

**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
)	
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
)	
Universal Service Reform – Mobility Fund)	WT Docket No. 10-208

To: The Commission

**PETITION FOR PARTIAL RECONSIDERATION OF
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

The Wireless Internet Service Providers Association (“WISPA”), by counsel and pursuant to Section 1.429 of the Commission’s Rules, hereby seeks reconsideration of certain specific actions that the Commission took in its Report and Order (“*Order*”) in the above-referenced proceeding.¹ Of paramount importance, WISPA asks the Commission to replace the term “unsubsidized competitor” with a market-based term of “area subject to unsubsidized

¹ *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; and Universal Service Reform – Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011). The Report and Order (“*Order*”) and Further Notice of Proposed Rulemaking (“*FNPRM*”) were published in the Federal Register on November 29, 2011. See 76 Fed. Reg. 73830 (Nov. 29, 2011).

competition” and to adopt the definition WISPA proposes herein. This change would provide a more accurate measure of areas that already receive facilities-based voice and broadband services, irrespective of whether those services are provided by a single entity or multiple entities, and better ensure that Connect America Fund (“CAF”) support is extended to unserved areas. WISPA also offers recommendations designed to ensure that new CAF subsidies are provided only as long as is necessary to accomplish the Commission’s goals.

Introduction

Founded in 2004, WISPA is a trade association of more than 600 wireless Internet service providers (“WISPs”), vendors and others dedicated to promoting, improving and expanding fixed wireless broadband service nationwide. WISPs serve more than three million residential and business customers and operate in every state using towers, radios and other equipment they own or lease. Most WISPs operate using unlicensed bands (*e.g.* 900 MHz, 2.4 GHz and 5 GHz) and the 3650-3700 MHz “licensed-lite” band to serve residences, businesses and community anchor institutions primarily in rural communities and other areas that would otherwise be unserved, and where few if any terrestrial broadband alternatives exist.

Although some WISPs are providing interconnected Voice over Internet Protocol (“VoIP”) services over their facilities and a few are competitive local exchange carriers that have obtained Eligible Telecommunications Carrier (“ETC”) status, most WISPs provide only fixed wireless broadband services. Under the Commission’s interpretation of Section 254 of the Communications Act of 1934, as amended (the “Act”), however, standalone “broadband” service without voice telephony is *not* a “telecommunications service” and such standalone broadband

service is deemed ineligible for Universal Service Fund (“USF”) and CAF support.² As a result, WISPs providing only fixed wireless broadband service generally have not received USF subsidies.³ By contrast, recipients of USF support are using the benefits of federal subsidies to finance broadband networks that compete in the same areas with unsubsidized fixed wireless broadband networks. The inequities flowing from this flawed system create competitive disadvantages for many WISPs.⁴

WISPA is pleased that the Commission has taken steps to transition the voice-based USF program to a CAF program that will focus on broadband deployment to unserved areas. Notwithstanding this objective and many of the sound policy decisions in the *Order*, two significant problems persist. First, WISPs that are not ETCs would remain ineligible to obtain federal support. Second, if the new rules are not modified, fixed wireless broadband providers would still be subject to subsidized competition.

Remedying the first problem would require a significant change in the Commission’s interpretation of the regulatory classification applicable to “broadband” and is not the subject of this proceeding. In its Comments preceding adoption of the *Order*, WISPA asked the Commission to “embrace a single, uniform standard that would apply nationwide to all providers of broadband service (as defined below), without regard to whether they are

² See *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, WT Docket No. 07-53 (rel. Mar. 23, 2007) (finding that terrestrial wireless broadband Internet access service is an “information service,” that the transmission component of such service is “telecommunications,” but that the offering of the telecommunications transmission component as part of a functionally integrated Internet access service offering is not “telecommunications service”); *Order* at ¶80 (“As a condition of receiving support, we require ETCs to offer voice telephony as a standalone service throughout their designated service area”).

