Patrick Sherrill
Accipiter Communications
2238 W. Lone Cactus Dr.
Suite 100
Phoenix, AZ 85027

December 29, 2011

FILED/ACCEPTED

DEC 29 2011

Federal Communications Commission
Office of the Secretary

REDACTED FOR PUBLIC INSPECTION

VIA HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, SW
Washington, DC 20554

Lynne Hewitt Engledow
Pricing Policy Division
Wireless Competition Bureau
Federal Communications Commission
Room TW-A325
445 12th Street, SW
Washington, DC 20554

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

Dear Ms. Dortch and Ms. Engledow:

Accipiter Communications Inc. hereby submits its Petition for Reconsideration and Clarification of the Commission's *Report and Order*, FCC 11-161, adopted on October 27, 2011 and released on November 18, 2011. Pursuant to the Protective Order adopted on September 16, 2010 in CC Docket No. 01-92, WC Docket Nos. 05-337, 07-135, and 10-90, and GN Docket No. 09-51, DA 10-1749, Accipiter Communications Inc. encloses herewith an original and two copies of a Redacted Confidential Document, as defined in the Protective Order. Accipiter will separately transmit one copy of a Stamped Confidential Document, as defined in the Protective Order.

No. of Copies rec'd 0+1
List ABCDE

Please contact me if you have any questions.

Sincerely,

/s/ Patrick Sherrill

Patrick Sherrill
Accipiter Communications
2238 W. Lone Cactus Dr.
Suite 100
Phoenix, AZ 85027
(623) 455-4500

REDACTED – FOR PUBLIC INSPECTION

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
	)	

PETITION FOR RECONSIDERATION AND CLARIFICATION

Accipiter Communications Inc.
2238 W. Lone Cactus Dr.
Suite 100
Phoenix, AZ 85027
(623) 455-4500

December 29, 2011

REDACTED – FOR PUBLIC INSPECTION

TABLE OF CONTENTS

I. INTRODUCTION 2

II. THE COMMISSION SHOULD RECONSIDER THE REPORT AND ORDER. 7

A. Immediate Imposition of the Report and Order Will Not Allow Accipiter to Survive. 7

B. The Commission Should Reconsider the Regression Caps Adopted in the Report and Order. 10

1. The Regression Caps Are Based on the Pursuit of a Flawed Objective. 11

2. The Report and Order Lacks Clarity Regarding Implementation. 11

3. The Report and Order Relies on Flawed Data. 12

4. The Report and Order Relies on Flawed Independent Variables. 14

5. The Commission Should Clarify the Report and Order's Implementation of its Regression Caps. 17

C. The Commission Should Reconsider the $250 Cap on Monthly Per-Line Support. 18

1. The Order Fails to Recognize that Growing Companies Will Require Decreasing Support. 18

2. Application of the Cap to 2010 Expenses and Loops is Arbitrary and Capricious. 18

D. The Commission Should Reconsider the Corporate Operations Expense Limit Applied to ICLS. 19

1. The Report and Order Fails to Consider the Dynamic of a Growing Company. 19

2. Application of the Corporate Operations Expense Limit to 2010 Expenses and Loops is Arbitrary and Capricious. 20

3. The Commission's One Size Fits All Rule is Inappropriate and Inflexible. 20

E. The Commission Should Reconsider the Reduction in Support for "Artificially Low" Rates. 20

1. Carriers May Face Significant Challenges in Raising Rates. 20

2. Accipiter's "Artificially Low" Linited Usage Rates Serve Important Needs and Allow Accipiter to Provide Broadband at a Price Comparable to That Available in Urban Areas." 21

3. The Report and Order Fails to Consider the Impact of Competition..... 22

III. CONCLUSION..... 22

REDACTED – FOR PUBLIC INSPECTION

SUMMARY

Accipiter Communications Inc. ("Accipiter"), respectfully requests reconsideration of the Commission's *Report and Order*, FCC 11-161, adopted on October 27, 2011 and released on November 18, 2011 and clarification of certain of the rules adopted by the *Report and Order*. The application of the Commission's new rules and policies to Accipiter, without alteration or waiver, would have a devastating impact on the company and would be arbitrary and capricious. Further, the Commission's failure to adequately justify and provide the underlying basis for its decision violates Accipiter's rights under the Administrative Procedure Act as well as Accipiter's right to due process of law.

Immediate implementation of the rules adopted in the *Report and Order* without modification will undermine Accipiter's ability to recover its costs. There are several fundamental problems with the *Report and Order* that, left uncorrected, will have a serious financial impact on Accipiter. The *Report and Order* is based upon models and methodologies which fail to address the real cost drivers for a carrier such as Accipiter. As Accipiter will demonstrate, these methodologies are in many instances flawed and subject to erroneous inputs. The Commission has only compounded this problem by refusing to provide sufficient information regarding its methodology for the company to accurately predict the long term financial effects of the new rules – meaning that Accipiter cannot even predict with certainty the scope of the financial impact that the *Report and Order* will cause.

