

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
The Uniendo a Puerto Rico and the Connect	)	WC Docket No. 18-143
USVI Fund	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
ETC Annual Reports and Certifications	)	WC Docket No. 14-58
	)	

**PETITION FOR RECONSIDERATION**

Tri-County Telephone Association, Inc. (“Petitioner”), by its attorneys and pursuant to Section 1.429 of the Commission’s Rules, 47 C.F.R. § 1.429, hereby petitions for reconsideration of the above-captioned May 8, 2018 Order (the “Order”). The Order appeared in the Federal Register on June 13, 2018. Therefore, this Petition is timely filed pursuant to 47 U.S.C. § 405.

Petitioner has standing to file this Petition as a recipient of high-cost support funding from the Universal Service Fund (“USF”). The Commission has capped this type of USF funding at \$2.15 billion,<sup>1</sup> and the funding authorized by the Order will reduce the USF funds available to Petitioner by disproportionately allocating high-cost funds to carriers in Puerto Rico and the U.S. Virgin Islands (“USVI”). Petitioner therefore has standing as a party whose “interests are adversely affected” by the Order.<sup>2</sup>

Petitioner seeks reconsideration of the Order on the basis that (1) the Commission failed to provide notice and seek comment on the Stage 1 Funding for Immediate Restoration (“Stage 1

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<sup>1</sup> See *Connect America Fund ETC Annual Reports and Certifications Rural Broadband Experiments*, Report and Order and Further Notice of Proposed Rulemaking, FCC 16-64, WC Docket Nos. 10-90, 14-58, 14-259 (rel. May 26, 2016).

<sup>2</sup> 47 U.S.C. § 405(a).

Funding”);<sup>3</sup> (2) the Commission failed to provide adequate record support for the funding levels provided in the Stage 1 Funding; (3) Congress did not intend the high-cost program to be used for the purpose of general disaster relief as provided by the Stage 1 Funding; and (4) the Commission has unlawfully expanded the scope and purpose of the USF when it opted to use the USF as insurance for natural disasters.

### **I. Failure to Undergo Notice and Comment on Stage 1 Funding**

In the Order, the Commission made available \$64.2 million of high-cost funds for carriers in Puerto Rico and USVI without undergoing the typical notice and comment procedures mandated by the Administrative Procedure Act (“APA”).<sup>4</sup> The Order relies on the good cause exception to the APA to justify this omission, which allows an agency to promulgate a rule without undergoing notice and comment in emergency situations.<sup>5</sup>

The Order sets a disturbing precedent for expanded use of the USF for natural disaster recovery, and the provision of Stage 1 Funding represents a shift, both financially and in terms of policy, in the administration of the USF. The Commission’s decision was an abrupt departure from the policy it established in the immediate aftermath of Hurricane Maria to advance the distribution of normal high-cost support funds to the carriers involved with the advances then being deducted from future high-cost disbursements.<sup>6</sup> The Order abruptly abandons that policy by effectively doubling the amount of high-cost support distributed to eligible entities on the islands without any factual support in the record for the dramatic increase. Stakeholders should

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<sup>3</sup> See *The Uniendo a Puerto Rico Fund and the Connect USVI Fund*, Order and Notice of Proposed Rulemaking, FCC 18-57, WC Docket Nos. 18-143, 10-90, 14-58, paras. 23-27 (rel. May 29, 2018) (“Uniendo a Puerto Rico/USVI Fund Order”).

<sup>4</sup> See 5 U.S.C. § 553.

<sup>5</sup> *Uniendo a Puerto Rico/USVI Fund Order*, paras. 23-27 (citing 5 U.S.C. § 553(b)).

<sup>6</sup> See *In re Connect America Fund*, FCC 17-129, WC Docket No. 10-90 (rel. Oct. 4, 2017).

have been presented an opportunity to comment on the precedential effect of using the USF for natural disaster recovery and whether the level of support provided in the Stage 1 Funding is appropriate.