³ See, e.g., “America’s Broadband Heroes: Fixed Wireless Broadband Providers,” October 2011, available at <http://www.wirelesscowboys.com/wp-content/uploads/2011/10/americas-broadband-heroes-fixed-wireless-2011.pdf>.

⁴ One example of the misapplication of federal support is occurring in Western Nebraska, where Hemingford Cooperative Telephone Company is receiving funding for broadband in an area where broadband services are already provided. For a more detailed discussion, see “\$10 million USDA FAIL!,” available at <http://www.wirelesscowboys.com/?p=217>.

‘telecommunications carriers.’”⁵ Instead, the Commission required that CAF recipients provide a “voice telephony service,” and it determined that “[c]arriers seeking federal support must still comply with the same universal service rules and obligations set forth in sections 254 and 214, including the requirement that such providers be designated as eligible to receive support, either from state commissions or, if the provider is beyond the jurisdiction of the state commission, from this Commission.”⁶ WISPA anticipates addressing this issue in response to the *FNPRM*.

The Commission should, however, modify its newly-promulgated rules to avoid perpetuating inequities that direct federal support from unserved areas to areas that are already served. WISPA urges the Commission to adopt its specific proposal and definition to ensure that federal support is extended only to unserved areas.

Discussion

I. THE COMMISSION SHOULD AMEND ITS RULES TO PROHIBIT SUPPORT TO CENSUS BLOCKS THAT ARE SUBJECT TO UNSUBSIDIZED COMPETITION.

In the *Order*, the Commission held that CAF recipients must offer voice telephony services as a core function.⁷ CAF recipients also will be required to offer broadband services that meet basic performance and public interest obligations, including the requirement to build out in census blocks where broadband is not available.⁸ To help implement these objectives, the Commission concluded as follows:

all broadband buildout obligations for fixed broadband are conditioned on not spending the funds to serve customers in areas already served by *an*

⁵ Comments of WISPA, filed April 18, 2011 at p.5. WISPA also requested that to the extent that current law prevents the Commission from including broadband services within the ETC category, the Commission should “forbear from imposing the requirement that future USF recipients be designated as ETCs and adopt a new slate of eligibility criteria that extends to all broadband providers.” *Id.* at 6.

⁶ *Order* at ¶73.

⁷ *See id.* at ¶89.

⁸ *See id.* at ¶86.

“unsubsidized competitor.” We define an unsubsidized competitor as a facilities-based provider of residential terrestrial fixed voice *and* broadband service.⁹

Section 54.5 of the Commission’s Rules defines “unsubsidized competitor” using slightly different language: a “facilities-based provider of residential fixed voice *and* broadband service that does not receive high-cost support.”¹⁰

In each case, the definition of “unsubsidized competitor” appears to require that both the voice and the broadband service components be provided by the same existing entity. This definition incorrectly focuses on the *company* providing the services, not on the voice and broadband services in a given area. WISPA believes this critical error, unless remedied on reconsideration, will have significant adverse policy and public interest consequences. Instead, to identify areas in need of CAF support, the Commission should look to the market conditions of the area to determine whether it is unserved, not to whether any particular single company in a market offers both unsubsidized voice and broadband services.

The Commission instead should modify the definition of “unsubsidized competitor” to state that CAF support will not be extended to any “*area subject to unsubsidized competition.*”

Section 54.5 thus should read as follows:

Area subject to unsubsidized competition. An “area subject to unsubsidized competition” consists of a census block in which there is at least one facilities-based provider of terrestrial fixed voice and at least one facilities-based provider of terrestrial fixed broadband service that do not receive high-cost support. For purposes of this definition, these voice and broadband services need not be provided by the same entity.

⁹ See *id.* at ¶103 (emphases added).

¹⁰ Emphasis added. Prior to acting on this Petition, the Commission should issue an Erratum to conform the definition by adding the phrase “that does not receive high-cost support” to the end of paragraph 103 and adding the word “terrestrial” in the definition of “unsubsidized competitor” in amended Section 54.5. As discussed herein, the term ultimately should be changed and the definition re-written.

