

**STATEMENT OF
CHAIRMAN JAMES H. CAWLEY
CONCURRING IN PART, DISSENTING IN PART**

In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45; Lifeline and Link Up, WC Docket No. 03-109

I am in agreement with most of the consensus recommendations that have been reached in the present deliberations and the issued Recommended Decision (R.D.) of the Joint Board. I have been particularly impressed with the dedication with which Commissioner Clyburn and the FCC staff have labored to guide our deliberations and capture them in an articulate decision.

I feel compelled, however, to address both the rationale and the approach of the referral to the Joint Board, and the alternative approaches that I believe should have been followed, recognizing that the members and staff of the FCC, like state public utility regulators and their staff members, daily face difficult policy choices and criticism as they try in good faith to do the public's business. Nothing said here diminishes my respect, personally and professionally, for them.

The National Broadband Plan. The Referral Order on Lifeline and Link Up made abundantly clear that the present deliberations of the Joint Board, as well as a large number of other recent and pending FCC regulatory initiatives, were based on the FCC's National Broadband Plan (NBP) that was released on March 16, 2010.¹ As the NBP acknowledges, the U.S. Congress "directed the FCC to develop a National Broadband Plan ensuring that every American has 'access to broadband capability'."² The NBP explicitly recommended the expansion of the "Lifeline and Link-Up programs by allowing subsidies provided to low-income Americans to be used for broadband."³

Interestingly, however, the Recovery Act directed only the preparation of a report to be submitted to designated House and Senate committees within one year of enactment of the Act, not implementation of the report, which presumably was to await further congressional direction after submission of the report.⁴ Indeed, the section requiring the plan had as its main purpose the creation of the Broadband Technology Opportunities Program, under the direction of "[t]he Assistant Secretary of Commerce for Communications and Information (Assistant Secretary), in consultation with the Federal Communications Commission (Commission)"⁵ to stimulate the nation's economy by means of grants to be awarded by the end of fiscal year 2010 with assurances by grantees "that they will substantially complete projects supported by the program

¹ *In re Federal-State Joint Board on Universal Service Lifeline and Link Up*, (FCC Released May 4, 2010), CC Docket No. 96-45 and WC Docket No. 03-109, ¶ 1, at 1. See also FCC, *Proposed 2010 Key Broadband Action Agenda Items*, available at <http://www.broadband.gov/plan/broadband-action-agenda.html>.

² FCC, *Connecting America: The National Broadband Plan*, (Washington, DC, March 16, 2010), at 3 and n.4 citing American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(D), 123 Stat. 115, 516 (2009) (Recovery Act).

³ NBP, Executive Summary, at XIII. See also Referral Order, ¶ 12, at 6 and n.36 citing NBP at 172-173.

⁴ Recovery Act, § 6001(k)(1)-(3).

⁵ *Id.*, § 6001(a).

in accordance with project timelines, not to exceed 2 years following an award.”⁶ It is apparent from the structure and content of Section 6001 that subsection (k)’s requirement of a “national broadband plan,”⁷ positioned as the eleventh subsection of thirteen and the only provision requiring action only by the FCC, was not the primary purpose of the section. Nor was the plan, unlike the grants program, apparently intended to provide an immediate stimulus to the economy, but rather as a necessary tool to provide longer term economic benefits should the decision be made to implement it.

Nevertheless, the FCC, under its existing statutory authority, has adopted an ambitious agenda of regulatory reforms based on the NBP and centered on the universal availability and adoption of affordable and technologically sufficient broadband access services. Although the NBP contemplates that these ambitious goals can be accomplished through the reforms of existing regulatory structures and mechanisms (largely through the redirection of the existing federal universal service fund (USF) resources), it acknowledges that congressional funding may also be needed in order to accelerate broadband deployment.⁸ Furthermore, the NBP identifies the so-called “broadband availability gap” and acknowledges (despite the availability of Recovery Act funds from Section 6001’s Broadband Technology Opportunities Program) that “[o]ther government support is required to complete the task of connecting the nation to ensure that broadband reaches the highest-cost areas of the country,” and that closing the “broadband availability gap and connecting the nation will require a substantial commitment by states and the federal government alike.”⁹

