds or other capital and using the Lifeline program to help address affordability needs for broadband and voice alike beyond those tackled by the Affordable Connectivity Program created by the new law.

III. INTERAGENCY COORDINATION REMAINS IMPORTANT BUT HAS IN RECENT YEARS BECOME MORE DIFFICULT DUE IN SIGNIFICANT PART TO BLURRED LINES OF RESPONSIBILITY AND PROGRAM FUNCTIONS.

Numerous federal programs, including those under the aegis of USDA and the National Telecommunications and Information Administration (“NTIA”), contribute to broadband accomplishments in rural America. By way of example, RUS loans, grants and technical assistance, and the Distance Learning, Telemedicine and Broadband Program; the Community Connect Program; ReConnect Program; and the Rural Health Care Pilot Program have all contributed to the deployment of critical broadband networks throughout the country¹⁹ Moreover, the Commission notes its long history of coordination with RUS and NTIA on matters relating to broadband funding,²⁰ and also highlights the formalization of these relationships via the Broadband Interagency Coordination Act (“BICA”). BICA requires the Commission, NTIA, and USDA to share information and coordinate their respective programs in reflection of high-cost support as well as other programs administered by the Commission and NTIA. These combined programs are essential components in the direction of crucial funding for critical broadband infrastructure in rural spaces. These various programs have been most effective when they are viewed (and implemented) as complementary to programs administered by other agencies. That coordinated approach ensures that valuable resources are targeted most effectively, and that the potential for waste and duplication is avoided. As described in the preceding section, however, there is a

¹⁹ *NOI*, at ¶ 13.

²⁰ *Id.* at ¶ 16.

fundamental difference, however, between high-cost USF support and the various NTIA and RUS programs that must be accounted for in crafting strategies for coordination.

This outcome is not a random result but rather evinces the intelligent design of Congressional intent and thoughtful foresight as to the related but distinct challenges presented in connecting Americans initially and then keeping them connected. The Communications Act is clear: universal service support must be “specific, predictable and sufficient.” In fulfillment of this vision, high-cost USF support programs are cemented into Commission rules and supported by contributions, rather than being subject to the vagaries of annual appropriation cycles. At the same time, while Congressional mandate compels “reasonably comparable rates and services” as a constant state, other recent manifestations of Congressional intent recognize the high value of supplemental funding that accelerates infrastructure buildout.

And, yet, despite the clear and focused intentions of Congress, the existence of complementary programs can portend potential conflict and confusion, particularly when USF programs have been treated at times by some effectively as a “quasi-grant” program focused on addressing only availability concerns. Such pitfalls, however, can be avoided with careful coordination among the administering agencies through both program design and administration. The results will be the intelligent application of resources in a manner that builds better and more lasting broadband. These safeguards are especially important in an environment in which enthusiasm for broadband buildout could lead to less-than-careful application and direction of funding. NTCA does not suggest decelerating agency movement, but rather a clear and methodical process that is fair, fast, and efficient.

As described above, the general administrative division between programs focused on financing deployment as compared to sustainability lends itself organically to an approach that

will seek to utilize resources in a complementary manner. Moreover, the quagmire of overbuilding – where competing programs provide funding (either financing or support) to competing providers operating redundant networks in area where “the market” will not justify the deployment or operation of even just one network on its own – must be avoided both to make the most of available resources *and* to avoid undermining the sustainability of the funded network once built. Anticipated trends of current and future broadband experiences will demand scalable and sustainable networks capable of exponentially increasing speeds. It is anticipated that, in just one year, 92% of the U.S. population will be Internet users.²¹ These will include not only traditional communications devices such as smartphones or computers, but also the ever-expanding range of devices to support consumer and industrial IoT at a predicted per capita rate of more than 13 connected devices per person.²² Whereas Cisco identified the average U.S. broadband speed as 58.9 Mbps in 2018 and projected the average speed to trend toward 143.6 Mbps by next year,²³ the Commission’s own 2021 *Measuring Broadband America* report indicated that the weighted average advertised speed of some of the largest Internet Service Providers was 193.9 Mbps²⁴ and Ookla data indicates that *median* U.S. broadband speeds were already at 143.76 Mbps download and 20.26 Mbps upload as of January.²⁵ Smart application of resources will ensure broader

²¹ See <https://www.cisco.com/c/en/us/solutions/executive-perspectives/annual-internet-report/air-highlights.html#>.

²² *Id.*

²³ *Id.*

²⁴ See https://www.fcc.gov/reports-research/reports/measuring-broadband-america/measuring-fixed-broadband-eleventh-report#_Toc427484591.

²⁵ See <https://www.speedtest.net/global-index/united-states#fixed>.

network deployments to support these needs and increased digital inclusion in our broadband society.

In the first instance, to borrow again a thoughtful phrase from the Infrastructure Act, an overriding imperative is to ensure that the various programs supplement but do not supplant each other.²⁶ For example, as discussed *infra*, the predominant majority of community-based recipients of high-cost USF support have leveraged those resources to build networks with capabilities that are in many places far in excess of the minimum required by Commission rules. However, where a supplemental program might enable the deployment of (or upgrading of existing) broadband infrastructure capable of delivering even higher speeds, rather than building a second, duplicative network “from scratch” through competing government programs, interagency coordination should ensure that priority grant funding for network construction be directed first and foremost to both: (1) areas that lack broadband and are “unserved” as defined by program standards, and (2) entities that are already receiving funding to serve an area under another program (such as USF) and have implemented a foundational network that can then be improved more efficiently with supplemental funding for network upgrades. The latter is particularly important in areas that present no business case for even a solitary self-sustaining operator.

By way of illustration, where high-cost USF support already supports the availability of 25/3 Mbps service, rather than giving new funds to a firm that would need to begin deploying a network from scratch, resources from new cap-ex-focused grant programs would be most efficiently directed to provide the high-cost USF recipient the ability to improve its network and commit to deliver services with materially higher capability – especially in those places where providers have taken steps to exceed minimal expectations and are in the process of deploying or

²⁶ Infrastructure Act § 60102(l).

have already deployed networks in excess of baseline speeds like 25/3 Mbps, but could use support to upgrade further and/or sustain those networks. This approach (to combine the resources of various federal programs) can fortify rural broadband achievement by improving and expanding existing network infrastructure *and* sustaining services of the highest quality thereafter. Coordination among agencies is thus necessary to prevent the substantial risk of creating two networks that will either (a) demand duplicative yet limited resources, or (b) be unable to thrive as the two funded networks undermine the sustainability of each one. This outcome would be detrimental to consumers, providers, and the relevant agencies, and should therefore be avoided.

Where approached properly in the past, interagency coordination has enabled demonstrable results. By way of example, as noted in Section I, *supra*, traditional borrowers have utilized RUS loans for decades. RUS has recognized that, with support, the rural communications industry could enable low-risk loan opportunities for the federal government to advance a mission of rural development through better communications services. In fact, before Commission overhauls of high-cost USF support programs in 2011, RUS loan delinquencies were “effectively zero.”²⁷ Even with the substantial uncertainty created by the Commission revisions in 2011, loan delinquencies during this period, with the highest numbers in 2014 to 2016, still only averaged 1.26%.²⁸ RUS itself observed recently that, “. . . [the traditional telecom loan program or “TTP”] dates back over 60 years and the borrowers in that program have been in operation for decades. These entities

²⁷ See, *Special Servicing of Telecommunications Programs Loans for Financially Distressed Borrowers*, USDA RUS, RUS-19-Telecom 0021, RIN 0572-AC41 (2020) (“*RIA*”).

²⁸ *RIA* at 7. Traditional Telecom Program (TTP) delinquencies in 2014, 2015 and 2016 were 2.00%, 1.97%, and 2.05%, respectively. Delinquencies fell to less than 1.5% in 2017 and 2018, but never achieved the near zero rates recorded in 2010-2013. *Id.* During a period of substantial uncertainty in these FCC programs from 2010 to 18, however, TTP loans decreased dramatically, from 2,257 loans (\$3.8 billion outstanding principal) to 753 loans (\$2.5 billion principal).

have a strong historical track record coupled with years of experience in providing service in the communities where our projects are being deployed.”²⁹ RUS observations are corroborated by independent analysts. By way of example, a recent report found that North and South Dakota (among other states) “regularly feature among the fastest states for broadband”³⁰ This independent report documents the success found by companies in these states that identify and leverage various complementary federal programs. Finally, the latest Broadband Survey Report of NTCA reveals that more than 75% of NTCA members’ rural customers can obtain broadband at rates greater than or equal to 100 Mbps. Notably, 73.5% of those customers can also obtain *upload* rates of 100 Mbps.³¹ These achievements evidence the thoughtful and *coordinated* use of different tools to deliver next-generation broadband services to users.

By contrast, recent rounds of the ReConnect program – while very much welcomed as sources of capital funding for rural broadband networks – have not in all cases been coordinated with Commission high-cost USF programs, including the Alternative Connect America Cost Model (“ACAM”) and CAF-Broadband Loop Support (“CAF-BLS”). Moreover, the Funding Opportunity Announcement for ReConnect Round III declared all areas without 100/20 Mbps broadband to be eligible for awards, without any direction as to how eligibility for awards would

²⁹ RIA at 7, 8. Current delinquencies include loans made under the Infrastructure Program, Broadband Program, DLT and BIP (RIA at 8).

³⁰ H. Trostle, Katie Kienbaum, Michelle Andrews, Ny Ony Razafindrabe, and Christopher Mitchell, “Cooperatives Fiberize Rural America: A Trusted Model for the Internet Era,” Institute for Local Self Reliance, at 11 (May 2020) (available at: https://ilsr.org/wp-content/uploads/2020/05/2020_05_19_Rural-Co-op-Report.pdf).

³¹ *Broadband/Internet Availability Survey Report*, NTCA, at 2 (Dec. 2021) (“*NTCA Membership Broadband Survey*”) (available at: <https://www.ntca.org/sites/default/files/documents/2021-12/2021-broadband-survey-report-final-12-15-21.pdf>).

be considered where high-cost USF support was currently being used to help *upgrade* existing networks toward higher speeds. Interagency coordination among the Commission and other agencies can and should aim toward focusing first on all areas lacking 25/3 Mbps to ensure that a high-cost compliant level of broadband is available across many areas before moving onto areas without 100/20 Mbps. This approach will require close coordination among the Commission, NTIA, USDA, and the states, but it will yield great dividends for users and make the most efficient possible use of available resources.

