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

In the matter of Rural Health Care Support Mechanism Amendment of Part 54 of the Commission's Rules to Further Modernize the Rural Health Care Program	 WC Docket No. 02-60

<u>REPLY COMMENTS OF ALASKA COMMUNICATIONS</u>

Alaska Communications[1] hereby submits these comments in response to the Petition for Rulemaking ("Petition")[2] filed with the Commission in the above referenced proceeding.[3] Alaska Communications supports the comments of USTelecom and others that contend that the proposals are, at best, unnecessary and contrary to the public interest and, in many cases, would violate the Communications Act.[4]

Alaska Communications files these Reply Comments specifically to address the Petition's call for expanded use of public-private partnerships to channel support from the rural health care ("RHC") and schools and libraries ("E-rate") universal service mechanisms into infrastructure construction. Public-private partnerships have the potential to deliver public benefits but, unless robust and enforceable safeguards are in place, they are ripe for anticompetitive abuse, to the ultimate detriment of the public interest.

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1 In these comments, "Alaska Communications" signifies the operating subsidiaries of Alaska Communications Systems Group, Inc. that provide services supported by the rural health care universal service support mechanisms, which include the incumbent local exchange carriers ("ILECs") ACS of Alaska, LLC, ACS of Anchorage, LLC, ACS of Fairbanks, LLC, and ACS of the Northland, LLC, as well as additional operating subsidiaries, such as ACS Internet, LLC.

2 *Rural Health Care Support Mechanism*, Petition for Rulemaking of Schools, Health & Libraries Broadband (SHLB) Coalition, *et. al*., CC Docket No. 02-60, (filed Dec. 7, 2015).

3 Public Notice, "Wireline Competition Bureau Invites Comment on Petition for Rulemaking Filed By Schools, Health, & Libraries Broadband Coalition, *et. al.*, Seeking Further Modernization of the Rural Health Care Program," DA 15-1424 (rel. Dec. 15, 2015).

4 *See, e.g.,* USTelecom Comments at 1; ITTA Comments at 2; NCA Comments at 3-4.

Background

Alaska Communications is one of the largest providers of voice and broadband services in Alaska, including services to schools, libraries, and rural health care providers ("HCPs") that are supported by the Commission's RHC and E-rate support mechanisms. Alaska Communications well understands the critical need for these services in rural and Bush regions of Alaska,[5] as well as the challenges in delivering them. One of the greatest of these challenges is a persistent lack of sufficient, affordable, terrestrial middle mile capacity in rural and Bush areas of Alaska, without which broadband services are prohibitively expensive, if they are available at all.[6]

Recent experience in Alaska has shown that the Commission must proceed with caution and appropriate safeguards, if it chooses to pursue the Petition's call to ease the rules surrounding public-private partnerships funded through RHC and E-rate support. The Petition asks the Commission: (1) to eliminate its rule prohibiting the entity constructing facilities owned by a rural HCP from leasing excess capacity on those facilities; and (2) to facilitate joint E-rate and Healthcare Connect Fund ("HCF") consortia applications for funding of fiber deployment in

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5 Conceptually, Alaska can be viewed as having three broad regions that each present different challenges to telecommunications service providers: the state's three largest population centers, Anchorage, Fairbanks and Juneau; rural areas connected to one or more of those population centers using the state's road system; and "Bush" communities.

"Bush" communities are isolated geographically from infrastructure resources commonly available elsewhere in the state, and the nation as a whole. Most Bush communities cannot be accessed by road, and are not connected to the state's power grid. To reach these communities, people, as well as goods and services, must arrive by plane, barge, snow machine, all-terrain vehicle, or other off-road transportation means. Communications services in these communities generally rely on satellite or terrestrial point-to-point microwave transport links to population centers in Anchorage, Fairbanks, or Juneau.

6 *See generally Connect American Fund*, WC Docket No. 10-90, *Ex parte* Letter from Karen Brinkmann, Counsel for Alaska Communications, to Marlene H. Dortch, Secretary, FCC (filed Nov. 19, 2015), Attachment: "Closing the Middle Mile Gap In Alaska: A Proposed Plan of Action for All of Alaska."

areas "left behind by commercial providers."[7] In such areas, however, where there is no private business case for unsubsidized fiber deployment, it is vital that the Commission couple public investment with robust and enforceable – preferably structural – safeguards to ensure that all providers have nondiscriminatory access to these facilities at affordable rates, and to prevent waste and abuse of scarce universal service resources.

