

**Before the
Federal Communications Commission
Washington, DC 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

COMMENTS OF THE



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SUMMARY

ACA has steadfastly supported the use of a competitive process to award high-cost support for the deployment of wireline broadband service. In these comments, ACA provides proposals designed to maximize the value of the competitive process. ACA is confident that, with the modifications discussed herein, the Commission can implement a successful competitive bidding process to accelerate universal broadband deployment.

A competitive process will be most successful if it is focused on clear goals; transparent; and based upon objective, relatively straightforward and well-defined, and measurable criteria. To that end, ACA submits that an effective auction can be achieved through the following measures:

- Support should be provided to a single recipient that bids to receive the lowest amount of support to provide broadband service meeting the public interest obligations in the eligible service area;
- Areas that are eligible to receive support should be based on census blocks;
- Census blocks eligible for support are those with costs for broadband service as determined by the forward-looking broadband cost model that are sufficiently above the national average but are not “extremely” high-cost and where an unsupported provider does not offer 4 Mbps/1 Mbps broadband service to at least a majority of locations;
- The public must be given the opportunity prior to the auction to comment on and challenge the determination of whether a census block is served by an unsupported competitor;
- An auction’s reserve price for an area should be based on the forward-looking cost model in combination with evidence from prior auctions;
- Auction participants should submit bids to provide service to all eligible high-cost census blocks in a census tract, and winners should be chosen on a census tract basis;

- Support should be provided for a five year term with no right to renewal, and the Commission should re-evaluate the need for support and method of support after that time;
- The Commission should hold sequential regional auctions, and bidding in each region should occur over multiple rounds until a clear, lowest bid is provided;
- Support should be awarded only if an auction is fully competitive, which can be determined by examining the degree by which the winning bid varies from winning bids in similarly situated areas; and
- Recipients of support should provide broadband service meeting the public interest commitments designated by the Commission to at least 95 percent of locations in the service area (census tract) within two years.

ACA agrees with the Commission's proposal to use the initial short-form auction application for certification of the bidder's financial and technical capability to provide the broadband service and documentation from a financial institution stating that the applicant has sufficient financial wherewithal to pay any bidding penalties imposed, and the long-form application to provide a detailed project description and certification as to the availability of funds to cover the unsupported costs of the project. Further, the auction winner should provide financial security in the amount of support received to protect the CAF against abuse as a result of performance defaults.

To attract as many competitive bidders as possible, it is essential that the Commission revise the current ETC designation process, which is onerous and acts as a barrier to participation by longstanding, leading providers of broadband service. If a winning bidder certifies it will comply with the Commission's public interest requirements, there is no policy rationale for not designating the bidder as an ETC, nor is there any legal impediment. The Commission has sufficient authority to ensure any state action is consistent with the Commission's policies for establishing a uniform national competitive bidding process to

efficiently disburse federal funds. In sum, the ETC designation process should involve a single application to the Commission after winning the auction with transparent requirements based on the performance obligations imposed by the Commission.

Finally, ACA generally agrees with the performance requirements proposed by the Commission with two significant exceptions. First, evidence continues to mount indicating that the proposed speeds of 4 Mbps downstream and 1 Mbps upstream are not adequate to meet the current and future demands of consumers or to fulfill the requirements of the Communications Act for access in high-cost areas. The Commission should, prior to holding an auction, adopt new, forward-looking speeds for the final three years of the five year support period. Second, based on the use of census tracts as the service area for support recipients and the experiences of ACA members, the build out time line should be accelerated. Recipients should provide service to 95 percent of locations within two years. Finally, ACA agrees with the Commission that rates should be reasonably comparable to those in urban areas, as determined by the Commission, and these rates must be established prior to hold an auction.

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY	1
II. THE COMPETITIVE BIDDING AUCTION IN PRICE CAP TERRITORIES MUST ENSURE THAT BROADBAND IS BROUGHT TO HIGH-COST UNSERVED AREAS USING THE FUNDING MOST EFFICIENTLY	5
A. The Auction Process Should be Focused On Providing Support to a Single Provider in High-Cost Areas Not Served By an Unsupported Competitor	7
B. The Competitive Bidding Process Should be Transparent	14
C. The Reverse Auction Process Should be Competitively Neutral	17
1. Auction Winners Should Obtain ETC Status Before Receiving Awarded Funds	18
2. The Commission Has the Authority to Design the ETC Designation Process for Broadband Service and Should Assert Exclusive Jurisdiction Over the ETC Process for the Ancillary Voice Telephony Services	21
III. THE MINIMUM PERFORMANCE REQUIREMENTS MUST ENSURE THAT UNSERVED AREAS PROMPTLY RECEIVE AFFORDABLE BROADBAND SERVICE AT SPEEDS THAT ARE EFFECTIVE TO MEET FORWARD- LOOKING CUSTOMER DEMANDS	28
IV. CONCLUSION.....	34

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**COMMENTS OF
THE AMERICAN CABLE ASSOCIATION**

The American Cable Association (“ACA”), by its attorneys, respectfully submits these Comments in response to the Federal Communications Commission’s (the “Commission’s”) Further Notice of Proposed Rulemaking (“*FNPRM*”) in the above captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

ACA has steadfastly supported the use of a competitive process to award high-cost support for the deployment of wireline broadband service since filing comments on the

¹ *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) (“*CAF Order* or *FNPRM*”).

