David Cosson
ATTORNEY AT LAW

2154 Wisconsin Ave, N.W.
Washington, D.C. 20007

Telephone (202) 333-5275
Telecopier (202) 333-5274

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

By Electronic Filing

Re: Connect America Fund, WC Doc. No. 10-90; A National Broadband Plan for our Future, GN Doc. No. 09-51; Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Doc. No. 07-135; High-Cost Universal Service Support, WC Doc. No. 05-337; Developing a Unified Intercarrier Compensation Regime, CC Doc. No. 01-92

Ex Parte Notice

Dear Ms. Dortch:

At issue for some time in the above proceedings has been the proposals to award incumbent local exchange carriers ("ILECs") a right-of-first refusal ("ROFR") of universal service support for the provision of broadband service in high cost areas. The Rural Independent Competitive Alliance ("RICA") has consistently opposed these proposals because they would unwisely and unlawfully limit the opportunities of RICA's member rural Competitive Local Exchange Carriers ("CLECs") to obtain universal service support. Since the August 24, 2011 filing of comments on the ABC Plan proposed by Price Cap Carriers, those carriers have filed proposed rules to implement a ROFR[1] and several other parties have made *ex parte* presentations for and against the idea. By this letter, RICA expands its earlier comments

[1] Letters from Jonathan Banks, US Telecom to Marlene Dortch, FCC, Sep. 28 and October 3, 2011, WC Doc. No. 10-90 et al. Letter from Cathy Carpino, ATT to Marlene Dortch, FCC, Oct. 4, 2011. *See also,* Letter from Michael R. Romano, NTA to Marlene Dortch, FCC, Oct. 5, 2011, WC Doc. 10-90 et al. ("Proposed rural rules").

to address the new information in the record. This letter also addresses new information regarding the proposals in the ABC Plan and elsewhere for Intercarrier Compensation reform.[2]

I The Commission Should Reject Proposals in the NPRM and the ABC Plan to Give ILECs a Right of First Refusal for CAF Support

. Small rural ILECs and their affiliated CLECs, not large carriers, have demonstrated the commitment and ability to serve rural areas by deploying a substantially higher percentage of Broadband in rural areas than Price Cap carriers.[3] The February 2011 NPRM proposed to offer the current Carrier of Last Resort ("COLR") for voice service a right of first refusal for support to offer both voice and broadband service.[4] RICA opposed this proposal as unlawful and bad policy as it would preclude its members from receiving support.[5] The ABC Plan filed July 29, 2011 makes a similar proposal to be applicable in the territory of Price Cap carriers.

Under the ABC Plan CAF support is determined by first identifying "support-eligible census block[s]" within a Price Cap carrier wire center. Eligible census blocks are defined as those that are not served by an unsupported competitor[6] and are high cost,[7] but below the alternative technology threshold.[8] Parsing the double-negatives, it follows that if a high cost census block is served by an unsupported competitor it is not eligible for CAF support. However, a high cost census block would be eligible for CAF support if a supported competitor provides Broadband service. The census block would also be eligible if a competitor provides service that is not capable of the 4Mb/768Kb speeds required for a service to qualify as "Broadband," whether or not the competitor is supported.

Next, a CAF Service Area is defined as being composed of all the high cost census blocks in a Price Cap carrier's wire center that are not served by an unsupported broadband competitor.[9] Thus, where a rural CLEC provides Broadband in a high-cost census block within a

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2 This letter addresses two currently high profile issues, the ROFR and the $0.0007 rate for transport and termination of all intercarrier traffic. RICA remains of the views expressed in prior filings regarding the multitude of other issues in these proceedings. Among these issues is the statutory requirement that universal service may be provided only to telecommunications carriers for a telecommunications service that has been designated a "supported service."

3 RICA Comments, Connect America Fund, WC Doc. No. 10-90, et al., Aug 24, 2011, p.8.

4 NPRM at para. 431.

5 RICA comments Apr. 18, 2011, p. 15.

6 Defined as (1) not the ILEC and (2) provides "broadband" (not High Speed Internet Access) without federal or state legacy high cost support for the area encompassing the census block. ABC Plan proposed § 54.5.

7 Cost is to be determined by a model designed by the Price Cap carrier proponents of the ABC Plan which has neither been validated nor made fully open for public inspection.