In short, with thoughtful coordination, agencies can enable a provider that is only required to deliver a lower level of broadband in certain areas through high-cost USF support under prior rules and existing support to expand those capabilities toward a far more capable network by combining the efforts of the programs. Similarly, as discussed earlier, programs that focus on financing networks (such as BEAD) can aim to support upfront capital expenditures, with USF then focusing upon recovery of any such expenditures not covered by the financing programs together with ongoing costs arising out of operation and maintenance of networks and the provision of services that are reasonably comparable in price and quality to those available in urban areas. In the end, it is essential as a matter of good government and effective use of scarce resources that the various programs be used in concert with each other to deploy the fastest, most reliable, and most sustainable networks possible to as many Americans as possible – rather than creating programs that undertake redundant functions and/or doubling down on robust broadband networks being deployed twice over in the same rural area even as other areas continue to sit lacking. This will take work by the agencies to be sure, but if approached with each program’s own alignment and purpose clearly identified and with clear “ground rules” in terms of how the

programs and agencies interact with one another, this work can pay off for the benefit of millions of Americans.

Finally, even as new (or, really, renewed) efforts at interagency coordination are considered, the value of local input and interests should not be lost as well. For example, various government and private industry statements have promoted inaccurate distinctions between for profit, government, and cooperative entities. While it can be reasonably inferred that larger national and regional operators tend to reflect their interests by focusing deployment efforts in large, densely populated areas instead of small, sparsely populated regions, small, locally operated providers tend to operate according to a different set of principles regardless of corporate or organizational form. Specifically, locally-operated providers are by definition focused more focused on their “home markets” and neighboring areas, as small as many of these may be. The achievements of these small, rural providers are demonstrated in substantial data; for example, as referenced *supra*, a recent survey of NTCA members reveals that 75% of providers offer broadband speeds of 100 Mbps in their local service areas.³² These accomplishments speak volumes to these carriers’ abilities, should they make applications under the emerging deployment programs, to deploy and maintain state-of-the-art broadband networks in their service regions. The accomplishments of this broad base of rural providers can be defined by more than merely the miles of facilities deployed or the raw capacity of their networks. Rather, the “return on investment” in these rural spaces can be measured by every student whose educational opportunities are expanded by access to broadband; every patient with better health outcomes due to telehealth; every worker and business whose ventures are broader with broadband.

³² *Id.*

With a proven track record, NTCA therefore advises coordinated efforts that not only align initiatives among various agencies but also “look local” rather than to the discrete form of a provider’s corporate organization in choosing where funding should be directed – experience should be leveraged, demonstrated commitment and presence in rural areas should be prioritized, and organizational form should not be penalized. New investments will be most effective when coordinated with existing networks and ongoing deployments. These include relying on existing local providers’ expertise in network design, deployment, and management, as well as back-office and customer-facing functions.

IV. WITH THE INFRASTRUCTURE ACT AS A BACKDROP AND SECTION 254 AS A FOUNDATION, THE COMMISSION SHOULD TAKE A NUMBER OF SPECIFIC STEPS TO ACHIEVE AND SUSTAIN UNIVERSAL SERVICE.

A. High-Cost USF Should be Reoriented to Refocus on Service Commitments and Sustainability of Facilities and Services Rather than Deployment Alone.

1. Four Lessons from the Past Decade Should Inform the Future of Universal Service and Guide Further Reforms to the High-Cost USF Program.

In 2010, the Commission faced several difficult challenges in considering how to update the high-cost USF mechanisms to reflect increasing demand for broadband access. In some rural areas, larger recipients of USF had failed to invest in their networks, doing the bare minimum to keep those networks up and running for the delivery of telephone service and failing to deliver much more than dial-up Internet access. Meanwhile, in other rural areas, smaller recipients of USF had generally done as of that time what the Joint Board on Universal Service touted as a “commendable job” in advancing broadband³³ – but this was achieved in many cases via lower-

³³ *High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 22 FCC Rcd 20477, 20488 (2007), at ¶ 39.

speed DSL platforms as broadband technology was still evolving at that time. In confronting these problems and considering the recommendations of the NBP, the Commission chose mostly to focus first on the broadband availability gaps in the larger carrier areas, creating a new CAF program that would provide support pursuant to a model for a series of years in exchange for commitments by the larger carriers to essentially “catch up” to where smaller providers were in serving rural markets.³⁴ Meanwhile, for their “commendable” work, smaller providers saw only new cuts, caps, and constraints on USF support in 2011,³⁵ with improvements to the mechanisms that supported these smaller operators’ investments and operations coming only through bipartisan action by the Commission several years later.³⁶

The Commission asks for comment now on the impact of the Infrastructure Act on the high-cost USF program, including how best to coordinate high-cost USF efforts with the new programs created by the recently-enacted law.³⁷ Based upon the winding path of high-cost USF reforms over the past decade, at least four lessons can be drawn to inform examination of “the future of universal service” in the wake of the Infrastructure Act. Indeed, these lessons square well with the Commission’s own observations in the NOI regarding the existence of ongoing operational costs and the need to ensure that services remain reasonably comparable even as the

³⁴ See *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17712-17738 (2011) (“*2011 Order*”), at ¶¶ 127-193 (adopting a new model-based support mechanism focused on advancing broadband in rural areas served by price cap-regulated providers).

³⁵ See *id.* at 17738-17771, ¶¶ 194-294 (providing no new broadband-focused mechanism for RLECs but instead adopting a series of support limitations including per-line caps, rate floors, and new capital and operating expense caps).

³⁶ See *2016 Order*, at 3094-3156, ¶¶ 17-184; *2018 Order*, at 11898-11944, ¶¶ 14-182.

³⁷ *NOI*, at ¶ 31.

Infrastructure Act sets higher bars for what is expected of funded networks.³⁸ Specifically, NTCA suggests that the Commission consider the following four lessons as part of this inquiry and future specific reforms to the high-cost USF mechanisms:

1. *Avoid the pitfalls of positioning high-cost USF as a one-time “quasi-grant” program and, consistent with the law, focus more broadly on the ongoing needs and challenges of providing high-quality services, sustaining networks, and keeping rates affordable in rural areas.*
2. *Fulfill the statutory mission of both preserving and advancing universal service, rather than aiming primarily or even exclusively to address concerns about “unserved areas” at the expense of sustainability considerations in areas already served.*
3. *Consistent with the notion that universal service is “evolving,” aim higher when it comes to expectations as to service levels that will be delivered – avoiding an inefficient and incrementalist approach and ensuring instead that consumers and communities will receive “reasonably comparable” services that keep pace with those available in urban areas for decades; and*
4. *Ensure transparency and accountability in the use of USF resources by setting clear standards and fully evaluating the capabilities of providers and the platforms they propose to use to deliver services prior to new awards of support.*

The **first** lesson has already been discussed in Section I, *supra*, of these comments – the perils of trying to contort a mechanism that distributes support on a monthly basis to promote reasonably comparable services at reasonably comparable rates into something resembling a grant program focused almost entirely on deployment in unserved areas. While understandable given a prior lack of both accountability and results in terms of how some larger operators particularly used their USF resources in the past in some areas, the 2011 emphasis on distributing funds to “build broadband” in unserved areas resulted in understandable confusion and even conflict as to how USF programs differed from loan and grant programs overseen by RUS, NTIA, and other federal and state agencies. As noted above and as discussed further below, a renewed focus on the

³⁸ *Id.* at ¶ 32.

express statutory goals of promoting reasonably comparable services at reasonably comparable rates and supporting *all of* the provision, upgrading, and maintenance of facilities and evolving levels of service³⁹ should help in reorienting the high-cost USF programs and enabling them to work well within a broader range of broadband-focused efforts like the new grant programs.

A **second** and related lesson for the “future of universal service” to be drawn from high-cost USF reforms over the past decade is to avoid the misguided approach of “leapfrogging” certain areas in terms of directing more support to other “unserved” areas based upon availability alone. If USF aims mostly or exclusively toward network deployment in unserved areas, such an overly narrow focus neglects the fundamental statutory directive to *both* preserve *and* advance universal service.⁴⁰ Of course, networks must be built in unserved areas to achieve universal service, and even if it does not provide upfront capital for such efforts, the high-cost USF program has a critical role to play in recovering capital expenses and thereby *enabling* the deployment of networks as described in Section I. But as important as deployment is, this again is not the singular mission of universal service. Instead, sustainability in the form of providing high-quality services, maintaining and upgrading facilities, and keeping rates affordable in rural areas are equally important – if not more so over the longer term. Thus, USF support should not be simplistically directed (or redirected, as the case may be) toward areas lacking broadband and by contrast capped or withdrawn altogether from areas that have broadband. To the contrary, a more nuanced and sophisticated analysis is required to discern where high-cost USF may or may not be needed on an ongoing basis. Put another way, the mission of universal service must be as much about *keeping* areas served as connecting them in the first instance.

³⁹ See 47 U.S.C. §§ 254(b)(3), (c)(1), and (e).

⁴⁰ *Id.* at § 254(b).