Further, the *Report and Order* fails to account properly for the unique circumstances an expanding carrier confronts. The critical factor for to Accipiter is subscriber growth. Unlike the majority of ILECs Accipiter is still expanding its service and adding new subscribers. But for

the effects of the *Report and Order*, Accipiter expects robust growth to continue and, given reasonable time, Accipiter should be able to grow into its current cost structure, with enough access lines to be beyond the effect of the caps and limitations established in the *Report and Order*. If, on the other hand, Accipiter is not afforded this limited time to grow into its cost structure, the Commission's new regime would be confiscatory.

REDACTED – FOR PUBLIC INSPECTION

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
	)	

PETITION FOR RECONSIDERATION AND CLARIFICATION

Accipiter Communications Inc. ("Accipiter"), pursuant to Section 1.429(a) of the Commission's rules, 47 C.F.R. § 1.429(a), hereby requests reconsideration of the Commission's *Report and Order*, FCC 11-161, adopted on October 27, 2011 and released on November 18, 2011 (the "*Report and Order*"). Additionally, Accipiter requests clarification of certain of the rules adopted by the *Report and Order*. As shown below the application of the Commission's new rules and policies to Accipiter, without alteration or waiver, would have a serious impact on the company and would be arbitrary and capricious. Further, the Commission's failure to adequately justify and provide the underlying basis for its decision violates Accipiter's rights under the Administrative Procedure Act as well as Accipiter's right to due process of law.

REDACTED – FOR PUBLIC INSPECTION

I. INTRODUCTION

Accipiter is an Incumbent Local Exchange Carrier holding a Certificate of Convenience and Necessity ("CC&N") granted by the Arizona Corporation Commission ("ACC" or "Arizona Commission") to provide local telephone service to a study area of 1010 square miles northwest of Phoenix, Arizona. There are approximately 4,600 inhabited residences within the study area, and most of the area is very sparsely populated. As of November 2011 Accipiter serves 875 regulated loops (718 residential and 157 business). Essentially all of these lines may be reached with Accipiter's high speed Internet services. Of these, 356 lines are served by fiber-fed digital loop carrier systems and the remainder are served through fiber-to-the-home ("FTTH") facilities. Accipiter has deployed FTTH facilities exclusively since 2004. Accipiter has been designated an ETC by the Arizona Corporation Commission and in 2010 Accipiter received USF support of $3,340,878.

Accipiter was incorporated in 1995 and in that year was granted a Certificate of Convenience and Necessity ("CC&N") by the ACC to serve portions of Maricopa and Yavapai counties in Arizona.[1] The original Accipiter service territory encompassed approximately 650 square miles and 115 occupied residences. As the Arizona Commission found

> "many residents of the amended proposed service area support Accipiter's efforts to expand telephone service in the area. We heard from a number of residents of the enormous construction charges USW [US West, subsequently Qwest] has quoted to

[1] *In The Matter of the Application of Accipiter Communications Inc. for a Certificate of Convenience and Necessity Authorizing the Construction and Operation of a Public Utility Telephone System in Portions of Maricopa and Yavapai Counties, Arizona*, Decision No. 59346 (Docket U-2847A-95-0026). ("*Accipiter CCN Order*").

> extend service to remote locations in the area. One resident commented that USW would charge $20,000 to extend service 100 yards to his property. Another spoke of a $200,000 charge to receive service from USW."[2]

As is true in many rural service areas, the Accipiter's service proposal was made possible by a combination of USF support provided under the FCC's Universal Service programs and low interest loans for rural telecommunications development provided by the Department of Agriculture Rural Utilities Service. As a result of the support provided by these programs, Accipiter was able to deploy service charging rates of $16.78 per month for residential service and $35.78 for business service. As the Arizona Commission noted, prior to the Accipiter proposal, residents in the area were quoted prices of tens or even hundreds of thousands of dollars to pay for the extension of ordinary telephone service to their homes. The Commission's Universal Service program and the Agriculture Department's RUS lending program working together as intended by Congress placed these rural residents on par with residents of urban areas.

Although much of the Accipiter service territory was, and continues to be, very sparsely populated, for approximately the past seven years the Southeast portion of the service territory has been the focus of a number of significant development efforts. These development efforts peaked prior to the 2008 real estate crash and since that time modest development has resumed.

---

[2] At the time the Certificate was granted, USW "provided telephone service to approximately 22 customers ("the existing subscribers") over approximately 30 access lines". *Accipiter CCN Order* at 3.

REDACTED – FOR PUBLIC INSPECTION

In 2002, Accipiter filed an application to expand its service territory and take over a portion of the service territory of Qwest Communications in which Qwest had constructed no telecommunications facilities and had no customers. The extension area encompassed a portion of a master plan development known as Lakeland Village/White Peak Ranch and was subsequently referred to as the "Vistancia" development. The following year, Accipiter filed an additional extension application to serve an area partially within the incorporated limits of Buckeye, Arizona and Surprise, Arizona as well as additional unincorporated portions of Maricopa County.

