



April 18, 2024

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

RE: *Safeguarding and Securing the Open Internet, WC Docket No. 23-320; Restoring Internet Freedom, WC Docket No. 17-108*

Dear Ms. Dortch:

On April 18, 2024, the undersigned, on behalf of NTCA–The Rural Broadband Association (“NTCA”) spoke with Elizabeth Cuttner, legal advisor for wireline and enforcement to Chairwoman Jessica Rosenworcel, regarding matters in the above-referenced proceedings.

NTCA raised concerns regarding potential forbearance – even if asserted to be temporary in nature¹ – by the Federal Communications Commission (the “Commission”) from the application of a mandatory universal service contribution obligation under section 254(d) of the Communications Act of 1934, as amended, in connection with the reclassification of broadband internet access service (“BIAS”).² As explained below, and consistent with prior advocacy,³ NTCA asserted that the Commission would be on sounder legal footing and would advance the public interest as a practical and policy matter if it were to issue a further notice of proposed rulemaking to consider how and whether to reform universal service contributions.

As an initial matter, NTCA observed that the record does not justify forbearance from contribution obligations. Rather than undertaking a detailed analysis of whether forbearance is necessary to avoid unjust or unreasonable outcomes, for consumer protection, and to serve the public interest,⁴ the Draft Order’s recitation of the scant record on contribution obligations in this far-reaching proceeding confirms that substantial questions remain with respect to what the Draft Order itself

¹ See *Safeguarding and Securing the Open Internet, et al.*, WC Docket Nos. 23-320, *et al.*, Declaratory Ruling Order, Report and Order, and Order on Reconsideration, FCC-CIRC-2404-01 (rel. Apr. 4, 2024) (“Draft Order”), at ¶ 364.

² 47 U.S.C. § 254(d).

³ See, e.g., *Ex Parte* Letter from Greg Guice, Chair, Affordable Broadband Campaign, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 23-320 (filed Apr. 8, 2024) (“Affordable Broadband Campaign *Ex Parte*”). NTCA participated in the meeting for which this *ex parte* notification was filed and several others in support of the Affordable Broadband Campaign.

⁴ See 47 U.S.C. § 160(a). It is worth noting that the law expressly requires an affirmative determination of *each* of the relevant prongs (“and”) rather than a finding that any one of these factors alone would be satisfied by forbearance.

acknowledges is “a complex and developing area.”⁵ For example, the Draft Order cites to a few parties who – without submitting detailed underlying data or analyses – have baldly asserted that such obligations would pose “major upheaval” to the existing contribution mechanism by “suddenly and unnecessarily imposing new fees” on BIAS.⁶ Yet the Draft Order neglects altogether more detailed evidence showing that applying contribution obligations to BIAS would have a positive impact on universal service objectives generally *and* no material impact on BIAS adoption and retention.⁷ Although NTCA contends that the record here supports application of contribution obligations that would follow from BIAS reclassification, at the very least the record itself is far more complex than the Draft Order portrays, and it is clear that this “complex and developing area” warrants greater examination than the Draft Order undertakes in limiting such further consideration at this time.

Interestingly, even as the Draft Order proposes to forbear from this obligation, it quickly seeks to “walk back” the effect of this, noting again the complexity of the issues presented and that the Commission would “not disclaim our authority to require new universal service contributions in a future rulemaking, and our decision today is not intended to prejudice or limit how the Commission might take action in the future.”⁸ In light of such considerations, however, forbearance is a blunt instrument where a lighter touch that has similar effect would be far more appropriate – and the “confident” observation that forbearance is reversible⁹ in this instance flies in the face of assertions and assurances elsewhere in the Draft Order that this is “strong forbearance”¹⁰ and that it would not be “trivial for the Commission” to revisit forbearance.¹¹ Put another way, as the Commission itself describes elsewhere in the item, it is difficult for the Commission to “un-ring the bell” once it has done so through forbearance.¹²

⁵ Draft Order, at ¶ 364.

⁶ *Id.* at ¶ 363 (citing and quoting Free Press Comments at 67 and WISPA Reply at 13).

