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

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	WC Docket No. 05-337
High-Cost Universal Service Support	)	
	)	CC Docket No. 01-92
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 96-45
	)	
Federal-State Joint Board on Universal Service	)	WC Docket No. 03-109
	)	
Lifeline and Link-Up	)	

COMMENTS OF ACCIPITER COMMUNICATIONS INC.

Accipiter Communications Inc. ("Accipiter") hereby comments on the Commission's *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90, released February 9, 2011, ("Notice of Rulemaking" or "NPRM") proposing changes to the Commission's Universal Service program and rules governing intercarrier compensation. For the reasons set forth below, Accipiter urges the Commission not to undermine the investment-backed commitments made by companies serving rural areas of the United States and to accommodate the need for those companies not only to recover their investments, but to repay loans provided by the United States government through the Rural Utilities Service ("RUS") to promote rural telecommunications deployment.

I. BACKGROUND

Accipiter is an Incumbent Local Exchange Carrier holding a Certificate of Convenience and Necessity ("CC&N") to provide local telephone service to a territory of 1014 square miles northwest of Phoenix, Arizona. There are approximately 6,000 inhabited residences within the service territory and most of the area is very lightly populated. As of March 2011 Accipiter serves ****REDACTED**** access lines (****REDACTED**** residential and ****REDACTED**** business). Essentially all of these lines may be reached with Accipiter's high speed Internet services. Of these, ****REDACTED**** lines are served by fiber-fed digital loop carrier systems and the remainder are served through fiber-to-the-home ("FTTH") facilities. At present Accipiter's DSL/copper network provides broadband speeds of up to 3 mbps down/1 mbps up and the FTTH network provides speeds of up to 60 mbps down/ 5 mbps up. Accipiter has deployed FTTH facilities exclusively since 2004. Accipiter has been designated an ETC by the Arizona Corporation Commission ("ACC" or "Arizona Commission") and in 2010 Accipiter received USF support of $3,340,878.

Accipiter was incorporated in 1995 and in that year was granted a Certificate of Convenience and Necessity ("CC&N") by the ACC to serve portions of Maricopa and Yavapai counties in Arizona.[1] The original Accipiter service territory encompassed approximately 650 square miles and 115 occupied residences. As the Arizona Commission found

> "many residents of the amended proposed service area support Accipiter's efforts to expand telephone service in the area. We heard from a number of residents of the enormous construction charges USW [US West, subsequently Qwest] has quoted to extend service to remote locations in the area. One resident commented that USW would charge $20,000 to extend service 100 yards to his property. Another spoke of a $200,000 charge to receive service from USW."[1] [fn[1] At the time the Certificate was granted, USW "provided telephone service to approximately 22 customers ("the existing subscribers") over approximately 30 access lines".
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> *Accipiter CCN Order* at 3.

[1] *In The Matter of the Application of Accipiter Communications Inc. for a Certificate of Convenience and Necessity Authorizing the Construction and Operation of a Public Utility Telephone System in Portions of Maricopa and Yavapai Counties, Arizona*, Decision No. 59346 (Docket U-2847A-95-0026). ("*Accipiter CCN Order*")

As is true in many rural service areas, the Accipiter's service proposal was made possible by a combination of USF support provided under the FCC's Universal Service programs and low interest loans for rural telecommunications development provided by the Department of Agriculture Rural Utilities Service. As a result of the support provided by these programs, Accipiter was able to deploy service charging rates of $16.78 per month for residential service and $35.78 for business service. As the Arizona Commission noted, prior to the Accipiter proposal, residents in the area were quoted prices of tens or even hundreds of thousands of dollars to pay for the extension of ordinary telephone service to their homes. The Commission's Universal Service program and the Agriculture Department's RUS lending program working together as intended by Congress placed these rural residents on par with residents of urban areas.

Although much of the Accipiter service territory was, and continues to be, very sparsely populated, for approximately the past seven years the Southeast portion of the service territory has been the focus of a number of significant development efforts. These development efforts peaked prior to the 2008 real estate crash and since that time modest development has resumed.

