

**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

PETITION FOR RECONSIDERATION

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Summary

The *CAF Order*, adopted by the Commission on October 27, 2011 in this proceeding, unjustifiably compromises a number of principles and policy objectives that have long governed the Commission's implementation of its universal service mandate—including cost-efficiency and competitive neutrality—while at the same time reversing the sound policy determinations reflected in the *Notice of Proposed Rulemaking* in this proceeding without adequate explanation or justification. Instead, the *Order* places the interests of inefficient incumbents over those of consumers by summarily diverting the lion's share of limited CAF support to those incumbents, despite ample record evidence demonstrating that competitive providers—including satellite broadband providers—could extend service to “unserved” households far more efficiently and far more effectively, at a fraction of the cost to the public. Accordingly, as an initial matter ViaSat requests that the Commission reconsider this framework, and instead utilize reverse auctions or other suitable market-based mechanisms to distribute CAF funds to the lowest-cost provider(s) in any given geographic area, consistent with the overwhelming record evidence in support of such approaches.

If the Commission nevertheless is determined to provide ILECs with funding on a preferential basis, it should at the very least reconsider specific aspects of that framework in order to ensure that it better serves the goals of efficiency and competitive neutrality. Specifically, ViaSat requests that the Commission:

1. Reconsider its decision to categorically preclude satellite broadband providers from establishing that their services are viable competitive alternatives to incumbent offerings in a given geographic area. The discriminatory treatment of satellite providers is contrary to the principle of competitive neutrality, and serves only to harm consumers and the CAF with no offsetting benefits. Satellite offerings should be judged against objective performance criteria—just like any other broadband offering. Competitive

and technological neutrality demand that satellite broadband providers have the ability to demonstrate that their current and future offerings can satisfy the same performance criteria that apply to other providers.

2. *Reconsider its apparent decision not to impose strong accountability measures on ILECs prior to the distribution of any CAF support.* While the *CAF Order* defers the implementation of such measures to an indeterminate point in the future, it is critical that they be put into place now so that ILECs are forced to internalize the full risk and costs of possible non-compliance before making any “statewide election” to receive funding on a preferential basis. More specifically, the Commission should: (i) require supported ILECs to post performance bonds; (ii) clarify that no support will be awarded for “partial” build-out; (iii) require supported ILECs that fail to meet milestones to return funds that they have received to date; and (iv) debar supported ILECs that fail to meet milestones for a period of time.

3. *Reconsider its decision to demand “reasonable comparability” of usage limits instead of reasonable comparability of broadband access in general.* Section 254(b)(3) of the Act directs the Commission to ensure the “reasonable comparability” of broadband access. The Commission’s approach to evaluating the comparability of supported broadband services is not logically consistent, and does not in all instances take into account the principles of sustainability and affordability inherent in Section 254(b). In evaluating comparability, the Commission has decided to consider three broadband performance attributes: speed, latency and capacity allowances. In the case of speed, the Commission has recognized that comparability does not mean equivalence with prevailing urban speeds, but rather means enabling supported high-cost households to enjoy most broadband applications, without *unreasonably* increasing the size of the program beyond sustainable limits. In the case of latency, a provider simply may show that it can support real-time applications such as

VoIP, with voice service remaining an important goal of the universal service program. However, in the case the third key attribute, capacity allowances, the Commission has eschewed consideration of *actual* consumer usage patterns, and whether the mandated service attribute has any real impact on the quality of the user experience as measured by empirical data. Reasonable comparability would be ensured as long as capacity allowances in rural areas are sufficiently high to accommodate typical nationwide usage patterns. Mandating a higher capacity allowance would not provide any additional benefit to the typical consumer, but would increase costs to rural providers, rural consumers, and the CAF, all contrary to the principles of Section 254(b).

4. Reconsider its decision to delay the provision of funding to “remote areas” that are most in need of CAF support. The objectives of universal service are best served by directing limited funding to challenging “remote areas” as soon as possible, rather than deferring action in those areas and instead attempting to pick relatively “low hanging fruit” first. At a minimum, the Commission should implement an interim program to enable consumers in remote areas to obtain broadband service from a provider of their choice at a modest discount while permanent program rules are being finalized.