Discussion

A. The Dangers of an Unregulated Monopoly

In 2014, the Alaska Statewide Broadband Task Force identified a lack of terrestrial middle mile facilities as a key impediment to broadband availability in rural and Bush areas of Alaska, and acknowledged that middle mile capacity must be in place before last mile connectivity can be achieved.[8] The Broadband Task Force Report recognized the value of public-private partnerships in deploying terrestrial fiber or microwave middle mile transport facilities in areas that cannot support private investment alone, but cautioned that, "[w]hen public funds are provided to match private funds, the project owner should be obligated to . . . commit to non-discriminatory access for other providers."[9]

The Broadband Task Force highlighted the importance of nondiscrimination safeguards because, by definition, in areas where public investment is necessary to support deployment of terrestrial middle mile transport facilities, there is likely to be only a single, monopoly owner of

[7] Petition at 20-22.

[8] Statewide Broadband Task Force, "A Blueprint for Alaska's Broadband Future" (Oct. 24, 2014), at 5 ("Broadband Task Force Report"), at 30 (last mile deployment should be supported "where new middle mile access is being deployed, such as high bandwidth fiber"). The Broadband Task Force Report is available at: http://www.alaska.edu/oit/bbtaskforce/docs/Statewide-Broadband-Task-Force-Report-FINAL.pdf).

[9] *Id*. at 10.

those facilities, funded by federal subsidies. If that facilities owner is not adequately regulated by federal or state communications authorities, this unregulated monopolist would be free to discriminate against would-be competitive service providers seeking access to limited middle mile resources, either by charging exorbitant, above-cost rates, or by denying access altogether. Moreover, that subsidy recipient, in offering services at unregulated rates, could overcharge even the very RHC and E-Rate programs that supported deployment in the first place.

Indeed, one such unregulated monopolist is already exploiting the lack of enforceable open access and nondiscrimination requirements in Alaska by extracting inflated payments for telecommunications services, particularly from the FCC's E-Rate and RHC universal service support mechanisms, while using price squeeze tactics to foreclose competition. In 2009, the Rural Utilities Service ("RUS") provided $88 million in federal Broadband Initiatives Program ("BIP") grant award and loan funding to United Utilities, Inc. ("UUI"), a subsidiary of the largest cable television provider in Alaska, General Communication, Inc. ("GCI"), to construct "TERRA-SW," a hybrid fiber-microwave terrestrial middle mile transport network intended to bring affordable terrestrial broadband services for the first time to Bush communities along Alaska's remote southwest coast.

Since completing the monopoly transport facility, GCI has offered affordable residential broadband services to its retail customers, but charges excessive rates at the wholesale level, and charges inflated satellite-equivalent rates for services to schools, libraries, and rural HCPs, which can, in turn, pass those inflated costs on through the federal E-rate and RHC programs. GCI has often explained that it is a necessary and intended part of its business plan to use these inflated RHC and E-Rate support payments to finance the expansion of its monopoly transport network to new areas of the state, thereby further increasing its profits. As an example, in GCI's own words:

> Further deployment of modern wireless and broadband networks to additional currently unserved communities in rural Alaska . . . depends upon the provision of services to key anchor telemedicine and distance learning customers that are supported by the various programs of the Universal Service Fund as well as continued efforts to leverage this funding to secure other private funding sources.[10]

In fact, since completing TERRA-SW, GCI has leveraged this stream of federal universal service funds to expand its network into vast areas of northwest Alaska, thus multiplying the size of its inflated funding stream many times over. In fact, in 2014, GCI alone received some $51.4[11] million in support from the Commission's RHC support mechanisms, meaning that roughly *one-fifth* of all 2014 rural health care support went to a single Alaskan company.[12]

At the same time, GCI forecloses any broadband competition by refusing to make sufficient wholesale capacity available at affordable rates to potential competitors. Its wholesale rates even for limited amounts of transport capacity on TERRA-SW are two to three times the cost of similar amounts of satellite-based transport capacity, and 200-400 times the cost of similar terrestrial fiber capacity in Anchorage.[13] Based on the affordable retail residential broadband rates offered by GCI's affiliates, such wholesale rates are clearly far higher than GCI apparently imputes to its own affiliates offering residential retail broadband services – a classic price squeeze. Indeed, the Commission in other contexts has characterized this form of price squeeze – "a monopolist

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10 *Connect America Fund*, Letter from Megan Delany, GCI, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208 (filed July 30, 2012), at 2-3, *available at* http://apps.fcc.gov/ecfs/document/view?id=7021995350.

11 *See Connect American Fund*, WC Docket No. 10-90, *Ex parte* Letter from Karen Brinkmann, Counsel for Alaska Communications, to Marlene H. Dortch, Secretary, FCC (filed Nov. 19, 2015), Attachment: "Bringing Better Broadband to Alaska," at 8.

12 Petition at 10, n.39 (citing $250 million in funding requests for FY 2013, and $279 million in funding requests for FY 2014). Calendar year 2014 straddled those two funding years.