Notice and comment was not only the prudent procedure for enacting the Stage 1 Funding, it was the procedure required by law. While the Commission relies on the good cause exception to the APA, Congress intended that exception to apply only under narrow circumstances.<sup>7</sup> Reviewing courts have approved an agency's decision to bypass notice and comment only where delay would pose an *imminent* threat to life or physical property, such as an imminent hazard to aircraft,<sup>8</sup> and when a rule was "of *life-saving importance* to mine workers in the event of a mine explosion."<sup>9</sup>

By contrast, in *Sorenson Communications, Inc. v. F.C.C.*,<sup>10</sup> the FCC promulgated a rule, without undergoing notice and comment, requiring new subscribers of IP-Captioned Telephone Service to pay at least \$75 for their telephones. The Commission justified forgoing notice and comment on the basis that delay could result in there being insufficient funds to meet the needs of the Service.<sup>11</sup> The D.C. Circuit held this justification insufficient, holding that an agency must provide "something more than an unsupported assertion" to take advantage of Section 553(b). The Court found significant that the Commission did not specify when the emergency was

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<sup>7</sup> *Nat'l Nutritional Foods Ass'n v. Kennedy*, 572 F.2d 377, 384 (2d Cir. 1978).

<sup>8</sup> *Jifry v. F.A.A.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004).

<sup>9</sup> *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 93 (D.C. Cir. 2012) (emphasis added).

<sup>10</sup> 755 F.3d 702 (D.C. Cir. 2014).

<sup>11</sup> *Misuse of Internet Protocol (IP) Captioned Telephone Service*, FCC 13-13, CG Docket Nos. 13-24, 03-123, para. 7 (2013).

supposed to take place, whether it would actually take place before notice and comment would elapse, or whether there were reasonable alternatives available to the Commission.<sup>12</sup>

In the Order at issue in this Petition, the Commission once again failed to provide adequate supporting evidence of an emergency necessitating the exclusion of the public's input. The Commission cites the imminence of the 2018 hurricane season and the possibility of carriers choosing cheaper restoration plans in the interim as evidence of an emergency.<sup>13</sup> However, the Order cites no specific forecasts or evidence that Puerto Rico or USVI will be subject to *imminent* natural disaster. The threat of hurricane season, by itself, cannot constitute an extraordinary emergency; hurricane season takes place every single year. Furthermore, the Commission has had notice of this "emergency" for many months, if not years, and would have had ample time to seek comment on the Stage 1 Funding had it acted at the appropriate time.

The Order also provides no evidence that carriers will be inclined to choose cheaper restoration plans if notice and comment were to take place. That assertion, therefore, is nothing more than mere speculation. Even if the Commission provided evidence that carriers were on the brink of choosing cheaper restoration plans, that situation could hardly be characterized as an "imminent threat to life or physical property."<sup>14</sup>

## **II. Lack of Support for Final Figures**

The Order makes available \$64.2 million of high-cost funds: \$51.2 million through the Uniendo a Puerto Rico Fund and \$13 million through the Connect USVI Fund.<sup>15</sup> All three figures are seemingly pulled out of thin air. Thus, the Order not only proceeds without

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<sup>12</sup> *Sorenson Communications, Inc.*, 755 F.3d at 707.

<sup>13</sup> *Uniendo a Puerto Rico/USVI Fund Order*, paras. 24-25.

<sup>14</sup> *Jifry*, 370 F.3d at 1179.

<sup>15</sup> *Uniendo a Puerto Rico/USVI Fund Order*, paras.14-15.

undergoing notice and comment, it proceeds without even attempting to explain how it determined the figures underlying the Stage 1 Funding.

The Commission determined that \$62.4 million was “roughly equal” to the amount it had already granted carriers in Puerto Rico and USVI, and that it would “be likely sufficient” for short-term restoration efforts.<sup>16</sup> The Order does not, however, identify specific costs associated with “immediate restoration” or explain why \$62.4 million is an appropriate level of funding. In this respect, the Commission’s method of disbursing Stage 1 Funding represents a drastic departure from the Commission’s usual high-cost program procedure. Eligible telecommunications carriers typically first incur the costs of providing service, demonstrate to the Commission that the costs are above average, and accordingly receive support based on verifiable financial data.<sup>17</sup> By contrast, the carriers poised to receive the Stage 1 Funding were not required to submit in advance any financial data to the Commission or proof of specific need for the Stage 1 Funding.