In 2002, Accipiter filed an application to expand its service territory and take over a portion of the service territory of Qwest Communications in which Qwest had constructed no telecommunications facilities and had no customers. The extension area encompassed a master plan development known as Lakeland Village/White Peak Ranch and was subsequently referred to as the "Vistancia" development. The following year, Accipiter filed an additional extension application to serve an area partially within the incorporated limits of Buckeye, Arizona and Surprise, Arizona as well as additional unincorporated portions of Maricopa County.

The Buckeye extension application was granted by the Arizona Commission on January 14, 2005.[2] In granting the extension, the Commission noted that:

> As a rural carrier, Accipiter's ability to serve high-cost areas that would otherwise remain unserved for many years promotes the public interest by enabling rural customers the opportunity to receive voice and data service, including calling to the Phoenix Metro calling area. The benefit of extending telecommunications services to rural areas is more than a hypothetical possibility. At the hearing, an existing Accipiter customer in the Lake Pleasant exchange, Mr. Joe Hull, offered public comment in support of the company's application. Mr. Hull stated that he resides in the Castle/Hot Springs area north of Lake Pleasant, along with approximately 40 other families. Despite the lack of any paved roads in the area, Mr. Hull indicated that Accipiter provides Castle/Hot Springs residents with local calling to the Phoenix Metro area as well as high speed internet service. Mr. Hull claims that Accipiter has consistently delivered on its promises to area residents in providing telecommunications services. *Buckeye Extension Order* at 9, 10.

The Commission also took explicit notice of the importance of the FCC's Universal Service policies as well as RUS funding in making such rural service possible.

> "Staff witness Boyles also testified that granting Accipiter ILEC status for the proposed extension area provides a benefit to potential customers due to Accipiter's status as a rural carrier. Rural carriers depend on Federal Universal Service Funds ("FUSF") to compensate for the difference in costs incurred to serve high-cost rural customers and revenues received from such customers for service (citation omitted). As a rural carrier receiving funding from RUS, Accipiter would therefore not be permitted to charge customers for construction costs incurred by the company to extend service." *Buckeye Extension Order* at 8.

As noted previously, the FCC's Universal Service programs and the RUS telecommunications lending program working in concert as intended by Congress place rural customers in essentially the same posture as urban customers who do not have to pay special and extraordinary charges to have a telephone company extend its network to serve them.

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[2] *In the Matter of the Application of Accipiter Communications, Inc., for an Extension of its Existing Certificate of Convenience and Necessity*, Docket No. T-02847A-03-0655, Decision No. 67675. ("*Buckeye Extension Order*").

Accipiter's Vistancia extension proposal became the subject of controversy which lingers today. Accipiter was initially approached by the developers of the Vistancia area with a request that it provide telephone service throughout the development. Later, the same developer negotiated an exclusive service arrangement with Cox Communications which included an extraordinary easement feature that made it almost impossible for any other service provider to install landline networks in the area. The Cox/Developer arrangement became the focus of an investigation by the United States Department of Justice Antitrust Division and was subsequently withdrawn. Nevertheless, the existence of the arrangement during the critical time when networks were being deployed in the Vistancia development precluded Accipiter from competing in the effort to gain customers in an initial sign-up. The Arizona Commission granted the Vistancia extension on February 15, 2005.[3] In granting the extension, the Commission took note of the Cox/Developer arrangement:

> "Although we believe Accipiter's CC&N extension request is in the public interest and should be approved, concerns have been expressed by counsel for Accipiter and staff regarding the legality of the arrangements implemented by the developer of Vistancia. Even a cursory review of the exclusive marketing and restrictive easement arrangement raises concerns about the chilling effect that such arrangement may have on the ability of telecommunications providers to fairly compete and on customers' ability to have a choice of providers and services. We believe such arrangements may be antithetical to the purpose of the Federal Telecommunications Act as well as our stated policies and rules encouraging competition and choice in the telecommunications industry. Therefore, we believe it is prudent to direct the staff to initiate, within 30 days, an investigation of the issues raised in this proceeding through a generic docket. This generic docket should include an investigation of the legal issues associated with exclusive marketing and/or restrictive easement arrangements." *Vistancia Extension Order* at 10.

