



October 5, 2011

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

**Re: *Ex Parte* Communication: WC Docket Nos. 10-90, 07-135, 05-337, 03-109;
GN Docket No. 09-51; CC Docket Nos. 01-92, 96-45**

Dear Ms. Dortch:

The Independent Telephone & Telecommunications Alliance (“ITTA”) supports the Commission’s efforts to adopt comprehensive reform of the outdated federal universal service (“USF”) and intercarrier compensation (“ICC”) regimes. As indicated in ITTA’s comments,¹ it believes that the consensus framework reflected in the industry-generated America’s Broadband Connectivity (“ABC”) and Rate-of-Return (“ROR”) plans² provides a solid basis for such reform. While there are certain modifications to the framework that should be adopted to take into account the needs of all mid-size carriers and their customers, ITTA is generally supportive of the plans.³ One aspect of the framework that is absolutely essential is the right-of-first-refusal (“ROFR”) for incumbent local exchange carriers (“ILECs”) in areas where they have made significant progress in deploying broadband.

¹ Comments of the Independent Telephone & Telecommunications Alliance, Cincinnati Bell, Inc., Hargray Telephone Company, Inc., and Hickory Tech Corporation, WC Docket No. 10-90, *et al.* (filed Aug. 24, 2011), at 2-3.

² See Letter from Robert W. Quinn, Jr., AT&T, Steve Davis, CenturyLink, Michael T. Skrivan, FairPoint, Kathleen Q. Abernathy, Frontier, Kathleen Grillo, Verizon, and Michael D. Rhoda, Windstream, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.* (filed July 29, 2011) (“ABC Plan”). Comments of NECA, NTCA, OPASTCO, and WTA, WC Docket No. 10-90, *et al.* (filed April 18, 2011), *as modified by* Letter from Walter B. McCormick, Jr., USTelecom, 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 Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.* (filed July 29, 2011).

³ See Letter from Genevieve Morelli, President, ITTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, *et al.* (filed Sept. 20, 2011), at 2-3.

The ROFR mechanism for distribution of high-cost USF support recognizes that in order to meet their carrier-of-last-resort (“COLR”) obligations incumbent carriers have devoted hundreds of millions of dollars to provide service to millions of Americans living in rural, high-cost areas of our country. More often than not, the only providers in or near high-cost areas are ILECs who serve them pursuant to COLR obligations. ILECs did not deploy service in these areas because it made independent business sense to do so, but rather because federal and state regulation compelled them to do so. The ROFR reflects this marketplace reality and allows incumbent carriers the ability to recoup their network investment and leverage it to expand broadband service in high-cost areas while continuing to provide uninterrupted service to their existing customers.⁴

At the same time, the ROFR mechanism represents the best option to achieve the Commission’s goal for broadband to be deployed to unserved areas as quickly as possible. Alternative proposals for competitive bidding for the distribution of funding to all high-cost areas will only serve to further delay achievement of this important goal.⁵ It will undoubtedly take significant time and resources to develop competitive bidding rules that address the myriad of practical and legal concerns that have been raised on the record.⁶ Moreover, once those rules are developed, it will take additional time to conduct the bidding process and to resolve any disputes that might arise. In the meantime, consumers will be denied broadband access that could have been rolled out expeditiously by the incumbent pursuant to the timelines triggered by the exercise of the ROFR option.⁷

Moreover, efficiency demands that the Commission leverage the network investment already made by ILECs rather than abandoning that investment and funding duplicative facilities. Some opponents view this previous investment as a “sunk cost” that is “irrelevant.”⁸ However, this argument completely overlooks the important constitutional implications that arise when there is a significant gap between the elimination of existing USF support and the

⁴ Some commenters have pointed out that COLR obligations apply only to the provision of voice and not broadband service. *See, e.g.*, Reply Comments of Cox Communications, Inc., WC Docket No. 10-90, *et al.* (filed Sept. 6, 2011) (“Cox Reply Comments”), at 5-6. This argument fails to acknowledge that consumers in high-cost areas benefit today from access to broadband services that COLRs have deployed over multi-use facilities.

⁵ *See, e.g.*, Comments of the National Cable & Telecommunications Association, WC Docket No. 10-90, *et al.* (filed Aug. 24, 2011), at 4, 13; Comments of Ad Hoc Telecommunications Users Committee, WC Docket No. 10-90, *et al.* (filed Aug. 24, 2011), at 9-10;

⁶ *See, e.g.*, Reply Comments of the Independent Telephone & Telecommunications Alliance, Cincinnati Bell, Inc., Hargray Telephone Company, Inc., and Hickory Tech Corporation, WC Docket No. 10-90, *et al.* (filed Sept. 6, 2011), at 4; Reply Comments of the Independent Telephone & Telecommunications Alliance, WC Docket No. 10-90, *et al.* (filed May 23, 2011), at 4-5; Comments of State Members of the Federal State Joint Board on Universal Service, WC Docket No. 10-90, *et al.* (filed May 1, 2011), at 32-33.