This market-based concept and definition will ensure that CAF support is not provided to areas already receiving both voice and broadband services that are unsubsidized, while also permitting such services to be provided by separate entities.¹¹

There are many reasons why this change is needed. First, the term “unsubsidized competitor” implies that CAF support is needed only in areas where no single company provides both unsubsidized voice and unsubsidized fixed broadband service. In many areas, voice service may be provided by a telecommunications carrier and broadband service may be provided by a separate fixed broadband provider. If CAF funds are used to support areas where unsubsidized services already exist, taxpayer dollars would be misdirected away from areas that truly need support to deliver both fixed voice and fixed broadband service. This outcome would contravene Commission policies and the objectives of the new CAF programs.

Second, for fixed broadband providers serving areas where voice services are already provided by existing telecommunications carriers, the current “unsubsidized competitor” definition creates the near certainty that CAF subsidies will be extended to these existing carriers that will then become direct competitors with existing unsubsidized fixed broadband providers. WISPs know first-hand the harmful competitive effects that the existing USF program and other federal broadband funding programs can and do cause. Subsidies are already being provided to voice companies that use those subsidies to offer broadband services in direct competition with WISPs that receive no such support. The existing term “unsubsidized competitor” does nothing to change this. Instead, a market-based definition would ensure that CAF funds are not used to

¹¹ WISPA agrees that areas eligible for support should be determined at the census block or smaller area. In identifying the census blocks served by fixed voice and broadband services, the Commission stated that it would collect data to measure universal availability of voice and broadband based on data in the National Broadband Map and/or Form 477. WISPA concurs in the use of these data in the near term and requests that the Commission’s reforms to the Form 477 data collection process, *see Order at n. 168*, be targeted to providing more accurate, cross-checked data to help ensure that subsidies are targeted in a manner consistent with the overarching goals of this proceeding to eliminate waste and inefficiency in network buildouts.

enable a telecommunications carrier to compete with an existing unsubsidized fixed broadband provider.

Third, the Commission's use of the regulatory classification "unsubsidized competitor" imposes unachievable requirements for standalone fixed broadband providers that are not subject to Title II regulations (such as apply to "telecommunications services"). In some rural and hard-to-serve markets, WISPs find that the cost of incurring additional Title II regulations would exceed the benefits of deploying and providing voice services to customers. Indeed, a fixed broadband provider, even one that may choose to become an ETC, may not have enough time to navigate the state or federal ETC certification process before the CAF programs get underway. Whatever the reason, it is unsound policy to contrive incentives for a successful fixed broadband provider to add voice service under these conditions.

Fourth, using a market-based definition to describe competition is not new. The Commission adopted a similar market-based approach in assessing competition in cable franchise areas. In 1992,¹² Congress mandated that a cable system could avoid rate regulation "[i]f the Commission finds that a cable system is subject to effective competition."¹³ Pursuant to Section 623(l)(1)(B) of the Cable Act, "effective competition" exists where:

the franchise area is: (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by the multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area.

In this definition, Congress and the Commission have taken a market-based approach that recognizes that competition can be offered *in the aggregate* by multiple companies. The

¹² See "Cable Television Consumer Protection and Competition Act of 1992," Pub. Law. 102-385 (Oct. 5, 1992). ("Cable Act").

¹³ Section 623(a)(2) of the Cable Act.

Commission should similarly acknowledge that unsubsidized voice and broadband competition exists where one company may provide the voice service and another company may provide the terrestrial broadband service.

Moreover, adopting the term “Area subject to unsubsidized competition” would be consistent with other market-based aspects of the *Order*. For instance, the Commission will use market-based competitive bidding for CAF Phase II support “to ensure the most efficient and effective use of public resources.”¹⁴ That same rationale and objective should apply to identify areas eligible for CAF support.

Taxpayer funds should not be used to support the provision of voice and broadband in areas where those services are already offered by unsubsidized entities. The rule changes proposed by WISPA will ensure that CAF support will be used only to support areas that are truly unserved.