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PETITION FOR RECONSIDERATION

ViaSat, Inc. (“ViaSat”) hereby petitions for reconsideration of the *Report and Order* adopted by the Commission on October 27, 2011 in this proceeding (the “*CAF Order*”).¹

The fundamental framework adopted in the *Order* for the Connect America Fund (“CAF”) significantly compromises a number of principles and policy objectives that have long governed the Commission’s implementation of its universal service mandate—including cost-efficiency and competitive neutrality. More specifically, the adopted framework places the interests of inefficient incumbents over those of consumers by summarily diverting the lion’s share of limited CAF support away from broadband providers with a demonstrated record of extending broadband service, and instead toward price cap and rate-of-return incumbent local exchange carriers (“ILECs”) that have made a business decision *not* to provide broadband service to large numbers of consumers within their

designated service areas. The *CAF Order* does so even though ample record evidence exists that competitive providers—including satellite broadband providers—could extend service to “unserved” households far more efficiently and far more effectively, at a fraction of the cost to the public.

Accordingly, as an initial matter ViaSat requests that the Commission reconsider this framework, and instead utilize reverse auctions or other suitable market-based mechanisms to distribute CAF funds to the lowest-cost provider(s) in any given geographic area, consistent with the overwhelming record evidence in support of such approaches. If the Commission nevertheless is determined to provide ILECs with funding on a preferential basis, it should at the very least reconsider specific aspects of that framework in order to ensure that it better serves the goals of efficiency and competitive neutrality. Specifically, ViaSat requests that the Commission:

- (i) Reconsider its decision to categorically preclude satellite broadband providers from establishing that their services are viable competitive alternatives to incumbent offerings in a given geographic area;
- (ii) Reconsider its apparent decision *not* to impose strong accountability measures on ILECs *prior* to the distribution of any CAF support;
- (iii) Reconsider its decision to demand “reasonable comparability” of usage *limits* instead of reasonable comparability of broadband access in general; and
- (iv) Reconsider its decision to delay the provision of funding to “remote areas” that are most in need of CAF support.

Such an approach would be consistent with general Commission policy to base decisions as much as possible on empirical data. In this case, the structure and implementation of the CAF should be driven as much as possible by empirical data regarding the ways that consumers *actually* use broadband services.

¹ 47 C.F.R. § 1.429.

I. BACKGROUND

As the Commission is well aware, ViaSat is a leading provider of advanced satellite and other wireless communications solutions and services, as well as a leading provider of broadband Internet access services through its WildBlue service. ViaSat recently launched ViaSat-1—the highest-capacity broadband satellite in the world—which will commence commercial service in early 2012, and drive a quantum shift in the speed and quality of satellite broadband service, while simultaneously increasing available capacity and ultimately allowing satellite broadband providers to serve millions of additional customers.

Critically, ViaSat-1 is only the first in a series of innovations that will enable ViaSat to provide broadband service to the millions of U.S. homes that are difficult or expensive to reach by cable or fiber networks. Going forward, ViaSat plans to design a series of broadband satellites with even more advanced technical characteristics and even more compelling bandwidth economics. At the same time, ViaSat is and will remain a communications solutions provider, willing to develop and implement whatever technologies or network architectures are best-suited to the needs of its customer or to overcome a particular challenge.

ViaSat has been an active participant in this proceeding, both individually and in collaboration with a number of other satellite broadband providers. ViaSat consistently has advocated the use of competitively- and technologically-neutral reverse auctions (or other suitable market-based mechanisms) to distribute limited CAF support in an efficient manner to those providers best positioned to extend quality broadband service to “unserved” households expeditiously. This approach would place the interests of consumers above those of entrenched incumbents—consistent with the requirements of Section 254 of the Communications Act, as amended (the “Act”).²

² 47 U.S.C. § 254.

II. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO ABANDON THE USE OF COMPETITIVE, MARKET-BASED MECHANISMS TO DISTRIBUTE CAF FUNDS TO THE MOST EFFICIENT PROVIDERS

The *Notice of Proposed Rulemaking* (“NPRM”) in this proceeding proposed to distribute CAF support through a competitive and transparent reverse auction mechanism, and made a number of initial findings in support of such an approach. ViaSat agrees with the Commission’s stated rationale for this approach—namely, that competitive bidding would allow the Commission to harness market forces to: (i) determine how much universal service support, if any, is truly needed in any given area; and (ii) help to ensure that limited funding flows to efficient carriers with low costs, thus reducing the amount of support needed to advance the Commission’s universal service objectives.

ViaSat also agrees that a properly designed reverse auction mechanism would advance the principle of “competitive neutrality,” which has been central to the Commission’s universal service policy for decades. In the *Universal Service First Report and Order*, the Commission adopted “competitive neutrality”—defined as the state in which “universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another”—as a guiding principle for the administration of the USF under Section 254(b)(7).³ The Commission committed to adopting rules to minimize competitive and technological bias, and recognized that such rules would “facilitate a market-based process whereby each user comes to be served by the most efficient technology and carrier.”⁴

The Commission also recognized that the principle of competitive neutrality demands an inclusive approach to participation in universal service funding mechanisms. Thus, the Commission determined that providers using *any* technology should be eligible for

³ 47 U.S.C. § 254(b)(7).