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[3] *In the Matter of the Application of Accipiter Communications Inc. to Extend its Certificate of Convenience and Necessity in Maricopa County*, Docket No. T-02847A-02-0641, Decision 67574 (February 15, 2005). ("*Vistancia Extension Order*").

On June 20, 2006, Accipiter filed what it believed would be a routine request with the FCC for a study area waiver to include the Vistancia extension within its study area. More than four years later, on September 1, 2010, the Commission denied Accipiter's study area request even though Accipiter had disclaimed any additional USF support that might flow from the inclusion of the Vistancia extension within its larger study area. The denial of the study area waiver is of direct relevance here because it precludes Accipiter from combining the low density areas of its larger service territory with a higher density area in the Vistancia development, thereby lowering its overall average costs, reducing its need for subsidy and enhancing its ability to repay its RUS loans. Denial of the waiver needlessly exacerbates what is already a difficult cost and service problem without any countervailing public benefit. It also works against the Commission's objective here to reduce high cost subsidies.

In considering the proposals for modification of the Universal Service program and intercarrier compensation, the Commission must take into account the numerous situations in rural areas of the country where a rural telephone company provides service to rural and low-density areas relying on the support provided by the Universal Service programs and lending provided by the Rural Utilities Service. This formula has served well for many years and has fostered the extension and improvement of rural networks across the country. It has produced exactly the result that Congress intended in that it has placed rural telephone subscribers in substantially the same posture as those living in urban areas. In considering changes to the existing programs, the Commission must take into account not only the explicit Congressional intent underlying these programs but also the reliance that rural telephone companies, their customers and the Rural Utilities Service have placed on them as well. While there are certainly ways in which these programs may be improved, the Commission should be very mindful that it should first "do no harm" to the existing services and rates enjoyed by rural residents today. As shown below, application of a number of the proposals set forth in the Commission's Notice of Proposed Rulemaking could have a deleterious effect on not only Accipiter but also numerous other telephone companies who rely on these programs throughout the nation.

II. PROPOSED USF REFORMS

The Commission has proposed a variety of reforms to its USF programs. The proposed reforms which would have the greatest financial impact on Accipiter include:

1. **Reduce the "reimbursement rates" for the current HCL program, i.e.,** decrease the current 65% and 75% support percentages, for incumbent LECs operating 200,000 or fewer loops, to 55% and 65%, respectively; eliminate rules providing HCLS to carriers with more than 200,000 working loops (no carriers currently qualify for such support).

2. **Eliminate the safety net additive** component of high-cost loop support.

3. **Phase out LSS** or, alternatively, combine LSS and HCLS into a single mechanism to support network costs. If LSS and HCLS are combined (into a new LHCS mechanism), the Commission proposes to calculate support similar to HCL where support would be provided if a LECs costs per loop exceed a national average by 115%, and this fund would be capped. The NPRM also asks whether LSS should be calculated at the holding company level.

4. **Reduce or eliminate support for corporate overhead expenses.**

5. **Establish benchmarks for reimbursable operating and capital costs for rate-of return companies.**

6. **Limit the total support per line any one carrier in the continental U.S. can receive to $250 per month per line ($3,000 per line annually).** Companies receiving in excess of $250 per month per line would have to justify higher amounts of support. The Commission asks if it should implement this proposal in one year, or implement a transition over a period of years, such as three years, and whether there should be an exception for carriers serving Tribal lands in addition to carriers operating outside of the continental United States.

