November 6, 2015

***Ex Parte* Notice**

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: ***Connect America Fund*, WC Docket No. 10-90; *Universal Service Reform – Mobility Fund*, WC 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 Intercarrier Compensation Regime*, CC Docket No. 01-92**

Dear Ms. Dortch:

On Wednesday, November 4, 2015, the undersigned on behalf of NTCA–The Rural Broadband Association ("NTCA"), met with Amy Bender, legal advisor to Commissioner Michael O'Rielly, and Rebekah Goodheart, legal advisor to Commissioner Mignon Clyburn, to discuss various matters in the above-referenced proceedings. Separately, the undersigned met with Travis Litman, legal advisor to Commissioner Jessica Rosenworcel, on Thursday, November 5, 2015, to discuss the same issues.

Rate Floor. NTCA started the discussion by reminding the Federal Communications Commission (the "Commission") of the time sensitivity of a still-pending Application for Review ("AFR") with respect to the "rate floor" that limits receipt of support via High-Cost Loop Support ("HCLS").[1] In the AFR, NTCA and its allies sought Commission review of a decision by the Wireline Competition Bureau to deny a Petition for Reconsideration regarding the methodology by which the rate floor is established.[2] Specifically, in the AFR, NTCA and its allies noted that the data used to calculate the rate floor were publicly released for the first time only a matter of days prior to an earlier order affirming the methodology that would be used to set the rate floor.[3] Yet once a chance for analysis of the rate floor methodology was finally obtained for the first time upon release of the data, these data revealed that

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[1] *See* Application for Review of NTCA, *et al*., WC Docket No. 10-90, *et al*. (filed Jan. 14, 2015).

[2] *See Connect America Fund*, WC Docket No. 10-90, *et al*., Order, DA 14-1882 (rel. Dec. 22, 2014).

[3] *See Connect America Fund*, WC Docket No. 10-90, *et al*., Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 7051 (2014) ("*Seventh Recon Order*").

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the Commission's prior assumptions in 2011 regarding the rate floor calculation methodology were in error.[4]

NTCA clarified that, at this stage of the process, the association and its allies are *not* raising a substantive challenge to the very application of a rate floor to HCLS support. Rather, the only question presented any longer is whether the *methodology* by which the rate floor is set is proper. More specifically, as noted in prior filings, the data that were only finally released to the public in early 2014 show that the dismissal of rural association proposals for use of some standard deviation measure for setting the rate floor, on the grounds that such an approach would result in a rate floor "so low as to be meaningless,"[5] were simply wrong. To the contrary, the Commission's own data show a standard deviation approach to setting the rate floor – an approach that is ironically used by the Commission to set the *upper* bound of "reasonable comparability" but yet not the *lower* bound in the form of the rate floor[6] – would have resulted in a rate floor of either $12.44 (based on a two-standard deviation approach) or $16.45 (based on a one-standard deviation measure) for 2014.[7] Plainly, neither approach would have yielded a rate floor "so low as to be meaningless" as the Commission once feared.

Resolution of the AFR and use of a more reasonable methodology to establish the rate floor going forward is increasingly time-sensitive as 2016 approaches. While the Commission provided for a phase-in of the rate floor toward $20.46 once it discovered that its 2011 estimates for the 2014 rate floor were so far off, this does not address the fundamental flaw (and patent unfairness) of a mechanism that uses a standard deviation approach to setting the *upper* bound of "reasonable comparability" but then requires rural consumers to pay the very same amount to the absolute penny as urban consumers in identifying the *lower* bound of reasonable comparability. In mid-2016, the rate floor will increase to $18 as part of its inexorable march toward a rate floor of $20.46 (and beyond). NTCA therefore

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[4] In particular, the data once finally released revealed that the rate floor for 2014 would be set at $20.46 – an amount dramatically higher than the $14 rate floor established in 2011 and materially higher than the Commission's own prior estimates, where it stated "we anticipate the rate floor for the third year [2014] will be set at a figure close to the sum of $15.62 plus state regulated fees." *Connect America Fund*, WC Docket No. 10-90, *et al*., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011) ¶ 243.

