



October 20, 2011

VIA ECFS

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: *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 an 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

Dear Ms. Dortch:

On behalf of General Communication, Inc. (“GCI”), I am writing to object to the lack of notice and the secret and flawed analysis contained in the Wireline Competition Bureau’s (“WCB”) ex parte filing made yesterday, October 19, 2011, in the above-referenced dockets (the “WCB ex parte”).<sup>1</sup>

The WCB ex parte, and particularly Appendix II, the *Summary of Staff Analysis of Areas Where Mobile Service is Available Only from a Small or Regional Provider Receiving High-Cost Support* (“Mobile Analysis”),<sup>2</sup> appears to violate not only the Administrative Procedure Act (“APA”), but also the letter and the spirit of President Obama’s Executive Order 13563, *Improving Regulation and Regulatory Review* (“Executive Order”),<sup>3</sup> and the Office of Management and Budget’s (“OMB”) Open Government Directive (“Directive”),<sup>4</sup> established at the direction of President Obama’s *Memorandum on Transparency and Open Government*.<sup>5</sup> It

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<sup>1</sup> See Letter from Jennifer Prime, Wireline Competition Bureau, to Marlene Dortch, Federal Communications Commission, WC Docket Nos. 10-90 et al. (filed Oct. 19, 2011).

<sup>2</sup> See WCB ex parte Appendix II at 4.

<sup>3</sup> See Executive Order 13563 of January 18, 2011, *Improving Regulation and Regulatory Review* 76 Fed. Reg. 3821 (January 21, 2011).

<sup>4</sup> See Memorandum from Peter Orszag, Office of Budget and Management to the Heads of Executive Departments and Agencies, Dec. 8, 2009, available at [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf) (last accessed Oct. 20, 2011) (“Directive”).

also is contrary to the OMB guidelines implementing the Federal Data Quality Act (“FDQA,” also referred to as the Information Quality Act).<sup>6</sup>

The WCB violated the APA’s notice requirements by filing the WCB ex parte on the day before the Federal Communications Commission’s (“Commission” or “FCC”) “Sunshine Rule” was scheduled to take effect.<sup>7</sup> This timing denies interested parties a meaningful opportunity for notice and comment, as this filing leaves almost no time for the many stakeholders in this complex proceeding to fully analyze, much less try to replicate and verify the WCB’s Mobile Analysis.<sup>8</sup> By contrast, the APA requires the Commission to “give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments.”<sup>9</sup>

The WCB also violated the Executive Order with respect to notice by not providing “an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.”<sup>10</sup> More broadly, that Executive Order requires that:

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<sup>5</sup> See Memorandum on Transparency and Open Government, from Barack Obama to the Heads of Executive Departments and Agencies, January 21, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/Transparency\\_and\\_Open\\_Government/](http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government/) (last accessed Oct. 20, 2011).

<sup>6</sup> *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies*, Final Guidelines (corrected), 67 Fed. Reg. 8452 (Feb. 22, 2002). See generally Section 515 of the Consolidated Appropriations Act, 2001 (Pub. L. 106-554).

<sup>7</sup> See 17 C.F.R. § 1.1203. Today at approximately 2:00 PM Eastern time, the Commission waived the sunshine period prohibition until 5:00 pm on Friday, October 21, 2011, still leaving little time for meaningful analysis and substantive comment on the Mobile Analysis. See Commission Meeting Agenda, *FCC to Hold Open Commission Meeting Thursday October 27, 2011*, Public Notice (rel. Oct. 20, 2011).

<sup>8</sup> GCI also raises APA notice concerns with respect to Appendix I of the WCB ex parte, which lists 16 additional Publicly Available Sources that the Commission “may consider as part of this proceeding.” WCB Ex Parte Letter at 1, Appendix I at 3. These sources were in addition to the list of 63 Sources filed by the WCB on October 17, 2011, and the list of 35 Publicly Available Sources filed by the WCB on October 7, 2011. See Letter from Jennifer Prime, Wireline Competition Bureau, to Marlene Dortch, Federal Communications Commission, WC Docket Nos. 10-90 et al. (filed Oct. 17, 2011); See also Letter from Jennifer Prime, Wireline Competition Bureau, to Marlene Dortch, Federal Communications Commission, WC Docket Nos. 10-90 et al. (filed Oct. 7, 2011). It would be nearly impossible for any interested party to review all of those sources in such a limited amount of time, in addition to all of the other public filings in this proceeding.