III. EFFECT OF PROPOSED USF REFORMS ON ACCIPITER COMMUNICATIONS

The USF reforms proposed in the Commission's Notice of Rulemaking would prevent Accipiter from investing further in currently unserved areas within the service territory, would create an incentive for the company to focus investments exclusively in subdivision areas, and would undermine the company's ability to maintain adherence to its existing RUS loan covenants. The proposed reforms would not only interrupt the company's existing plans to reach currently unserved populations but would also jeopardize existing services to previously unserved subscribers. The ultimate result would be a retroactive invalidation of regulatory commitments and loan contracts which were initially assumed with the intent to accomplish the still-standing congressional mandate underlying the universal service program.

To understand the impact of proposed USF reform on Accipiter it is important to remember that the company in recent years has deployed network facilities reaching a number of previously unserved populations. This new investment in far-reaching and sparsely populated areas resulted in a high dependence upon USF support. However, with this network now complete, Accipiter can add subscribers with relatively small incremental investment and little incremental increase in operating expense and thus quickly lower its USF support per line. This discussion of the impact of USF reform focuses on the contrasting opportunities presented by incremental investments in Accipiter's still unserved areas compared with incremental investments in Accipiter's subdivision areas.

Within Accipiter's service territory there are approximately ****REDACTED**** unserved households located in very rural areas. Accipiter's service territory also contains growing subdivision developments where there is an opportunity to add approximately ****REDACTED**** subscribers over the next five years. Accipiter is the regulated carrier of last resort in both of these areas. As such, the company must plan for capital investments to provide service in all areas while maintaining adherence with RUS loan covenants and other regulatory obligations to protect the existing service of current rate payers.

Inside Accipiter's subdivision areas the incremental investment to serve new subscribers is relatively low and the revenue collected from the customer will provide Accipiter both positive cash flow and positive net income. The rural and still unserved areas require high incremental investment per subscriber. The required investment in these unserved areas will produce negative cash flows and negative net income. Without universal service support, this investment will negatively affect Accipiter's ability to repay its current RUS loans and preclude it from obtaining financing to serve these areas.

Since Accipiter already has operations and network facilities available for the extension of service, the addition of new subscribers can be accomplished with a relatively small incremental increase in operating expenses. The company's data shows that the incremental operating cost associated with a new subscriber is approximately ****REDACTED**** per month.

The chart below illustrates the contrasting cash flow effects produced by Accipiter's unserved and subdivision footprints:

Accipiter Communications - Cash Flow View of Incremental Subscriber Additions		
	Unserved Areas	Subdivision Areas
Average customer revenue per month (all services)	****REDACTED****	****REDACTED****
Less: Incremental monthly operating expenses	****REDACTED****	****REDACTED****
Equals: Monthly cash available for debt service	****REDACTED****	****REDACTED****
Average investment per new subscriber	****REDACTED****	****REDACTED****
Monthly debt service for new subscriber investment	****REDACTED****	****REDACTED****
Monthly cash surplus (deficit)	**REDACTED**	****REDACTED****

The results above clearly show that Accipiter cannot invest in the unserved areas without a universal service support mechanism to offset negative cash flows.

Prior to the FCC's currently proposed USF reform the company's capital deployment plans sought to strike a balance of investment which provided service to both subdivision and unserved areas while holding USF support levels flat. The planned result would be a decline in USF support per line while still protecting existing investments and operations, establishing service to unserved populations, maintaining compliance with loan covenants, and meeting the carrier of last resort obligations of an ILEC.

If the FCC's USF reform is enacted as proposed, Accipiter's focus would by necessity change to its subdivision areas in an attempt to replace the drastic loss of USF revenues. Investment in unserved areas would become infeasible as the company would not be able to bear the additional loss of cash created by such high per-subscriber investments. Ironically, the outcome would produce exactly the opposite result from that intended by Congress in enacting the universal service program.

To further illustrate the impact of the proposed reforms on Accipiter's operations, the company prepared the analysis attached as Exhibit A. This analysis shows a simplified income statement view of Accipiter's planned results before the proposed reform and a revised income statement based on the impact of those reforms.

