

Before the  
**Federal Communications Commission**  
Washington, DC 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
	)	
High Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	

**REPLY COMMENTS OF COX COMMUNICATIONS, INC.**

Cox Communications, Inc. (“Cox”), by its attorneys, hereby submits its reply comments in response to the Commission’s *Request for Further Comment* seeking responses to questions concerning proposals for reform of the high cost universal service program and intercarrier compensation submitted by parties in this proceeding.<sup>1</sup>

These reply comments address a limited number of issues raised by the comments of the proponents of the ABC Proposal.<sup>2</sup> As Cox noted in its initial comments, there are significant elements of the ABC Proposal that should be revised to ensure that the Commission’s final rules

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<sup>1</sup> Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding, *Public Notice*, WC Docket Nos., 10-90, 07-135, -5-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, FCC 11-13 (rel. Aug. 3, 2011) (the “*Request for Further Comment*”).

<sup>2</sup> Letter from Walter B. McCormick, Jr., United States Telecom Association, Robert W. Quinn, Jr., AT&T, Melissa Newman, CenturyLink, Michael T. Skrivan, FairPoint, Kathleen Q. Abernathy, Frontier, Kathleen Grillo, Verizon, Michael D. Rhoda, Windstream, Shirley Bloomfield, NTCA, John Rose, OPASTCO, and Kelly Worthington, WTA, to Chairman Julius Genachowski, Commissioner Michael J. Copps, Commissioner Robert M. McDowell, Commissioner Mignon Clyburn, FCC, WC Docket No. 10-90 et al. (filed July 29, 2011) (the “ABC Proposal”).

are consistent with the goals set out in the *Notice*.<sup>3</sup> The ABC Proponents' comments, moreover, suggest that additional, potentially more troubling, elements of the plan were not disclosed in their earlier filings with the Commission.<sup>4</sup> This is one more reason for the Commission to avoid blind adoption of the ABC Proposal, and instead to address its own goals and obligations under the Communications Act.

These comments address three specific issues. First, the ABC Proponents argue that, under their plan, incumbent local exchange carriers ("LECs") should be entitled to receive support from the access replacement mechanism to offset revenues lost as a result of reductions in access charges for IP-based services.<sup>5</sup> This proposal would exacerbate the imbalance that the ABC Proposal already would create between incumbent LEC and competitive LECs. Second, the ABC Proponents argue that a right of first refusal should be made available to incumbent LECs that offer high-speed Internet to 35 percent of the service locations in a wire center because those providers have previously-funded facilities or supposed regulatory obligations.<sup>6</sup> There is no basis for giving incumbents preferential treatment, and doing so would be economically inefficient. Third, the ABC Proponents offer their intent to submit proposed rule changes to the Commission "in a subsequent filing."<sup>7</sup> The Commission should not accept such proposals, especially given the short time frame between the comment period and the Commission's intended action in this proceeding.<sup>8</sup>

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<sup>3</sup> Comments of Cox Communications, WC Docket No. 10-90 et al. (filed Aug. 24, 2011) ("Cox August 24 Comments"); Connect America Fund, *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, WC Docket Nos., 10-90, 07-135, -5-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, FCC 11-13 (rel. Feb. 8, 2011), ¶ 9 (the "*Notice*").

<sup>4</sup> Joint Comments of AT&T, CenturyLink, Fairpoint, Frontier, Verizon, and Windstream, WC Docket No. 10-90 et al. (filed Aug. 24, 2011) (the "ABC Proponent Comments").

<sup>5</sup> *Id.* at 24.

<sup>6</sup> *Id.* at 12-13.

<sup>7</sup> *Id.* at 14.

<sup>8</sup> See J. Genachowski, M. Copps, R. McDowell and M. Clyburn, *Bringing Broadband to Rural America: The Home Stretch on USF and ICC Reform*, at <http://www.fcc.gov/blog/bringing-broadband-rural-america-home-stretch>

**I. The Commission Should Reject Efforts to Create Competitive Imbalance Through the Access Replacement Mechanism.**

As described in Cox's initial comments, there is reason to be skeptical of the necessity of the proposed access replacement mechanism, particularly because it could provide additional revenue to the companies that would be the primary beneficiaries of lower access rates.<sup>9</sup> The comments filed by the ABC Proponents, however, suggest that the Commission should adopt rules that would, in effect, use the access replacement mechanism to create a new competitive imbalance between incumbent LECs and competitive LECs by allowing incumbent LECs to receive support from the mechanism for revenues lost as a result of differential compensation rates for IP-based traffic.