⁴ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, at ¶ 48 (1997) (“*Universal Service First Report and Order*”).

universal service support as long as they meet the statutory criteria set forth in Section 214(e)(1) of the Act.⁵ The Commission also concluded that “any wholesale exclusion of a class of carriers by the Commission would be inconsistent with the language of the statute and the pro-competitive goals of the 1996 Act.”⁶

The *CAF Order* abandons the rationale set forth in the *NPRM* without any real attempt either to distinguish the Commission’s prior analysis, or to address the ample record evidence demonstrating that the use of reverse auctions (or another market-based mechanism) would increase dramatically the efficiency of the program and the likelihood that “unserved” households would receive quality broadband service in an expeditious manner. For example, ViaSat submitted a quantitative analysis by Dr. Charles Jackson demonstrating that allowing satellite broadband providers to compete for funds would result in billions of dollars in savings, as compared to the costs of relying on terrestrial technologies.⁷ This analysis assumed that non-incumbent *terrestrial* providers would be able to compete for support. The excess costs created by the adopted CAF structure would be significantly higher because non-ILEC terrestrial competitors are generally excluded, along with satellite providers. Tellingly, Dr. Jackson’s report is not cited *even once* in the *CAF Order*.

Furthermore, the *CAF Order* abandons the principle of “competitive neutrality,” with only the faintest attempt at a justification. The Commission acknowledges that it is doing as much by providing ILECs with a presumptive right to CAF funding, to the exclusion of competitive providers, yet asserts that this preferential treatment of ILECs is justified because ILECs supposedly are in a “unique” position to deploy broadband networks

⁵ *Id.* at ¶ 145.

⁶ *Id.*

⁷ See Dr. Charles L. Jackson, *Satellite Service Can Help to Effectively Close the Broadband Gap* (Apr. 18, 2011), attached as Exhibit A to Comments of ViaSat, Inc., WC Docket No. 10-90 (Apr. 18, 2011) (“ViaSat Comments”).

rapidly and efficiently in such areas.⁸ The *CAF Order* claims that this “uniqueness” stems from: (i) the ILECs’ “long history” of providing service throughout the relevant areas; and (ii) the fact that ILECs generally have already obtained ETC designations.⁹

The first of these claims is factually inaccurate. Because the areas that would be supported by CAF funding necessarily lack broadband service, it simply is not true that ILECs have a “long history” of providing service to those areas, or greater experience in providing broadband service to consumers. To the contrary, ILECs have a long history of *failing* to provide broadband service to “unserved” areas—while many competitive providers have significant experience in extending service to such areas. For that reason, there is no reason to think that ILECs would be able to implement broadband networks more efficiently than competitive providers, or offer better service to consumers in an expeditious manner.

The second of these claims is highly misleading. As the Commission well knows, many competitive providers have obtained ETC status already. Moreover, to the extent that ILECs have ETC status, this stems from the fact that: (i) virtually all ILECs are ETCs *by default*, and have not needed to go through the complicated (and frequently dilatory) process of obtaining ETC designations at the state and/or federal levels; and (ii) many competitive providers are subject to discriminatory treatment under legacy ETC designation procedures, and the vicissitudes of state commission politics, which favor incumbents at the expense of newer technologies.

The Commission should not use *existing* discrimination as a justification for *future* discrimination—particularly when the Commission could act to address the procedural bias inherent in the ETC designation process by, among other things, addressing the proposal

⁸ *CAF Order* ¶ 177.

⁹ *Id.*

that ViaSat made to address this very issue.¹⁰ In fact, the Commission has a more-than-adequate record basis to correct the deficiencies in the current ETC-designation process, and thereby facilitate the provision of competitive broadband alternatives. Correcting those problems today would be preferable to using those problems as justification for perpetuating the ILEC biases that are inherent in the current universal service framework as it transitions to new CAF mechanisms.

At bottom, there is no reasoned basis for departing from the principle of competitive neutrality. That principle ensures that universal service mechanisms are efficient and limits the potential market-skewing effects of subsidizing some providers over others. Adherence to that principle also facilitates the Commission's ability to craft rules and shape policy in response to empirical data regarding *actual* consumer needs and preferences as revealed in the competitive market—instead of adopting policies that are biased toward entrenched incumbent interests. Accordingly, ViaSat requests that the Commission reconsider the fundamental framework reflected in the *CAF Order*, and instead utilize reverse auctions or other suitable market-based mechanisms to distribute CAF funds to the lowest-cost provider(s) in any given geographic area, consistent with the overwhelming record evidence in support of such approaches.