For these reasons, the high-cost USF program operates best in context and coordination with loan and grant programs when it is viewed as a *sustainability* initiative that helps to make sure the networks built and the services delivered atop them comport with the statutory mandates for universal service. **In practice, this means that USF support can and should continue to be distributed in some areas even after networks are deployed – areas that become served must stay served in a way that satisfies the principles and directives of Section 254.** Admittedly, this does not mean every rural area will need high-cost USF support after networks are built; there will be some areas where a low-interest loan or grant for broadband deployment may be all that is needed to overcome barriers to ongoing fulfillment of the mission of universal service. But the converse is equally true, in that there will be rural areas where even a low-interest loan or complete grant is insufficient to achieve the mission of universal service after the network is deployed. In such areas, high-cost USF support has a critical role to play after networks are built.⁴¹

A **third** lesson to be drawn from reforms of the high-cost USF program over the past decade is the peril of aiming too low in establishing deployment targets and service levels that satisfy only today’s demand. Because network deployment is a prerequisite (but not an end unto

⁴¹ It is also worth noting that, in areas where networks already exist and services are already provided, reverse auctions make no sense as a distribution mechanism. *See NOI*, at ¶ 32. While of some utility perhaps – if structured properly – in areas that are wholly unserved, the idea of auctioning USF support to sustain service in areas where it already exists is highly inefficient, creates perverse incentives in terms of deployment choices, and makes little sense as a matter of economics or public policy. More specifically, the prospect of serial auctions encourages winners to perform only to the minimum specifications required by the award in the hope of keeping areas eligible for future support in subsequent auctions, rather than delivering better services only to find that the “reward” for having overperformed is that the area is considered “served” and thus not eligible for future USF support. The prospect of serial auctions to deploy networks in “unserved” areas at incrementally higher levels of service thus sets poor incentives to deliver the best possible service as soon as possible to customers in need and almost certainly costs the USF program *more* over time as networks constantly need to be rebuilt to achieve the next level of performance for the next auction threshold.

itself) in achieving universal service, the networks that are deployed must be capable of meeting an “evolving level” of service.⁴² And upgrading networks to evolve with service demands cannot be achieved overnight or at no cost, particularly on some platforms that depend upon yet-to-come technology developments or substantial reconstruction efforts. Despite this, there has been sincere temptation on the part of policymakers to aim lower and accommodate only current demand, seemingly because “it’s cheaper upfront.” This can be seen most acutely in the painfully incremental evolution of high-cost USF performance obligations over the past ten years, with speed thresholds increasing from 4/1 Mbps in 2011 to 10/1 Mbps in 2014 to 25/3 Mbps in 2018.⁴³ Even in the Commission’s most recent high-cost auction, while the vast majority of winning bidders pledged to deliver Gigabit-level service (which itself presents a fourth lesson learned as discussed *infra*),⁴⁴ the baseline speed for participation remained 25/3 Mbps – even as the *median* fixed broadband speed as of January 2022 was nearly 145/20 Mbps.⁴⁵

This inefficient and incrementalist approach over the past decade to setting the baseline for “reasonably comparable” broadband service should be jettisoned. Given the nature of investments in capital infrastructure, networks built to deliver on these service level commitments should be designed in anticipation of “evolving” service demand, and it will in fact cost the high-cost USF

⁴² 47 U.S.C. § 254(c)(1).

⁴³ See *2011 Order*, at 17673, ¶ 22; *Connect America Fund, et. al.*, WC Docket Nos. 10-90, *et al.*, Report and Order, 29 FCC Rcd 15644, 15649 (2014), at ¶ 15; *2018 Order*, at 11895, ¶ 3.

⁴⁴ See, *i.e.*, Joan Engebretson, *RDOF Winner Map: Fiber, Fixed Wireless Win Big, Winners Commit to Gigabit Speeds*, Telecompetitor (Dec. 8, 2020) (<https://www.telecompetitor.com/rdof-winner-map-fiber-fixed-wireless-win-big-winners-commit-to-gigabit-speeds/>).

⁴⁵ See <https://www.speedtest.net/global-index/united-states#fixed>. This represents a sizeable increase just in the last twelve months over the 110/16 Mbps median speed reported for January 2021.

program *less* over time⁴⁶ – and send far better signals of the Commission’s commitment to ensuring rural communities receive quality service – if performance obligations are set in a way that efficiently reflects this anticipation. More specifically, broadband service level commitments for the high-cost USF program should be set at a level of service that can reasonably be expected in urban areas over a reasonable time horizon (*i.e.*, anticipating evolution),⁴⁷ rather than seeking to satisfy only current demand and/or adopting a milquetoast “technological neutrality” policy that puts the interests of certain kinds of providers demanding access to USF support revenues above the consumers and communities that are the intended beneficiaries of universal service.

A **fourth** lesson that arises out of reforms to the high-cost USF program in recent years is the importance of transparency and accountability not only in the use of funds but in determining to whom support should be distributed in the first instance. In prior iterations of the high-cost program, eligible telecommunications carriers (“ETCs”) were subject to stringent oversight at the federal and state level alike. Translating these requirements to today’s broadband services can be difficult at times, but doing so in some fashion is important to promote accountability and effective oversight of the use of USF resources.⁴⁸ In the CAF Phase II auction, for example, the Commission

⁴⁶ See, e.g., *Ex Parte* Letter from Shirley Bloomfield, Chief Executive Officer, NTCA, and Gary Bolton, Chief Executive Officer, Fiber Broadband Association, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 19-126, *et al.* (filed Feb. 8, 2021) (providing a technical analysis by Cartesian highlighting concerns regarding SpaceX’s capability to meet its USF obligations through low-earth orbit satellite technologies); *Ex Parte* Letter from Michael R. Romano, Senior Vice President, NTCA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 19-126, *et al.* (filed Feb. 1, 2021) (submitting a technical analysis by Vantage Point Solutions evaluating the limitations of fixed wireless technologies in reliably delivering higher-speed services to multiple users throughout rural areas).

⁴⁷ See generally *NTCA Membership Broadband Survey*, footnote 31, *supra*.

⁴⁸ Many dismiss ETC obligations as a relic of times passed, but they continue to serve important functions of accountability and in providing a state role in ensuring the effective delivery of universal service consistent with the Act’s call for a shared federal and state role in doing so.

sought to promote transparency and accountability through a data-driven “bright-line” bidding qualification rule that permitted would-be ETCs to bid at performance levels based upon actual commercially available offerings as indicated by providers’ own claims.⁴⁹ In the subsequent RDOF auction, however, the Commission inexplicably departed from this precedent, rendering this bright-line rule a mere presumption that individual firms could overcome through confidential filings asserting the ability to deliver higher levels of performance than they offer today using certain technologies or than are otherwise generally seen in the broadband marketplace.⁵⁰ Unfortunately, neither the standards for review of such confidential requests for special treatment nor any decisions made upon such review were published. Furthermore, the Commission provided neither notice of nor opportunity for public comment with respect to any such confidential requests for special treatment.

In short, rather than merely opening the doors for entry by qualified participants seeking to become new ETCs subject to careful vetting, the Commission flung the doors open wide in RDOF with little initial review and subject to undefined standards for entry – resulting in significant

To be clear, NTCA acknowledges in the context of Lifeline support in particular, ETC requirements may be unnecessary (or could be substantially relaxed at the very least) given the nature of the support received and the desire to promote competitive offerings for lower-income consumers. In the high-cost USF context, however, where only one party will in theory be receiving support to serve an area and that party will in many respects serve as “the 21st century provider of last resort” for the area supported, the accountability that comes with being an ETC, along with the ability for states to have a continuing role in such oversight, is appropriate and necessary.

⁴⁹ *Connect America Fund Phase II Auction Scheduled for July 24, 2018 Notice and Filing Requirements and Other Procedures for Auction 903*, AU Docket No. 17-182, WC Docket No. 10-90, 33 FCC Rcd 14281468 (2018), at ¶¶ 103-104.

⁵⁰ *Rural Digital Opportunity Fund Auction Scheduled for October 29, 2020 Notice and Filing Requirements and Other Procedures for Auction 904*, AU Docket No. 20-34, WC Docket Nos. 19-126 and 10-90, 35 FCC Rcd 6077, 6113-16 (2020), at ¶¶ 99-108.

questions now regarding the ability of some winning bidders' ability to perform, calling into question the success of the RDOF auction, and putting at risk the prospect for delivering on the mission of universal service in some unserved areas that had otherwise looked poised to “win” in the auction. To avoid such confusion and uncertainty going forward, the Commission can and should take cues from the recent Infrastructure Act. Although the Infrastructure Act does not govern the distribution of USF support, the law's directives to ensure greater upfront accountability by NTIA and states in distributing new grant funds provide a useful roadmap for the Commission's efforts. Specifically, prior to making awards to prospective subgrantee service providers, the Infrastructure Act instructs the states, under NTIA's oversight, to ensure that the party among other things:

- is capable of carrying out activities funded by the subgrant in a competent manner in compliance with all applicable federal, state, and local laws;
- has the financial and managerial capacity to meet the commitments of the subgrant and the requirements of the program; and
- has the technical and operational capability to provide the services promised in the subgrant in the manner contemplated by the subgrant award.⁵¹

As the Commission undertakes any future reforms to its high-cost USF programs, it should follow a similar roadmap, depending upon not only after-the-fact reporting as to deployment and performance testing results but also clear and publicly stated standards and careful consideration *prior to* new distributions regarding the technical, managerial, financial, and operational qualifications of the parties seeking funding, their experience in delivering service in rural areas, and the real-world capabilities of platforms they propose to use to deliver service – and, consistent with both the procedures for ETC designation set forth in the Communications Act and the

⁵¹ Infrastructure Act § 60102(g)(2)(A)(iii).

Infrastructure Act’s recognition of the value of enlisting those governmental officials closer to the consumers and communities to be served, the states can and should help with such oversight efforts pursuant to processes and standards set by the Commission.

2. Several Recommendations on Future High-Cost USF Reforms Follow from Application of these Lessons.

Several high-cost USF initiatives have enabled NTCA members to deliver services that, as noted earlier, are often far in excess of the performance obligations in fact required by those programs. The primary programs that have furthered over time and help to sustain this work by small rural local exchange carriers (“RLECs”) include: (1) CAF-BLS and High-Cost Loop Support (“HCLS”), which distribute support to help recover capital and operating costs actually incurred in deploying networks and delivering services; (2) ACAM, which distributes support based upon a model that estimates the capital and operating costs of deploying networks and delivering services; and (3) the Alaska Plan, which provides fixed support based upon historical levels of capital and operating expenses. NTCA submits that the data show these programs have done perhaps more than any others in promoting and sustaining broadband access in rural America, but each of them would benefit from updates and enhancements that keep them from realizing their full potential.

In light of the “lessons learned” as outlined in the preceding subsection, NTCA suggests several ways in which each of CAF-BLS/HCLS, ACAM, and the Alaska Plan could be enhanced and improved. NTCA submits that the “future of universal service” in fact depends upon such changes, and we plan to offer in coming months more specific proposals for each program to address these considerations.

First, it is time for these “RLEC USF” programs to cease being viewed as merely “deployment” or “availability” programs alone. As noted above, they each undoubtedly *help enable* network construction and thereby promote availability. But, in recent years, programs like ACAM and other model plans have been presented and pitched as “deployment” programs, and this is an incomplete picture that does them a disservice – and complicates efforts to achieve and sustain universal service. ACAM, CAF-BLS/HCLS, and the Alaska Plan ultimately ensure “reasonably comparable services at reasonably comparable rates,” which entails a host of objectives including availability, affordability, adoption, and sustainability. This of course differentiates these RLEC USF initiatives from efforts like BEAD or ReConnect or other grant programs which, while important in their own right, aim narrowly to support construction and are not as concerned (if at all) with these other goals and do not provide any ongoing support for operations or service delivery.