The Buckeye extension application was granted by the Arizona Commission on January 14, 2005.[3] In granting the extension, the Commission noted that:

> As a rural carrier, Accipiter's ability to serve high-cost areas that would otherwise remain unserved for many years promotes the public interest by enabling rural customers the opportunity to receive voice and data service, including calling to the Phoenix Metro calling area. The benefit of extending telecommunications services to rural areas is more than a hypothetical possibility. At the hearing, an existing Accipiter customer in the Lake Pleasant exchange, Mr. Joe Hull, offered public comment in support of the company's application. Mr. Hull stated that he resides in the Castle/Hot Springs area north of Lake Pleasant, along with approximately 40 other families. Despite the lack of any paved roads in the area, Mr. Hull indicated that Accipiter provides Castle/Hot Springs residents with local calling to the Phoenix Metro area as well as high speed internet service. Mr. Hull claims

[3] *In the Matter of the Application of Accipiter Communications, Inc., for an Extension of its Existing Certificate of Convenience and Necessity*, Docket No. T-02847A-03-0655, Decision No. 67675. ("*Buckeye Extension Order*").

> that Accipiter has consistently delivered on its promises to area residents in providing telecommunications services.[4]

The Commission also took explicit notice of the importance of the FCC's Universal Service policies as well as RUS funding in making such rural service possible.

> "Staff witness Boyles also testified that granting Accipiter ILEC status for the proposed extension area provides a benefit to potential customers due to Accipiter's status as a rural carrier. Rural carriers depend on Federal Universal Service Funds ("FUSF") to compensate for the difference in costs incurred to serve high-cost rural customers and revenues received from such customers for service (citation omitted). As a rural carrier receiving funding from RUS, Accipiter would therefore not be permitted to charge customers for construction costs incurred by the company to extend service." *Buckeye Extension Order* at 8.

As noted previously, the FCC's Universal Service programs and the RUS telecommunications lending program working in concert as intended by Congress place rural customers in essentially the same posture as urban customers who do not have to pay special and extraordinary charges to have a telephone company extend its network to serve them.

Accipiter's Vistancia extension proposal became the subject of controversy, the effects of which linger today. Accipiter was initially approached by the developers of the Vistancia area with a request that it provide telephone service throughout the development, a portion of which was within Accipiter's existing study area and a portion of which required a service area extension approval from the Arizona Corporation Commission. Later, the same developer negotiated an exclusive service arrangement with Cox Communications which included an extraordinary easement feature that made it almost impossible for any other service provider to

---

[4] *Id.* at 9-10.

install landline networks in the area. The Cox/Developer arrangement became the focus of an investigation by the United States Department of Justice Antitrust Division and was subsequently withdrawn. Nevertheless, the existence of the arrangement during the critical time when networks were being deployed in the Vistancia development precluded Accipiter from competing in the effort to gain customers in an initial sign-up. The Arizona Commission granted the Vistancia extension on February 15, 2005.[5] In granting the extension, the Commission took note of the Cox/Developer arrangement:

> "Although we believe Accipiter's CC&N extension request is in the public interest and should be approved, concerns have been expressed by counsel for Accipiter and staff regarding the legality of the arrangements implemented by the developer of Vistancia. Even a cursory review of the exclusive marketing and restrictive easement arrangement raises concerns about the chilling effect that such arrangement may have on the ability of telecommunications providers to fairly compete and on customers' ability to have a choice of providers and services. We believe such arrangements may be antithetical to the purpose of the Federal Telecommunications Act as well as our stated policies and rules encouraging competition and choice in the telecommunications industry. Therefore, we believe it is prudent to direct the staff to initiate, within 30 days, an investigation of the issues raised in this proceeding through a generic docket. This generic docket should include an investigation of the legal issues associated with exclusive marketing and/or restrictive easement arrangements."

On June 20, 2006, Accipiter filed what it believed would be a routine request with the FCC for a study area waiver to include the Vistancia extension within its study area. More than four years later, on September 1, 2010, the Commission denied Accipiter's study area request

---

[5] *In the Matter of the Application of Accipiter Communications Inc. to Extend its Certificate of Convenience and Necessity in Maricopa County*, Docket No. T-02847A-02-0641, Decision 67574 (February 15, 2005). ("*Vistancia Extension Order*").

even though Accipiter had disclaimed any additional USF support that might flow from the inclusion of the Vistancia extension within its larger study area. The denial of the study area waiver is of direct relevance here because it precludes Accipiter from combining the low density areas of its larger service territory with a higher density area in the Vistancia development, thereby lowering its overall average costs, reducing its need for subsidy and enhancing its ability to repay its RUS loans. Denial of the waiver needlessly exacerbates what is already a difficult cost and service problem without any countervailing public benefit. It also works against the Commission's objective to reduce high cost subsidies.

The combination of the needless denial of Accipiter's study area waiver and the caps and limitations established in the *Report and Order* threaten Accipiter's economic survival. If Accipiter is provided, either through reconsideration or waiver, a reasonable window of time, perhaps three to four years, to continue its current pace of growth, it will have sufficient access lines to place it beyond the caps and limitations established in the *Report and Order*, and will grow into its current cost structure. If, on the other hand, Accipiter is not afforded this limited time to grow into its cost structure, it cannot survive under the Commission's new regime.