Aside from the NBP itself, the FCC staff recognized in its September 29, 2009 presentation that the cost of any national broadband plan varies widely depending on the definition of “broadband.”¹⁰ These costs range from approximately \$20 billion for 1.5 mbps to \$350 billion for 100 mbps. A proposed speed in the 1-4 mbps range could cost from \$20 to \$35 billion. It is difficult to see how the current \$9 billion federal USF can implement any of these proposed national broadband definitions, even with repurposing the entire current USF.

The magnitude of the “broadband availability gap” and the congressional directive for the NBP as a tool for possible future economic recovery measures on the broadband front raise the fundamental question of whether the FCC should have adopted its very ambitious agenda of national and universal broadband deployment and availability in the absence of a more precise congressional mandate and accompanying federal appropriations. The NBP’s contemplated redirection of the federal USF will not be sufficient to overcome the “broadband availability gap,” and the structural design of the federal USF was not intended to accomplish such a purpose. Thus, the goal of universal broadband within the United States will require a *national* funding commitment that clearly goes well beyond the existing size of the federal USF.

⁶ *Id.*, § 6001(d)(2)&(3).

⁷ *Id.*, § 6001(k)(2).

⁸ NBP at 151.

⁹ NBP at 139 and NBP Exh. 8-D.

¹⁰ FCC, September Commission Meeting, September 29, 2009, Slide No. 45, available at <http://reboot.fcc.gov/open-meetings/2009/september>.

Redefinition of “Universal Service.” Consequently, a national funding commitment for the universal deployment and availability of broadband access services at the retail level is absolutely necessary because, as the R.D. demonstrates, the FCC is proceeding with a redefinition of the universal service concept supported by the federal USF in accordance with its NBP. This redefined concept of the supported universal service includes broadband. Under Section 254(c) of the federal Telecommunications Act of 1996, 47 U.S.C. § 254(c), recommendations regarding the redefinition of the universal service concept and the inclusion of a broadband component are both legally and substantively within the purview of the Joint Board. In its 2007 Recommended Decision, the Joint Board indicated its preference for “ubiquitous broadband access” and posited the proposition that “it should be eligible for support under Section 254, with the goal of making it available to all.”¹¹ However, the 2007 R.D. did not consider the numerous, interlinked implications of including a supported broadband access service component into a properly redefined universal service concept. Such implications, including the potential for a substantial increase in the size of the overall federal USF, need to be recognized and addressed with the FCC’s overall federal USF reforms and contemplated redirection of the USF. A timely comprehensive referral to the Joint Board during the development of the NBP or shortly after its issuance would have been appropriate.

Instead, the Joint Board was given a very narrow directive on Lifeline and Link Up issues, which are certainly pressing and important but still only a subset of supported universal service. The resulting R.D. contains a possibly broader redefinition of universal service by adopting the principle that universal service funding should recognize the importance of advanced (e.g., broadband access services) as well as voice services to consumers, including low-income consumers. I fundamentally disagree with this approach because the issues of redefinition and their implications should receive a more encompassing and detailed examination by the Joint Board. Without a more comprehensive referral, the statutorily prescribed advisory role of the Joint Board, and the justified role of the states, is marginalized. Because the issues and the implications of redefining supported universal service with an appropriate broadband access service component are inextricably linked with the contemplated reforms of the federal USF and the interstate intercarrier compensation mechanisms, the Joint Board should be materially involved through all-inclusive FCC referrals.

There may be general agreement that some abstract broadband access service component should be part of supported universal service given the economic importance of broadband. There may also be a need for a broadband Lifeline/Link Up component to eligible end-user consumers. To do that, however, there is a need to decide, designate, and live with the specific details of such a broadband access service addition. The R.D. already echoes some of these concerns within the narrow confines of the Referral Order.¹² These concerns are equally applicable to the overarching issues of a redefined universal service that includes broadband.