The Order directs USAC to audit Stage 1 disbursements, but given that the carriers are not required to submit financial data to receive the Stage 1 Funding, what exactly USAC will audit is unclear. The more prudent approach would have been for the Commission to carefully outline acceptable uses for the Stage 1 Funding and to reimburse carriers for expenses they incur at the Commission’s direction. This approach would have allowed the Commission to verify that the Stage 1 Funding gets put to its most effective and efficient uses. Instead, the Stage 1 Funding is a give-away with minimal strings attached. Unfortunately, this approach is all too consistent

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<sup>16</sup> *Id.* at para. 14.

<sup>17</sup> *See* 47 C.F.R. § 54.307.

with the U.S. Government Accountability Office’s findings that the high-cost program lacks transparency and accountability of spending.<sup>18</sup>

The Commission here put the cart before the horse, virtually ensuring that tens of millions of dollars of public funds will be spent one way or another whether needed or not. The Commission needs to be a better steward of the public’s money. Its response to Hurricane Katrina in 2005 better exemplified this duty, when it authorized the use of high-cost funds for repairing facilities, instead of distributing additional funds, and required additional certifications from high-cost carriers intending to use their funds in this manner.<sup>19</sup>

The Commission’s reasoning behind the allocation of Stage 1 Funding between Puerto Rico and USVI is also a mystery. The Order claims that the allocation is based on differences between the landmass, geography, topography, and population of the islands. However, the Order does not link these factors to the chosen proportion itself. As the Commission itself notes, this novel allocation between the islands is a departure from the allocation it typically employs for frozen high-cost support.<sup>20</sup>

As the D.C. Circuit has noted, the Commission may not promulgate rules without providing evidence and justifications for the numbers underlying those rules.<sup>21</sup> In the context of universal service, the Commission must “provide adequate record support and reasoning for

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<sup>18</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-587, FCC SHOULD IMPROVE THE ACCOUNTABILITY AND TRANSPARENCY OF HIGH-COST PROGRAM FUNDING (2014).

<sup>19</sup> *In re Federal-State Joint Board on Universal Service, Schools and Libraries Universal Support Mechanism, Rural Health Care Support Mechanism, Lifeline and Link-Up*, FCC 05-178, CC Docket Nos. 96-45, 02-6, WC Docket Nos. 02-60, 03-109, para. 55 (rel. Oct. 14, 2005) (“Hurricane Katrina Order”).

<sup>20</sup> *Uniendo a Puerto Rico/USVI Fund Order*, para. 22.

<sup>21</sup> *San Antonio, Tex. By & Through City Pub. Serv. Bd. v. United States*, 631 F.2d 831, 834 (D.C. Cir. 1980).

whatever level of support it ultimately selects.”<sup>22</sup> In this case, nothing in the record supports the level of funding the Commission chose, or how it proportioned the funding between the islands.

### **III. Congress Did Not Intend the Universal Service Program Be Used for Natural Disaster Relief**

The Commission does not have *carte blanche* to enact any universal service policy it chooses. When Congress passed the Telecommunications Act of 1996, it found that the universal service mechanisms existing at the time adequately promoted universal service.<sup>23</sup> It also sought to ensure that changes in markets and technology would be equally realized by both rural and urban areas. Accordingly, it instructed the Commission to promulgate rules that would *preserve* and *advance* universal service. The Commission is limited to enacting universal service policies that further both of these specific goals.<sup>24</sup>

The Stage 1 Funding is completely unrelated to Congress’ aforementioned goals. The Commission explicitly designed the Stage 1 Funding to restore networks that were damaged as a result of a natural disaster. Congress did not authorize the Commission to enact policies to respond to natural disasters; it authorized the Commission to enact policies to ameliorate disparities in service caused by population scarcity. The relief provided here goes well beyond any concept of service contemplated by Congress.