8 Proposed Sec. 54.5. In this section the term "high cost" will be used to mean high cost but below the alternative technology threshold. There are also serious problems with the concept and the proposed implementation of the alternative technology threshold.

9 Proposed Sec. 54.207 (f).

Price Cap company wire center and receives state or federal legacy high cost support for the area,[10] the census blocks would be eligible for support, but the ILEC could be entitled to the RoFR. The CLEC's existing support would be phased out over five years, but the ILEC would not have to provide Broadband service before the end of the fifth year or after the 10th year.

If a Price Cap ILEC makes available[11] "High Speed Internet Access"[12] to more than 35% of the service locations (i.e. business & residential) in a wire center, then the ABC Plan provides it with a right of first refusal to be the only[13] provider receiving CAF support to provide "Broadband" [14] to the support-eligible census blocks in[15] the wire center that have no "unsupported" competition.[16] The Cable industry, while stating it still opposes a R0FR, has now proposed a compromise that would make the ROFR available when *less than* 35% of the service locations are passed.[17]

If the ILEC Price Cap carrier rejects the Commission's offer of support, or does not qualify for the ROFR, then it is awarded to any "qualified" provider by auction if there is more than one applicant. If there are no applicants, the FCC is to sweeten the pot.

Upon review of the above described further details, RICA remains of the firm opinion that the RoFR proposals would not serve the public interest and are contrary to law and precedent. First, the RoFR proposal by the Price Cap carriers ignores the historical proof of their disinterest in serving rural areas. The most significant factor in evaluating the ABC proposal to give Price Cap carriers a RoFR or other advantage over competitors is the undisputable record

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10 Assuming the CLEC has ETC designation, under the identical support rule it receives the same per line support as the Price Cap carrier. Although Non-rural carriers receive HCM support in only 10 states, IAS support is available in Non-rural areas nationwide except in 2 states (where rural carriers receive IAS), the territories and the District of Columbia. USAC Fourth Quarter 2011 Appendix HC02.

11 "Makes available" is apparently used instead of "provides" in order to indicate that all service locations get counted if the Price Cap carrier's facilities are capable of serving the location at the 768/200 speed, regardless of whether anybody at the location subscribes to the service.

12 The ABC Plan proposed rules, as revised October 4, 2011, define "broadband service" as "an Internet access service that provides customers with a minimum actual downstream bandwidth of 4 Megabits per second and a minimum actual upstream bandwidth of 768 kilobits per second. Proposed Sec. 54.5 In contrast, to demonstrate "Substantial existing broadband investment" to qualify for a ROFR a price cap carrier need only make available service with *advertised* speeds of at least 768Kb/200Kb. Proposed Section 54.317(c)(1).

13 The ABC Plan does not provide for a separate mobile mechanism.

14 Defined as 4Mb/768Kb

15 The Plan does not discuss overlaps, but wire center boundaries and census block boundaries often do not coincide.

16 ABC Plan proposed § 54.317(c)(2).

17 American Cable Association/NCTA *ex parte* October 4, 2011; Testimony of Michael Powell, Senate Committee on Commerce, Science and Trade, Universal Service Reform, Oct. 12, 2011, p. l7.

evidence that small locally owned and controlled carriers have deployed Broadband to a substantially higher percentage of users than have the Price Cap carriers.[18] Given this history, the Commission cannot form a "predictive judgment" that the availability of support will somehow change behavior patterns established over the last 130 years. Given their long history of generally ignoring rural areas as much as possible, there is no logical basis for the Commission to provide price cap carriers with "first dibs" on CAF support. Even a lottery, which RICA does not advocate, would likely produce more public benefit.

The mid-sized company supporters of the ABC Plan make the difference in operating philosophies quite clear. They state the ROFR is necessary for ILECs to meet their COLR obligations in high cost areas where they "did not deploy service …because it made independent business sense to do so, but rather because federal and state regulation compelled them to do so."[19] Small, rural locally owned and controlled ILECs and CLECs extend service to their neighbors to the maximum extent financially feasible because that is their life's work and their commitment to their communities. They are focused on providing the best possible service, not Wall Street's reaction to their quarterly earnings report. The truth of these statements can be verified by simply looking at the results.