III. IF THE COMMISSION DOES NOT RECONSIDER THE FUNDAMENTAL FRAMEWORK OF THE CAF, IT SHOULD RECONSIDER SPECIFIC ASPECTS OF THE *CAF ORDER*

If the Commission remains determined to provide ILECs with funding on a preferential basis, it should at the very least reconsider specific aspects of the framework established by the *CAF Order* in order to ensure that the CAF better serves the goals of efficiency and competitive neutrality. Specifically, ViaSat requests that the Commission: (i)

¹⁰ For example, ViaSat has proposed that the Commission act to designate satellite broadband providers as “nationwide” ETCs on the federal level. The *CAF Order* defers action on that request. See *CAF Order* ¶¶ 1234 *et seq.*

reconsider its decision to categorically preclude satellite broadband providers from establishing that their services are viable alternatives to incumbent offerings in a given geographic area; (ii) reconsider its apparent decision *not* to impose strong accountability measures on ILECs *prior* to the distribution of any CAF support; (iii) reconsider its decision to demand “reasonable comparability” of usage *limits* instead of reasonable comparability of broadband access in general; and (iv) reconsider its decision to delay the provision of funding to “remote areas” that are most in need of CAF support.

A. The Commission Should Not Preclude Satellite Broadband Providers from Establishing that They Are Viable Competitive Alternatives to Incumbents

While the *CAF Order* provides funding to ILECs on a preferential basis, it also creates mechanisms through which certain competitive providers can establish that they are viable alternatives to those ILECs—and thereby deny or limit funding that those ILECs receive. The *CAF Order* specifies minimum performance requirements to be used in evaluating the viability of a competitive offering for these purposes. ViaSat agrees that incumbents should not receive funding where a competitor is offering service, and supports the use of objective performance requirements as proposed by the Commission—provided those requirements are based on empirical data regarding *actual* consumer needs, usage patterns, and preferences.

Unfortunately, in instituting these mechanisms, the Commission also has decided to categorically ignore the potential contribution of satellite providers. There is no valid basis for the Commission’s decision to categorically exclude *any* provider from even attempting to establish that it can meet applicable performance requirements, and thus demonstrate that incumbents in a given geographic area should not receive funding. For this reason, ViaSat specifically requests that the Commission: (i) reconsider its decision that satellite broadband providers cannot qualify as “unsubsidized competitors” in a given

geographic area; and (ii) reconsider its suggestion that the availability of satellite broadband “alternatives” is irrelevant in evaluating whether a waiver of ILEC program requirements is appropriate. Competitive and technological neutrality demand that satellite broadband providers have the ability to demonstrate that their current and future offerings can satisfy the same performance criteria that apply to other providers.

1. The Commission Should Permit Satellite Broadband Providers to Demonstrate that They Meet the Performance Requirements Necessary to Qualify as “Unsubsidized Competitors”

The *CAF Order* provides that a recipient of CAF support may not spend funds to serve customers in areas already served by an “unsubsidized competitor,” defined to include any “facilities-based provider of residential *terrestrial* fixed voice and broadband service.”¹¹ This policy correctly recognizes that the presence of an unsubsidized competitor in a given geographic area provides one indication that a business case already exists for providing service to that area absent government subsidy. At the same time, this policy recognizes that providing a subsidy to one competitor, but not another, could skew competition in a given market, and potentially even convert that competitive market into a monopolistic one.

Even though satellite broadband providers can and will offer competitive broadband services that meet the objective performance requirements established by the Commission, the *CAF Order* deliberately and categorically excludes such providers from the definition of “unsubsidized competitor” on an *a priori* basis.¹² The Commission attempts to justify this exclusion by expounding its belief that this exclusion “will disqualify few, if any, broadband providers that meet CAF speed, capacity, or latency minimums for all locations

¹¹ *Id.* at ¶ 103.

¹² *Id.*

within relevant areas of comparison, while significantly easing administration of the definition.”¹³ This explanation does not bear scrutiny.

As an initial matter, the record does not justify the discriminatory treatment of satellite broadband providers. The Commission fails to provide *any* data-driven rationale for its *a priori* rejection of satellite technologies—*perhaps because there is none*. To the contrary, there is ample evidence that satellite broadband providers *are* capable of providing affordable voice and broadband service that meets the Commission’s performance requirements—without the aid of a subsidy.