⁷ *See, e.g.*, Comments of NTCA, WC Docket No. 23-320 (filed Dec. 14, 2023), at 33-34 (citing and discussing two reports providing economic analysis of BIAS demand elasticity and the effects of contribution obligations on consumer adoption and retention of such service); Comments of INCOMPAS, WC Docket No. 23-320 (filed Dec. 14, 2023), at 54 (citing Carol Matthey, *USForward* Report (Sept. 2021) and The Brattle Group, *The Economics of Universal Service Fund Reform* (Aug. 2023)). Copies of the reports cited in NTCA’s comments in this proceeding, which were also filed previously in the contribution methodology proceeding, are resubmitted in their entirety as Attachments B and C to this letter.

⁸ Draft Order, at ¶ 364.

⁹ *Id.* at n. 1469.

¹⁰ *Id.* at ¶ 276.

¹¹ *Id.* at ¶ 305.

¹² To make matters worse still, some parties urge the Commission not only to tie possibly its own hands when it comes to considering these issues further, but to preclude states from similarly considering how to advance the mission of universal service. *Ex Parte* Letter from Matthew Brill, Counsel for NCTA, Latham & Watkins, to Marlene H. Dortch, Secretary, Commission, WC Docket Nos. 23-320, *et al.* (filed Apr. 15, 2024), at 5.

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To this end, NTCA recommended that, in lieu of forbearance (even if posited as potentially temporary in nature), the Commission should adopt a procedural approach that will at once enable more careful consideration of the merits of contribution reforms and potential impacts while also precluding even the slightest risk of “major upheaval” as some claim exists prior to more careful review. In the first instance, NTCA noted that any contribution obligation that would attach to BIAS through reclassification would not be self-effectuating; as the Affordable Broadband Campaign *Ex Parte* described in painstaking detail, every time the Commission has determined a service to be assessable in the past, it has taken additional implementation measures to consider how to apply such obligations to that service.¹³ Nonetheless, to the extent that there is any concern whatsoever that somehow these obligations would become immediately applicable upon the effective date of the order, the Commission can easily care for this by waiving the application of Section 54.706 of its rules to BIAS.¹⁴ This approach would achieve the same effect as forbearance in terms of avoiding even the slightest risk of any alleged “upheaval.”¹⁵ At the same time, the Commission could then undertake further analysis of this “complex and developing area” in a more measured manner through a further notice of proposed rulemaking in its contribution methodology proceeding without the need to also go through the arduous task of considering also how to reverse forbearance – which, as the Commission has again noted, is hardly “trivial” in the case of “strong forbearance.” NTCA’s proposed modifications to the Draft Order consistent with the recommendations herein can be found in Attachment A to this letter.

Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the Commission’s rules, a copy of this letter is being filed via ECFS.

Sincerely,

/s/ Michael Romano

Michael Romano

Executive Vice President

cc: Elizabeth Cuttner

¹³ Affordable Broadband Campaign *Ex Parte*, at 3-5. By way of another example, section 254(d) itself became law on February 8, 1996; telecommunications carriers of course did not begin contributing to universal service on February 9, 1996 precisely because the Commission needed to establish first the “mechanisms” for such contribution.

¹⁴ 47 C.F.R. § 54.706.

¹⁵ It is also worth noting that any party convinced that forbearance is warranted in the instance case could file a petition during the pendency of this waiver and the further rulemaking to seek such relief prior to the obligation ever taking effect. There is clear precedent for considering forbearance from contribution through such a vehicle. *See Petition of NTCA–The Rural Broadband Association and the United States Telecom Association for Forbearance Pursuant to 47 U.S.C. § 160(c) from Application of Contribution Obligations on Broadband Internet Access Transmission Services*, WC Docket No. 17-206, Order, 33 FCC Rcd 5712 (2018)