The Act does not permit the Commission to exclude competitors from Universal Service Support in the areas of non-rural telephone companies.[20] Section 214(e) of the Act requires that more than one qualified carrier be designated as an eligible carrier in the areas of non-rural telephone companies. The obvious Congressional purpose was to ensure that competitors with the large carriers would have access to support. This underlying purpose would be entirely defeated by the ROFR proposal that would provide the non-rural incumbent carrier with an effective veto over such support. Such an anti-competitive rule would violate the Act and the principle of competitive neutrality that the Commission expressly adopted.

The ABC Plan would apparently remove state commissions from the process of determining which carriers will receive support in any given area. The 1996 Act, however, made quite clear that (1) only Eligible Telecommunications Carriers ("ETCs) may receive universal service fund support, and (2) state commissions (except where they do not have jurisdiction under state law) are to designate which carriers are ETCs. The Act does not appear to require new designation proceedings for existing ETCs each time the list of supported services is required. Assuming, *arguendo,* that the Commission has authority to exclude existing ETCs from CAF support in areas where there are multiple ETCs, there should be a specific, formal role for state commissions in reaching those exclusion determinations.

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18 As was the case with prior technological improvements such as digital switching, buried cable, custom calling features, SS7, etc., these improvements were brought to a higher percentage of rural customers by small rural companies long before their neighbors served by the large (now Price Cap) carriers.

19 ITTA *ex parte* letter, Oct. 5, 2011 at 2 ("ITTA *ex parte*").

20 Non-rural and Price Cap carriers are, of course, not precisely equivalent categories. There are some rural Price Cap companies; however they constitute a small proportion of that category by access lines.

The mid-sized carriers reply to the not-competitively neutral problem by asserting that "multiple levels of protection ensure a level playing field, first because the ROFR "applies only …where an unsupported competitor, such as a cable operator, already offers service."[21] The ABC Plan, however, as explained above, would make the ROFR available in wire centers with high cost census blocks with *no* unsupported competition. Whichever way it cuts, the fact remains that the proposal is not competitively neutral.

ITTA also argues that the ROFR does not violate competitive neutrality is because it is only available where the ILEC does not offer "broadband service [i.e. "high speed internet access"] to at least 35% of service locations in a wire center." [22] What high speed Internet Access the ILEC provides is irrelevant to competitive neutrality. For example, if a rural CLEC receiving IAS support under the identical support rule offers broadband (or even "high speed Internet access") service to 35%, 36% or 100% of the wire center, the ILEC would still qualify for the ROFR. The critical point being that where a competitor has made investments to provide substantially better or even equivalent service in a wire center, the ILEC can choose CAF support, but the CLEC cannot under the ABC Plan's RoFR. Such a rule cannot be said to be competitively neutral with a straight face.

The ROFR is a key component of the ABC Plan's apparent intent to preclude competition in rural areas without incurring substantial obligations. The ABC Plan proposes to measure whether unsupported competition exists in a census block by determining whether unsupported competitors offer service at 4Mb/768Kb in each census block group. The Price Cap carrier's eligibility for a right of first refusal however, would be determined by the much less rigorous test of whether it offers service at 768Kb/200Kb to 35% of the service locations in the wire center. Generally that can be easily met by providing basic DSL over copper in the "donut hole." This asymmetry appears designed to maximize the price cap carrier's ability to limit its investment to the lowest cost portions of its wire centers.[23]

The apparent contention of the ABC Plan proponents is that where this investment in basic DSL has been made in the donut hole, there will be economies realized when the Price Cap carrier expands broadband out into the donut. Such economies are not likely, however. While the basic DSL can often be upgraded in the donut hole to meet the proposed 4Mb/768Kb definition of broadband, different technologies are generally required to expand long distances that are not more economical because of the existence of the DSL over copper in the donut hole.

Although the ABC Plan purports to espouse the views that support is unnecessary where an unsupported carrier provides Broadband[24] and that only one provider[25] should receive CAF

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21 ITTA *ex parte* at 3.

22 Id.

23 ITTA ignores the asymmetry of the ABC Plan, stating that the ROFR requires a Price Cap ILEC to offer "broadband" to a least 35% of its service locations, but the proposed requirement is the lesser High Speed Internet Access. ITTA *ex parte* at 3.

24 Letter from ABC Plan sponsors (AT&T, CenturyLink, FairPoint, Frontier, Verizon & Windstream) to Chairman and Commissioners of FCC, July 29, 2011, Doc 10-90 et al., p. 2.

support in an area,[26] the application of the ABC Plan to areas served by rural CLECs would be inconsistent with these principles as well as the public interest.