[5] *Connect America Fund*, WC Docket No. 10-90, et al., Third Order on Reconsideration, 27 FCC Rcd. 5622 (2012) ¶ 23.

[6] *See* Public Notice, WC Docket No. 10-90, DA 14-384 (rel. Mar. 20, 2014), at 1. ("In the USF/ICC Transformation Order, the Commission adopted a rate floor 'to ensure that states are contributing to support and advance universal service and that consumers are not contributing to the Fund to support customers whose rates are below a reasonable level.' To be consistent with section 254(b) of the Communications Act, the Commission also determined that '[eligible telecommunications carriers] must offer voice telephony service, including voice telephone service offered on a standalone basis, at rates that are reasonably comparable to urban rates,' and it adopted a presumption that 'a voice rate is within a reasonable range if it falls within two standard deviations above the national average.'")

[7] Petition for Reconsideration of NTCA, *et al*., WC Docket No. 10-90, *et al*. (filed Aug. 4, 2014), at 9.

urged the Commission to act upon the AFR and, well in advance of June 2016, to adopt a more reasonable methodology for the rate floor based upon the same sort of methodology (if not the exact same methodology) that is used to set the upper bound of "reasonable comparability" for local rates.

Universal Service Reform Generally. NTCA next discussed its views with respect to potential universal service fund ("USF") reform. NTCA first noted its active engagement and collaboration with other rural telecom stakeholders in trying to flesh out suggestions made by various Commission offices for a "bifurcated approach" to reform under which prior investments and associated expenses would be recoverable through HCLS and Interstate Common Line Support ("ICLS") while new investments and associated expenses (as well as a subset of some existing investment and expenses associated with the provision of standalone broadband services) would be recoverable through a new mechanism.[8]

At the same time, NTCA noted that questions persist with respect to a "bifurcated approach," and that additional testing and vetting is needed to identify potential trends, disruptions, odd results, and unintended consequences that could arise out of any bifurcation and establishment of the new mechanism. NTCA observes that, while it is important to get reform done *quickly*, it is more important to get reform done *right*. NTCA further sought express clarification as to what specific policy objective bifurcation is intended to achieve, noting that all of the principles previously articulated by the Commission for reform[9] would seem not to be achieved via actual bifurcation itself but rather through other already-proposed measures that are ready or closer to ready for adoption, such as budget controls and reasonable limits on operating expenses and prospective capital investments. NTCA also notes that, while they may have shortcomings and be in need of updating, HCLS and ICLS have actually worked by any factual measure *better than any other system* thus far in encouraging and enabling sustainable investment in rural broadband. Any action taken with respect to those mechanisms should therefore ensure both that prior success will not be undermined and that strong incentives will remain in place for sustainable rural broadband deployment going forward after any reforms. Indeed, it is essential that any reforms strike a careful balance toward *both* a reasonable opportunity to recover costs in accordance with the rules in place at the time the relevant investments and associated expenses were incurred *and* the need to provide sufficient and predictable support for future broadband deployment and operations; neither can or should be sacrificed for the other. To this end, NTCA expressed strong interest in seeing the results of the testing of the bifurcated approach in coming weeks, and NTCA reaffirmed its strong commitment to continuing dialogue and proactive engagement – through a reasonable and measured process – to examine carefully the efficacy of such a bifurcated approach in achieving this important careful balance, the principles for reform articulated by the Commission, and ultimately the statutory mandates of universal service.

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[8] *See, e.g.*, *Ex Parte* Letter from Lynn Follansbee, USTelecom, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Sept. 25, 2015).

[9] *See Seventh Recon Order*, at ¶ 269 (identifying four principles to be achieved in reforming USF: "(a) calculate support amounts that remain within the existing rate-of-return budget, (b) distribute support equitably and efficiently, so that all rate-of-return carriers have the opportunity to extend broadband service where it is cost-effective to do so, (c) distribute support based on forward-looking costs (rather than embedded costs), and (d) ensure that no double recovery occurs by removing the costs associated with the provision of broadband Internet access service from the regulated rate base").