The Stage 1 Funding is also unrelated to the goals of the high-cost program. The high-cost program is based upon § 254(b)(3), which provides that consumers in rural, insular, and high-cost areas should have access to telecommunications services at rates that are “reasonably

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<sup>22</sup> *Qwest Corp. v. F.C.C.*, 258 F.3d 1191, 1203 (10th Cir. 2001).

<sup>23</sup> *Qwest Commc'ns Int'l, Inc. v. F.C.C.*, 398 F.3d 1222, 1236 (10th Cir. 2005) (citing 47 U.S.C. § 254(b)).

<sup>24</sup> *Id.*

comparable to rates charged for similar services in urban areas.”<sup>25</sup> The Order provides no evidence that consumers in Puerto Rico and the USVI have experienced higher rates for service than other parts of the country as a result of Hurricane Maria. The Order makes clear that there is *less* service, not that service has become more expensive. But infrastructure may become damaged, leading to less service in a given area, for any number of reasons, and the Commission simply is not authorized to dip into the high-cost program every time this takes place, acting fundamentally as an insurance provider.

In fact, a bill was introduced in the House of Representatives on January 18, 2018 proposing to amend § 254 to authorize the use of high-cost support for restoration of telecommunications capabilities following a major disaster or emergency.<sup>26</sup> The proposed legislation raises an obvious question: if the Commission already has statutory authority to use the high-cost program to restore telecommunications networks after a major disaster, why would Congress bother amending § 254 for that very same purpose? Plainly, Congress itself believes that the Commission does not now have the authority it has claimed.

The Commission itself seems less than confident in its statutory authority to authorize the use of the USF for responding to natural disasters. After Hurricane Katrina in 2005, the Commission authorized high-cost carriers to use funds received from the USF to repair and rebuild facilities, but only after waiving 47 C.F.R. 54.7 and forbearing from enforcing 47 U.S.C. 254(e).<sup>27</sup> For whatever reason, the Commission did not bother taking these procedural steps in the Order at issue.

#### **IV. The Commission is Not Authorized to Use the Universal Service Fund as Insurance for Natural Disasters**

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<sup>25</sup> 47 U.S.C. § 254(b)(3).

<sup>26</sup> See H.R. 4832, 115th Cong. § 2 (2018).

<sup>27</sup> *Hurricane Katrina Order*, para. 55.



The Stage 1 Funding resembles an insurance payout more than a high-cost support mechanism. From a policy standpoint, this is a questionable use of the USF. Insurance policies are specifically designed to cover the costs of disasters in advance of their occurrence by risk pooling across multiple participants or markets. By contrast, the USF is financially designed to address the disparity in the cost of providing service between rural and urban markets. The cost of addressing this disparity bears no relationship to the cost of responding to natural disasters, and the approach is therefore flawed from a policy standpoint. As currently postured, the USF is set up as a poorly administered insurance fund that simply extracts additional funding from the compulsory contributors to the Fund whenever an emergency arises rather than planning ahead for emergencies and smoothing out the contributory burdens over years. This financially irresponsible way of proceeding is inherent in the fact that the USF was never intended to be an insurance policy against emergencies so its funding mechanism does not account for things like natural disasters.

Petitioner is not unsympathetic to the devastation wrought by Hurricane Maria and Hurricane Irma and wishes to see the islands' networks restored as quickly as possible. However, Petitioner questions the appropriateness of the USF for responding to this very serious issue, and Petitioner also desires to see the USF administered in a prudent and economic fashion for its own benefit and that of all other rural service providers who must rely on the USF for normal high-cost support. The Commission must rescind the Order because it failed to seek comment on the Stage 1 Funding, failed to provide adequate record support for the level of funding it chose, was not authorized by Congress to enact the Stage 1 Funding, and has unlawfully expanded the

purpose and scope of the USF by using it as insurance for natural disasters.

July 13, 2018

Respectfully submitted,

**Tri-County Telephone Association, Inc.**

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