The ABC plan proposes to give Price Cap carriers protection from competition through the ROFR, but carefully minimizes the obligation to provide service until the end of the fifth year after support begins and continues that service obligation for only five more years.[27] It cannot be coincidence that the beginning of the service obligation would be at the time any legacy support to a competing CLEC would terminate under the proposed 5-year elimination of CLEC support. Of course a carrier requires some time to plan and construct facilities, and that time will vary depending upon its ability to convert existing facilities to Broadband use. However, the additional provision that allows Price Cap carriers with a ROFR to juggle the service locations to which the obligation applies between high cost census blocks and alternative technology threshold census blocks[28] necessarily means that no potential customers have any reasonable assurances of receiving service, but CLECs will have been excluded from receiving support necessary to serve those customers.

Without the proposed right of first refusal, a price cap carrier's competitors, such as rural CLECs, would at least have an opportunity to obtain support for the provision of broadband in the area, but the obligation would require the provision of broadband service, not High Speed Internet Access. While protected by the ROFR, the ILEC would be able to avoid the expense of upgrading its facilities for most of the first five years and have no obligation to even continue offering the slower service to 35% of the service locations beyond the time it receives the award of non-competitive support. A competitor however, would necessarily have to begin providing full broadband service as soon as possible because it will have many expenses not covered by the support. In short, the effect of the ROFR will most certainly be to delay service to rural areas.

The mid-sized carriers argue that the ROFR for Price Cap ILECs would mean faster deployment of broadband because award of support will not be delayed while the Commission

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25 The ABC Plan proposes to provide support to Broadband providers defined as "an entity that provides broadband service…." Proposed Section 54.5. RICA and others have repeatedly pointed out that the Act permits high cost support to be provided only to carriers, citing Secs. 214(e) and 254(e). The purported legal analysis accompanying the ABC Plan improperly purports to elevate general statutory goals over specific requirements.

26 RICA and others have repeatedly pointed out that in service the areas of non-rural carriers state commissions (and the Commission when acting under Sec. 214(e)(6)) *shall* designate more than one common carrier as an eligible telecommunications carrier. This provision strongly indicates that Congress wanted to ensure that non-rural carriers were not protected from competition by becoming eligible for USF support where their competitors were not.

27 Proposed Sec. 54.317(a)

28 Proposed Sec. 54.317(a)(ii) & (iii). Note that while the carrier can juggle obligated service locations among census blocks, support is provided on a census block basis, providing more room to game the system.

develops and implements auction rules.[29] Their argument fails for several reasons. First, as discussed above, providing "high speed Internet access" over basic DSL in the donut hole is often unlikely to provide a platform for provision of "broadband" in the donut. Second, the proposed model to be used to determine support amounts has yet to be subjected to the "open and transparent public review process" promised by Chairman Genachowski.[30] As a part of the model development process, RICA continues to advocate that there must be a straightforward process for rural companies to demonstrate that its costs are not accurately predicted by the model. These cost showings would, of course, be subject to subsequent review as cost studies have always been, but the process should not be a waiver proceeding that entails long delays and uncertainty.

Finally, the mid-sized carriers would have the Commission believe that adoption of the proposed ROFR is somehow necessary to avoid violating the Fifth Amendment's takings clause.[31] It is not clear how a qualified right of first refusal to obtain support for the costs and assets used in providing an unregulated service would cure any takings issue with the phase out of support and access for regulated assets and costs. To the extent there are valid takings claims, the better argument lies in favor of the rural CLECs whose support would be eliminated, whose regulated interstate access rates would be forced to a rate effectively less than zero, and whose competitor will have an exclusive right to support if the ABC Plan is adopted.

II The Commission Should Reject the ABC Plan Proposal to Set Access Rates at $0.0007 per minute.

The ABC Plan proposes rules that would unify all (inter and intrastate) terminating rates charged by Price Cap, CLEC and CMRS carriers under Section 251(b)(5) at a rate of $0.0007 per minute effective July 1, 2017.[32] A Transitional Access Replacement Mechanism is proposed for ILECs but not CLECs.[33] The ABC Plan would eliminate the existing "rural exemption" for CLEC access charges in current Section 61.26(e) that allows rural CLECs to benchmark access rates to NECA rates.