II. THE COMMISSION SHOULD RECONSIDER THE *REPORT AND ORDER*.

A. Immediate Imposition of the Report and Order Will Not Allow Accipiter to Survive.

The Federal Constitution generally protects utilities from being limited to a charge for their service that is so low as to be confiscatory in that it effectively precludes them from recovering their costs. *See, e.g., FPC v. Hope Natural Gas*, 320 U.S. 591 (1944); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989). A regulatory order becomes confiscatory where

the result is "so unjust as to destroy the value of its property for all the purposes for which it was acquired." *Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 597 (1896)*

Where rates imposed threaten a utility's "financial integrity," those rates may be deemed "so unjust as to be confiscatory" and to represent a taking in violation of constitutional protections. *See Duquesne Light Co.*. at 307, 312 (1989). "If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the *Fifth* and *Fourteenth Amendments*. *Id.* at 308. The changes embodied in the *Report and Order* jeopardize Accipiter's financial integrity and represent an unconstitutional taking.

As it currently stands, the changes imposed by the *Report and Order* are so abrupt that they will provide Accipiter with no opportunity to recover its costs. If the *Report and Order* is enacted in full according to the Commission's proposed timeframes without alteration or waiver, Accipiter will suffer such a severe loss in revenues that the company will become insolvent. Although there appear to be numerous flaws, errors and confusing aspects of the Commission's model, Accipiter's initial forecasts, based on Accipiter's best understanding and assumptions concerning the Commission's model, suggest that Accipiter will face losses of approximately ***REDACTED REDACTED*** in 2012, and cumulative losses of approximately ***REDACTED REDACTED*** through ***REDACTED REDACTED***, until finally recovering to positive net income in ***REDACTED REDACTED***. Accipiter's forecasts are attached hereto as Exhibit 1. Accipiter simply cannot afford to absorb such losses and, further, cannot adjust its rates sufficiently in order to

account for these changes. In parts of its service territory, Accipiter faces competition – meaning that customers would simply switch away from Accipiter's service in the event Accipiter attempted to raise rates sufficiently to make up for the losses. Even in those areas where Accipiter does not face competition, the scope of the rate increases necessary for Accipiter to survive would leave many customers unable or unwilling to continue to purchase service from Accipiter and thus without service.

There are three fundamental causes for the devastating financial impact the *Report and Order* will have on Accipiter. First, the *Report and Order* is based upon models and methodologies which fail to address the real cost drivers for a carrier such as Accipiter. These methodologies are flawed and subject to erroneous inputs.

Second, while Accipiter has attempted to model the effect of the *Report and Order*, the Commission has refused to provide sufficient information regarding its methodology for the company to accurately predict the long term financial effects of the new rules.

Third, the critical factor with respect to Accipiter's ability to survive is subscriber growth. Unlike the majority of ILECs Accipiter is still expanding its service and adding new subscribers. In 2011 alone Accipiter's regulated loops have increased from 521 to 875 , or approximately 68 percent. But for the effects of the *Report and Order*, Accipiter expects robust growth to continue and it forecasts that it will add another 185 regulated loops in 2012. As noted above, based on the information the Commission has provided, it is not possible to reliably model the financial impacts the *Report and Order* will have on Accipiter, but, based on Accipiter's best approximations, it appears that the company's current growth trends would

allow the company to outgrow the cost limitations the *Report and Order* imposes. Given enough time, perhaps three to four years, to continue its current pace of growth, Accipiter should be able to grow into its current cost structure, with enough access lines to be beyond the caps and limitations established in the *Report and Order*. Alternatively, if the *Report and Order* is enacted in full according to the proposed timeframes, Accipiter will be unable to cut enough costs to survive. These effects are shown in Exhibit 1, attached hereto.

B. The Commission Should Reconsider the Regression Caps Adopted in the Report and Order.

The regression caps imposed by the *Report and Order* suffer from a number of legal and factual flaws that call for reconsideration. The regression caps reflect arbitrary and capricious decision-making. An agency's determinations will be considered "arbitrary and capricious" if the agency "relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Manufrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Factors considered in evaluating an agency's conclusions include whether "the agency examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* "The agency's explanation cannot 'run[] counter to the evidence,' and it must 'enable [a court] to conclude that the [agency's action] was the product of reasoned decisionmaking." *Kristin Brooks Hope Ctr. v. FCC*, 626 F.3d 586,588 (D.C. Cir. 2010) As

discussed in greater detail below, in this case, a number of the Commission's conclusions in the *Report and Order* reflect arbitrary and capricious decision-making.

1. The Regression Caps Are Based on the Pursuit of a Flawed Objective.

The objective of the *Report and Order* appears to be the development of a method to cap the cost recovery of all high-cost ILECs , regardless of circumstance. The Commission's approach fails to achieve a more reasonable and appropriate objective of identifying which high-cost ILECs may legitimately be outliers due to particular considerations, including population density, terrain, and operating environment, and which entities are outliers due to waste, fraud or abuse, or other inefficiencies. The Commission's failure to distinguish between these circumstances is irrational and reflects a failure to consider facts in evidence before the agency concerning the specific challenges Accipiter, and other carriers, face in delivering service.