II. THE COMMISSION SHOULD CLARIFY HOW IT WILL DISCONTINUE FROZEN HIGH-COST SUPPORT ONCE AN AREA BECOMES SUBJECT TO UNSUBSIDIZED COMPETITION.

In its push to reform existing universal service mechanisms, the Commission observes that the existing program “fails to target new investment to areas of need and, in particular, may be rewarding investment in areas where there are unsubsidized competitors, contrary to our principle of fiscal responsibility.”¹⁵ WISPA urges the Commission to carry forward this “principle of fiscal responsibility” to the CAF.

Under the new rules, “price cap carriers that receive frozen high-cost support will be required to certify that they are using such support in a manner consistent with achieving

¹⁴ *Order* at ¶165.

¹⁵ *Id.* at ¶198.

universal availability of voice and broadband.”¹⁶ In a footnote, the Commission added that “a carrier must certify [in its annual report] that with respect to the frozen high cost support dollars subject to this obligation, a substantial portion went to areas without an unsubsidized competitor.”¹⁷ The Commission does not define “substantial portion” in this context.¹⁸

In light of WISPA’s proposal to change the term from “unsubsidized competitor” to “area subject to unsubsidized competition,” the Commission should revise these certification requirements accordingly. With regard to the provisions for middle-mile feeders, the Commission should not generally support competition in areas where there is unsubsidized competition. Given the five-year timeline associated with frozen high-cost support funding, unsubsidized competition likely will enter into certain census blocks where price cap carriers are receiving such support. Rather than certifying that a “substantial portion” of the support dollars went to areas without an unsubsidized competitor, a support recipient should be required to make an alternative certification: that no frozen high-cost support dollars went to areas with unsubsidized competition so long as, with respect to investments in middle-mile feeders, the support recipient must certify that at least 50 percent of the locations served are in census blocks shown as unserved by unsubsidized competition, as shown on the National Broadband Map. In addition, entities that provide unsubsidized competition in the subject area should have an opportunity to review and comment on the support recipient’s annual certification.

¹⁶ *Id.* at ¶591. By contrast, the Commission plans to “gradually phase out all high-cost support received by incumbent rate-of-return carriers where an unsubsidized competitor – or a combination of unsubsidized competitors – offers voice and broadband service that meets the performance requirements for 100 percent of the residential and business locations in the incumbent’s study area.” *Id.* at ¶1095.

¹⁷ *Id.* at n. 970. Such a certification would be made in connection with the new annual reporting requirements every April 1 for ETCs receiving support. *See, e.g., id.* at ¶591.

¹⁸ That said, the Commission notes that with respect to investments in middle-mile feeders, the recipient “must certify that ... at least 50 percent of the locations served are in census blocks shown as unserved by an unsubsidized competitor, as shown on the National Broadband Map.” The Commission states that it recognizes that “certain expenditures, such as investments in a digital subscriber line access multiplexer (DSLAM) and/or middle mile infrastructure, that benefit a geographic area unserved by an unsubsidized competitor may also benefit some locations where an unsubsidized competitor provides service.” *Id.* at n. 238.

If the public record confirms that an area becomes subject to unsubsidized competition during the funding period, the support recipient cannot lawfully file the required certification and thus should lose support. The Commission should have the express ability to phase out support to the recipient and apply the “reclaimed” funds to areas that remain unserved. Where a competitor is serving a market where another provider is receiving CAF support, that should be a strong signal that support should be phased out and that market forces should govern.¹⁹

Conclusion

WISPA respectfully requests that the Commission replace the term and the definition of “unsubsidized competitor” with “area subject to unsubsidized competition,” and adopt the other proposals discussed above.

Respectfully submitted,

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**WIRELESS INTERNET SERVICE
PROVIDERS ASSOCIATION**

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¹⁹ See *id.* at ¶617. Further, WISPA concurs with the Commission’s decision to provide for reductions in support for failure to file the required reports in a timely fashion.