13 *See* Middle Mile White Paper at 12. Despite the public funding of TERRA-SW, GCI's rates are also similar to (or higher than) the rates it offers on its privately funded monopoly fiber route from Fairbanks to Prudhoe Bay, Alaska.

setting input prices that are actually higher than its prices in the output market" – as the "most extreme case."[14] In light of the well-recognized harm to competition and consumers that results from such a price squeeze, the FCC has previously ensured in other contexts that it has sufficient safeguards in place to detect and deter such conduct.[15] The Commission has not yet intervened with respect to TERRA-SW, however.

Alaska Communications submits that such arrangements are not consistent with the public interest. With any publicly supported program such as RHC or E-Rate, it is vital that the Commission ensure that robust and enforceable safeguards are in place before permitting the distribution of funds to private infrastructure. Indeed, although the BIP *Notice of Funds Availability*, under which the TERRA-SW award was made, required recipients to "offer interconnection on reasonable rates and terms,"[16] the awarding agency (the RUS), lacked any process for enforcing those open access and nondiscrimination conditions. Once GCI had received all of its grant funding for TERRA-SW, the agency's primary sources of leverage over grant recipients – the ability to impose special award conditions, disallow costs, or suspend or revoke the award – were no longer available.

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[14] *See Access Charge Reform*, CC Docket No. 96-262, First Report and Order, FCC 97-158, 12 FCC Rcd 15982 (1997), at ¶ 275.

[15] *Id.* at ¶ 278; *see also International Settlement Rates*, IB Docket No. 96-261, Report and Order, FCC 97-280, 12 FCC Rcd 19806 (1997), at ¶ 231.

[16] BIP loan and grant awardees were required to "offer interconnection on reasonable rates and terms to be negotiated with requesting parties." *Notice of Funds Availability*, 74 Fed. Reg. 33104, 33111 (2009). As a loan and grant recipient GCI pledged to adhere to the policies set forth in the Commission's *Broadband Internet Policy Statement*, CC Docket Nos. 02-33 *et al.*, FCC 05-151 (rel. Sept. 23, 2005). *See id.* Through its ILEC affiliate, GCI specifically agreed to "offer wholesale and retail services to carriers and other customers that wish to provide or use broadband and other services in Service Area communities." United Utilities Inc., "TERRA-SW: Terrestrial Broadband In Southwestern Alaska," Executive Summary at 2, *available at*: http://www.ntia.doc.gov/broadbandgrants/applications/summaries/93.pdf.

B. Before Funding Infrastructure Construction, the Commission Should Put Additional Safeguards in Place to Protect the Public Interest

To truly ensure the full public interest benefits of infrastructure investments, therefore, the Commission must ensure that it has identified a clear source of vigilant oversight authority, enforceable rules, and meaningful penalties for noncompliance. Without such safeguards, the benefits of public-private partnerships cited by other commenters may never be realized.[17]

Alaska Communications has previously proposed that the Commission put structural safeguards in place, for example, limiting the owner of middle mile facilities constructed with federal universal service funding to a wholesale role, and prohibiting the recipient of this funding from competing in downstream retail markets for broadband services, whether to consumer, business, enterprise, or public sector customers.[18] Alaska Communications believes that similar structural or non-structural safeguards (*e.g.*, requiring wholesale access and regulating rates, terms and conditions of access to the subsidized facilities) are necessary in this context.

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[17] *See, e.g.*, MORENet Comments at 4; UAMS Comments at 3; NTCA Comments at 19 ("NTCA cautions that if the Commission decides to re-evaluate joint E-rate/RHC Program applications accordingly, it should install appropriate safeguards to protect existing public investment from inefficient consortium purchases.").

[18] Middle Mile White Paper at 7 (The Commission should "fund the construction of a single, public middle mile network, neutrally administered for the benefit of all. In order to do so, the FCC should authorize a neutral administrator of the Alaska Middle Mile Network that would be owned, operated, and maintained either by an agency of the state of Alaska or a non-profit entity chartered for the purpose of constructing, owning, operating and maintaining affordable middle mile capability. It should make middle mile capacity available to all service providers in the state on equitable and non-discriminatory terms, so competitive and affordable [retail] broadband services can be made available throughout Alaska. It should own and operate the network, maintain and upgrade it, and generally operate for the benefit of the public. Wholesale services would be subject to the oversight of the FCC under Title II of the Communications Act, as well as the Regulatory Commission of Alaska (the "RCA"). *The administrator would be prohibited from participating (directly or indirectly) as a competitor in downstream retail markets*.") (emphasis added).

1. Leasing of HCP-Owned Facilities

With regard to the rule prohibiting the entity that constructed facilities owned by a rural HCP from leasing excess capacity on those facilities,[19] Alaska Communications believes that the neither the Petition nor the rule as written strikes the right balance. The Petition would eliminate this prohibition, opening the way for less-than-arms'-length deals between the rural HCP and a broadband service provider that constructed the network. On the other hand, Section 54.633(d)(5), as written, fails to limit the HCP's ability to sell IRUs to any other entity, even if that entity would thereby gain monopoly status on the route by acquiring all available capacity.