2. The Report and Order Lacks Clarity Regarding Implementation.

It is unclear from the *Report and Order* how the regression caps the Commission has imposed will actually be applied. In particular, when the caps are implemented on July 1, 2012, it is not clear whether the caps will apply to Accipiter's 2010 cost study, and thus affect revenues received in July 2012 or apply to Accipiter's 2012 costs which, in turn, will affect USF revenues received in 2014. In creating its financial forecast of the potential impact of the *Report and Order*, Accipiter has used a worst-case assumption – namely that the Commission intends for the caps to apply to Accipiter's 2010 cost study, which will have a devastating effect on 2012 revenues. This lack of clarity serves to underscore the problems the *Report and Order* has created – Accipiter cannot even be certain of the impact of the *Report and Order*.

REDACTED – FOR PUBLIC INSPECTION

3. The Report and Order Relies on Flawed Data.

The census data which the Commission uses as inputs to its model in the *Report and Order* are subject to a substantial degree of error. In any model, where there are errors or inaccuracies in the inputs, those data flaws will also create errors or inaccuracies in the outputs of the model. The *Report and Order* does not address this significant problem.

Part of the input error is created by the Commission's use of the TeleAtlas tool to define study areas. This tool is notably flawed for Accipiter, as is evidenced by a map showing the errant study area relied on by the Commission compared with Accipiter's actual study area. The difference in these respective study areas in shown on Exhibit 2, attached hereto. While the Commission's model assumes an Accipiter study area encompassing 30.5 square miles, Accipiter's actual study area encompasses 1,010 square miles – an extraordinary error by any measure and one that is certain to produce a flawed result. Even when the correct study area boundary is used to collect the census data used for the FCC model inputs, the process is still produces substantial input errors. Census block boundaries and study area boundaries are not always coterminous. Applying the FCC's methodology, where a study area boundary contains the centriod of a particular census block, that census block data is counted for the carrier as if the entire block was served. For carriers like Accipiter which serve low density areas adjacent to high-density areas, this introduces significant errors in inputs. When Accipiter attempted to use the company's actual study area boundaries to query census blocks with centroids located within the boundaries, Accipiter's 1,010 square mile study area produced census blocks with a total area of 1,610 square miles. Thus, the model employed by the Commission appears to be incapable of predicting the correct study area for Accipiter.

Further, Accipiter requested that the Commission staff provide a list of census blocks that were used to generate input data based on the TeleAtlas boundary used for Accipiter so that Accipiter could attempt to verify how the model was working and why its results were so inaccurate – but the staff refused to provide such a list. Ultimately, Accipiter sought to replicate the FCC's data through a time-intensive and costly trial and error process but Accipiter has no way of confirming that the result reached is the same as that relied upon by the Commission. Reliance on flawed data is plainly arbitrary and capricious, and the Commission should reconsider its conclusions based on this factor alone. Moreover the Commission's failure to provide underlying data that would allow Accipiter to understand and replicate the Commission's conclusions also raises serious Administrative Procedure Act and fundamental due process issues.

Under the Administrative Procedure Act ("APA"), "[i]t would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008). Pursuant to the APA's notice and comment requirements, "[a]mong the information that must be revealed for public evaluation are the 'technical studies and data' upon which the agency relies [in promulgating rules]." *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006) (citation omitted). This is so because "it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules" to allow interested parties to provide useful input or criticism. *Conn.*

Light & Power Co. v. Nuclear Regulatory Comm'n, 218 U.S. App. D.C. 134, 673 F.2d 525, 530 (D.C. Cir. 1982). Disclosure of such information allows commenting parties to point out where information relied upon by the agency is erroneous or where the agency may be drawing improper conclusions from that information. *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC,* 237 U.S. App. D.C. 390, 737 F.2d 1095, 1121 (D.C. Cir. 1984). "It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency." *Portland Cement Ass'n v. Ruckelshaus,* 486 F.2d 375, 393 (D.C. Cir. 1973).

Further, where a party requests and is denied access to information upon which an agency's decision is based, such a denial may constitute a due process violation. *See, e.g., Brock v. Roadway Express*, 481 U.S. 252, 265 (1987). In this case, without access to the information upon which the Commission's decisions were based, Accipiter and other interested parties have little or no ability to understand and, if necessary, challenge the Commission's decision-making process. Withholding this information effectively denies procedural due process rights, because parties cannot test and verify the Commission's conclusions which, in turn, effectively preclude Accipiter from recovering its costs.

4. The Report and Order Relies on Flawed Independent Variables.

The independent variables that are ultimately contained in the Commission's regression formula do not appear to faithfully capture the factors that may influence a carrier's costs, or help to explain why a carrier has costs that are notably higher than the national average.

First, the Commission's model uses the number of loops as an independent variable. This approach fails to account for the trajectory of growth of an expanding carrier like Accipiter.

REDACTED – FOR PUBLIC INSPECTION

Carriers must frequently incur costs before customers are added. As a result, growing carriers generally have significantly higher initial costs while they are expanding. By way of example, Accipiter's regulated loops increased by 46 percent from the 2009 cost study to the 2010 cost study, which reflects the second highest percentage gain observed among the companies included in the data the Commission provided. On average, the 720 carriers contained in the Commission's dataset experienced an 8 percent *decrease* in the number of regulated loops. Because of these differences, data applicable to these carriers is unlikely to be reflective of Accipiter's cost structure.

