

October 22, 2015

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Connect America Fund*, WC Docket No. 10-90; *Universal Service Reform Mobility Fund*, WT Docket No. 10-208; *ETC Annual Reports and Certifications*, WC Docket No. 14-58; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *Developing an Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92

Dear Ms. Dortch,

On behalf of General Communication, Inc. (“GCI”) and the Alaska Telephone Association (“ATA”), we urge the Commission to adopt all of the Consensus Alaska Plan (“Alaska Plan”) without issuing a further Notice of Proposed Rulemaking (“NPRM”) seeking comment on the Alaska Plan’s rate-of-return carrier provisions.¹ The Commission has already provided notice sufficient to adopt the Alaska Plan in its entirety – including both rate-of-return LEC and CETC provisions – at the same time as it adopts Connect America Fund (“CAF”) rules for rate-of-return carriers. If, however, the Commission concludes that it must seek further notice on the Alaska Plan, at a minimum it should ensure that the support that Alaska’s rate-of-return carriers would receive under that plan is reserved, and not distributed through any national rate-of-return CAF mechanisms. To distribute that support prior to a final decision on the Alaska Plan would be disruptive both to Alaska carriers and to rate-of-return carriers in the rest of the country, and as a practical matter would prejudice a central element of that plan.

In August 2014, Chairman Wheeler challenged providers to reach an Alaskan consensus on high cost reforms for Alaska. GCI and the ATA took the Chairman’s challenge to heart and worked diligently to develop a plan that would meet the needs of Alaskan’s communications providers using a framework that is consistent with the Commission’s policy goals. On February 20, 2015, the ATA submitted the Alaska Plan to the Commission. The Plan covers all open CAF high cost reform rulemaking issues with respect to setting support levels in Alaska, and provides mechanisms to ensure that the support is used effectively to support voice and expanded

¹ Attachment to Letter from Christine O’Connor, Executive Director, Alaska Telephone Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, Docket No. 10-90 (filed Feb. 20, 2015).

broadband services in areas where they would not be available without such support.² If adopted, the Alaska Plan would stabilize both rate-of-return LEC and mobile wireless support for the next ten years, with demonstrable public interest benefits. Notably, for both rate-of-return LECs and CETCs, the Alaska Plan is an incentive regulation plan, as it is not tied to specific rate base investments and expenses, and contemplates the development of specific deployment and service requirements that would be associated with the support provided.

1. CETC Mobility Support Reforms.

In its *April 2014 Further Notice of Proposed Rulemaking* (“FNPRM”), which was subsequently published in the Federal Register, the Commission specifically proposed to freeze the total support amount provided to each competitive ETC serving remote areas in Alaska.³ The Commission also sought comment with respect to a GCI proposal for a new transition plan for Alaska CETC support, which is substantially similar to the CETC provisions of the Alaska Plan.⁴ Thus, the Commission has provided the public notice necessary to adopt the CETC provisions of the Alaska Plan.

2. Rate-of-return LEC Support Reforms.

The Commission may also proceed to adopt the Alaska Plan’s rate-of-return LEC provisions as a response to specific questions contained in its NPRMs and as a logical outgrowth

² The Plan does not address high cost support for Alaska’s lone price cap LEC because the Commission has already adopted frozen support for non-contiguous price cap LECs, which sets the support levels. The Commission and Alaska Communications Systems (ACS) are currently considering the associated performance and deployment obligations. Letter from Karen Brinkmann, Counsel, Alaska Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 1, Docket No. 10-90 (filed Sept. 18, 2015); Letter from Karen Brinkmann, Counsel, Alaska Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 1, Docket No. 10-90 (filed Feb. 3, 2015).

³ *Connect America Fund; Universal Service Reform—Mobility Fund; ETC Annual Reports and Certifications; Establishing Just and Reasonable Rates for Local Exchange Carriers; Developing a Unified Intercarrier Compensation Regime*, Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 14-54, 29 FCC Rcd. 7051, 7133-7134 ¶ 256 (2014) (“April 2014 FNPRM”); *Connect America Fund; ETC Annual Reports and Certifications; Establishing Just and Reasonable Rates for Local Exchange Carriers; Universal Service Reform-Mobility Fund; Developing an Unified Intercarrier Compensation Regime*, 79 Fed. Reg. 39,195 (Jul. 9, 2014).

⁴ April 2014 FNPRM ¶ 257 & n.471; *see also* Letter of John T. Nakahata, Counsel, General Communication, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, Docket No. 10-90 et al. (filed Apr. 16, 2014).

of its consideration of alternative incentive regulation plans for rate-of-return carriers. Just as the Commission adopted its option for frozen support for price cap LECs serving non-contiguous portions of the United States as an alternative to model-based support without specifically seeking comment on that action, the Commission here may adopt the Alaska Plan's frozen support for rate-of-return LECs as an alternative to its proposed Alternative Connect America Model ("A-CAM") based support. In both cases, frozen support is a logical outgrowth of the other proposals, given the difficulties developing an appropriate cost model for Alaska.