National Broadband Plan.² As the Commission has found in awarding spectrum through auctions over the past 15 years, a competitive process can be instituted quickly and allocate a limited resource more efficiently than any administrative process. In these comments, ACA provides proposals designed to maximize the value of the competitive process used when a price cap incumbent does not elect to serve all its study areas in a state. ACA is confident that, with the modifications discussed herein, the Commission can implement a successful competitive bidding process to accelerate universal broadband deployment.

A competitive process will be most successful if it is focused on clear goals; transparent; and based upon objective, relatively straightforward and well-defined, and measurable criteria. As noted by a group of 71 Concerned Economists, “[c]areful auction design is crucial to ensuring an efficient outcome...First, the criteria on which the bids will be scored or ranked must be clear...Second, the ability to ‘game’ the procurement process increases with the ambiguity of the rules and the number of criteria included in a bid.”³ In addition, the Commission’s and the public’s interest in maximizing the number of participants in the competitive process depends on constructing a rational, competitively neutral process for qualifying recipients of support. Consequently, it is essential that the Commission use its

² See *Ex Parte* Presentation of the American Cable Association, GN Docket No. 09-51 and WC Docket Nos. 05-337 and 10-90 (Sept. 23, 2010), in which ACA stated, “[Awarding support through a competitive process] has important policy benefits. First, the quality and performance of broadband service should be greater as additional and more capable broadband providers vie to receive support. Second, the fund will be more efficient when more entities participate. Third, it will limit any government role in providing competitive advantages among broadband providers.”

ACA notes and the Commission has acknowledged that Alaska may require a different path to reform that reflects the unique challenges and costs of providing broadband services to that state. Because a nationwide approach may not work for Alaska, ACA urges the Commission to consider different mechanisms that nonetheless remains consistent with the principles of competitive neutrality and stemming fund growth.

³ See Comments of 71 Concerned Economists, *Using Procurement Auctions to Allocate Broadband Stimulus Grants*, submitted to the National Telecommunications and Information Administration and Rural Utilities Service (Apr. 13, 2009).

authority to amend the current process of sanctioning providers as eligible telecommunications carriers (“ETCs”) as described below.

ACA submits, as discussed herein, that an effective auction can be achieved through the following measures:

- Support should be provided to a single recipient that bids to receive the lowest amount of support to provide broadband service meeting the public interest obligations in the eligible service area;
- Areas that are eligible to receive support should be based on census blocks;
- Census blocks eligible for support are those with costs for broadband service as determined by the forward-looking broadband cost model that are sufficiently above the national average but are not “extremely” high-cost and where an unsupported provider does not offer 4 Mbps/1 Mbps broadband service to at least a majority of locations;
- The public must be given the opportunity prior to the auction to comment on and challenge the determination of whether a census block is served by an unsupported competitor;
- An auction’s reserve price for an area should be based on the forward-looking cost model in combination with evidence from prior auctions;
- Auction participants should submit bids to provide service to all eligible high-cost census blocks in a census tract, and winners should be chosen on a census tract basis;
- Support should be provided for a five year term with no right to renewal, and the Commission should re-evaluate the need for support and method of support after that time;
- The Commission should hold sequential regional auctions, and bidding in each region should occur over multiple rounds until a clear, lowest bid is provided;
- Support should be awarded only if an auction is fully competitive, which can be determined by examining the degree by which the winning bid varies from winning bids in similarly situated areas; and

- Recipients of support should provide broadband service meeting the public interest commitments designated by the Commission to at least 95 percent of locations in the service area (census tract) within two years.

ACA agrees with the Commission's proposal to use a two-stage application to vet providers that wish to participate in the auction. The initial short-form auction application should include a certification of the bidder's financial and technical capability to provide the broadband service, as well as documentation from a financial institution stating that they applicant has sufficient financial wherewithal to pay any bidding penalty imposed. The long-form application should include, among other things, a detailed project description and certification as to the availability of funds to cover the unsupported costs of the project. Further, the auction winner should provide financial security in the amount of support received to protect the CAF against abuse as a result of performance defaults.

To attract as many competitive bidders as possible, it is essential that the Commission revise the current ETC designation process, which, because it is so onerous, acts as a barrier to participation by longstanding, leading providers of broadband service. If a winning bidder certifies it will comply with the Commission's public interest requirements, there is no policy rationale for not designating the bidder as an ETC, nor is there any legal impediment. The Commission has sufficient authority to ensure any state action is consistent with the Commission's policies for establishing a uniform national competitive bidding process to efficiently disburse federal funds. In sum, the ETC designation process should involve a single application to the Commission after winning the auction with transparent requirements based on the performance obligations imposed by the Commission.