The Role of the States. The inclusion of an appropriate broadband access service component in a supported universal service concept in general and in Lifeline in particular raises significant issues about the appropriate role of the states. Although the R.D. recognizes the

¹¹ *In re High-Cost Universal Service Support Federal-State Joint Board on Universal Service*, (Joint Board, released November 20, 2007), WC Docket No. 05-337, CC Docket No. 96-45, ¶¶ 61-62, at 16 (2007 R.D.).

¹² Other concerns that touch upon the potential availability of federal USF support for Internet Protocol or IP-based services such as voice over IP (VoIP), and for broadband access capable devices and related distribution programs, may also affect related and future policy decisions at the federal and state levels.

significant role that the states play in the maintenance and enhancement of universal service inclusive of Lifeline and Link Up (where this role includes appropriate bi-jurisdictional regulatory oversight and enforcement), the limitations of the Referral Order leave unanswered the questions of a future state role when and where broadband access services are involved. At present, because of past FCC decisions, the states have a very limited regulatory oversight role over the provision of retail broadband access services. However, as the R.D. indicates, the states will continue to play a significant oversight and enforcement role in the provision of Lifeline and Link Up services to eligible end-user consumers. The potential addition of a broadband component to Lifeline – and to supported universal service in general – creates the question of whether the states will be able to exercise their traditional roles of consumer protection and appropriate oversight and enforcement in this area given the current absence of a proper and clear regulatory mandate. For example, it is unclear if the states will be given any mandate to deal with carrier refusals to provide broadband access services to Lifeline eligible end-user consumers, or with broadband access providers who claim federal USF support for superior, but actually substandard, levels of service to Lifeline end-user consumers. As the Statement of Commissioner Baum notes, the recent growth in the low-income portion of the federal USF is a serious concern, and the inclusion of a supported broadband access service component in Lifeline and Link Up will only aggravate this concern absent appropriate bi-jurisdictional regulatory oversight and enforcement.

Potential state intervention in such operational matters may take place if a state has designated a provider of broadband access services as an eligible telecommunications carrier (ETC) under Section 214(e)(2) of the Act, 47 U.S.C. 214(e)(2). However, such state intervention may result in litigation that can easily reach the federal level for resolution in view of the proposed reclassification of broadband access facilities and services. The R.D. recommends that the FCC adopt the additional principle of universal service, pursuant to its authority under Section 254(b)(7) of the Act, 47 U.S.C. § 254(b)(7), which provides additional flexibility to the FCC in view of the parallel proceeding regarding Title II common carrier reclassification of broadband access facilities and services.¹³ It does not, however, provide any concrete guideposts for the future role of the states in this area.

The Title I vs. Title II Reclassification Debate. The Title II reclassification debate is becoming increasingly intertwined with the FCC’s proposals on “network neutrality.” I acknowledge that there are various technical, operational, and legal aspects that cannot keep these two issue areas completely and distinctly separate. However, it appears that the increased focus on “network neutrality” not only delays finality of the Title II common carrier reclassification debate, but it also causes great levels of uncertainty and delays the resolution of other long-standing priorities, such as the reform of the federal USF and intercarrier compensation as well as the proper classification of the IP-based services. Simply put, even if the FCC commences its planned initiatives on federal USF and intercarrier compensation reform, these initiatives will proceed on a “parallel track” with the intertwined mix of “Title II” and “network neutrality” with all the uncertainty and risks of delay that this approach entails.