For these reasons, and as just one example of more specific changes that should be considered to the programs, NTCA submits that references to “buildout obligations,” “deployment obligations,” or similar terms should be phased out of USF nomenclature. Instead, consistent with the notion that “universal service” is about *service* in the end, NTCA proposes that any performance obligations be crafted and considered as consumer-focused “service level commitments,” indicating that the job of high-cost USF is not accomplished merely when the network is built but instead is focused too on the ongoing work of delivering services that meet certain levels of quality. Such a shift in reference, even if superficial in nature, would signal a shift in focus away from seemingly “competing” with the grant and loan deployment programs and instead resetting USF back where it long sat – as a complement to financing programs that recovers both capital and operating expenses and thus plays a unique and distinct consumer-

focused role to ensure the sustainability of networks and services long after construction is complete.

Relatedly, the Commission must address the question of what happens in areas where high-cost USF programs were already redesigned over the past decade, for better or worse, to address “unserved” areas narrowly and neglected to take full account of the kinds of sustainability and affordability objectives that are part and parcel of the broader mission of universal service. In particular, as Premier Communications has raised in prior filings, the CAF 2 model program was designed with the overly simplistic goal of deploying broadband of certain, very limited speeds in rural areas – with the “reward” for those providers who took it upon themselves to exceed very low speed targets by building better networks being the complete elimination of support in those areas, at least as the rules stand today.⁵² This perspective must be rectified, consistent again with the notion that one cannot declare “mission accomplished” on universal service merely because a network exists in an area. Ongoing costs of operation, maintenance, and upgrades, depreciation of plant, and repayment of loans or recovery of other capital used to deploy the network (if not grant dollars) all must be considered in determining whether services that are reasonably comparable in price and quality to those in urban areas can be delivered in the future – especially

⁵² See *Ex Parte* Letter from Carol Matthey, Matthey Consulting, to Marlene H. Dortch, Secretary, Commission, WC Docket Nos. 10-90, *et al.* (filed Jan. 8, 2022) (highlighting the need for ongoing support even where networks have been deployed in excess of prior deployment obligations). Eliminating support in “served” areas creates perverse incentives, encouraging providers to do “just barely enough” to satisfy baseline performance obligations in lieu of doing more to respond to customer demand. If the provider does “just barely enough,” the area is likely to be deemed “unserved” the next time the Commission recalibrates performance obligations, leaving the area eligible for potential support and paying again for incremental network upgrades; by contrast, if the provider puts forward the best possible effort in deploying a network and delivering services, a USF mechanism that focuses narrowly on the “unserved” is highly likely to result in the elimination of all support. Certainly, the Commission should reject such a poorly designed public policy regime and inefficient outcome.

when smaller operators delivering such services across vast swaths of rural America face the prospect of trying to recover all of these costs from small customer bases in the absence of USF support.

Indeed, the issue confronted by operators like Premier is in many ways a “canary in the coal mine,” as similar questions will arise in the context of BEAD grants and other deployment-focused financing programs. Specifically, the Commission needs to consider whether the mere award of a grant to build a network will in fact result in the goals of universal service being achieved *on an ongoing and sustainable basis* in that area, and then design its high-cost USF programs accordingly.⁵³ This is a question that requires far more careful thought and analysis than merely ascertaining whether an area is “served” or “unserved” – it will require a determination of whether an area will *stay* served at the right kinds of service levels and at rates that are affordable for all of the consumers in that area even after the network is constructed. This means that some recovery of capital expenses incurred (to the extent not covered fully by grants) and then ongoing operating expenses may be needed in areas where BEAD or other grants have been distributed – and certainly in rural areas where networks have been built without the benefit of grants. On this point as well, NTCA looks forward to providing more specific and detailed recommendations in the near future as to what a “sustainability” program can look like for those providers who, whether

⁵³ It is worth noting that the CAF-BLS and HCLS programs already operate precisely in this manner by providing recovery for costs actually incurred. Thus, to the extent that a grant covers some portion of capital expenses for construction of a network, these mechanisms by their very design would not provide USF support for those costs and would instead enable recovery of only ongoing costs for operations and any remaining capital expenses not already covered by the grant. Of course, programs designed for these other non-RLEC areas will need to be tailored to the unique challenges presented in those areas, distinct from ACAM and CAF-BLS/HCLS.

by virtue of new grant programs or their own prior investments, have essentially become the 21st century “providers of last resort” for broadband in large swaths of rural America.

Second, the service level commitments for the RLEC USF programs should be recalibrated for a sustainable, long-term future. In 2015, under the theory that rural residents should receive services that are reasonably comparable to those available in urban areas, NTCA and several other organizations proposed to peg high-cost USF speed targets for supported broadband networks to the then-current Section 706 speed standard,⁵⁴ but the Commission nonetheless chose to set the baseline speed thresholds at only 10/1 Mbps.⁵⁵ In 2018, the Commission increased the baseline target speed in the RLEC USF programs to 25/3 Mbps (again at the urging of NTCA and others to aim higher).⁵⁶ In lieu of continuing to pursue an incrementalist approach to setting speed targets for service level commitments, the Commission should aim higher over a longer horizon. When helping to enable the deployment of a network through high-cost USF distributions, consistent with notions of sustainability, the Commission should be considering what level of service (and support) is likely to be needed over the economic life of that network that is being supported – and set the speed targets at that level (and provide support commensurate with those objectives). With CAF-BLS/HCLS service level commitments needing to be reset after 2023,⁵⁷ with a petition for

⁵⁴ *See Ex Parte* Letter from Michael R. Romano, Sr. Vice President, NTCA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Dec. 16, 2015), at 2.

⁵⁵ *2016 Order*, at 3097 and 3149, ¶¶ 23 and 166. These thresholds were consistent with those adopted for price cap-regulated carriers as well.

⁵⁶ *2018 Order*, at 11895, ¶ 3.

⁵⁷ *Id.* at 11927, ¶ 112 (noting obligations are developed pursuant to a 5-year forecast)

rulemaking already pending to enhance and extend the ACAM mechanism,⁵⁸ with companies like Premier having already lost USF support in certain areas simply for having “built too well,” and with the Alaska Plan’s term running through 2026, it makes good sense for the Commission to use this proceeding as a springboard to examine how – even as RLECs have already tended to leverage these programs to outperform existing commitments as a practical matter – these programs can be better coordinated and deliver services in rural America that will be reasonably comparable in price and quality to those available to urban residents both now and for years to come. NTCA once again intends to offer more specific recommendations in coming months as to how this objective could be achieved more consistently and effectively across the various RLEC USF programs.

Third, even as the data are clear that these various high-cost USF programs have done far better to date than any other initiatives in ensuring that broadband both becomes *and* stays available in rural areas, the lack of certainty and sufficiency in these programs has hindered even greater progress. For example, CAF-BLS and HCLS are subject to a budget control mechanism that, despite welcome Commission efforts in 2018 to stabilize it,⁵⁹ continues to vex efforts to plan ahead for smaller providers. Just this past year, the Commission thankfully stepped in on a unanimous basis to avert a substantial spike in the budget control mechanism⁶⁰ – but NTCA anticipates the same problem will arise yet again with even greater severity in May of this year. Given that this issue is arising (and recurring) precisely because carriers are investing more in their

⁵⁸ Petition for Expedited Rulemaking of the ACAM Broadband Coalition, RM No. 11868 (filed Oct. 30, 2020).

⁵⁹ See *2018 Order* at 11916-11924, ¶¶ 72-100.

⁶⁰ See *Connect America Fund*, WC Docket No. 10-90, Order, 36 FCC Rcd 9766 (2021).

networks to deliver better services and also because more customers are transitioning to “standalone broadband” and ceasing to buy legacy telephone services, it is important for the Commission to determine on a longer-term basis how to address these budget concerns given these are the precise outcomes otherwise desired. Here again, NTCA anticipates offering more specific suggestions in the near future as to how this might be achieved through a combination of measures, including a possible option for more providers to move voluntarily to fixed support mechanisms that provide greater sufficiency and predictability. Similarly, model extension is important because the original models contemplated the operation of networks with economic lives measured in a few decades while providing a more limited term of support.⁶¹ The same is true of Alaska Plan support. Providing support to help recover the remaining costs of deploying and maintaining those networks and delivering an evolving level of services over them at affordable rates will be essential as well to better achieve the mission of universal service not only today but for years to come.

⁶¹ It is worth observing that the current version of ACAM is slated to provide support for only ten years, despite the fact that the networks supported have economic and useful lives far in excess of this term – and ignoring the fact that ongoing costs will be incurred in the delivering services and maintaining networks in these high-cost areas even after plant is depreciated. *See, e.g.,* CostQuest Associates, *Connect America Cost Model*, Model Methodology, CACM version 4.2, Document version 4.2 (Dec. 22, 2014), at 66 (discussing lives of plant and depreciation schedules converted into monthly values in developing Annual Charge Factors) (available at: <https://transition.fcc.gov/wcb/CAM%20v.4.2%20Methodology.pdf>).

B. The Lifeline Mechanism and the Affordable Connectivity Program Must Work in Concert to Enable Low-Income Consumers to Obtain Affordable Access to Communications Services of Their Choosing.

The NOI seeks comment on the Lifeline mechanism, as well as the new Affordable Connectivity Program, specifically inquiring as to potential amendments to the former considering the adoption of the Infrastructure Act.⁶² In considering this question, NTCA urges the Commission to proceed with an eye towards ensuring that communications services meet beneficiaries' individual needs in lieu of mandating specific requirements that hinder consumer choice.

An important step the Commission should take to facilitate such choice is to provide flexibility with respect to low-income consumers' use of the Lifeline program subsidy. Specifically, Lifeline eligible consumers should be able to apply the full \$9.25 subsidy to any communications service of their choosing, whether standalone broadband or voice service or a "bundle" of the two. With respect to support for stand-alone *voice* service, as the Commission found in its recently adopted "State of the Lifeline Marketplace" Report, low-income consumers, like others, continue to rely on voice service.⁶³ NTCA members report a strong, continuing demand for voice-only service, particularly among older subscribers, and – even with the Emergency Broadband Benefit program and now the ACP available to place a broadband service within reach of most of these consumers – the demand for a voice-only product persists. For many rural Americans, the Lifeline program continues to make more affordable their connection to the outside world, either for contacting family or as a literal "lifeline" to emergency services, and the Commission should support that choice.