ATTACHMENT A
PROPOSED EDITS TO PARAGRAPHS 359-364
OF THE DRAFT ORDER

359. ~~However, we find it appropriate—as the Commission~~We note that the Commission previously ~~found decided~~ in 2015 ~~—~~to forbear from the first sentence of section 254(d) and our associated rules insofar as they would require new universal service contributions to be assessed on BIAS service to end users.¹⁴⁴⁰ The first sentence of section 254(d) states that “[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the” USF.¹⁴⁴¹ In the 2015 Open Internet Order, however, the Commission “forb[ore] in part from the first sentence of section 254(d) and our associated rules insofar as they would immediately require new universal service contributions associated with [BIAS].”¹⁴⁴² The Commission stated that, as with forbearance from requiring new TRS contributions, forbearing from requiring new universal service contributions to be assessed on BIAS service would permissibly “‘balance the future benefits’ of encouraging broadband deployment ‘against [the] short term impact’ from” forbearing from immediate new contribution assessments.¹⁴⁴³ The Commission also pointed to other parallel proceedings, both before the Commission and before other bodies, examining “a wide range of issues regarding how contributions should be assessed, including whether to continue to assess contributions based on revenues or to adopt alternative methodologies for determining contribution obligations.”¹⁴⁴⁴ The Commission thus determined to “forbear[] from applying the first sentence of section 254(d) and our implementing rules insofar as they would immediately require new universal service contributions for [BIAS] but not insofar as they authorize the Commission to require such contributions in a rulemaking in the future.”¹⁴⁴⁵

360. ~~As in 2015, we again forbear from the first sentence of section 254(d) and our associated rules insofar as they would require new universal service contributions to be assessed on BIAS service to end users.~~ We agree with commenters who say that the Universal Service Fund helps to protect consumers and to ensure that communications services are available to all Americans on just and reasonable rates and terms, and indeed for that reason we have found it important to reclassify BIAS as a Title II service to ensure that we can continue to support the availability and affordability of BIAS through USF programs.¹⁴⁴⁶ But the record in this proceeding neither directly addresses the standards for nor justifies forbearance with respect to new USF contribution obligations that would otherwise apply to BIAS, nor does the record here show that assessing new USF contribution requirements on BIAS service is necessary for the Universal Service Fund to fulfill those goals at this time.¹⁴⁴⁷ ~~On the contrary, the Universal Service Fund has been funding broadband access and affordability for well over a decade without imposing contribution requirements on BIAS providers.~~¹⁴⁴⁸ ~~And the record does not show that anything would substantially change in that regard without imposing contribution requirements on BIAS service. In fact, the Universal Service Fund successfully operated under a materially identical set of contribution and support schemes throughout the time that the 2015 Open Internet Order was in effect. To be sure, several commenters contend that it would be preferable to expand the contribution base to include BIAS service, or that doing so might become necessary in the future,~~¹⁴⁴⁹ ~~but the record does not convincingly show that imposing universal service contribution requirements on BIAS is necessary at this time.~~

361. In light of these considerations, ~~W~~we conclude that further deliberation is necessary and in the public interest before either applying or forbearing from imposing new universal service contribution requirements on BIAS service is in the public interest.¹⁴⁵⁰ We therefore will continue to consider appropriate reforms to the contribution methodology in WC Docket No. 06-122, and we intend to issue a further notice of proposed rulemaking to refresh the record in that proceeding. ~~For one thing, we agree with commenters who warn that suddenly and unnecessarily imposing new~~

fees on broadband service could pose “major upheaval in what is actually a stable and equitable contribution system.”¹⁴⁵¹ Rather than risk this upheaval To avoid potential upheaval pending such further consideration and deliberation, however, we believe it in the public interest to proceed cautiously and incrementally.¹⁴⁵² We therefore waive on our motion the application of any new USF contribution obligations with respect to BIAS service that would otherwise apply pursuant to Section 54.706 of our rules, pending the issuance of an order pursuant to the further notice of proposed rulemaking referenced above. Taking such action is consistent with the measured way in which the Commission has previously evaluated the inclusion of other telecommunications services in the contribution base.¹ The Commission thus recognized in 2015 that it is appropriate to forbear from extending new contribution requirements to BIAS pending ongoing deliberations, both before the Commission and before other bodies, on future USF contribution reform. Contrary to the assumption of some commenters,¹⁴⁵³ Commission efforts remain ongoing in this area.¹⁴⁵⁴ It is also worth noting that Congress has ~~also~~ been actively deliberating on legislative proposals to reform the USF contribution and funding mechanisms and that undertaking may provide additional guidance for the Commission’s consideration.¹⁴⁵⁵ Moreover, any party that believes forbearance from a contribution obligation is warranted in the interim could always file its own petition to seek such relief and thereby foster development of a more detailed record on that specific question.² In the end, USF contribution reform is an immensely complex and delicate undertaking with far-reaching consequences, and we believe that any decisions on whether and how to make BIAS providers contribute to USF funding are best addressed holistically in those ongoing discussions that are keenly focused on USF contribution reform, on a full record and with robust input from all interested parties, rather than in this immediate proceeding where our primary focus is on likewise complex and far-reaching questions surrounding open Internet policies. A premature decision on forbearance or the application of new USF contribution obligations to BIAS at this time is not consistent with the public interest.¹⁴⁵⁶