Even if that were not the case, the use of a technologically-neutral definition still would yield the correct result: *any* broadband provider (satellite or otherwise) unable to meet the Commission’s performance requirements would not qualify as an “unsubsidized competitor.” In other words, if the Commission were correct that satellite broadband providers generally would not meet its performance requirements, the additional limitation in the definition would be entirely superfluous. On the other hand, where a satellite broadband provider could meet those performance requirements, the additional limitation necessarily would incorrectly prevent that provider from qualifying as an “unsubsidized competitor,” and correspondingly would fail to preclude the wasteful spending and market-skewing effects that the *CAF Order* seeks to avoid by eliminating support to areas with unsubsidized *terrestrial* competitors. In other words, the additional definitional exclusion of satellite broadband providers serves only to cause harm without providing any offsetting benefit.

Any suggestion that excluding satellite broadband providers from the definition of “unsubsidized competitor” would significantly ease the administration of that definition also is without foundation—the Commission certainly provides no data in support of this proposition—and in any event administrative convenience would not justify such an

¹³ *Id.* at ¶ 104.

exclusion. The administrative burden of determining whether a satellite broadband provider meets the Commission’s performance requirements is no greater than that of determining whether a terrestrial provider meets those requirements. In fact, that burden may be significantly reduced given that the Commission necessarily has the full technical details of satellite networks, including coverage maps, at its disposal. Even if there were some small additional burden inherent in the evaluation of satellite broadband providers, that burden would be more than offset by the cost savings to the CAF from the elimination of unnecessary support, and the benefits of unfettered competition in a given geographic market.

2. The Commission Should Consider the Availability of Satellite Broadband “Alternatives” in Evaluating Whether to Waive ILEC Program Requirements

The *CAF Order* creates a process through which an ILEC can seek a waiver of any or all of the program rules and requirements set forth therein—including performance requirements and funding limitations.¹⁴ The *CAF Order* properly puts ILECs on notice that such waivers will not be granted unless the requesting carrier satisfies an exacting standard and establishes, *inter alia*, that absent a waiver consumers would be at risk of losing voice service and would have no alternative *terrestrial* provider available to provide that service.¹⁵ The Commission’s apparent intent is to ensure that: (i) ILECs have exhausted their available options, including partnering arrangements with other providers, before seeking waiver of CAF program rules; and (ii) consumers would not have other service options absent a waiver.

A footnote to the *Order* makes clear that the Commission will *not* require a carrier requesting a waiver to demonstrate that satellite voice service is unavailable in the area.¹⁶ The Commission claims that this policy is appropriate because the record allegedly “does not conclusively establish that, at this time, satellite voice services . . . provide the

¹⁴ *Id.* at ¶ 539.

¹⁵ *Id.* at ¶ 540.

same consumer benefits as terrestrial voice services.”¹⁷ Contrary to the Commission’s assertion, ample record evidence exists of the quality of satellite voice service.¹⁸ Moreover, the Commission already has concluded that satellite networks are capable of providing consumers with quality voice service, and that “*non-landline telecommunications providers should be eligible to receive universal service support even though their local calls are completed via satellite.*”¹⁹

Even if the record did not establish the quality of satellite voice service, there would be no basis for the Commission’s categorical decision *not* to consider the availability of satellite broadband “alternatives” in evaluating whether to waive ILEC program requirements. The Commission has not categorically refused to consider any other type of technology—including untested terrestrial technologies that may emerge in the future. There simply is no reason to single out satellite technology, as the *CAF Order* does, as the only technology that cannot be deemed a competitive alternative to ILEC-provided broadband. To the extent that the Commission has concerns about whether a particular form of voice service truly is a viable alternative to wireline voice service, the only legally sustainable approach would be to establish competitively-neutral performance requirements and then test the voice service—as well as other potential alternatives—against those requirements.

¹⁶ *Id.* at ¶ 540 n.904.

¹⁷ *Id.*

¹⁸ *See, e.g.*, Reply Comments of the Satellite Broadband Providers, WC Docket No. 10-90, at 5 (Sep. 6, 2011) (noting highly successful demonstrations of satellite voice capability provided by ViaSat in April 2011); ViaSat Comments at 32 (discussing potential use of: (i) geostationary orbit satellite mesh networking systems—*e.g.*, one satellite hop systems; (ii) hybrid satellite/terrestrial solutions; and (iii) low-latency satellite solutions, such as the use of a LEO or MEO satellite link).

¹⁹ *Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration, 13 FCC Rcd 5318, at ¶ 10 (1997) (emphasis added).