Second, the Commission's use of housing units as a variable fails to account for housing units in a carrier's service area that are unserved. This may be relatively rare, but Accipiter confronts this scenario both because there are still homes in very rural locations in its service territory that are still unserved by Accipiter's facilities and because Accipiter is unable to serve homes in two developments in its service territory because of an exclusive service arrangement between the developer and Cox Communications similar to the one discussed above. Errors in census block data as described above can also overstate or understate the housing unit factor.

Third, the Commission's use of the number of census blocks as a proxy for population density is arbitrary and capricious. The census blocks may mathematically fit the Commission's regression model, but using the number of census blocks as a measurement of scale is arbitrary and unreasonable. While the Census Bureau employs certain some criteria for constituting the boundary of a census block, the actual definition of the boundary appears to be more of an art than a science, and the variation in census block consistency is likely most significant in rural

areas. Further, it is not at all clear why it is appropriate and reasonable to compare costs among carriers merely because they have the same number of census blocks in their study area. A particular carrier's costs may significantly exceed the norm because the carrier's service area is among the most sparsely populated in the nation – as is the case with Accipiter. It is plainly arbitrary and unreasonable to cap that carrier's costs support for existing investment based on the number of census blocks in the carrier's service area especially since errors in census block data can also overstate or understate the census block factor.

Fourth, the Commission's consideration of the percentage of water in the service area to help account for terrain factors is seriously flawed. The Commission failed to consider much more significant terrain features that will impact costs, such as soil type, geographical considerations including mountains or canyons, and costs of rights-of-way, among other things. These features are largely independent of the percentage of water in a service area, but have a significantly greater effect on the costs of service. The failure to account for these factors is arbitrary and capricious Additionally, again, errors in census block data can also overstate or understate the percent water factor.

Fifth, as noted, the Commission's model appears to have used the wrong data with respect to the land area served by Accipiter. The model attributes to Accipiter a service area of 30.5 square miles. In fact, Accipiter's service area is approximately 1,010 square miles. But, when Accipiter adds up the land area in the census blocks assigned to Accipter's service area using the Commission's methodology, the total is approximately 1610 square miles. Errors of

this magnitude in the data used by the FCC to build its model demonstrate that reliance on the model would be arbitrary and capricious.

Sixth, the Commission's inputs for housing units, land area and number of census blocks are further delineated according to the Census Bureau's categorization of each census block as "urbanized area," "urbanized cluster," or "non-urban." The Census Bureau has not yet published the categorizations for Accipiter's census blocks, which makes it even more challenging for Accipiter to have any hope of forecasting the regression results. However, examination of the coefficients the Commission's model uses with respect to the rural or urban categorization yields counterintuitive results. For example, if a census block was recategorized from a rural assignment to an urbanized cluster assignment, the model's capped output for cable and wire facilities would increase based on the housing unit factor, decrease based on the land area factor, and decrease based on the census block factor. If the census block was recategorized from an urbanized cluster to an urbanized area the model's cap output would decrease for housing units, decrease for land area, and increase for census blocks. This result appears to be nonsensical and thus is arbitrary and capricious.

5. *The Commission Should Clarify the Report and Order's Implementation of its Regression Caps.*

As noted above, it is unclear from the *Report and Order* how the regression caps the Commission has imposed will actually be applied. It is thus not completely clear how severe the impact on Accipiter will actually be. Accipiter thus requests that the Commission clarify how the caps are to apply so that Accipiter and other carriers will understand how the caps are to be applied in practice and be better able to estimate the impact of the *Report and Order*.

In particular, Accipiter requests that the Commission clarify whether, when the caps are implemented on July 1, 2012, they will apply to Accipiter's 2010 cost study, and thus affect revenues received in July 2012. or instead will apply to 2012 costs which, in turn, will affect USF revenues received in 2014.

C. The Commission Should Reconsider the $250 Cap on Monthly Per-Line Support.

1. The Order Fails to Recognize that Growing Companies Will Require Decreasing Support.

The $250 monthly per-line cap fails to take into account the economic realities confronted by an expanding carrier like Accipiter. Such a carrier requires significant new investments before customers can even be added. Of course, a growing carrier will need less support per line over time as customers can be added in lower-cost increments. Thus, while the immediate imposition of the $250 monthly per-line cap would be financially crippling for Accipiter, Accipiter should ultimately grow into this cap as it continues to add customers. Delaying the implementation of the cap by just a few years would substantially reduce or eliminate the effect of the cap on Accipiter. In fact, Accipiter presently estimates that it will be under the cap by the second quarter of the year 2014.

2. Application of the Cap to 2010 Expenses and Loops is Arbitrary and Capricious.

The Commission's application of its newly-adopted rules to 2010 expenses and loops is arbitrary and capricious decision-making. Accipiter reasonably and rationally made decisions about 2010 investments and expenses based on the rules that were in place in 2010. In applying its rules to 2010 expenses and loops, the Commission "entirely failed to consider an important

aspect of the problem," failed to provide a reasonable explanation connecting the "facts found and the choice made," *Motor Vehicle Manufrs. Ass'n*, 463 U.S. at 43.

