

**STATEMENT OF COMMISSIONER ROBERT M. McDOWELL
APPROVING IN PART, CONCURRING IN PART**

Re: Connect America Fund (WC Docket No. 10-90); A National Broadband Plan for Our Future (GN Docket No. 09-51); Establishing Just and Reasonable Rates for Local Exchange Carriers (WC Docket No. 07-135); High-Cost Universal Service Support (WC Docket No. 05-337); Developing an Unified Intercarrier Compensation Regime (CC Docket No. 01-92); Federal-State Joint Board on Universal Service (CC Docket No. 96-45); Lifeline and Linkup (WC Docket No. 03-109) and Mobility Fund (WT Docket No. 10-208), Report and Order and Further Notice of Proposed Rulemaking

The feat of modernizing the high cost portion of the Universal Service subsidy program to support next-generation communications technologies, while keeping a lid on spending, is monumental. Thus, our action today is a vital first step in reforming USF while ensuring that rural consumers benefit from needed advanced services.

As I have said several times before, the communications needs of rural America is personal to me. My family deep roots in rural America. My father spent part of his boyhood during the Great Depression on a ranch on the Tex-Mex border without electricity, running water or phone service. With that background in mind, I am committed to carrying out Congress's intent of ensuring the most remote parts of our country are connected.

The challenge of solving the seemingly intractable Universal Service and intercarrier compensation puzzle, however, has cast a long shadow over the FCC for more than a decade. In my nearly five and a half years here, I have traveled across America to learn more about the practical realities of the program. I have held productive policy roundtable discussions with multiple stakeholders in the least populated state, Wyoming, as well as its neighbor South Dakota. I have traversed Tribal lands and some of the least densely populated areas of our country, including Alaska. I've also learned from consumers in urban and suburban areas who pay rates above costs to subsidize rural consumers. And I know that my colleagues have diligently conducted similar field investigations.

In trying to encapsulate what the FCC is accomplishing today, I've turned to one of North America's best telecommunications policy minds, none other than the Great One, Wayne Gretzky. Without any of us realizing it, by implication he predicted what we would do today when he said, "A good hockey player plays where the puck is. A great hockey player plays where the puck is going to be." Today, the FCC is repurposing the high cost program to support unserved consumers' use of communications technologies from where they *are* to where they are *going to be* – in both a technological and geographical sense.

October 27, 2011, is a date that marks a dramatic departure from nearly a century-old policy of opaquely subsidizing analog, circuit-switched voice communications services, to using the efficiencies of market-based incentives to support broadband connectivity in those areas where economic realities have stalled market penetration. Under both Republican and Democratic administrations, the High Cost Fund has become bloated and inefficient. Today, a Republican and three Democrats are taking a giant leap together to fix that. I commend the

Chairman for his leadership and fortitude throughout this process. I also thank Commissioners Copps and Clyburn for their thoughtfulness, graciousness and collegiality during this proceeding.

Since I arrived at the Commission in 2006, I have been calling for the FCC to achieve five primary goals when focusing on USF reform, the most important of which is to contain the growth of the Fund. While our efforts are not perfect, today we are largely achieving this goal in a town otherwise known for its *inability* to control spending.

While I'm on that subject, some have suggested that we scrap the USF program altogether. Others can have that debate. In the meantime, we are mindful that Congress created this program and its ultimate survival is a matter only for Congress to determine. We are duty bound to operate within the statutory constructs handed to us.

In the spirit of being fiscally responsible, however, we are mandating that the high cost program of the Universal Service Fund live under a *definitive budget* for the first time in history. Functionally, the budget serves as an annual cap through 2017. Until then, the Fund may not rise higher than \$4.5 billion per year, on average after true-ups, without Commission approval. After that time, it is my hope that competitive forces will flourish and the development of new technologies will create additional efficiencies throughout the system. If so, much of the vacuum will have been filled and the need for future subsidies will have declined substantially. Perhaps the day will come when Congress can determine that subsidies are no longer needed.

Of course, there is nothing we can do to prevent future Commissions from voting to comprehensively alter what we have done and spend more money later. That would be true as a matter of law whether we called our fiscally prudent action today a "definitive budget," "cap," "beret" or "sombbrero." If the FCC of tomorrow wants to undo what we have done today, however, good luck with that. You're going to need it. If history is our guide, the alacrity with which the Commission can accomplish comprehensive USF reform is nothing short of glacial. Nonetheless, I hope future Commissions will keep their caps *on* out of respect for fiscal responsibility and the consumers who pay for these subsidies.

Also, today we are only addressing the high cost program of the distribution side of the Universal Service Fund. We are not addressing the entire Universal Service Fund, which currently distributes over \$8 billion per year. To put that figure in context, USF is larger than the annual revenues of Major League Baseball. In separate proceedings, we will also reform the other USF spending programs. I cannot stress enough that all of the fiscal efficiencies that we will realize in the wake of today's reforms will be lost if similar fiscal discipline is not applied to all Universal Service programs as well.

Moreover, we are only addressing part of the distribution, or spending, side of the Universal Service program. In fact, despite all of the exhaustive efforts to get to this point, our work on comprehensive Universal Service reform is not even half finished. Equally important is the need to reform the contribution methodology, or how we are going to pay for all of this. It is no secret that for years I have been pushing for contribution reform to be carried out at the same time as distribution reform. Obviously, that is not happening today; therefore we must act quickly. The contribution factor, a type of tax paid by consumers, has risen each year from

approximately 5.5 percent in 1998 to an estimated 15.3 percent in the fourth quarter of this year. This trend is unacceptable. We must abate this automatic tax increase without further delay. Accordingly, I strongly urge that we work together to complete a proceeding to reform the contribution methodology in the first half of the year.