B. The Commission Should Implement Strong Accountability Measures Before Providing Any CAF Support to ILECs

The *CAF Order* correctly notes that “[t]he billions of dollars that the Universal Service Fund disburses each year to support vital communications services come from American consumers and businesses, and recipients must be held accountable for how they spend that money.”²⁰ However, the *CAF Order* does not impose any real consequences on ILECs that make a “statewide election” to receive support and then fail to meet their public interest obligations. While the *CAF Order* purports to “create a rule that entities receiving such support will receive reduced support should they fail to fulfill their public interest obligations, such as by failing to meet deployment milestones, to provide broadband at the speeds required by this *Order*, or to provide service at reasonably comparable rates,” this “rule” is not given substance.²¹ Instead, the Commission appears to defer such issues to the *Further Notice of Proposed Rulemaking* included in the *CAF Order*.²²

If the Commission is determined to provide ILECs with an unjustified preference over competitors, it should, at a minimum, take measures to ensure that those ILECs are held accountable where they decide to make a “statewide election” and then fail to satisfy the concomitant public interest obligations. Otherwise, ILECs would have no reason *not* to make that election, as there would be only upside for them, in the form of increased funding, and no consequences for failing to use that funding appropriately. In order to curb the potential for such abuse, ViaSat urges the Commission to:

²⁰ *CAF Order* ¶ 568.

²¹ *See id.* at ¶ 618; *see also* new 47 C.F.R. § 54.320(c) (providing that ILECs that fail to meet their obligations may be subject to “further action”).

²² *See CAF Order* ¶ 618 n.1014.

- Require all price cap ILECs to post a performance bond for each state in which they make a “statewide election” to receive support, which could be proportionately reduced whenever a relevant milestone is met (similar to the treatment of milestones in the satellite context²³);
- Make clear that *no* support will be awarded for “partial” build-out, since this would reward ILECs that provide substandard service and leave the “unserved” problem unsolved;
- Require price cap ILECs that make a “statewide election” but fail to meet milestones to return any funds that they have received to date; and
- Debar price cap ILECs that make a “statewide election” but fail to meet milestones from receiving additional funds for a period of time.

These measures would not be intended to punish price cap ILECs that do not meet their obligations, but rather to ensure that they internalize the full risk and costs of possible non-compliance before making any “statewide election.” As a result, these measures would incent ILECs to decline funding where they are not in a position to extend quality broadband service to “unserved” households expeditiously. These measures also would create additional opportunities for more efficient competitive providers to receive support through the “secondary” CAF mechanism.

For this reason, it is critical that these measures are implemented *before* any funding is provided under new CAF mechanisms. It simply is not enough to rely on vague promises that funding will be reduced, or possible accountability measures that may or may not be adopted in connection with the *Further Notice of Proposed Rulemaking* included in the *CAF Order*.

C. Instead of Demanding “Reasonable Comparability” of Usage *Limits*, the Commission Should Facilitate “Reasonable Comparability” of Network Access

The Commission’s approach to evaluating comparability of supported broadband services is not logically consistent, and does not in all instances take into account the principles of sustainability and affordability inherent in Section 254(b). In evaluating

²³ See 47 C.F.R. §§ 25.164, 25.165.

comparability, the Commission has decided to consider three broadband performance attributes: (i) speed; (ii) latency; and (iii) capacity allowances. The 4/1 Mbps speed requirement arguably will result in supported high-cost households receiving slower service than that which is typical in urban areas, which may not fully support applications like two-way video conferencing that require upload speeds in excess of 1 Mbps. Indeed, 4/1 Mbps speeds are far below the 12/3 Mbps speeds that will be broadly available over ViaSat-1 within the next month. Yet, the Commission has determined—based on an analysis of empirical data regarding consumer preferences and usage patterns—that supporting 4/1 Mbps speeds will enable supported high-cost households to enjoy most broadband applications, without *unreasonably* increasing the size of the program beyond sustainable limits.²⁴ Similarly, in establishing a latency requirement that is satisfied if a given provider can support real-time applications such as VoIP, the Commission implicitly has invited service providers to use empirical data to demonstrate that their network latency does not preclude such voice-based applications.

In the case of capacity allowances (which the Order also calls “usage limits”), though, the Commission has eschewed consideration of *actual* consumer usage patterns, and of whether the mandated service attribute has any real impact on the quality of the user experience as measured by empirical data. Instead, the *CAF Order* provides that “any usage limits imposed by an ETC on its USF-supported broadband offering must be reasonably comparable to usage limits for comparable broadband offerings in urban areas”²⁵ The Commission’s decision to focus on usage *limits* in urban areas, and to require usage limits in rural areas to be comparable to those in urban areas, is misguided, and does not reflect the

²⁴ See *CAF Order* ¶ 93.

²⁵ *Id.* at ¶ 98.

actual needs and preferences of broadband users as reflected in empirical data regarding their usage patterns.