⁶² *NOI*, at ¶ 36.

⁶³ *See Report on the State of the Lifeline Marketplace*, WC Docket No. 09-197, WC Docket No. 11-42, WC Docket No. 20-437, Wireline Competition Bureau (Jun. 2021), at 21-22.

It should also be noted that the establishment of the ACP gives the Commission even more opportunity to allow the Lifeline program to facilitate consumer choice. While support for standalone voice service was phased out in 2016 due in part to the desire to “modernize” the program and direct more funding to broadband services,⁶⁴ the launch of the ACP should cause the Commission to reconsider that approach. With up to \$30 per month available for broadband support (and via a mechanism that has moved beyond an “emergency” mechanism and is likely to be operational for some time), this infusion of broadband-focused funding provides flexibility to employ the Lifeline program to support both voice and broadband (or either), enabling low-income consumers to apply the subsidy as they see fit. For consumers requiring an extra \$9.25 per month beyond the ACP to make a broadband service within financial reach, the Lifeline program can fill that need. Yet it can also ensure that those low-income Americans in need of critical (and perhaps otherwise unaffordable) voice service can have that need fulfilled as well. Put another way, this flexibility in the Lifeline mechanism will in no way undermine the broadband adoption gains the ACP is intended to make, as it will be up to the beneficiary at all times to decide whether the former’s subsidy is needed for a voice service or to complement the ACP in subscribing to broadband service.

⁶⁴ *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, *et al.*, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962 (2016), at 3979, ¶ 48 (stating that “to ensure the Lifeline program continues to focus its funding on modern, future-facing services for which affordability is an issue, we phase in a requirement that to be eligible for Lifeline support, a voice service must include broadband service, thereby phasing-out support for voice service as a standalone option”).

C. The E-Rate and Rural Health Care Mechanisms Should Continue Their Important Roles in Enabling Community Anchor Institutions to Purchase Robust Connections and Filling Discrete Availability Gaps Only Where Specifically Needed.

The NOI seeks comment on the USF Schools and Libraries (“E-Rate”) mechanism, as well as the Emergency Connectivity Fund (“ECF”), in light of the Infrastructure Act.⁶⁵ It likewise seeks recommendations related to administration of its Rural Health Care (“RHC”) efforts going forward.⁶⁶ Just as the Commission should ensure that its broadband support mechanisms are coordinated with other agencies’ funding programs, as discussed in Section III, *supra*, program coordination is critical here as well within the Commission itself. In particular, the E-Rate and RHC mechanisms should continue their essential roles of enabling critical community anchor institutions to purchase needed services where available, while filling service availability gaps only where other programs are not already working to do so.

The E-Rate program, like the other discrete USF programs, fills a unique and vital need, making it possible for our nation’s schools and libraries to access and leverage the most modern technologies in furtherance of their respective missions. The ECF, for its part, has stepped in to temporarily give any household with a student a connection to access remote learning. The RHC program meanwhile incorporates several subsidies to support procurement of an array of connectivity and connected care services, including for patients at home or while mobile. Yet, in the rural areas served by NTCA members, it is the high-cost USF program that is tasked in the first instance with ensuring that households and other users (such as schools and libraries) throughout these communities have sufficient and affordable access to broadband. Going forward, it is critical

⁶⁵ *NOI*, at ¶¶ 37-39.

⁶⁶ *Id.* at ¶¶ 40-43.

that the high-cost, E-Rate, and RHC mechanisms all continue in these complementary roles, ones in which they have been successful as different “tools in a toolkit” to fill the needs of specific portions of any given community. More specifically, a properly structured and sufficiently funded high-cost USF program can continue its important work in making high-quality connections available on a community-wide basis in rural areas (and with respect to households with students, certainly at speeds better than can be obtained with a mobile “hotspot”). Meanwhile, the E-Rate mechanism remains essential in providing eligible institutions with a much-needed discount on these robust communications services, and the RHC programs provide targeted subsidies to enable use of evolving connected care applications.

To this end, while it is critical that the E-Rate and RHC mechanisms focus primarily on helping make connectivity services more affordable and not funding redundant connections where the high-cost USF program is already supporting community-wide access, E-Rate and RHC might be used to fill discrete gaps in service that anchor institutions confront where those are not being filled by the high-cost USF program or otherwise by service providers. Thus, where for example a school or library lacks any connection from any current provider and where the high-cost USF program will not help enable such service in the future, special construction funds under E-Rate should continue to be available to a school or library. Yet, this should be paired with reasonable safeguards to ensure that E-Rate resources in well-served areas are at all times used to solve the particular challenge that each eligible school or library faces, whether that be availability or affordability.⁶⁷ Absent attention to proper program coordination, which begins by recognizing the

⁶⁷ Petition for Rulemaking of Central Texas Telephone Cooperative, Inc., *et al.*, RM-11841, CC Docket No. 02-6, WC Docket No. 13-184 (filed May 22, 2019), at 4-5 (proposing that “the Commission adopt rules that prohibit the use of universal service funds for special construction of fiber networks that overbuild existing fiber networks”); *see also* Comments of NTCA–The Rural Broadband Association, WC Docket No. 13-184 (filed Jul. 1, 2019), at 3 (stating that “existing

separate but interconnected roles for the various USF programs, there is substantial risk of redundant network connections to schools, libraries or even households – both funded by Commission programs that compete with each other. By contrast, if the programs are administered to work hand-in-hand, this could conserve limited resources for better use in filling unaddressed needs elsewhere.

As one example of a means of promoting program coordination, the Commission should amend its E-Rate competitive bidding rules to include limited safeguards to prevent redundant services from being supported by multiple USF programs. As NTCA has previously proposed,⁶⁸ where existing facilities are already in place, at the very least, an application for construction of a new connection (either as an individual connection or as part of a consortium) to a school or library should trigger a 30-day review to ensure that the E-Rate applicant is given the best price possible. During this review period, a provider with the facilities already in place to serve the E-Rate applicant at its requested speed (within 10 business days) should be permitted to agree to match the price found in the application for construction of a new connection. In this way, the E-Rate program’s resources will go to where they are needed most, while recognizing and respecting the many efforts underway by providers and other programs to ensure communities – including the schools and libraries within them – are connected and have access to robust and affordable communications services.

providers with connections in place sufficient to meet an E-Rate applicant’s needs for broadband would be given the opportunity to respond to an application for self-construction filed by a school or library”).

⁶⁸ See Comments of NTCA—The Rural Broadband Association, WC Docket No. 13-184, WC Docket No. 10-90, CC Docket No. 02-6 (filed Jul. 1, 2019).

D. THE COMMISSION SHOULD TAKE SEVERAL STEPS TO PUT ITS ESSENTIAL USF PROGRAMS ON A MORE STABLE AND SUSTAINABLE FOUNDATION.

Given the importance of the various USF programs as discussed above to the ongoing mission of preserving and advancing universal service, the Commission should take several steps to stabilize the USF contribution mechanism. Indeed, such action is critical to the “‘ability of the Commission to achieve the universal service goals for broadband’ that are applicable to each of the USF programs or some other aspect of the Fund.”⁶⁹ As discussed further below, it is essential that the Commission undertake now those steps that it can pursuant to its existing authority to address this concern, while actively and simultaneously pursuing additional steps that are necessary to further improve the long-term viability of the USF contribution mechanism and promote equity and fairness among all of those that use and benefit from broadband services.

1. There is broad consensus for the Commission to act as soon as possible to include fixed and mobile broadband Internet access revenues within the USF contribution base – and it is in the public interest to do so.

As an initial matter, there is broad consensus that the current USF contribution mechanism is in dire need of reform and, as discussed further *infra*, that the Commission has the authority to take certain steps to do so. A recent “Call to Action” issued by over 330 stakeholders representing “public interest groups, communications companies, anchor institutions, and consumers”⁷⁰ highlighted widespread support for action in this regard. As this group noted, despite “diverse perspectives, we share a common interest in the broad statutory mission of universal service, in

⁶⁹ *NOI*, at ¶ 45, citing Infrastructure Act § 60104(c)(2).

⁷⁰ *See Ex Parte* Letter from Carol Matthey, Matthey Consulting, to Marlene H. Dortch, Secretary, Commission, WC Docket Nos. 21-476 and 06-122, (Feb. 14, 2022), at Att. 1 (“*Call to Action*”).

the viability and sustainability of the USF, and the predictability that both residential and business consumers need.”⁷¹ Yet, as that group also noted, the sustainability of the contribution mechanism is in doubt because the contribution factor “has spiraled from about 7% to around 30% over the last two decades and could exceed 40% in the near future.”⁷² Why this is happening is no mystery either: as the recently released *USForward Paper* found, the revenues used to calculate contributions [fell] from \$79.9 billion in 2001 to \$29.6 billion in 2021 - a 63% decrease.”⁷³ Just as importantly, this trend shows no sign of abating.

As concerning as the mathematical trends in the contribution base are for the predictability and even viability of the USF mechanisms, the uneven and discriminatory nature of the current contribution obligations are troubling too from a public policy perspective. Some services that do not contribute (such as “one-way VoIP” services or broadband Internet access services, for example) are in some respects functionally equivalent to, and adopted as substitutes by users for, others that do (like other voice and data transmission services). In addition to being unbalanced in terms of burden, this fosters confusion in compliance and even promotes gaming, as parties “self-classify” services in certain ways that they believe colorable but ultimately work to the detriment of the essential USF programs by reducing contributions. Moreover, even as all four USF mechanisms have been updated over the past decade to better support national broadband objectives, and even as broadband represents the primary use of networks today, USF programs

⁷¹ *Id.* at 1.

⁷² *Id.*

⁷³ *USForward*, FCC Must Reform USF Contributions Now: An Analysis of the Options, Matthey Consulting, Inc. (Sept. 2021) (“*USForward Paper*”) (available at: <https://www.ntca.org/sites/default/files/documents/2021-09/FINAL%20USForward%20Report%202021%20for%20Release.pdf>).

continue to be funded largely on the backs of purchasers of “legacy” telecommunications services – an untenable proposition that cannot be squared with the statute’s call for equitable and nondiscriminatory contributions.