The ABC Proponents explain that the access replacement mechanism for incumbent LECs "would offer support in response to revenue losses that may arise due to the interim intercarrier compensation treatment of VoIP traffic going forward under the plan (i.e. interstate access charges for access calls and reciprocal compensation for non-access calls)."<sup>10</sup> In other words, incumbent LECs would be eligible for support as a result of revenue lost from the differential voice over IP access rate, but competitors would not.

There is no way to understand this proposal except as a punitive measure imposed on competitors for using IP-based technologies. There is no doubt that the differential rates under the ABC Proposal would have their greatest impact on cable operators that offer voice services. Under the proposal, cable operators would be required to accept interstate rates for their access services for the vast majority of their traffic over the first eighteen months of the transition, while incumbent LECs would charge higher rates for intrastate access than interstate access on the vast

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(visited Sep. 6, 2011) (describing intent to complete "reforming the distribution side of the universal service equation this fall").

<sup>9</sup> Cox August 24 Comments at 11-12

<sup>10</sup> ABC Proponent Comments at 24.

majority of their traffic during that same period.<sup>11</sup> It is apparent that the revenue impact on cable operators and other competitors that use voice over IP technologies will be much more significant than the impact on incumbent LECs. Yet the ABC Proponents argue that incumbent LECs – and only incumbent LECs – should be allowed to recover a portion of their lost revenue from the replacement mechanism.

As a matter of policy and economics, this makes no sense. Any access replacement mechanism should be focused on carriers that are bearing a disproportionate burden under intercarrier compensation reform. Giving only incumbent carriers access to that support for losses due to differential voice over IP rates is exactly the opposite approach. It will, in fact, magnify the competitive advantages that both the access recovery mechanism and the differential rate for IP-based services will confer on incumbent LECs during the transition period.<sup>12</sup> Moreover, it also would exacerbate the concern that Cox identified in its comments by potentially providing even more support to companies like AT&T, CenturyLink and Verizon that are the principal beneficiaries of intercarrier compensation reform.<sup>13</sup> Thus, to the extent that the Commission adopts a differential rate for IP-based traffic, it should exclude revenues lost by incumbent LECs resulting from that differential from access recovery mechanism calculations.

## **II. There Is No Reason to Grant a Right of First Refusal to Incumbent LECs that Offer Broadband Service in Part of a Wire Center.**

The ABC Proponents offer two claims that they say support adoption of a right of first refusal for CAF support for incumbent LECs that offer broadband service in some portion of a

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<sup>11</sup> Indeed, some cable operators would be required to accept reduced rates for 100 percent of their access traffic.

<sup>12</sup> As Cox noted in its initial comments, any transition rules that give incumbent LECs the ability to charge higher access rates than their competitors would give the incumbent LECs a competitive advantage in the retail marketplace, as the incumbents would face less pressure to raise their retail rates or cut costs to maintain profits. Cox August 24 Comments at 10.

<sup>13</sup> *Id.* at 11-12.

wire center. For the reasons described in Cox's initial comments, the Commission should reject this idea entirely.<sup>14</sup> The ABC Proponents' arguments do not affect this analysis.

First, the ABC Proponents argue that, where previous support has been used for a partial broadband buildout, "efficiency demands that the Commission leverage those investments rather than abandoning them and funding duplicative facilities."<sup>15</sup> Nothing could be further from the truth. The money that already has been invested is a sunk cost – as a matter of the economics of building out broadband going forward, any money that was spent before is irrelevant.<sup>16</sup> That investment matters only if it enables the incumbent to provide service to the rest of the relevant service area more efficiently than any competitor. The only way to find out whether that is the case is to seek competitive bids. If the previous investment reduces future costs, the incumbent will have an advantage in the bidding as a result of that investment.<sup>17</sup> On the other hand, if the incumbent is inefficient, and has spent previous funds unwisely, granting a right of first refusal will increase future costs, not decrease them. Thus, as a matter of efficiency, the Commission should disregard any previous buildout or support provided to an area that is eligible for CAF funding.

