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

In The Matter Of	)	
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
	)	

COMMENTS OF THE
SCHOOLS, HEALTH & LIBRARIES BROADBAND (SHLB) COALITION

John Windhausen, Jr.
Executive Director
Schools, Health & Libraries Broadband (SHLB) Coalition

July 29, 2019

COMMENTS OF THE
SCHOOLS, HEALTH & LIBRARIES BROADBAND (SHLB) COALITION

The Schools, Health & Libraries Broadband (SHLB) Coalition ("SHLB Coalition")[1] respectfully submits these comments in opposition to imposing an overall cap on the funding for the Universal Service Fund (USF). The SHLB Coalition joined with 63 other parties in issuing a joint statement opposed to this proposal in June.[2] These comments provide a more detailed explanation of our reasons for opposing this proposal. Imposing an overall funding cap on the USF would conflict with the statutory language, would be arbitrary and capricious, and would be inconsistent with the Commission's stated goals of closing the digital divide.

I. Imposing an Overall Cap on USF Spending Would Conflict with the Statutory Language.

Section 254 of the Communications Act requires that USF spending should be "specific, predictable and sufficient."[3] It is significant that the Notice of Proposed Rulemaking (NPRM}[4] does not mention this statutory language. The statutory language – especially the mandate for "sufficient" funding – does not contemplate a cap on USF spending. In fact, it mandates just the opposite. The statutory language calls upon the FCC to provide enough funding to accomplish the goals of each of the four USF programs. If the Commission adopts and enforces an overall USF spending cap, it would have the effect of denying funding for projects that the Commission has already determined meet its program rules. Thus, an overall spending cap on the USF program would be inconsistent with the clear statutory language to make sufficient funding available to promote equitable access to telecommunications and broadband services.

---

[1] The SHLB Coalition is a broad-based coalition of organizations that share the goal of promoting open, affordable, high-quality broadband for anchor institutions and their communities. A complete list of our Members is available at www.shlb.org.
[2] See, http://www.shlb.org/uploads/FCC%20Filings%20FINAL/Joint%20Statement%20and%20Cover%20Ltr%20Opposing%20USF%20Cap%20-%20Final.pdf.
[3] 47 U.S.C. § 254(b)(5)
[4] See, In the Matter of Universal Service Contribution Methodology, Notice or Proposed Rulemaking, FCC 19-35, issued May 31, 2019, available at https://docs.fcc.gov/public/attachments/FCC-19-46A1.pdf. (*USF Cap NPRM*).

II. Imposing an Overall Cap on USF Spending Would Not Accomplish the Commission's Goal of Promoting Broadband for All Americans.

Moreover, imposing an overall cap on USF spending would not be good public policy. According to the FCC's website, Chairman Pai's "top priority is to close the digital divide between those who have access to cutting-edge communications services and those who do not".[5] An overall cap on funding would impose artificial limits on the USF programs and could deny funding where it is needed to help promote broadband deployment and use. Thus, an overall cap on USF spending could prevent the Commission from achieving its Chairman's top priority.

The four universal service programs (and perhaps the new Connected Care pilot program as well) work most efficiently if each program addresses different aspects of the "digital divide" in a complementary manner. If the Commission adopts an overall cap on USF spending and the need for funding grows larger than the cap, the four/five USF programs would have to compete with each other for funding. Rather than working in a complementary fashion, each of the four/five program stakeholders would have an incentive to denigrate the other programs in order to advance their own mission. The program stakeholders would have to spend energy defending their own program from budgetary attack, rather than focusing their energies on solving the "digital divide." This will set up an unfortunate dynamic that would be counter-productive and make each individual program less efficient and less productive.

III. Imposing an Overall Cap on USF Spending Is Likely to Be Found Arbitrary and Capricious by a Reviewing Court.

The NPRM proposes to impose an overall cap of $11.4 billion per year on Universal Service Fund spending. But there is no rational reason to impose such a cap when each of the programs is already subject to budget limits. Either the cap would never have any impact (in which case it is superfluous and unnecessary), or, if it did constrain funding, it would deny otherwise meritorious applications for funding that already comply with the Commission's program rules and the goal of promoting broadband deployment and use. Thus, an overall USF cap could easily be found to be arbitrary and capricious by a reviewing court.

Furthermore, the Commission has not engaged in a cost study that would support and justify any particular cap on funding. The USF Cap NPRM proposes to base the cap on the authorized funding levels

[5] See, "FCC Initiatives: Bridging the Digital Divide for All Americans," https://www.fcc.gov/about-fcc/fcc-initiatives.

for each of the four programs, but this funding cap is not based on any empirical analysis of what it would or should cost to reach the goals of each of the four USF programs. The $11.4 billion figure is not based on any factual evidence in the record and would thus be highly susceptible to a finding that it is arbitrary and capricious.

The NPRM tries to justify the cap as follows:

> A cap could promote meaningful consideration of spending decisions by the Commission, limit the contribution burden borne by ratepayers, provide regulatory and financial certainty, and promote efficiency, fairness, accountability, and sustainability of the USF programs.[6]

As explained below, imposing an overall USF funding cap would achieve none of these objectives:

A. Imposing an overall USF cap would not "promote meaningful consideration of spending decisions" because each of the programs already has detailed rules that require applicants to justify their USF support.