The lack of certainty and finality also holds the potential of adversely affecting individual state reform efforts for intrastate intercarrier compensation and state-specific USFs. For example, although the FCC wisely has not preempted the states from assessing state-specific USF contributions to interconnected VoIP providers, a federal appellate court decision has clouded this

¹³ *In re Framework for Broadband Internet Service*, (FCC Released June 17, 2010) Notice of Inquiry, GN Docket No. 10-127; Further Inquiry, GN Docket No. 09-191, WC Docket No. 07-52, September 1, 2010.

issue¹⁴ and an FCC proceeding is still pending on this matter.¹⁵

Meanwhile, the state public utility commissions continue to grapple with a variety of issues that arise under the federal Telecommunications Act of 1996 and applicable state law. Increasingly, however, these state decisions are made in the absence of FCC final rulings and guidance in crucial areas of regulatory importance. For example, the lack of finality in the long-standing IP-based services proceeding continues to have implications for intercarrier compensation disputes and the legitimate function and viability of state-specific USFs. Potentially also in doubt are interconnection arrangements between competing carriers as well as between carriers and other communications services providers.

Therefore, it is imperative that the FCC conclude its Title II reclassification proceeding as soon as possible. Fundamental questions on the “common carrier” aspects of the FCC’s Title II inquiry must be answered. If the intertwined nature of “Title II” and “network neutrality” continues to delay such a decision, then the FCC should make a concerted effort to reach an immediate conclusion on the more fundamental aspects of its Title II inquiry and address the more intricate and stand-alone aspects of “network neutrality” at a later date.

I am afraid that unless there is a renewed focus, prioritization, and resolution of the fundamental aspects of the Title II proposal, any FCC initiatives on the structural reform of interstate intercarrier compensation and the federal USF will proceed in an environment of regulatory uncertainty for the FCC, the states, and many interested parties. Federal-State cooperation in the resolution of these matters is essential.

Inclusion of Broadband and the Size of the USF. The potential introduction of a yet undefined broadband access component in the Lifeline and Link Up supported services will create new and highly competing priorities for the existing federal USF dollars. It will also create a precedent that supports broadband for a discrete class of consumers that will be hard to deny to other consumers. The R.D. ascribes an historical focus of the High Cost Fund of the federal USF as supporting legacy networks that primarily provide traditional voice services. But it is common knowledge, especially for the rural ILEC recipients of High Cost Support, that the funds have been and continue to be utilized for the deployment of broadband networks and services. Furthermore, one of the NBP’s goals is not only to increase the availability of broadband access services in the rural areas *but also to support the continuing provision* of broadband access services in currently served areas. The continuous upgrading of broadband network facilities and services by recipients of federal USF High Cost Support is fully consistent with the stated goals of the NBP regarding national broadband deployment. Because of the continuous technological transformation of the networks that regulated landline telecommunications carriers have deployed and continue to deploy, the distinction between legacy networks that provide traditional voice services and broadband networks that provide a new and ever changing mix of services has become increasingly blurred. This development makes the contemplated redirection of federal USF High Cost Support under the NBP and other regulatory initiatives of the Commission even more challenging.

In this respect, I share the concerns expressed in the Statement of Commissioner Landis on whether and how the federal USF will be able to accommodate many and competing priorities

¹⁴ *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm’n*, 564 F.3d 900 (8th Cir. 2009).

¹⁵ *Petition of the Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, FCC WC Docket No. 06-122, filed July 16, 2009.

(and overcome the “broadband availability gap”) while the FCC proceeds with its structural reform and redirection. These challenges may necessitate an unavoidable narrowing of the Commission’s focus on certain NBP tasks and final resolution of other long-standing proceedings, especially interstate intercarrier compensation reform and completion of the IP-enabled services proceeding.

Increasing Eligibility from 135% to 150% of the Federal Poverty Guidelines. I agree completely with the Statement of Commissioner Burke on this subject. Until the effects of including broadband as a supported service are better known, it is wiser to redouble efforts to reach presently eligible low income customers than to diminish the dollars available to them by expanding the program to include others who are somewhat better off.

In conclusion, I understand the importance of the FCC’s efforts to provide broadband in rural, high cost areas and in lower income urban areas based upon my experience promoting that same policy in Pennsylvania. However, as a regulator from a net contributor state to the federal USF, I remain concerned about the cost to net contributor states, notwithstanding the need for a national broadband plan. Going forward, these considerations suggest a broader role for the Joint Board, which is composed of state members who remain convinced of the importance of maintaining a collegial Federal-State partnership.