The principal objective of Section 254(b)(3)—the source of the “reasonable comparability” standard—is to ensure that consumers in rural and urban areas have comparable *access* to telecommunications and information services.²⁶ Such comparability is ensured as long as usage limits in rural areas are sufficiently high to accommodate typical nationwide usage patterns, such that the typical consumer would have comparable access to broadband service in both types of areas. This approach would tie the capacity allowance requirement to empirical data regarding consumer needs, and in the process also ensure that those needs are met without imposing *unreasonable* expenses on the CAF. In contrast, mandating a usage limit that is significantly higher than required to accommodate typical usage patterns would not provide any *additional* access to most rural consumers, or result in “comparability” between rural and urban access that is more “reasonable;” instead, it would merely increase costs to rural providers, rural consumers, and the CAF, all contrary to the principles set forth in Section 254(b).

The Commission’s own analysis suggests several ways in which a capacity allowance requirement could be grounded in empirical data. Notably, Commission reports suggest that the vast majority of users (about 85 percent) can be expected to use less than 32 GB per month in 2015, while almost all users (about 94 percent) can be expected to use less than 60 GB per month in that year.²⁷ The same reports suggest that the *median* user can be

²⁶ 47 U.S.C. § 254(b)(3) (“Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have *access* to telecommunications and information services . . . that are reasonably comparable to those services provided in urban areas”) (emphasis added).

²⁷ The Commission estimates that 85 percent of users consumed less than 8 GB per month in 2009, and that 94 percent of users consumed less than 15 GB per month in that year. *See Broadband Performance*, OBI Technical Paper No. 4, at 6. Assuming, as the Commission has, that monthly usage will double roughly every three years based on historical growth, 85 percent of users can be expected to use less than 32 GB

expected to consume at most 14 GB per month in 2015,²⁸ while the *mean* user can be expected to consume only about 40 GB per month in that year.²⁹ Regardless of the exact metric that the Commission employs, these data show that it is unreasonable to require rural providers to incur substantial costs so that they can offer usage limits many times higher than expected consumption levels. Doing so would result in unnecessary costs being passed along to the CAF and, ultimately, consumers based on a flawed “comparability” comparison with urban limits that simply are irrelevant to most urban broadband users. As the Commission already has recognized in establishing its 4/1 Mbps speed requirement, the pertinent question is whether the underlying service is capable of supporting typical consumer usage “based on [an] examination of overall Internet traffic patterns”³⁰ With respect to capacity limits, the data clearly show that a service with a modest usage limit meets this test, whereas the typical consumer neither needs nor benefits from these artificially high usage limits—or their associated costs. In short, it is reasonable and appropriate for rural providers to base usage limits on *actual* usage patterns.

per month (8 GB x 4) in 2015, while 94 percent of users can be expected to use less than 60 GB per month (15 GB x 4) in that year.

²⁸ The Commission estimates that the median user consumed 1.7 GB per month in 2009. *See Broadband Performance*, OBI Technical Paper No. 4, at 6. At the same time, the model used to estimate the broadband availability gap assumes a “medium usage” case in which users consume 3.5 GB per month in 2009. *See The Broadband Availability Gap*, OBI Technical Paper No. 1, at 90-91. Assuming, as the Commission has, that average monthly usage will double roughly every three years based on historical growth, the median user can be expected to consume at most 14 GB per month (3.5 GB x 4) in 2015.

²⁹ While the mean user consumed close to 10 GB per month in 2009, the Commission has correctly noted that “[t]he extreme difference between average and median data usage is principally due to a relatively small number of users who consume very large amounts of data each month[.]” *See Broadband Performance*, OBI Technical Paper No. 4, at 6. Assuming, as the Commission has, that average monthly usage will double roughly every three years based on historical growth, the mean user can be expected to consume only about 40 GB per month (10 GB x 4) in 2015.

³⁰ *See CAF Order* ¶ 93.

Moreover, focusing on typical usage patterns would be consistent with prior Commission proposals in the voice context. For example, in the *Universal Service First Report and Order*, the Commission established “local usage” as a service that would be supported by universal service, and required all ETCs to offer a minimum number of minutes of such usage to their subscribers.³¹ The Commission took this step to ensure that consumers would have adequate capacity available to support their calling patterns, without having to pay overage charges to subsidized carriers.³² In its subsequent *Further Notice of Proposed Rulemaking*, the Commission proposed to adopt a more specific metric for determining the relevant “minimum” based on actual consumer usage patterns.³³ Although the Commission never adopted such a metric, and instead left the required “minimum” vague and underspecified, this precedent reflects the Commission’s recognition that in defining the level of service that should be provided in rural areas, *actual* usage levels in urban areas are far more relevant than usage *limits* that may be imposed in those areas. This precedent also reflects the Commission’s concern that imposing high usage limit minimums could discriminate against certain types of providers or technologies, and preclude them from entering local markets—to the detriment of consumers.³⁴

Apart from more closely aligning the *CAF Order* with the objectives of Section 254(b)(3), focusing on *actual* usage levels would help to preclude large providers

³¹ *Universal Service First Report and Order* ¶¶ 65-70; see also *Federal-State Joint Board on Universal Service*, Recommended Decision, 18 FCC Rcd 2943, at ¶¶ 43-45 (2002) (“2002 USF Recommended Decision”).