The Alaska Plan directly responds to numerous specific questions the Commission asked in this proceeding, which is the intended purpose of notice and comment rulemaking and almost its definition. Since its first Notice of Proposed Rulemaking in 2010, the Commission has sought comment on incentive regulation plans for rate-of-return carriers. In 2010, the Commission asked "whether the Commission should replace rate-of-return regulation with the price-cap framework recently adopted for voluntary conversions, an alternative price-cap framework, or some other form of incentive regulation."⁵ In the 2011 *Connect America Fund NPRM*, the Commission sought comment "on possible changes to the current rate-of-return system . . . including capping and shifting interstate common line support to an incentive regulation framework."⁶ The Commission sought comment on capping ICLS on, *inter alia*, a study area basis, and whether some form of incentive regulation would need to be adopted to limit the size of the fund.⁷ When the Commission adopted the 2011 *Transformation Order and FNPRM*, it noted that the Rural Associations had proposed that "incremental broadband buildout requirements would be tied to an individual company's ability to receive incremental CAF support for new investment" and sought comment "on any other proposals to transition areas served by rate-of-return carriers to CAF, or any other analysis or recommendations to facilitate this process."⁸

⁵ *Connect America Fund; A National Broadband Plan For Our Future; High-Cost Universal Service Support*, Notice of Inquiry and Notice of Proposed Rulemaking, FCC 10-58, 25 FCC Rcd. 6657, 6680 ¶ 55 (2010) ("2010 NOI and NPRM").

⁶ *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, 29 FCC Rcd. 4554, 4568 ¶ 32 (2011) ("2011 NPRM and FNPRM").

⁷ 2011 NPRM and FNPRM ¶ 450.

⁸ *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, Report

In its *April 2014 FNPRM*, the Commission further discussed reforms for modernizing universal service for the 21st century, including what to do with funding for rate-of-return carriers.⁹ The Commission noted, “[a]s we move forward with the Connect America Fund Phase II for price-cap carriers, we remain cognizant of the fact that many of the same marketplace and technological forces that led to the development of the Connect America Fund for price cap carriers are also affecting rate-of-return carriers.”¹⁰ The Commission sought comment on whether “a better approach [would] be one that provides a set amount of Connect America support for voice and broadband-capable infrastructure in the study area, potentially with the amount per study area adjusted over time in a manner consistent with the growth in broadband-only subscription rates, rather than a per line amount.”¹¹ The Commission also sought comment on whether “rate-of-return carriers should be allowed to transition on a voluntary basis to an alternative rate regulation approach,” and “whether the voluntary path to model-based support and the alternative rate regulation approach are linked, or whether they should be considered independent of one another.”¹² The Commission sought comment on “alternative rate regulation approaches and specific implementation details.”¹³

The Alaska Plan responds directly to the Commission’s inquiries. It proposes a ten-year freeze on funding for Alaskan rate-of-return carriers to stabilize universal service fund support, including a study area level freeze of amounts currently distributed in ICLS support, as well as HCLS amounts. This substantially refines a 2011 proposal for, *inter alia*, an ILEC study area support freeze in August 2010, upon which the FCC never acted with respect to rate-of-return LECs.¹⁴ The Alaska Plan is “an alternative rate regulation approach” that replaces determination of high cost support through rate-of-return calculations, as well as substituting for cost-model based support. The Alaska Plan would also contain specific deployment and service level commitments to promote the Commission’s universal service objectives. With the proposed funding freeze, Alaskan rate-of-return carriers would have the necessary stability to continue expanding deployment to underserved and unserved areas.

and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd. 17,663, 18,050 ¶ 1043 (2011) (“Transformation Order”).

⁹ See April 2014 FNPRM ¶ 258.

¹⁰ *Id.*

¹¹ *Id.* ¶ 272.

¹² *Id.* ¶ 276.

¹³ *Id.*

¹⁴ Letter from Chris Nierman, Director of Federal Regulatory Affairs, General Communication, Inc., to Marlene H. Dortch, Federal Communications Commission, Docket No. 10-90 et al. (filed Aug. 1, 2011).

The Alaska Plan also is a logical outgrowth of the Commission's consideration of alternative incentive regulation plans for rate-of-return carriers. The Administrative Procedure Act does not require an agency to publish each precise proposal it may ultimately adopt.¹⁵ Instead, it may adopt a proposal without seeking further comment when the final rule is a "logical outgrowth" of a proposed rule.¹⁶ Moreover, notice is sufficient if it can "fairly apprise interested persons of the subjects and issues."¹⁷ Courts have taken this to mean that agency inquiries identifying the scope for comment satisfies the requirement for adequate notice when the final rule adopted falls within that scope.¹⁸

