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No. 0074 P. 2

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November 2, 2011

The Honorable Julius Genachowski  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Dear Chairman Genachowski:

I am writing to you expressing concerns that I have regarding the Federal Communications Commission's (FCC) announcement of the Connect American Fund on October 27, 2011. Of particular concern is the legal authority of the FCC to expand the Universal Service Fund (USF) to include broadband coverage. I am additionally concerned about the FCC's decision to expand USF coverage to broadband at a time when its original mission of providing phone coverage is in need of significant reforms.

Current law provides the FCC with the goal of bringing "access to advanced telecommunications and information services" to all Americans. 47 U.S.C. § 254(b). Yet the operation of the USF is limited to "telecommunications services". § 254(c)(1). Broadband internet service was declared by the FCC in 2002 to be an "information service" in which data processing and transmission were deemed inseparable components thereof. 17 FCC Rcd 4798 (2002). The Supreme Court affirmed the permissibility of this definition in *National Cable & Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967 (2005). As a result, FCC counsel recognized that, in order to extend USF to broadband services, it had to change its interpretation of "broadband" as it is categorized as a "telecommunications service" or an "information service." 2010 FCC Lexis 2899, \*8-10, 13-14.

This definitional change reverses FCC policy adopted in 2002 and confirmed by the Supreme Court in 2005. An agency is entitled to much deference when interpreting statutory definitions and it may also change its interpretations from time to time. *Brand X*, 545 U.S. at 981; *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Nevertheless, agencies may not issue definitions, or applications thereof, that are arbitrary, capricious, or otherwise contrary to statutory law. *Brand X*, 545 U.S. at 981; *Chevron*, 467 U.S. at 844.

As with other agencies, the FCC may avoid a charge of being arbitrary and capricious in a definitional change by asserting some sort of changed circumstances or other reasoned

factors that justify the change. In the issue of broadband internet service, there has been no such change nor a revelation in the wisdom of policy. To be sure, technology has advanced and the number of people using broadband internet access has increased dramatically since the first half of the last decade. Yet the *nature* of broadband internet services has not changed since the FCC issued its interpretation in 2002. Consequently, the new interpretation does not reflect a reasoned reassessment of the subject of the regulation (broadband internet services) but merely a policy decision. My concern is that a policy desire alone should not be enough to legally justify the reinterpreting how the service is categorized by a statutory term of an administrative agency.

Perhaps then-chairman Michael Powell said it best in his concurrence with the 2002 ruling, as found in 17 FCC Red, at 4867:

The Commission must attempt to faithfully apply the statutory definition to a service, based on the nature of the service, including the technology used and its capabilities, and the nature of the interactive experience [ . . . ] The Commission is not permitted to look at the consequences of different definitions and then choose the label that comports with its preferred regulatory treatment. That would be contrary to law. The Commission must apply the definition and then accept the regulatory regime that adheres to that classification and that which Congress chose when it adopted the statute.

Is the FCC's current course of action consistent with Chairman Powell's statement? I cannot help but feel concerned that the statutory authority is lacking to alter the application of the definitions of "telecommunications service" and "information service" on a purely policy basis without any real change in circumstances or understanding.

In addition to the questions surrounding the legal authority for the FCC to expand USF coverage to broadband, I believe that it would be prudent for the FCC to address several serious issues in need of reform with the USF. I am particularly concerned with the reported abuses in the Lifeline program. According to a letter of October 20, 2011, from Thomas A. Schatz, President of Citizens Against Government Waste:

In 2008, the Lifeline program began allowing telephone companies to provide free wireless service to certain eligible individuals. According to the Government Accountability Office, this addition to the Lifeline program resulted in the number of recipients and overall program spending to nearly double in size from 2008 to 2011. An investigation by the Federal Communications Commission into these sudden, drastic increases revealed multiple instances of program recipients using Craigslist to advertise the sale of Lifeline-subsidized phones and service. In other cases, Lifeline beneficiaries have violated the one phone line restriction of the program by signing up for the Lifeline service from multiple carriers.

I would appreciate hearing from you about the FCC's plans for combating future abuses of the Lifeline program and other non-Lifeline program abuses within the USF. I believe

that it would be prudent to rid the USF of significant waste, fraud, and abuse before creating a massive new program to provide for broadband access with the USF.

Thank you for your review of this correspondence and I look forward to receiving your reply. Should you have any questions regarding this letter, please feel free to contact me, or my Legislative Director, Scott Cunningham, at 202.225.6605 or [scott.cunningham@mail.house.gov](mailto:scott.cunningham@mail.house.gov).

Sincerely,

  
Kenny Marchant  
Member of Congress



U.S. Congressman

**KENNY MARCHANT***Representing the 24th District of Texas*

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**Fax Cover Sheet**Date: Nov-2-2011To: FCC Leg Affairs

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Subject: \_\_\_\_\_

Pages: 4 (including cover sheet)

From:

☒ Kenny Marchant,  
☐ Brian Thomas,  
☐ Scott Cunningham,  
☐ Ryan Moy,  
☐ Donelle Harder,  
☐ James Williams,  
☐ Maddie Kempf,  
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Comments: \_\_\_\_\_

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