³² *Universal Service First Report and Order* ¶ 67.

³³ *Federal-State Joint Board on Universal Service; Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, Further Notice of Proposed Rulemaking, 12 FCC Rcd 18514, at ¶ 179 (1997) (proposing to establish a minimum usage limit based either on the number of minutes per month *used* by the average customer subscribed to flat-rate local service, or the product of the average number of calls included in measured-rate plans and the average call length).

³⁴ *2002 USF Recommended Decision* ¶ 45 (recognizing that “establishing a very high level of local usage would give a competitive advantage to wireline carriers”).

from attempting to “game” the system. By demanding comparability in usage *limits*, the *CAF Order* incents these providers to offer plans with unnecessarily high usage limits in urban areas—which would not provide any additional benefit to the typical urban consumer, or impose any additional costs on the provider, given typical usage levels—in an attempt to “box out” potential competitors from entering rural markets or qualifying for CAF support in those markets. In contrast, *actual* usage levels are driven from the bottom-up by consumer demand, and as such are much more reflective of market dynamics and less susceptible to this type of predatory behavior by entrenched incumbents.

D. The Commission Should Reconsider Its Decision To Delay Funding for “Remote Areas”

The *CAF Order* relieves ILECs of any obligation to serve “remote areas” where “the cost of providing service is typically much higher for terrestrial networks in the hardest-to-serve areas of the country than in less remote but still rural areas.”³⁵ Instead, the *CAF Order* relegates these households to a separate “Remote Areas Fund.” Although households in these areas are *most* in need of support, and *least* likely to receive broadband service absent such support, the *CAF Order* currently would not provide any support to these areas until sometime in 2013 at earliest—assuming that all relevant program rules are finalized in a timely manner.³⁶ In contrast, the *CAF Order* provides additional funding to price cap ILECs serving comparatively well-off areas almost immediately, beginning in early 2012.³⁷

This timetable turns Section 254 of the Act on its head. As the Commission has recognized in the voice context, the most costly households to serve are the ones most in need of funding, such that funding to those households should be prioritized above funding

³⁵ *CAF Order* ¶ 533.

³⁶ *Id.* at ¶ 30.

³⁷ *Id.* at ¶ 22.

households that are less costly to serve.³⁸ The objectives of universal service, and the goals embodied in Section 254, are best served by directing limited funding to these challenging areas, rather than attempting to pick relatively “low hanging fruit.” In short, the Remote Areas Fund should have been established at the same time as, or even before, the general CAF—not after.

The *CAF Order* would provide \$775 per line in incremental broadband support to price cap ILECs that accept Phase I funding. This amounts to a subsidy of approximately \$26 per line per month. Even that amount would offset significantly the price that a household in a remote area otherwise would need to pay to obtain broadband service. Accordingly, ViaSat respectfully requests that the Commission implement an interim program to enable consumers in remote areas to obtain broadband service from a provider of their choice at a discounted rate, subject to reimbursement from the CAF to the provider in the amount of the discount (in a manner similar to the Lifeline program).

IV. CONCLUSION

For the foregoing reasons, ViaSat respectfully requests that the Commission reconsider the fundamental approach taken in the *CAF Order*, and instead adopt a market-based approach consistent with ViaSat’s previous comments in this proceeding. In addition, ViaSat requests that the Commission reconsider certain specific aspects of the *CAF Order*, and in particular that the Commission: (i) reconsider its decision to categorically preclude satellite broadband providers from establishing that their services are viable competitive alternatives to incumbent offerings in a given geographic area; (ii) reconsider its apparent decision *not* to impose strong accountability measures on ILECs *prior* to the distribution of any CAF support; (iii) reconsider its decision to demand “reasonable comparability” of usage

³⁸ See, e.g., *Federal-State Joint Board on Universal Service; Access Charge Reform*, 14 FCC Rcd 8078, at ¶ 31 (1999) (providing limited support to states with per-line costs significantly above the national average).

limits instead of reasonable comparability of broadband access in general; and (iv) reconsider its decision to delay the provision of funding to “remote areas” that are most in need of CAF support.

Respectfully submitted,

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