Application of the rules to 2010 expenses and loops further runs afoul of the statutory requirement that there be "specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." 47 U.S.C. § 254(b)(5). Application of newly-adopted rules to previously-incurred expenses is in no way consistent with the Congressional directive that support should be "predictable," and would punish carriers for reasonable investment decisions that cannot be reversed to account for the Commission's new rules.

D. The Commission Should Reconsider the Corporate Operations Expense Limit Applied to ICLS.

1. The Report and Order Fails to Consider the Dynamic of a Growing Company.

The Commission's failure to consider the special circumstances of an expanding carrier is again reflected in the Commission's inflexible corporate operations expense limit. Corporate operations expenses must be incurred before a carrier can add its first line. However, per-line corporate operations costs are quickly averaged down as new subscribers are added. Accipiter represents a perfect example of this effect. The company will fall below the corporate operations expense cap when it reaches ***REDACTED REDACTED*** access lines. If it continues to expand at its current pace, Accipiter projects to reach this threshold in ***REDACTED REDACTED***. Immediate imposition of the limit to ICLS would, however, have devastating financial implications for a carrier that is actively expanding its service to rural customers.

2. Application of the Corporate Operations Expense Limit to 2010 Expenses and Loops is Arbitrary and Capricious.

As discussed above, the Commission's application of its newly-adopted rules to 2010 expenses and loops is arbitrary and capricious decision-making. Accipiter reasonably and rationally made decisions about 2010 investments and expenses based on the rules that were in place in 2010. Application of the rules to 2010 expenses and loops also, again, is contrary to the statutory requirement that there be "specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." 47 U.S.C. § 254(b)(5).

3. The Commission's One Size Fits All Rule is Inappropriate and Inflexible.

Corporation operations expenses can vary significantly from one region to another for at least two reasons. First, there is significant variability in wages and other personnel costs by region. Second, corporate and regulatory requirements are different in every state, and compliance may legitimately require substantially variable legal and regulatory budgets, depending on a particular state's requirements. The Commission's use of a single, rigid, nationwide formula fails to account for these differences, reflecting a failure "to consider an important aspect of the problem," that is arbitrary and capricious. *Motor Vehicle Manufrs. Ass'n.*, 463 U.S. at 43.

E. The Commission Should Reconsider the Reduction in Support for "Artificially Low" Rates.

1. Carriers May Face Significant Challenges in Raising Rates.

Carriers such as Accipiter may have significant difficulty in raising rates because such an adjustment may require a state rate hearing and there is no assurance that a proposed rate increase will be approved. The Commission cannot simply order away this requirement by fiat,

and state regulatory authorities may not be willing to approve rate increases for their customers based on the Commission's declaration that rates are "artificially low." The Commission's decision places Accipiter in the position of having to explain to a state regulatory body that the rates that body has approved are, according to the Commission, "artificially low." There is no guarantee that this approach will carry the day.

2. *Accipiter's "Artificially Low" Linited Usage Rates Serve Important Needs and Allow Accipiter to Provide Broadband at a Price Comparable to That Available in Urban Areas."*

Accipiter's low usage line rate is considered "artificially low". This designation ignores that the low usage rate serves important purposes and also makes it possible for Accipiter to provide broadband service at a price comparable to that available in urban areas – a result that is one of the FCC's broadband policy objectives. The low usage rate provides a way for lower income customers to acquire service very economically. It also allows customers who reside in Accipiter's service territory for only part of the year to acquire service for a cost that is reasonable on an annual basis without the need to establish and discontinue service repeatedly over the course of the year – a practice that would be more expensive for Accipiter than leaving the service in place throughout the year. The low usage service also makes it possible for Accipiter to establish telephone/broadband service bundles for a price that is comparable to that available in urban areas. Absent this bundling the use of a loop to provide broadband-only service would require the imputation of a very high NECA charge that would make the service unaffordable. This effect is an artifact of the interplay between the FCC's accounting rules, NECA practices and the new universal service scheme which have not been reconciled to account for the FCC's desire to refocus the system on support for broadband services. These

policies and practices must be reconciled before the FCC renders judgment that a rate which is effectively a product of its own uncoordinated policies is "too low".

3. The Report and Order Fails to Consider the Impact of Competition.

The FCC has crafted a set of rules where a competitor can serve the more profitable higher density portion of an ILEC's market, win customers, and force the ILEC to lose its support in the competitive area which would drive the cost-per-line in the ILECs solely-served rural area above FCC-imposed caps. The ILEC would struggle to maintain service to rural customers while the CLEC avoids altogether the obligation to serve these low density areas. Ultimately, customers with no service alternatives lose service as the ILEC cannot afford to serve only low density areas relying on USF support determined on the basis of the costs to serve higher density areas.