The ABC Plan proposal to reform Intercarrier Compensation should be rejected, and rural CLECs should be allowed to set access rates on the same basis as rural ILECs and with the same eligibility for support from the Access Replacement Mechanism. The proposed transition to an access rate of $0.0007 per minute would financially destroy most rural CLECs. The rate bears

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29 Testimony of Kathleen Q. Abernathy, Frontier Communications, Senate Committee on Commerce, Science and Technology, Universal Service Reform, Oct. 12, 2011, p.4.

30 FCC Chairman Julius Genachowski, "Connecting America: A Plan To Reform and Modernize the Universal Service Fund and Intercarrier Compensation System," Oct. 6, 2011, p. 9.

31 ITTA *ex parte* pp 2-3.

32 Proposed XX.2(a)

33 No implementing rules for the Access Replacement Mechanism have been submitted by the ABC Plan proponents.

no relationship to their cost of providing access service and is generally below their cost of billing.

A sample of the reduction in access revenues RICA members would experience, assuming no change in usage or originating rates, shows reductions in total intercarrier compensation of 54% to 76% after transitioning to the $0.0007 terminating rate. Unlike the ABC Plan's ILEC sponsors, these companies would have no opportunity to recover any of this loss through CAF funds under the ABC Plan.

The ABC plan provides no justification whatever for elimination of the rural exemption of Section 61.26(e). The factors the Commission found justifying higher rates for rural CLECS remain valid today. The proposed rules of the Rural Associations however do maintain 61.26(e), with modifications.[34] RICA can agree with this formulation.

The ABC plan provides no justification for excluding CLECs from the Access Replacement Mechanism. Since the concept of an Access Replacement Mechanism was first proposed in the early years of Docket 01-92, RICA has explained why rural CLECs should have the same opportunity to participate as rural ILECs.[35] The Commission has recognized that rural costs are higher than average and the various proposals to reduce access rates have been recognized as leaving carriers without viable alternatives to recover their costs. Of course the ABC Plan sponsors would all gain a competitive advantage if they are able to recover at least a portion of the reduction in access revenues through the CAF, but the CLECs competing with them are not.

The ABC plan's justification for placing all terminating access under Section 251(b)(5) is invalid. RICA and others have previously discussed at length that Section 251(b)(5) is properly understood to be concerned with the interchange of traffic between local service competitors, not access to terminating interexchange service.[36] Even if, *arguendo,* the Commission does have authority to bring all interstate and intrastate terminating access under Section 251(b)(5), that Section does not provide the Commission with authority to set a rate. Instead, the Act contemplates prescription of rates only in state arbitration proceedings. Even if, *arguendo,* the Commission does have authority to prescribe a rate, that rate must be cost based: "such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."[37] The proposed $0.0007 per minute rate probably does not meet that standard for any carrier, and certainly does not equal the cost of interconnection of rural carriers, ILECs or CLECs.

III Conclusion

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[34] Proposed rural rules, Sec. 61.26(c).

[35] RICA Reply Comments, Developing a Unified Intercarrier Compensation Regime, CC Doc. No. 01-92, Jul. 20, 2005, pp 7-8.

[36] Id.

[37] 47 U.S.C. 252(d)(2).

RICA has shown above, and in multiple prior filings, that adoption of the proposed right-of-first-refusal would be bad public policy and bad law. There are better ways to transition to a support system for broadband that will both ensure a higher probability of service to rural areas and conform to the requirements of the Act.

Specifically, both ILECs and CLECs should have the right to propose service territories underserved or unserved by fixed broadband for which support is requested. The amount of support could be determined by use of either a model, or a site specific forward looking cost study. Where applications duplicate or overlap each other, the Commission would choose among the applications based upon a comparison of relevant factors including the carrier's prior history of provision of quality service in high cost areas.

The Commission should also reject the ABC Plan's proposal to relabel all access as reciprocal compensation and prescribe a default rate of $0.0007 per minute. Less drastic and more legally supportable alternatives are on this ten-year record that would eliminate the inter-intrastate disparity and gradually reduce the overall rate while providing a recovery mechanism to all carriers that currently recover a portion of their costs through access charges.

Sincerely yours

David Cosson
Counsel to Rural Independent Competitive Alliance

cc: Chairman Genachowski
Commissioner Copps
Commissioner McDowell
Commissioner Clyburn
Zac Katz
Margaret McCarthy
Christine Kurth
Angela Kronenberg
Sharon Gillett
Carol Mattey