362. Forbearance will also serve the important public interest goals of broadband access and affordability. As always, we are mindful of section 706’s directive to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . regulatory forbearance.”¹⁴⁵⁷ That directive is echoed in the universal service principles set forth in section 254(b) of the Act, which include “access . . . in all regions of the Nation” at “just, reasonable, and affordable rates.”¹⁴⁵⁸ Here, estimates show that assessing contribution requirements on BIAS service could result in a material increase in consumer broadband bills, potentially in the range of roughly \$5 to \$18 per month.¹⁴⁵⁹ The impact of those additional fees is likely to be highly regressive, with a disproportionate impact on low-income

¹ See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3081-3082, paras. 112-113 (2005); Federal-State Board on Universal Service, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, Docket No. 96-45, 13 FCC Rcd 21252, 21257 (1998); Universal Service Contribution Methodology, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006).

² See NTCA–The Rural Broadband Association and the United States Telecom Association, Petition for Forbearance, WC Docket No. 06-122 (filed June 14, 2017); see also Petition of NTCA–The Rural Broadband Association and the United States Telecom Association for Forbearance Pursuant to 47 U.S.C. § 160(c) from Application of Contribution Obligations on Broadband Internet Access Transmission Services, WC Docket No. 17-206, Order, 33 FCC Rcd 5712 (2018).

consumers who may be particularly sensitive to price increases.¹⁴⁶⁰ Imposing new contribution requirements on broadband service could therefore be detrimental to the goal of promoting broadband adoption and affordability.¹⁴⁶¹ For these reasons, as with our forbearance from TRS contribution requirements,¹⁴⁶² we deem it appropriate and in the public interest to forbear from the imposition of new contribution requirements on BIAS service.

³⁶³ We are not persuaded that allowing BIAS providers to continue to forgo USF contributions would be contrary to section 254(d)'s requirement that providers contribute "on an equitable and nondiscriminatory basis" even if we were not forbearing from that requirement.¹⁴⁶³ Forbearance essentially maintains the longstanding status quo.¹⁴⁶⁴ Our rules generally permit carriers to recoup their universal service contributions from their customers through surcharges on customers' monthly bills, so most of the burden ultimately falls on end users.¹⁴⁶⁵ Given estimates that extending the contribution requirements to BIAS service could considerably increase consumers' broadband bills, and would require residential consumers to bear a much greater share of the burden relative to business users, forbearing from new contribution requirements may be more equitable.¹⁴⁶⁶ And in any event, we do not think it inequitable to forbear from imposing new and unnecessary costs on BIAS service when seeking to promote universal broadband availability, while requiring contributions from more mature services that have already achieved near-universal penetration.¹⁴⁶⁷

³⁶⁴³⁶² We caution^{note}, as the Commission did in 2015, that our determination to forbear^{decision above} at this time is based on the present record in a complex and developing area.¹⁴⁶⁸ We do not disclaim our authority to require new universal service contributions in a future rulemaking, and our decision today, including the granting of a waiver on our own motion and the planned issuance of a further notice of proposed rulemaking in our contribution methodology proceeding, is not intended to prejudge or limit how the Commission might take action in the future.¹⁴⁶⁹

ATTACHMENT B

2020 WILLIAMS/ZHAO REPORT

ATTACHMENT C
2022 WILLIAMS/ZHAO REPORT