⁷ The ROFR also protects consumers from the practical implications that will arise if funding is denied the incumbent in favor of subsidizing the build-out of duplicative facilities of a competing provider. Without ongoing support, the incumbent most likely will be forced to raise rates, and may face capacity constraints which could lead to the degradation of service to existing customers. Either scenario would undoubtedly result in significant customer frustration and inconvenience.

⁸ Cox Reply Comments at 5.

replacement of that support with CAF funding. While the Commission has the authority to alter or eliminate support programs and there is no constitutional right to guaranteed government-subsidized profits, the Commission is bound by the Takings Clause of the U.S. Constitution. Regulated entities are constitutionally required to be afforded the opportunity to earn a reasonable rate of return based on regulated assets and costs. The ROFR mechanism helps mitigate these constitutional due process concerns for carriers that already have made significant broadband investment in high-cost areas and have not fully recovered these costs.

A number of opponents of the ROFR contend that it is not competitively or technologically neutral and does not ensure that support goes to the most efficient provider.⁹ These criticisms ignore the realities of the competitive marketplace and what must happen to ensure rapid and ubiquitous broadband deployment in high-cost areas. To the contrary, the ROFR included in the ABC Plan has been crafted to take into account concerns that a ROFR mechanism is not competitively or technologically neutral. The proposed ROFR incorporates multiple layers of protection to ensure a level playing field for CAF support eligibility. First and foremost, the ROFR applies only in high-cost areas where an unsupported competitor, such as a cable operator, already offers service. Furthermore, in areas that are not served by a cable company or other facilities-based competitor, the ROFR cannot be exercised to obtain support if the ILEC does not offer broadband service to at least 35% of service locations in a wire center.¹⁰ As discussed above, this threshold ensures that ILECs are not left with stranded investment where they have made significant progress in achieving broadband deployment, and instead, allows these facilities to be leveraged and upgraded to extend broadband service to additional households and businesses in the wire center in an efficient manner.¹¹ “At the same time, this threshold is high enough that it will not preclude competitors from receiving CAF funding for high-cost areas in which they could most efficiently provide service.”¹²

Further, opponents are incorrect that the ROFR fails to guarantee the economically efficient provision of broadband service to consumers. This argument does not consider that by

⁹ See, e.g., Letter from Michael K. Powell, National Cable & Telecommunications Association, and Matthew M. Polka, American Cable Association, to Chairman Julius Genachowski, FCC, WC Docket No. 10-90, *et al.* (filed Aug. 23, 2011), at 2; Comments of United States Cellular Corporation, WC Docket No. 10-90, *et al.* (filed Aug. 24, 2011), at 31.

¹⁰ The ROFR also contains a mechanism to ensure that CAF support is directed to areas that are truly high-cost. Specifically, CAF support is only available in census blocks where the average costs to deploy broadband service exceed a benchmark of \$80 per line. See ABC Plan at 3, 5-6.

¹¹ The ROFR also incentivizes ILECs to support areas they might not otherwise choose to support absent the ability to exercise a ROFR for CAF funding.

¹² Joint Reply Comments of AT&T, CenturyLink, FairPoint, Frontier, Verizon, and Windstream, WC Docket No. 10-90, *et al.* (filed Sept. 6, 2011), at 14. In fact, the ROFR goes further than the standard advanced by the cable industry for distribution of high-cost USF support less than two years ago. Under that proposal, an unsupported wireline provider competing with an ILEC could challenge the support being provided to the ILEC if the competitor offered service in 75% of a supported area. See NCTA, Petition for Rulemaking, *Reducing Universal Service Support in Geographic Areas That Are Experiencing Unsupported Facilities-Based Competition*, RM-11584 (filed Nov. 5, 2009), at i-ii.

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definition any forward-looking cost model employed to establish high-cost support will set funding at the level required by an efficient provider.

It also bears noting that the ROFR provides for technological neutrality. Under the industry framework, the CAF recipient – whether it is an ILEC that accepts funding pursuant to the ROFR or a different provider that receives funding through a competitive bidding or application process – can deploy any broadband technology it chooses, so long as it meets the broadband performance obligations imposed by the Commission.

* * * *

In sum, the ROFR contemplated by the industry framework is narrowly designed to achieve a variety of policy objectives while taking into account the realities of the broadband marketplace. It moves away from impractical proposals in favor of an approach that reflects the real-world environment faced by incumbent carriers and the substantial investment they have made to deploy a nearly ubiquitous network in high-cost areas of the country. The ROFR provides the best means to push out broadband to the areas that remain unserved as expeditiously as possible, consistent with the Commission's goal of achieving universal broadband access for all Americans.

Please do not hesitate to contact the undersigned with any questions regarding this letter.

Respectfully submitted,



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