<sup>9</sup> 5 U.S.C § 553(c); see also *Federal Express Corp. v. Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004).

<sup>10</sup> Executive Order at 3822.

“To promote that open exchange, each agency, consistent with Executive Order 12866 and other applicable legal requirements, shall endeavor to provide the public with an opportunity to participate in the regulatory process. To the extent feasible and permitted by law, each agency shall afford the public a *meaningful opportunity to comment* through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days. To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, *timely online access* to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on *all pertinent parts of the rulemaking docket*, including relevant scientific and technical findings.”<sup>11</sup>

The WCB has not met that standard here.

The WCB also violated the Directive with respect to notice and transparency. That Directive states, “[t]he three principles of transparency, participation, and collaboration form the cornerstone of an open government,”<sup>12</sup> and that, “[t]imely publication of information is an essential component of transparency.”<sup>13</sup> Introducing into the record such a critical analysis underlying a central assumption of USF reform with respect to support for mobile broadband with no effective time for parties to review or respond to it is completely the opposite of “timely publication.”

The WCB also likely violated OMB’s *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies* implementing the FDQA (“FDQA Guidelines”). The FDQA Guidelines call for Agencies to “treat information quality as integral to every step of an agency’s development of information, including creation, collection, maintenance, and dissemination. This process shall enable the agency to substantiate the quality of the information it has disseminated through documentation or other means appropriate to the information.”<sup>14</sup> The WCB has not followed those Guidelines here either.

The Mobile Analysis has significant flaws that demonstrate why this type of study must be available in the record with more than one day’s notice, and with much greater detail and information quality regarding its underlying data, assumptions, and conclusions. While any critique of the Mobile Analysis is necessarily preliminary and incomplete, it is plain from the face of the Mobile Analysis that it has significant flaws:

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<sup>11</sup> Executive Order at 3821-22 (emphasis added).

<sup>12</sup> Directive at 1.

<sup>13</sup> Directive at 2 (emphasis added).

<sup>14</sup> FDQA Guidelines at 8459.

*First*, AT&T and T-Mobile receive support in some areas, and, unlike Verizon and Sprint, are not under any order to sunset that support, so in certain areas they are “supported” providers. Thus, simply looking at supported areas served only by small and/or regional carriers does not itself show anything about the support required to serve other areas.

*Second*, the Mobile Analysis ignores the fact that a wireless carrier usually provides service over a single air interface, and that GSM and CDMA are incompatible air interfaces (as are the lesser-used TDMA and iDEN). Therefore, any area that has only one provider likely is unserved for one of the two predominant national air interfaces. In that situation, there likely would be two supported providers, and eliminating one would reduce wireless service and coverage, with particular harm to roaming.

*Third*, simply because there are multiple competitors does not mean that support is above that which would be necessary if there were only one provider. No group of providers in a single area can serve more than 100 percent of the customers. To the extent that there are duplicative network and overhead costs, those are offset by the competitive discipline over time to drive costs down and improve service. In any event, it cannot be assumed that the entire amount of support in an area is unnecessary to sustain the provision of wireless service.

*Finally*, demonstrating a glaring lack of transparency, the WCB does not even list the 17 Competitive Eligible Telecommunications Carriers (“CETCs”) or study areas indentified in step 3.b of its Mobile Analysis, so there is no way to verify the WCB’s identification of study areas in which a single subsidized CETC is the only wireless provider.

With respect to Alaska in particular, it appears that the WCB did not include study areas in which there are multiple providers, even if they are all subsidized. Furthermore, the Mobile Analysis does not appear to include areas where there is no provider whatsoever, which is the case in many areas of Alaska.

A copy of this letter is being filed in the above-referenced dockets.

Sincerely,

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/s/

John T. Nakahata  
*Counsel to General Communication, Inc.*

Cc: Austin Schlick  
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