Over the years, for all of the back-and-forth and handwringing and calls for more analysis, a closer look reveals there have been at bottom just *five* fundamental ideas floated for reforms (along with various combinations of these five) to address the contributions crisis. For a debate that has persisted so long, it has evolved little – indicating the challenge is likely more political than technical in nature. Those five fundamental reform options can be summarized as follows:

1. *Add broadband Internet access revenues to the current revenue-based mechanism;*
2. *Assess connections of all kinds, whether voice or data;*
3. *Assess telephone numbers;*
4. *Replace (or supplement) the current mechanism with assessments upon Internet-based businesses that depend upon networks for the delivery of video streaming and other services; or*
5. *Replace the current contribution mechanism with annual appropriations from Congress.*

The recent *USForward Paper* examined several of these options – specifically, reforms based upon assessment of broadband revenues, connections, or telephone numbers.⁷⁴ Publicly available data sources were used in the paper to evaluate the mechanics of each option and its potential impact on ratepayers,⁷⁵ with findings that a revenues-based mechanism would drop the

⁷⁴ *Id.* at 14-21. The three options analyzed by the paper are those that might be rightly characterized as “structural changes” to the existing mechanism, as compared to the remaining two options which, as outlined by many (but not all) proponents, are often positioned as replacing the existing mechanism.

⁷⁵ *Id.*

contribution factor from approximately 30% to less than 4% and that connections- and numbers-based reform would result in customers paying between \$0.72 and \$0.86 per connection or number per month to support USF.⁷⁶ Moreover, as the paper notes, the Commission has sought comment on this issue and these specific options for reform several times, indicating that it should not be a heavy lift for the Commission to complete its work toward enacting any such reforms in relatively prompt order.⁷⁷

Consistent with the analysis in the report and the ensuing Call to Action issued by several hundred stakeholders,⁷⁸ NTCA submits that adding fixed and mobile broadband Internet access revenues to the existing USF contribution base represents the simplest and straightest path forward. Prompt action by the Commission to adopt such reforms is in the public interest and warranted for several reasons.

First, as the *USForward Paper* highlights, broadband revenues have been on a steady trajectory.⁷⁹ Presumably, the Commission (and Congress and other federal agencies) agree with the “staying power” of broadband or they would not be taking as many actions as they are, whether in terms of funding or other policies, to promote it. Thus, by including fixed and mobile broadband revenues within the contribution base, the Commission would place the contribution mechanism on a stable foundation for likely decades to come.

⁷⁶ *Id.* at 14-20.

⁷⁷ *Id.* at 14.

⁷⁸ *See Call to Action*, footnote 70, *supra*.

⁷⁹ *USForward Paper*, at 22.

Second, as the *USForward Paper* explains, including broadband revenues within the current contribution base would be relatively simple and expeditious to implement.⁸⁰ Parties contribute to USF today based upon revenues, and thus internal accounting and other systems are already geared toward such a methodology – contributors would need only add broadband Internet access revenues to the list of revenue categories upon which they contribute. The Commission is familiar with this methodology as well, further easing the path toward reform for all parties involved, including agency staff and the Universal Service Administrative Company (“USAC”).

Third, as NTCA and others noted as early as 2012, “[a] revenues-based contributions mechanism also meets the Commission’s oft-uttered commitment to technological neutrality; it best captures the value that consumers place on competing services that use underlying telecommunications networks without regard to the specific technology used to deliver the service.”⁸¹ Various categories of providers (wireline, wireless, cable, fiber, etc) would not be placed at any disadvantage relative to the other, as each would be subject to the same revenues calculations for contributions purposes – thus promoting competitive neutrality as well.

Fourth, it is a jarring juxtaposition indeed to have broadband Internet access service increasingly become the focus of USF support mechanisms and public policy initiatives more broadly while excluding this very same service from providing financial support for all of those efforts consistent with the original statutory design of universal service funding. As the *USForward Paper* aptly observed:

⁸⁰ *Id.*

⁸¹ Comments of NTCA, *et al.*, WC Docket No. 06-122 (filed Jul. 9, 2012), at 37.

The service that is driving value in the communications marketplace should contribute to support today's modern communications network for all. Residential consumers and businesses have largely adopted broadband internet access service. While consumers and businesses continue to use other services that contribute, those services alone should not carry the responsibility to finance USF. This conclusion is buttressed by the fact that all four programs in the USF now support the availability of broadband networks that can deliver broadband internet access service.⁸²

There are some who will argue that assessing broadband Internet access revenues is misguided public policy because it will suppress adoption. Those making such arguments, however, have little detailed empirical evidence to back such claims, and as discussed in the following subsection, there are strong indications to the contrary – that a small assessment as part of a broader contribution base, if structured properly, will have no material effect whatsoever upon adoption or retention of broadband. Others, meanwhile, will undoubtedly argue that additional reforms are needed, whether these involves a “hybrid” of revenues and other options or more novel and promising-as-well concepts such as including other contributions (like large “edge providers”). While other options should certainly be explored as well – and, as discussed further *infra*, NTCA specifically supports including larger Internet-based businesses in the base of contributors – it is essential that “the perfect...not be the enemy of the better.”⁸³ Still others would have stakeholders review (or search for) “more data” in the hope that staring at the same options over and over for long enough might yield a miracle cure after decades of inertia.

Although any contribution methodology is bound to have drawbacks, thoughtful action to stabilize the base is essential now to ensure that support under the four important USF mechanisms will be sufficient and predictable and that these various programs can achieve their universal

⁸² *USForward Paper* at 22.

⁸³ *Call to Action* at 1.

service missions now and into the future. NTCA again supports ultimate adoption of a broader contribution base than even just telecommunications and broadband revenues alone, but these other methods warrant further study and will seemingly necessitate a grant of additional authority from Congress. In lieu of waiting for these additional steps to undertake any reform at all, the Commission should act based upon the legal authority it already possesses and the fact that the same fundamental reform options have been evaluated repeatedly over a decade with little change other than the underlying data as to size and impact of each on the contribution factor. Indeed, in this regard, the Commission can follow the cues of a number of states that have recognized the perilous declines in their own universal service mechanisms and taken steps in recent years to adopt reforms along the lines of those described above. Of course, many of these states have adopted connections-based reforms, driven in no small part by their limited jurisdiction over broadband Internet access service.⁸⁴ The larger point, however, is that like these states the Commission should recognize that inaction presents real risk to the viability of critical universal service objectives.

⁸⁴ See, e.g., New Mexico Public Regulation Commission, *State Rural Universal Service Fund 2019 Per-Connection Charge Calculation And Fund Size*, Case No. 18-00252-UT, Order Setting State Rural Universal Service Fund Size And Per-Communication Connection Charge For 2019 (available at <https://www.gvnwusf.com/Portals/4/Documents/Orders/18-00252-UT.pdf?ver=2018-12-14-080936-183>); Utah Public Service Commission, *In the Matter of the Utah Administrative Code R746-8, Docket No. 17-R008-01, Calculation and Application of UUSF Surcharge* (available at <https://psc.utah.gov/2017/07/06/docket-no-17-r008-01>); Nebraska Public Service Commission, *In the Matter of the Nebraska Public Service Commission, on its own motion, to consider revisions to the universal service fund contribution methodology*. Application No. NUSF 100, ORDER (Oct. 31, 2017).

2. ***Adding broadband to the contribution base will not undermine consumer demand for that service.***

Despite the claims by some that expansion of the contribution base to include broadband Internet access revenues will suppress consumer demand for broadband, the most detailed economic literature to examine this question in recent years has found to the contrary. Specifically, in May 2020, a study by the Berkley Research Group examined the price elasticity of consumer demand with respect to retail broadband Internet access service. The study evaluated in particular the effects on adoption and retention of expanding the contribution base to include both broadband and voice connections. As explained further in the report, the economists structured and conducted “a robust examination of consumer preferences and sensitivities,”⁸⁵ adhering to “generally accepted principles of questionnaire design.”⁸⁶ The study ultimately confirmed the continuing accuracy of prior economic literature, finding that “the demand for a broadband connection has become more inelastic, i.e., less sensitive to price change changes over time.”⁸⁷ The study specifically found that “the estimated percentage reduction in demand for broadband services is approximately 0.08% for every 1% increase in total service fees.”⁸⁸ Estimating that adding broadband to the base would increase consumer bills by \$0.80 (for broadband-only subscribers) the study found that, on average, “98% of survey respondents would not choose to make changes

⁸⁵ *NTCA-USF Study*, Expert Report of Michael A. Williams, PH.D. and Wei Zhao, PH.D. (rel. May 7, 2020) (available at: <https://www.ntca.org/sites/default/files/documents/2020-05/2020-05-07%20-%20Williams-Zhao%20report%20Final.pdf>), at 4.

⁸⁶ *Id.*

⁸⁷ *Id.* at 5.

⁸⁸ *Id.*

to their current communications services—voice or broadband—as a result of a monthly increase in their bills that would amount to \$0.80 per connection at most.”⁸⁹

Particularly if contribution reforms are structured carefully to protect those lower-income consumers who are likely most price-sensitive (and for whom demand is therefore more elastic),⁹⁰ this detailed economic study – the only of its kind to be conducted examining the specific question of contribution reform impacts – indicates that such reforms will have little to no impact on broadband adoption or retention. Particularly during a pandemic when elected officials and policymakers of all kinds have taken note of how even more critical broadband is to the conduct of daily life, it is far-fetched to believe that a small assessment on a broadband bill (especially when structured to protect lower-income consumers and also *relieving* the contribution burden on millions of consumers who still buy traditional telecommunications services today) will somehow lead to widespread cancellation of broadband services by American consumers.

⁸⁹ *Id.* at 37.

⁹⁰ Although another report released in the last year briefly referenced demand elasticity in the broadband marketplace, this report’s overview appears to rely primarily upon analysis that is more than six years old to estimate price elasticity and depends upon several material assumptions that NTCA would assert *should not be part of any contribution reform*, including most significantly: (1) assessing all broadband users, rather than excluding lower-income consumers from potential assessment; and (2) assuming that broadband would be the *only* service to contribute (*i.e.*, that all other services contributing today would *cease* to contribute). *Subsidizing Universal Broadband Through a Digital Advertising Services Fee: An Alignment of Incentives*, Hal J. Singer and Ted Tatos (Sep. 16, 2021), at 50-51 (available at: <https://www.econone.com/wp-content/uploads/2021/09/Digital-Divide-HSinger-TTatos-2.pdf>).