Second, the ABC Proponents claim a right of first refusal is justified because some incumbent LECs "have built out their networks . . . to unusually high-cost areas not because it made independent business sense, but because federal and state regulation compelled them to do so."<sup>18</sup> Again, this provides no basis for a right of first refusal. As an initial matter, this argument

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<sup>14</sup> *Id.* at 23-24.

<sup>15</sup> ABC Proponents Comments at 12.

<sup>16</sup> See *MCI Communications v. American Tel & Tel. Co.*, 708 F.2d 1081 (1983) (explaining in the context of decisions about new investment in telecommunications facilities that "[t]he historical costs associated with the plant already in place are essentially irrelevant . . . since those costs are 'sunk' and unavoidable and are unaffected by the new production decision").

<sup>17</sup> In practice, the use of study areas based on wire centers already gives incumbents an unwarranted advantage that will stymie competition for CAF support and reduce the efficiency of the program.

<sup>18</sup> *Id.*

is a non sequitur. Cox is unaware of any carrier of last resort obligations that apply to broadband services. Thus, to the extent that incumbents have been building broadband facilities along with mandatory voice facilities, that has been their own decision, made at their own business risk. In addition, carrier of last resort obligations generally do not operate the way that the ABC Proponents suggest. In many states, competitive LECs are subject to the same carrier of last resort obligations as incumbent LECs.<sup>19</sup> In most, if not nearly all cases, carrier of last resort obligations also are tied to obtaining compensation for build-outs, so as to ensure that the carrier remains whole.<sup>20</sup>

Third, from a practical perspective, the 35 percent threshold is yet another example of the administrative complexities that would arise from adopting the ABC Proposal.<sup>21</sup> To put this proposal into effect, the Commission would have to adopt a process for determining whether the threshold had been met, including determining how to calculate the coverage percentage, setting deadlines for incumbent LECs to assert their rights of first refusal and creating opportunities for competitors to challenge incumbent LEC assertions of their rights. Considering the number of individual service areas that potentially could be subject to a right of first refusal, it could take years before all of these claims are resolved. The administrative burden on the Commission, not to mention the likely delays in bringing broadband to unserved areas, would impose costs that would not be offset by any gains in efficiency or reductions in the support paid from the CAF. In fact, as described above, the end result likely would be a less efficient allocation of CAF support. Thus, the Commission should reject the proposed right of first refusal.

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<sup>19</sup> Cox, for instance, is subject to carrier of last resort obligations in Kansas and Louisiana.

<sup>20</sup> Typically, these statutes require a carrier to extend lines to any requesting customer in their service areas, but also provide that the customer must pay the construction costs for extensions beyond a certain distance from the carrier's existing footprint. *See, e.g.*, N.D. Century Code § 49-21-23.2 (limiting obligation to extend lines to cases in which remote customers are willing to pay the cost).

<sup>21</sup> *See* Cox August 24 Comments at 21-22 (discussing difficulties inherent in attempting to use a cost model instead of a hard cap for CAF support).

### **III. The Commission Should Not Grant the ABC Proponents a Last-Minute Opportunity to Propose Specific Rules.**

Finally, the ABC Proponents inform the Commission that they intend to “submit [their] proposed rule changes in a subsequent filing.”<sup>22</sup> The Commission should reject any such submission and craft its own rules.

As shown above, the ABC Proponents’ comments already have demonstrated that there are previously undisclosed elements of their proposal that benefit incumbent LECs and harm their competitors, without any concomitant benefit to the public interest. There is a significant risk that any rules the ABC Proponents might draft would contain similar traps. And, given the time remaining before the time the Commission intends to act in this proceeding, it would be difficult to identify and remove all of the provisions that would be harmful to competition, development of broadband and the public interest generally.

If the ABC Proposal itself is incomplete and has to be supplemented with specific rules drafted by the ABC Proponents, that is an indication that the Commission should take great care in evaluating the terms of the proposal. The holes and gaps left by the ABC Proponents could be exploited by carriers seeking to take advantage of arbitrage opportunities, or to glean advantages in obtaining CAF support.

For these reasons, it is far better for the Commission to develop its own rules to implement those portions of the ABC Proposal that it chooses to incorporate into its reform of high cost universal service and intercarrier compensation.

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<sup>22</sup> ABC Proponents Comments at 14.