NTCA next raised concerns about an important structural element of a bifurcated approach if such an approach were to be adopted and implemented, even as it is possible that other issues, questions, or concerns may still be identified following the proper and necessary testing and vetting of the bifurcated approach. Specifically, NTCA noted that the preeminent value proposition of such an approach would be to enable a reasonable transition to a new mechanism as new investments are made, such that HCLS and ICLS would diminish "naturally" over time – put another way, the value of any bifurcated approach would arise primarily out of the fact that, even as reforms are enacted and new mechanisms put into place, it would allow investments to be recovered in accordance with rules that were in place at the time those investments and associated expenses were incurred. If, however, a bifurcated approach were to include an artificial "cut-off" for HCLS and ICLS that moves all costs therein to the new mechanism as of a future date certain, this would undermine, if not eviscerate, the primary value proposition of a bifurcated approach and call into question why one would undertake the complexity and potential disruption of adopting such an approach only to then "take it down" within a few years. NTCA therefore argues that HCLS and ICLS support must continue for the useful life of networks used to deliver supported services; even after those networks are fully depreciated, rural rate-of-return-regulated local exchange carriers ("RLECs") will continue to incur expenses to deliver voice and broadband services over them.

NTCA then discussed continuing concerns about the state of the record with respect to identification of purported "overlap" by unsubsidized competitors in areas served by RLECs. As NTCA has expressed in prior filings, it appreciates the evolution of the Commission's "challenge process" with respect to perceived competitive overlap – particularly the attempts to discern better the true extent to which a competitor serves specific locations within larger geographic areas are indicated on FCC Forms 477.[10] At the same time, as the record in the "100% competitive overlap" proceeding demonstrates, the process of actually and accurately identifying such overlap very much remains "a work in progress" at best and very muddy waters at worst. The current state of the record with respect to competitive overlap matters does not yet provide any clear path to move further forward with respect to such issues at this time. Although some may contend that it would be possible to adopt a new "overlap" policy and *then* work through lessons learned from the "100% competitive overlap" experience and treat details such as how competitors and competitive areas are identified as implementation details after-the-fact, NTCA notes that it is essential as a matter of good public policy and process to establish, publish, and seek comment upon such important aspects of the issues upfront rather than treating them as mere implementation details to be dispensed with later upon delegation.

Finally, NTCA discussed the recent letter it had filed jointly with several other rural telecom stakeholders containing proposals for revised "speed standards" and reporting requirements in the context of USF support.[11] In that letter, NTCA and its allies observed that, to achieve "reasonable comparability" between rural and urban consumers, it made little sense for the Commission to maintain a separate, lower broadband speed objective for high-cost areas in the USF program while identifying more robust broadband speeds as being the target objective pursuant to Section 706 of the Telecommunications Act of 1996 on a nationwide basis. Instead, NTCA noted that its letter suggested

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[10] *See, e.g.*, Reply Comments of NTCA, WC Docket No. 10-90 (filed Sept. 28, 2015).

[11] *Ex Parte* Letter from Michael R. Romano, Sr. Vice President-Policy, NTCA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Oct. 26, 2015).

a path that would avoid creating "unfunded mandates" on carriers while: (1) more closely tethering the targets or objectives of high-cost USF programs to Section 706 standards; (2) providing the Commission with much improved data on the extent to which RLECs are actually delivering such speeds to consumers in certain locations using USF resources; and (3) ensuring rural consumers do not suffer the loss of support and access to affordable broadband simply because another provider might be offering a broadband service that would actually be deemed insufficient in an urban area pursuant to Section 706.[12] NTCA therefore urged the Commission to adopt the proposals set forth in its prior filing.

Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS.

Sincerely,

/s/ *Michael R. Romano*
Michael R. Romano
Senior Vice President – Policy

cc: Amy Bender
Rebekah Goodheart
Travis Litman

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[12] Put another way, given what it has established as national objectives for broadband access at 25/3 speeds, it would be a jarring juxtaposition indeed for the Commission to adopt a rural broadband policy that: (1) suggests by contrast that 10/1 speeds as may be offered by a competitor are "good enough" for rural consumers; and (2) then reduces or eliminates USF support that is essential for rural consumers to obtain broadband access that track toward the national objectives due to the presence of a competitor offering something materially less than the national objectives or what the USF recipient offers.