3. ***The Commission has ample legal authority to shore up the contribution mechanism by including broadband Internet access revenues – and it need not reach the question of classifying broadband Internet access to do so.***

- a. **Statutory Backdrop and Commission Precedent**

Section 254(d) of the Communications Act requires that “every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanism established by the Commission to preserve and advance universal service.”⁹¹ This first sentence of Section 254(d) makes providers of “interstate telecommunications services” mandatory contributors to USF. Telecommunications service is the “offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used.”⁹² The Commission and courts have affirmed that “telecommunications services” are “essentially the same as common carrier.”⁹³

Section 254(d) also allows the Commission to expand the requirement so that “[a]ny other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.”⁹⁴ By contrast with the first provision, this latter sentence applies to a larger group comprised of “provider[s] of interstate telecommunications.” By definition, “telecommunications” includes “the transmission, between and among points specified by the user, or information of the user’s choosing, without change in

⁹¹ 47 U.S.C. § 254(d).

⁹² *Id.* at § 153(53).

⁹³ *See Virgin Islands Tele. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).

⁹⁴ 47 U.S.C. § 254(d).

the form or content of the information as sent and received”⁹⁵ and therefore includes services beyond common carrier services.

Since its adoption, the Commission has utilized its permissive authority in Section 254(d) twice to expand the USF contribution base beyond the mandatory contribution required from common carriers. In 1997, as part of the initial establishment of the USF and its processes, the Commission used its permissive authority to require payphone aggregators and private carriers to contribute to the Fund: “[U]nder our permissive authority over ‘other providers of telecommunications’” the Commission found that “the public interest requires private service providers that offer their services to others for a fee and payphone aggregators to contribute to our support mechanisms.”⁹⁶ The Commission determined it was in the public interest and in support of competitive neutrality to include these services to reduce “the possibility that carriers with universal service obligations will compete directly with carriers without such obligations” and to expand the contribution base thereby lessening the burden on telecommunications carriers.⁹⁷ The inclusion of these services into the base was further supported by the fact they either could not operate without access to the public switched telephone network (“PSTN”), which was at least partially supported through USF, or, if not using the PSTN, then the service competes with common carriers and should not enjoy a competitive advantage.⁹⁸

⁹⁵ *Id.* at § 153(50).

⁹⁶ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9183 (1997) (“*Universal First Report and Order*”), at ¶ 794.

⁹⁷ *Id.* at 9183, ¶ 795.

⁹⁸ *Id.* at 9184, ¶ 796.

In 2006, the Commission exercised its permissive authority again and required interconnected VoIP providers to contribute to USF.⁹⁹ The Commission concluded that it could assess USF on interconnected VoIP because the service “provides interstate telecommunications” and therefore including it in the contribution base was in the public interest. This requirement was imposed even though the Commission did not classify interconnected VoIP as either a “telecommunications service” or “information service” but instead evaluated whether the service “provides interstate telecommunications” under its Section 254(d) permissive authority.¹⁰⁰

First, the Commission determined that interconnected VoIP includes the provision of interstate telecommunications. In doing so, the Commission first found that interconnected VoIP is *providing* the service, as distinguished from *offering* the service.

Pursuant to the [Communications Act’s] definitions, a “provider of interstate telecommunications” provides “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” Unlike providers of interstate telecommunications services, however, providers of interstate telecommunications do not necessarily “offer” telecommunications “for a fee directly to the public.”¹⁰¹

The Commission further concluded that these services are telecommunications. “As the Commission has recognized, the heart of telecommunications is transmission. The Commission has previously concluded that interconnected VoIP services involve transmission of voice by aid

⁹⁹ *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006) (“*VoIP Order*”), *aff’d*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

¹⁰⁰ *Id.* at 7537, ¶ 35.

¹⁰¹ *Id.* at 7538, ¶ 38 (internal citations omitted).

of wire, cable, or other connection and/or transmission by radio of voice.”¹⁰² Finally, the Commission noted that it had already determined that interconnected VoIP is jurisdictionally mixed and therefore inherently has an interstate component as part of its service.¹⁰³

The Commission then determined that it was in the public interest to apply USF assessment to interconnected VoIP. First, interconnected VoIP uses the public telephone network, which is partially supported through USF. “Congress designed the universal service scheme to exact payments from those companies benefiting from the provision of universal service.”¹⁰⁴ Therefore, because the service benefits from USF, the Commission concluded that it should support USF.

In addition, the statutory requirements for competitive neutrality as part of the contribution methodology supported inclusion of the service.¹⁰⁵ “Competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.”¹⁰⁶ Most importantly, the Commission did not want the application of USF contribution requirements to “shape decisions regarding the technology that interconnected VoIP providers use to offer voice services to customer or to create opportunities for regulatory arbitrage.”¹⁰⁷

¹⁰² *Id.* at 7539, ¶ 41 (internal citations and quotation marks omitted).

¹⁰³ *Id.* at 7540, ¶ 42. It is worth of course noting that the underlying transmission upon which VoIP typically relies is none other than a network focused primarily upon the provision of broadband Internet access service. In fact, many VoIP products necessitate specifically broadband transmission to operate. *See, e.g.*, <https://www.vonageforhome.com/> (“Vonage’s VoIP phone service uses your Internet connection to make and receive calls.”).

¹⁰⁴ *VoIP Order*, 21 FCC Rcd at 7541, ¶ 43.

¹⁰⁵ *See e.g.*, 47 U.S.C. § 254(b)(4) and (5).

¹⁰⁶ *VoIP Order*, 21 FCC Rcd at 7541, ¶ 44.

¹⁰⁷ *Id.*

While the Commission has not issued any additional orders expanding the USF contribution base under its permissive authority, it has proposed doing so several times since the *VoIP Order*. In the *2012 USF Contributions FNPRM*, the Commission recognized its statutory authority to expand the contribution base to include providers of interstate telecommunications and sought comment on the inclusion of additional services such as broadband.¹⁰⁸ The Commission requested comment on using its permissive authority to require text messaging, one-way VoIP, and broadband Internet access services to contribute to the Fund due, in part, to the existing confusion about their classification.¹⁰⁹ Further, the Commission asked for comments on applying contribution requirements without classifying the services as information or telecommunications “to advance our proposed goals for contributions reform, namely creating greater efficiency, fairness and sustainability of the Fund.”¹¹⁰ More recently, the Commission asked for comment to refresh the record regarding assessing one-way VoIP under its permissive authority.¹¹¹

¹⁰⁸ *Universal Service Contribution Methodology; A National Broadband Plan for our Future*, WC Docket No. 06-122, et al., Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357, 5379, (2012) (“*2012 Contribution FNPRM*”), at ¶ 39.

¹⁰⁹ *Id.* at 5378-79, ¶ 38. (“The question of whether certain enterprise communications services are currently assessable as telecommunications service or non-assessable as information service has led to significant disputes, uncertainty, and incentives for providers to attempt to characterize their services in a particular way in order to avoid contributions requirements.”).

¹¹⁰ *Id.* at 5381, ¶ 42.

¹¹¹ *Comments Sought to Refresh the Record in the 2012 Contribution Methodology Reform Proceeding with Regard to One-Way VoIP Service Providers*, WC Docket No. 06-122, Public Notice (rel. June 11, 2020).

b. The Commission has a clear path to use permissive authority to make broadband assessable.

The Commission has legal authority to find that broadband Internet access service providers are providers of interstate telecommunications for the purposes of USF without classifying the service as either a telecommunications or information service. As determined in the *VoIP Order*, the Commission could evaluate broadband Internet access service and find that it “provides” a transmission that is jurisdictionally mixed and that it is in the public interest to exercise Section 254(d) permissive authority to include the service in the USF contribution base.

Indeed, the Commission has repeatedly determined that broadband Internet access services include a transmission or telecommunications component. When the Commission classified broadband as a telecommunications service in 2015, it noted that broadband Internet access service providers are offering “straightforward transmission capabilities.”¹¹² When the Commission reversed its position a few years later and classified broadband as an information service, it noted that “[t]he record reflects that information processes must be combined with transmission in order for broadband Internet access service to work.”¹¹³ And, although it reversed the “telecommunications service” classification of broadband Internet access, the Commission noted that the “basic nature of Internet service – ‘[p]rovid[ing] consumers with a comprehensive capability for manipulating information using the Internet via high-speed telecommunications’ – has remained the same since the Supreme Court upheld the Commission’s similar classification of

¹¹² See *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling and Order, GN Docket No. 14-28, 30 FCC Rcd 5601, ¶ 43 (2015), *aff’d sub nom.*, *United States Telecomms Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

¹¹³ *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, Order, 33 FCC Rcd 311, 340 (2018), at ¶ 49, vacated in part, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (“*Restoring Internet Freedom Order*”).

cable modem service as an information service twelve years ago.”¹¹⁴ The Commission also emphasized that Internet Service Providers make available information-processing and transmission through broadband Internet access.¹¹⁵

The Commission’s legal analysis in 2018 focused on whether broadband Internet access providers “offer” a telecommunications service and did not “address the scope of the ‘telecommunications’ definition” to justify its classification, in part because it could “have implications beyond the scope of issues ... in this proceeding.”¹¹⁶ Indeed, the Commission’s 2018 conclusion that “there cannot be a stand-alone offering of telecommunications” under the “telecommunications service” definition can still be true “even if the information service could be said to involve the *provision of telecommunications* as a component of the service.”¹¹⁷ Moreover, in its 2015 decision, the Commission forbore in part only from the first sentence of Section 254(d), the mandatory contribution obligation,¹¹⁸ concluding that such “limited forbearance” was warranted “to allow the Commission to consider the [universal service contribution] issues presented based on a full record in that docket”¹¹⁹ such that the *Restoring Internet Freedom Order* did not “‘short circuit’ the rulemaking concerning contributions issues.”¹²⁰ Therefore, the

¹¹⁴ *Id.* at 321, ¶ 28 (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 987 (2005)).

¹¹⁵ *Id.* at 322, ¶ 31.

¹¹⁶ *Id.* at 341, ¶ 52.

¹¹⁷ *Id.* at 343, ¶ 53 (emphasis added).

¹¹⁸ *Id.* at 784, ¶ 488.

¹¹⁹ *Id.* at 786, ¶ 489.

¹²⁰ *Id.* at 786, ¶ 490 & n.1471.

Commission has left open the possibility of using its permissive authority to find broadband Internet access service providers *offer* an information service *but also provide* “telecommunications” that the Commission could find is subject to Section 254(d)’s permissive contribution requirement.