Each of the four USF programs *already* has extensive rules to ensure that each application for funding is meritorious. If adopted, the cap would only kick in *after* all of the applications for all four programs have undergone review and approval, which means that meritorious applications would nevertheless not receive their full funding. The funding denial would not occur because the Commission made "meaningful consideration of spending decisions"; the denial would occur solely because of an arbitrary and blunt instrument that is unrelated to the merits of the application. Thus, imposing an overall cap on the USF contributes no "meaningful consideration of spending decisions."

B. Imposing an overall USF cap would not "limit the contribution burden borne by ratepayers" because the funding for each program is already limited.

As the USF Cap NPRM admits, each of the four USF programs is already subject to a limit on funding, either by operation of a cap or a "budget." The proposed cap on the entire USF program would be set based on the authorized spending levels of each program, so the cap would not reduce funding to an amount less than the caps/budget that are already in place. If this cap is adopted, it will not reduce spending and would have absolutely no impact on the so-called "burden" on ratepayers.

The only scenario in which an overall cap would limit the burden on ratepayers would occur in the unlikely event that the Commission raises the cap on one or more individual programs and does not

[6] USF Cap NPRM, para. 1.

raise the overall cap on the USF program. But if the FCC decides to raise the cap for an individual program, it would do so because it is convinced of the need for that additional funding to accomplish its universal service goals, and it would also likely raise the overall cap to ensure that its decision is implemented. Thus, an overall USF cap would not realistically limit the "contribution burden" on ratepayers.

C. Imposing an overall USF cap would not provide "regulatory and financial certainty" because it would introduce another layer of review, and thus increase applicants' uncertainty.

The adoption of an overall cap would introduce an additional hurdle before funding could be awarded. In the current application process, applicants already must undergo review by USAC and the Commission to determine whether or not they meet the Commission's rules for funding. Then they are only awarded funding if the total demand for funding for that particular program is below the cap for that program. If applicants must wait still longer for the FCC to determine whether the overall cap is breached, that will delay the funding decision even further.

Currently, the program works best when applicants receive their funding decisions within a few months after their applications are submitted. If an overall cap is enforced, however, applicants may have to wait until the end of the funding year for all four programs before any individual applicant is funded. This additional delay increases uncertainty, not certainty.

D. Imposing an overall USF cap would not "promote efficiency, fairness, accountability, and sustainability of the USF programs" because, again, the programs are already subject to procedures and spending limits to accomplish these goals.

As already stated, the four USF programs are already governed by strict rules that promote efficiency, fairness, and accountability. In both the E-rate and Rural Health Care programs, applicants must go through a competitive bidding process to determine the most qualified applicant. The FCC and USAC must review these applications to ensure that the competitive bidding processes are transparent and operate in a fair and competitively neutral manner. Imposing an overall USF funding cap does not weed out undeserving applications; it would only deny funding to applications that have already been proven to be worthwhile. If the Commission believes that there is more that should be done to promote efficiency, fairness and accountability, it should consider strengthening the rules for each individual program.

It is odd that the stated goal should include a reference to the "sustainability" of the USF program. Imposing an overall USF cap in no way promotes the sustainability of the USF, but we agree that "sustainability" is an important issue. The USF contribution factor has recently risen from 19% to over 24%.[7] This sudden increase could foretell even further increases that could spiral out of control. As the fee on interstate/international telecommunications services increases, carriers will have even greater incentives to shift their services to non-telecommunications services, which reduces the base of funding and will drive the contribution factor even higher. If the Commission is truly concerned about the "sustainability" of the USF, it should tackle reforming the contribution factor rather than imposing an overall USF cap that will have no real impact. This USF cap proceeding is largely a distraction from the important goal of preserving and advancing broadband connectivity across the U.S., as Congress required in the Telecommunications Act of 1996.

E. The proposed overall USF funding cap is illogical and inconsistent.

The NPRM struggles to make a coherent argument in favor of the cap. For instance, the NPRM says:

> We take this action to preserve and advance universal service, to increase access to telecommunications services for all consumers at just, reasonable, and affordable rates, to meet our obligation to protect against Fund waste, and to ensure that the universal service programs are funded appropriately. (NPRM, para. 3)

A cap would in fact prevent the achievement of these goals. Capping the USF would not advance universal service or increase access to telecommunications services; by its very nature it would prevent the Commission from awarding funding that is needed to achieve the goals of the individual programs. If there is waste in the program, imposing a cap is not the way to root it out; imposing a cap would theoretically harm worthwhile expenditures while doing nothing to identify the wasteful spending by a small handful of applicants. Most amazingly, the argument that an overall USF cap would "ensure that the universal service programs are funded appropriately" is completely nonsensical.

IV. The Commission Should Not Combine the Caps on the E-rate and Rural Health Care Programs.

In paragraphs 23 through 25, the USF Cap NPRM asks whether the E-rate and RHC program caps should be combined into one. The SHLB Coalition does not support this approach. The programs and program budgets should each stand on their own. As the USF Cap NPRM recognizes, the SHLB Coalition

[7] https://www.fcc.gov/document/3rd-quarter-2019-usf-contribution-factor-244-percent.

has suggested administrative reforms that would simplify and streamline the application processes for both programs. SHLB has suggested the idea of allowing applicants to seek E-rate and RHC funding simultaneously in one application on a trial basis. But, allowing a single application does NOT require combining the two programs, and combining the two program caps would NOT further SHLB's proposal for a single application.

For all the reasons listed above, we urge the Commission to reject the idea of imposing an overall cap on the USF.

Respectfully Submitted,

John Windhausen, Jr.
Executive Director
Schools, Health & Libraries Broadband (SHLB) Coalition
jwindhausen@shlb.org
(202) 263-4626

July 29, 2019