Alaska Communications suggests a middle ground, permitting the sale of IRUs to any entity, under nondiscriminatory rates, terms, and conditions, covering only a reasonable portion of the excess capacity on any route, thereby ensuring that all potential market competitors are able to gain entry on a nondiscriminatory basis. Indeed, the National Telecommunications and Information Administration ("NTIA") put similar constraints in place to govern the sale of IRUs in middle mile fiber projects funded through the Broadband Technology Opportunities Program ("BTOP").[20]

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[19] 47 C.F.R. § 54.633(d)(5) ("An eligible health care provider (typically the consortium, although it may be an individual health care provider participating in the consortium) must retain ownership of the excess capacity facilities. It may make the facilities available to third parties only under an indefeasible right of use (IRU) or lease arrangement. The lease or IRU between the participant and the third party must be an arm's length transaction. To ensure that this is an arm's length transaction, neither the vendor that installs the excess capacity facilities nor its affiliate is eligible to enter into an IRU or lease with the participant.")

[20] *See* NTIA Fact Sheet, "Broadband Technology Opportunities Program (BTOP) Sale/Lease Restriction, Indefeasible Rights-of-Use, and Fiber Swaps" (August 2013), at 3 ("No entity or group of affiliated entities may: (i) obtain IRUs in a majority share of the capacity available for purchase at the time of the transaction on any fiber route constructed with BTOP funds; and/or (ii) cumulatively obtain a majority of the initial total capacity on any such fiber routes."), *available at:* http://www2.ntia.doc.gov/files/btop_sale-lease_iru_factsheet_final_v2.pdf).

2. Joint Funding of Projects with E-rate

With respect to the Petition's request for the Commission to facilitate joint E-rate and HCF consortia applications for funding of fiber deployment in areas "left behind by commercial providers,"[21] the Commission should put similar safeguards in place. While Alaska Communications generally supports the Commission's recently announced E-rate reforms to support infrastructure expansion,[22] there are not yet adequate safeguards in place to prevent the same kind of anticompetitive abuses that have plagued TERRA-SW and that may yet arise in connection with infrastructure funded under the Commission's universal service programs. The Commission's rules do not require the owners of facilities deployed pursuant to the E-rate infrastructure program requirements (or incremental capacity built alongside the E-rate funded infrastructure) to offer other service providers affordable, open, or nondiscriminatory access to middle mile capacity on the resulting networks. Further, the entity that constructs the facilities may concurrently deploy additional fiber strands for its own use while bearing only the incremental deployment cost of the additional strands.[23]

Furthermore, the Commission has no rules in place requiring the entity to provide nondiscriminatory or affordable access to those (likely monopoly) facilities to other retail providers of broadband service. Where there is a single monopoly provider controlling the essential transport facilities, competitive checks on the bidding process to serve the E-rate and

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[21] Petition at 22.

[22] *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Second Report and Order and Order on Reconsideration, FCC 14-189, 29 FCC Rcd 15538 (2015), at ¶¶ 9 *et seq.*

[23] *See, e.g.*, USAC, 2015 Applicant Training, "Fiber Options"), at 22 ("Applicant needs 12 strands of fiber. Construction is for 96 strands. If no plans for other customers, only remove cost for 84 additional strands, but all other special construction costs would be fully eligible."), *available at:* http://www.usac.org/_res/documents/SL/training/2015/Applicant-Training-05-Fiber-Options.pdf.

RHC applicants in the area are currently likely to be absent or severely attenuated. Thus, the Commission should cap E-rate and RHC support for services in Alaska where the bidding process was not competitive (*e.g.*, where the applicant did not receive at least two bids from unaffiliated providers) based on a reasonable, cost-based premium to the Anchorage rate.

Thus, while Alaska Communications urges the Commission to put sufficient safeguards in place to ensure nondiscriminatory and affordable access to the facilities its E-rate and RHC universal service mechanisms support, it should most certainly do so before enabling applications for joint projects that will draw funds from both mechanisms. Such projects are likely to preclude future applicants from demonstrating that additional construction of facilities in the same area is cost effective, thus leaving them (and the federal support mechanisms) at the mercy of an unregulated monopoly provider that faces no effective competitive check on its bids for supported services.

Conclusion

For the foregoing reasons, Alaska Communications urges the Commission to put sufficient safeguards in place to ensure that those in control of federally funded middle mile transport facilities, particularly in Alaska, are not able to engage in anticompetitive monopoly abuses, to the detriment of the federal E-rate and RHC universal service support mechanisms and the public interest alike.

Respectfully Submitted,

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