Since the Commission has determined repeatedly that broadband Internet access service includes telecommunications, the logical next step is to determine that broadband Internet access service *provides* interstate telecommunications. In the *VoIP Order*, the Commission explained that, even when a provider offers an integrated service, it could still provide a part of that service – namely the telecommunications portion – separately:

Congress did not define the term “provide” or “provider,” but the structure of the [Communications Act] informs us that “provide” is different and more inclusive than “offer...” Because Congress used a different term – “providers” – we understand Congress to have meant something broader. Common definitions of the term “provide” suggest that we should consider the meaning of “provide” from a supply side, *i.e.*, from the provider’s point of view. For example, Black’s Law Dictionary defines “provide” to mean “[t]o make, procure, or furnish for future use, prepare. To supply; to afford; to contribute.” Transmission is an input into the finished service “offered” to the customer. But from the interconnected VoIP provider’s point of view, we believe that the provider “provides” more than just a finished service. We believe it is reasonable to conclude that a provider “furnishes” or “supplies” components of a service, in this case, transmission.¹²¹

Upon appellate review of the *VoIP Order*, the court deferred to the Commission’s interpretation of “provide” and “offer.” First, the court found that the word “‘provide’ is sufficiently broad to encompass the Commission’s interpretation.”¹²² The court then determined

¹²¹ *VoIP Order*, 21 FCC Rcd at 7538, ¶ 40.

¹²² *Vonage v. FCC*, 489 F.3d at 1239.

it was reasonable for the Commission to distinguish “provide” from “offer.” “We also see nothing that would prevent the Commission from interpreting the word ‘offer’ from the demand side ... and the word ‘provide’ from the supply side.... Indeed, we have repeatedly held that ‘[w]here different terms are used in a single piece of legislation, the court must presume that Congress intended the terms to have different meanings.’”¹²³

An appellant argued that the Commission could not find a VoIP provider to be both a private carrier (providing telecommunications) and an information service provider. The court disagreed, noting that “although ‘information service’ and ‘telecommunications service’ are mutually exclusive categories, [the appellant] points to no authority supporting its argument that a provider of ‘information services’ cannot also be a ‘provider of telecommunications’ for the purposes of section 254(d). *Indeed, the [Communications Act] clearly contemplates that ‘telecommunications’ may be a component of an ‘information service.’*”¹²⁴

The FCC’s permissive authority thus does not require the agency to determine that a service is either an information service and telecommunications service because both include a transmission component. Instead, it allows the FCC to determine that a service can both “offer” an information service and “provide” telecommunications, without fitting the “telecommunications services” definition. The Commission’s position in the *Restoring Internet Freedom Order* is consistent with its decision to include interconnected VoIP in the contribution

¹²³ *Id.* at 1240 (quoting *Transbrasil S.A. Linhas Aereas v. Dep’t of Transp.*, 791 F.2d 202, 205 (D.C. Cir. 1986)).

¹²⁴ *Vonage v. FCC*, 489 F.3d at 1241 (dismissing the appellant’s argument and emphasis added).

base¹²⁵ and, as noted above, the Commission explicitly left open the possibility of determining that broadband Internet access “provides telecommunications.”

The courts have regularly deferred to the Commission’s judgment on regulatory classification and USF contribution assessment of services. After the Commission included interconnected VoIP as part of the USF contribution base but did not classify it as either telecommunications or information service, the court upheld the Commission’s decision, deferring to the Commission’s analysis.¹²⁶ When the Commission classified broadband as a telecommunications service and then reversed itself and classified broadband as an information service, the court deferred to the agency’s expertise in both instances, despite the reversal of its position.¹²⁷ Based on the Commission’s *VoIP Order*, the Commission’s *Restoring Internet Freedom Order*, and the court’s analysis, the Commission can determine that broadband Internet access service is “providing” interstate telecommunications for purposes of Section 254(d) even if the provider also “offers” an information service to the customer and the courts should defer to the Commission’s interpretation.

¹²⁵ *Restoring Internet Freedom Order*, 33 FCC Rcd at 342, ¶ 52, n.192 (citing *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1239-41 (D.C. Cir. 2007) as “upholding the FCC’s distinction between ‘providing’ telecommunications and ‘offering’ telecommunications service”).

¹²⁶ *Vonage Holdings Corp.*, 489 F.3d at 1238 (applying the two-part Chevron test to review the agency’s interpretation of the underlying statute).

¹²⁷ See *United States Telecomms Ass’n*, 825 F.3d at 727 (affirming the Commission’s decision and noting that the court reviews the “agency’s interpretation of its own regulations with substantial deference”) (internal quotation marks and citation omitted). See also *Mozilla Corp. v. FCC*, 940 F.3d at 19 (“Our review is governed by the familiar *Chevron* framework in which we defer to an agency’s construction of an ambiguous provision in a statute that it administers if that construction is reasonable.”).

Consistent with this legal analysis and based upon arguments raised in Sections IV.D.1 and D.2, *supra*, the Commission can and should include fixed and mobile broadband Internet access in the USF contribution base as consistent with the public interest and based upon its well-settled permissive authority to do so.

4. *The Commission should actively pursue other measures to broaden the base by ensuring that all of those that benefit from broadband availability and adoption in offering Internet-based services contribute to the mission of universal service and help adequately recover the costs of enabling such services.*

Even as reforms such as those suggested above should be adopted as soon as possible to shore up the USF contribution base, efforts to broaden the base must not cease there. Additional measures should be promptly explored and authority sought promptly from Congress to complete reforms that will best ensure contribution obligations are spread in a manner that is as equitable and nondiscriminatory as possible.

More specifically, early last year Commissioner Brendan Carr offered a thoughtful analysis of, and potential path forward for, further addressing the current unsustainable USF contribution mechanism. Calling on all involved to “fundamentally rethink how we fund our high-speed networks,”¹²⁸ Commissioner Carr proposed “requiring Big Tech to pay its fair share.”¹²⁹ Most notably, Commissioner Carr’s referenced a study finding that up to 75 percent of data on rural broadband networks is attributable to video streaming services.¹³⁰ NTCA understands that

¹²⁸ *Ending Big Tech's Free Ride*, Newsweek, OPINION, Brendan Carr, FCC Commissioner (May 24, 2021).

¹²⁹ *Id.*

¹³⁰ *Id.*, citing *Rural Broadband and the Unrecovered Cost of Streaming Video Entertainment*, Roslyn Layton, Aalborg University, Department of Electronic Systems, Center for Communication, Media and Information Technologies and Petrus H. Potgieter (June 2021).

members across the country experience similar strains on their networks, meaning that some of those that benefit most from the existence of these networks and the delivery of services atop them appear to contribute little to nothing to their availability and affordability for users – and it is worth noting as well that even the USF support mechanisms as currently structured do not provide full recovery for all of the costs associated with accommodating these substantial traffic demands, including network elements such as substantial middle mile facilities.

Despite their significant dependence on these networks and the substantial benefits they gain from being able to deliver their products over these networks at no cost to them, these large Internet companies do not contribute directly to the deployment, sustainability, or affordability of broadband in rural America. As a conceptual matter, the USF contribution mechanism captures a notion that all of those that benefit from universal connectivity should contribute on an equitable and nondiscriminatory basis to the fund – but this is not happening today. Even as these Internet-based businesses would be unable to deliver their streaming video services (especially higher quality video products) without reliable, high-speed broadband connections throughout the country, the USF does not account for the costs these services imposed on rural networks and does not ask these Internet-based businesses to help even in contributing to support those costs that are covered by USF distribution mechanisms now.

Fortunately, leading members of Congress have taken note, introducing both the *FAIR Contributions Act*¹³¹ and the *Rural Broadband Network Advancement Study Act*,¹³² legislation that

¹³¹ *Wicker, Capito, Young Introduce Bill to Explore Collecting USF Contributions from Big Tech*, Press Release (Jul. 21, 2021) (available at: <https://www.commerce.senate.gov/2021/7/wicker-capito-young-introduce-bill-to-explore-collecting-usf-contributions-from-big-tech>).

¹³² *Mullin Introduces Rural Broadband Network Study Act*, Press Release (Mar. 10, 2021) (available at: <https://mullin.house.gov/news/documentsingle.aspx?DocumentID=4525>).

would direct the Commission to examine the demands placed on rural networks by streaming services. Similarly, other members of Congress have introduced legislation that would compel the Commission to reform the USF contribution system within one year after considering the relative fairness of proposed reforms to consumers and businesses and the impact of proposed reforms on seniors.¹³³

NTCA therefore endorses ensuring that the kinds of entities mentioned by Commissioner Carr in his call for action last spring ultimately bear their fair share in contributing to USF and helping to recover the full range of costs arising out of the kinds and scope of data these entities transmit across rural broadband networks. It is clear that three critical steps must be taken to implement such reforms: (1) the Commission must undertake further analysis of the scope of the demands placed upon such networks by these Internet-based businesses; (2) the Commission must develop a means of contribution that ensures these entities indeed bear their “fair share” (*e.g.*, Commissioner Carr has suggested looking possibly to digital advertising revenues); and (3) Congress must confer upon the Commission the authority to implement such an assessment. For these reasons and those described above, even as NTCA embraces taking all three of these steps as promptly as possible, we urge the Commission not to depend upon such measures alone; rather, NTCA submits that the Commission should look to capture *all* of users and beneficiaries of the networks and services that ultimately deliver universal service. This would include *both* expanding now the contribution base to include broadband Internet access revenues *and* taking the three steps noted above as quickly as possible to include these Internet-based businesses within the contribution base *as well*. Ultimately, by broadening the base in such a manner, the Commission will reduce the obligation on any one class of users or

¹³³ *Reforming Broadband Connectivity Act*, S. 3236, 110th Cong. (2021).

beneficiaries, thereby promoting a truly “fair share” in spreading contribution burdens and best fulfilling the statutory mandate that contributions must be equitable and nondiscriminatory in nature.

V. CONCLUSION

This proceeding represents a critical chance for the Commission to reassess the statutory mission of universal service and to recalibrate its essential programs to carry out that mission. The Commission’s efforts remain as critical as ever for the ultimate objectives of universal service, and NTCA hopes that these Comments provide the Commission with a useful roadmap for returning its universal service goals more broadly and its USF programs more specifically to their rightful and statutorily mandated focus on promoting *and* sustaining universal service.

Respectfully submitted,

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