In the meantime, today we are undertaking significant reforms. Although time does not allow me to discuss each one, I'd like to mention a few of my favorites.

- It may surprise some observers the vigor and breadth to which we give life to competitive bidding, a market-based approach to distributing subsidies, otherwise known as reverse auctions. This is more than I could have hoped for in 2008, when a Republican-controlled FCC teetered on the cusp of comprehensive reform before our efforts were scuttled. Supporting these provisions was likely not easy for some of my colleagues and I thank them for their spirit of compromise.
- We are eliminating the inefficient identical support rule. The wasteful era of subsidizing multiple competitors in the same place has come to an end.
- We are finally giving consumers the benefit of more transparency by phasing out hidden subsidies, albeit 15 years after Congress told us to do so in the Telecommunications Act of 1996. Better late than never, I suppose. As the veil is lifted, however, industry and government alike will have to do their best to keep consumers properly educated on what they will see on their phones bills and what it all means. For the vast majority of consumers, rates should decline or stay the same, so I will look with skepticism on any news stories that claim the FCC is raising rates. The simple truth is: We are not.
- We are creating a frugally-minded, but reasonable, waiver process for highly unlikely cases where carriers are definitively experiencing extreme hardship due to our reforms.
- In the further notice, we propose means testing to identify qualified recipients in remote areas. Such a screening process could save money and maximize the effectiveness of the Fund.

As a legal matter, some question whether the Commission has the authority to use Universal Service funds to support broadband directly. As I have said many times before, I believe the Commission *does* have broad authority to repurpose support to advanced services as handed to us by the plain language of section 254.

In section 254(b), Congress specified that “[t]he Joint Board and the Commission *shall* base policies for the preservation and advancement of universal service on [certain] principles.”¹ Two of those principles are particularly instructive: First, under section 254(b)(2), Congress sets forth the principle that “[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation.”² Second, with section 254(b)(3), Congress

¹ 47 U.S.C. § 254(b) (emphasis added).

² 47 U.S.C. § 254(b)(2).

established the principle that “[c]onsumers 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* . . .”³

Also, section 254(b)(7) instructs the Commission and Joint Board to adopt “other principles” that we “determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with” the Communications Act. In that regard, in 2010 the Federal-State Board on Universal Service recommended to the Commission that we use our authority under section 254(b)(7) to adopt a principle to “specifically find that universal service support should be directed where possible to networks that provide advanced services.”⁴

As part of this order today, we agreed with the Joint Board recommendation and adopted “support for advanced services” as an additional principle. Moreover, even if any of the statutory language in section 254 appears to be ambiguous,⁵ the Commission’s reasonable interpretation would receive deference from the courts under *Chevron*.⁶

It should come as no surprise, however, that I cannot support the view that section 706 provides the Commission with authority to support broadband through Universal Service funds. As I have said many times before, section 706 is narrow in scope and does not provide the Commission with specific or general authority to do much of anything. We respectfully agree to disagree on that analysis in this order.

Finally, given the breadth and magnitude of today’s actions, the effects will not be fully apparent in the near term. Certainly, there will be varied opinions regarding what we have accomplished. That said, Universal Service reform is an iterative process. We will constantly monitor its implementations and quickly make adjustments, if needed.

In sum, I would like to thank all of the people who have sacrificed countless family dinners, weekends, vacations, birthday and anniversary celebrations and such over the past many months to make this day possible. While Sharon Gillett, Carol Matthey, Rebekah Goodheart, Trent Harkrader, Amy Bender, Steve Rosenberg, Brad Gillen, Victoria Goldberg and Marcus Maher of the Wireline Bureau and Rick Kaplan, Margie Weiner and Jim Schlichting of the

³ 47 U.S.C. § 254(b)(3) (emphasis added).

⁴ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, WC Docket No. 03-109, *Recommended Decision*, 25 FCC Rcd 15598, 15625 ¶ 75 (2010).

⁵ Some contend that the definition of universal service under section 254(c)(1) muddies the water because it does not include “information service.” Instead, that provision states that “[u]niversal service is an evolving level of *telecommunications services* . . . taking into account advances in telecommunications and information technologies and services.” But, it is also relevant that the term “telecommunications service” is qualified by the adjective “evolving.” Even if section 254 were viewed as ambiguous, pursuant to the well established principle of *Chevron* deference, the courts would likely uphold the FCC’s interpretation as a reasonable and permissible one. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁶ *Chevron*, 467 U.S. 837; *see also* Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999) (relying on *Chevron* deference in affirming FCC authority to implement universal service provisions set forth in the Telecommunications Act of 1996).

Wireless Telecommunications Bureau deserve high praise, we all know that legions more dedicated public servants have shed their blood, sweat, toil and tears to make this endeavor possible today. I also commend the Chairman's Chief Counsel, Zac Katz, for his tireless efforts, patience and leadership during this process. Furthermore, I thank Commissioner Copps's legal advisor Margaret McCarthy and Commissioner Clyburn's legal advisor Angie Kronenberg for your collegial efforts during this process. And from my office, Christine Kurth deserves a special mention. When I hired her over two years ago from the Senate I said, "Your main mission is to fix Universal Service." She accepted my offer anyway, and has completed half of that mission today. Many, many thanks to all of you for your incredibly hard work.