III. CONCLUSION

The application of the Commission's new rules and policies to Accipiter, without alteration or waiver, would have a serious financial impact on the company that implicates Accipiter's constitutional protections against regulatory takings. There are demonstrable errors in the data and methodologies upon which *Report and Order* is based, and the *Report and Order* represents arbitrary and capricious decision-making. This problem is only exacerbated by the Commission's refusal to provide access to certain data and information underlying its decision, in violation of Accipiter's rights under the Administrative Procedure Act as well as Accipiter's right to due process of law. But for the *Report and Order*, Accipiter expects its robust subscriber growth to continue and, given reasonable time, Accipiter will grow beyond the caps and limitations established in the *Report and Order*.

REDACTED – FOR PUBLIC INSPECTION

For the foregoing reasons, Accipiter respectfully requests that the Commission reconsider the *Report and Order* and provide reasonable clarification regarding the implementation of the *Report and Order*.

Respectfully Submitted

/s/ Patrick Sherrill
Patrick Sherrill
President and Chief Executive Officer
Accipiter Communications Inc.

December 29, 2011

REDACTED – FOR PUBLIC INSPECTION

EXHIBIT 1

REDACTED

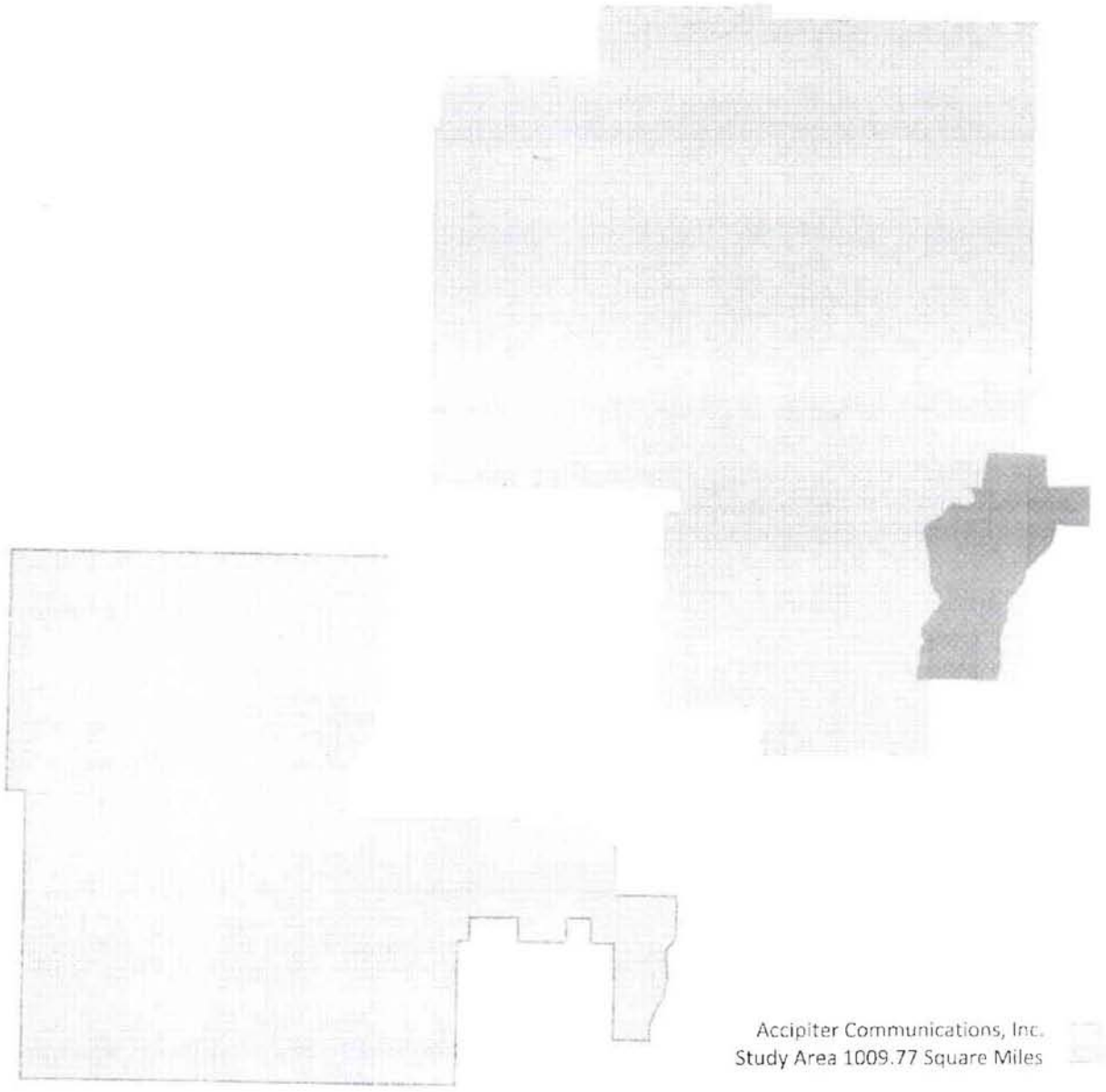
REDACTED

REDACTED

REDACTED – FOR PUBLIC INSPECTION

EXHIBIT 2

Accipiter Communications, Inc.
Study Area



Accipiter Communications, Inc.
Study Area 1009.77 Square Miles

Tele Atlas Telecommunications Suite 2010.06
Study Area 36.32 Square Miles