As mentioned earlier, Accipiter's capital deployment plans seek to balance the need to serve all areas within its service territory while maintaining the basic financial strength required by its regulatory obligations to the state and its loan covenants with RUS. More specifically, the company is seeking to manage investments such that:

- Total universal service revenues remain relatively flat.
- Cash flow is positive.
- Time Interest Earned Ratio (TIER) remains above 1.0.

The top portion of Exhibit A (shaded in green) shows the income statement results of such a capital deployment strategy. It is important to note that within this analysis the "1.3 Loops" counted by Accipiter include lines served within the Vistancia extension area previously discussed. Accipiter assumes that the FCC will grant its application for review and the loops served in the Vistancia extension will be included in the study area. If these loops are not counted Accipiter may be subject to further reduction in USF support due to the Commission's proposed $3,000 per line annual cap.

The results of the analysis show that Accipiter's ability to add profitable customers through subdivision customers added in 2011 and 2012 create enough headroom for the company to invest to serve unserved customers in 2013 and 2014 while still maintaining compliance with its loan covenants. The company also lowers its support per line from ****REDACTED**** to ****REDACTED****. Clearly the company has the ability to accomplish the goals of the USF program if more reasonable USF reforms are implemented.

The bottom portion of Exhibit A (shaded in blue) shows the income statement results of the Commission's proposed USF reforms. The reduction in revenues is too much, too soon, for Accipiter to accommodate. Therefore the company would be forced to change its capital deployment plan in an attempt to sustain positive cash flow. This would mean adding customers in the subdivision areas while avoiding the non-profitable investments in unserved areas. Even with this modified plan, the results show that the profitable customers added in the subdivision areas cannot replace enough net income to offset the drastic USF cuts created by the Commissions proposed reform. ****REDACTED****.

The fiber optic network that Accipiter has already deployed is precisely the kind of network the Commission hopes carriers will deploy in the future as a result of the changes in its

Notice of Rulemaking. Yet, those very changes if applied to Accipiter would undermine the provision of the state-of-the-art services currently provided to Accipiter's customers.[4]

Given the economic realities discussed above and presented in Exhibit A, it is clear that the existing Universal Service Program coupled with RUS lending provides the basis for service to customers in low density and unserved areas within Accipiter's territory. In the absence of these programs, carriers like Accipiter must, to insure their financial survival, concentrate their services in more densely populated urban and suburban areas. The direct effect of the Commission's proposed phase down of Universal Service support will be a reduction in the geographical area where service may be economically provided. Plainly, the Commission should not adopt changes to its Universal Service program which make service to low density and unserved areas even more difficult than it already is.

IV. CONCLUSION

Pursuant to explicit Congressional policy the FCC and the Rural Utilities Service have had in place for many years complementary Universal Service and telecommunications loan programs which have made possible the deployment of reasonably priced telephone service to those living in rural and low-density areas of the nation. Accipiter has relied upon those policies in deploying a state-of-the-art telephone and broadband network in its rural service territory. The changes the FCC has proposed would undermine Accipiter's ability to provide these services to its customers at rates comparable to those available to urban consumers and would

[4] Likewise, the Commission's failure to grant Accipiter's study area waiver, while having no impact on the Commission's Universal Service policies, needlessly undermines Accipiter's ability to reduce per-line high-cost support. The additional lines that Accipiter seeks to add to its study area would reduce its average support per line substantially (approximately ****REDACTED**** decrease) and, by the end of 2012, bring it beneath the $3,000 per-line support cap which the Commission has proposed in its NPRM.

undermine the Commission's stated objectives in this proceeding related to the deployment of broadband and IP networks.[5]

Respectfully submitted,

/s/ Patrick Sherrill
Patrick Sherrill
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Accipiter Communications Inc.

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[5] The combination of smaller telephone companies is not a solution to the service problem described here. Larger companies will face the same economic realities that small companies do in serving remote areas. And there is no reason to expect larger companies to acquire smaller firms when the negative cash flows incurred in serving remote areas would dilute their earnings and cash flows.

<u>EXHIBIT A</u>

REDACTED