The Alaska Plan easily meets the "logical outgrowth" standard. Indeed, the Commission appears already to have concluded that adopting a frozen support model with performance obligations has been sufficiently noticed in this proceeding. The Alaska Plan is a logical outgrowth of the Commission's proposal for alternative cost-model support for rate-of-return carriers, just as the Commission's adoption of frozen support in non-contiguous areas served by price cap LECs was a logical outgrowth of its proposal for CAF Phase II model-based support for price cap LECs. Although no Notice of Proposed Rulemaking published in the Federal Register had specifically proposed that price cap LECs in non-contiguous areas could elect to receive support frozen at 2011 levels in lieu of model-based support, in the 2011 *Transformation Order*, the Commission delegated authority to the Wireline Competition Bureau to create such an option if the model did not provide sufficient support.¹⁹ The Commission could only have adopted the alternative for frozen support for non-contiguous price cap LECs as a logical outgrowth of its proposal for model-based support, in light of the many deficiencies identified in the record with the cost-model as it applied to Alaska and other non-contiguous areas.²⁰ Here

¹⁵ See *Omnipoint Corp v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996).

¹⁶ See *Edison Elec. Institute v. OSHA*, 849 F.2d 611, 621 (D.C. Cir. 1988).

¹⁷ *Nat. Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 121 (D.C. Cir. 1987).

¹⁸ See *Public Service Comm'n of D.C. v. FCC*, 906 F.2d 713, 718 (D.C. Cir. 1990) (finding that petitioner had actual notice as to the scope of the proceedings and should have known that the ultimate outcome was a possibility because the final rule was within the announced objective of the rulemaking).

¹⁹ Transformation Order ¶ 193. The Wireline Competition Bureau exercised its delegated authority to create a frozen support option in DA 14-534. *Id.* ¶¶ 150-154. Neither the 2010 NOI and NPRM nor the February 2011 NPRM contained any express proposal for CAF Phase II support based on frozen historical support levels. See 2010 NOI and NPRM; 2011 NPRM and FNPRM.

²⁰ See Transformation Order ¶ 193 n.314; *Connect America Fund; High-Cost Universal Service Support*, Report and Order, DA 14-534, 29 FCC Rcd. 3964 nn. 434 & 435 (2014). See also *Federal-State Joint Board on Universal Service; Forward-Looking Mechanism for High-Cost Support For Non-Rural LECs*, Tenth Report and Order, FCC 99-304, 14 FCC Rcd. 20,156, 20,342 ¶¶ 422-431 (1999); Comments of General Communication, Inc. at 3-7,

too there are substantial reasons to anticipate that the A-CAM model will underestimate high cost support necessary to provide broadband meeting the FCC's 10 Mbps/1 Mbps standard, including the fact that the A-CAM has been built based on the CAM used for price cap LEC support. For example, it is highly unlikely that the model's difficulties in correctly projecting Alaska middle-mile costs have been corrected. Just as the Commission concluded that frozen support, with specific deployment and service obligations was a logical outgrowth of model-support for price cap LECs, so too can the Commission permissibly proceed to adopt frozen support for Alaska's rate-of-return LECs as a logical outgrowth of the A-CAM model-based incentive regulation plan.

Accordingly, the rate-of-return LEC provisions of the Alaska Plan are both a response to, and a logical outgrowth of, the Commission's specific solicitations of comment with respect to incentive rate regulation plans for rate-of-return LECs. Thus, the Commission may, consistent with the Administrative Procedure Act's notice requirements, proceed to adopt the rate-of-return LEC provisions of the Alaska Plan without seeking further comment through a further NPRM published in the Federal Register.

3. If the Commission decides it must seek further notice and comment on the Alaska Plan rate-of-return LEC provisions, it should at a minimum set aside the support Alaska ILECs would receive under the Alaska Plan.

If the Commission concludes that it cannot adopt the rate-of-return LEC provisions of the Alaska Plan without seeking further notice and comment, it should take care to reserve the support that the Alaska carriers would receive from funds that would otherwise be distributed under any CAF high cost support for rate-of-return carriers nationally. If the Commission were to fail to do so, it would effectively prejudice its ability to act on the Alaska Plan, because it

Docket No. 10-90 (filed Jan. 7, 2014); Letter from Richard Cameron, Consultant, Alaska Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 15-16, Docket No. 10-90 (filed Mar. 28, 2014); Letter from Russell M. Blau, Counsel, Vitelco, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2, Docket No. 10-90 (filed Mar. 11, 2014); Comments of Puerto Rico Telephone Company at 2-6, Docket No. 10-90 (filed Jan. 9, 2014).

Ms. Marlene H. Dortch
October 22, 2015
Page 7 of 7

would have distributed that support across the country. The Commission should give itself the ability to consider the Alaska Plan on its merits, and should not effectively foreclose its implementation.

* * *

Please do not hesitate to contact me if you have any questions regarding this matter.

Sincerely,

/s/ Christine O'Connor



Christine O'Connor
Executive Director
Alaska Telephone Association
201 E. 56th Ave., Ste. 114
Anchorage, AK 99518
(907) 563-4000
oconnor@alaskatel.org

John T. Nakahata
Harris, Wiltshire & Grannis LLP
1919 M Street NW, The Eighth Floor
Washington, DC 20036
(202) 730-1320
jnakahata@hwglaw.com

Counsel for General Communication, Inc.