Finally, ACA generally agrees with the performance requirements proposed by the Commission with two significant exceptions. First, evidence continues to mount indicating

that the proposed speeds of 4 Mbps downstream and 1 Mbps upstream are not adequate to meet the current and future demands of consumers or to fulfill the requirements of the Communications Act for access in high-cost areas.⁴ Second, based on the use of census tracts as the service area for support recipients, the build out time line should be accelerated. Recipients should provide service to 95 percent⁵ of locations within two years. Finally, ACA agrees with the Commission that rates should be reasonably comparable to those in urban areas, as determined by the Commission. The Commission should establish these rates, which would apply over the five year period, prior to holding the auctions.

II. THE COMPETITIVE BIDDING AUCTION IN PRICE CAP TERRITORIES MUST ENSURE THAT BROADBAND IS BROUGHT TO HIGH-COST UNSERVED AREAS USING THE FUNDING MOST EFFICIENTLY

The *FNPRM* begins with the correct goals for the competitive bidding process in territories served by price cap LECs – extend effective broadband service to as many locations as

⁴ The Commission adopted public interest requirements in the *CAF Order* that include a requirement to provide broadband service initially at speeds of 4 Mbps/1 Mbps and 6 Mbps/1.5 Mbps to an unspecified number of locations at the end of the five year period. As ACA submitted in prior filings, because providers are increasing broadband speeds by approximately two times every two years, these low speeds will not reflect the market when Phase II funding is awarded in 2013 and beyond. In these comments, ACA does not request that the Commission reverse its decision but does argue that service at speeds of 4 Mbps/1 Mbps should be delivered to 95 percent of locations at the end of its proposed two year deployment period. It also urges the Commission to conduct a brief proceeding later this year to establish speeds that are anticipated to reflect average performance by the most efficient provider in the market in 2015-2017. (By focusing its analysis on the most efficient provider, the Commission will limit the amount of support required while increasing performance.). The public interest requirements then should be amended to reflect this expected performance, which ACA anticipates should at least reflect its proposed speeds of 16 Mbps/4 Mbps.

⁵ Because of the great variance in the cost of serving locations in the least dense and most remote areas, it would be exceedingly difficult for a broadband provider to serve each and every location in a census tract.

possible for the lowest total cost.⁶ For the Commission’s competitive bidding process to serve the asserted goal of bringing effective broadband service efficiently to the greatest number of high-cost locations, the auction should be: focused on clear goals; transparent; and based upon objective, relatively straightforward and well-defined, and measurable criteria. If the auction is correctly designed, it will attract the greatest number of bidders, which provides the best chance that service providers will propose bids that are advantageous to consumers in high-cost areas that lack broadband service, as well as to the fund. The better the bids, the greater public good that can be realized from the limited funds.

The Commission has proposed a competitive bidding process for price cap territories that, with some improvements, can work to support broadband deployment to high-cost unserved areas of the country. A major flaw, however, is the Commission’s failure to take full ownership of the process by continuing to defer to the states with respect to ETC designations and requirements. From both a statutory and a policy perspective, CAF support for broadband deployment is very different from supporting the legacy voice service offerings of ETCs. The *CAF Order* represents a momentous and positive shift in the goals and functionality of universal service support in this country. It is time that the Commission designs an ETC designation process to coincide with that shift – an ETC process that can complement rather than hinder a reverse auction to efficiently provide effective and sorely needed affordable broadband service to unserved Americans living and working in high-cost areas.

⁶ According to the Commission, the goal is to “distribute support in a way that maximizes the extent of robust, scalable broadband service and minimizes total cost.” *FNPRM*, ¶ 1189. It further states that its objective is to “identify those providers that will make most effective use of the budgeted funds, thereby extending services to as many consumers, businesses, and community anchor institutions as possible.” *FNPRM*, ¶ 1190. Finally, the reverse auction should be targeted to eligible areas “where supported services can be offered at the lowest cost per unit.” *FNPRM*, ¶ 1190.

A. The Auction Process Should be Focused On Providing Support to a Single Provider in High-Cost Areas Not Served By an Unsupported Competitor

In the *CAF Order*, the Commission decided to develop a forward-looking cost model to determine on a census block or smaller basis high-cost areas that will be eligible for support in CAF Phase II.⁷ Census blocks where an unsubsidized competitor offers affordable broadband service that meets the performance requirements for CAF Phase I⁸ (e.g., 4 Mbps downstream and 1 Mbps upstream speeds) will not be considered eligible for support.⁹ The cost model will also identify extremely high-cost areas that will receive funding separately under the Remote Areas fund.¹⁰ The remaining eligible areas will receive CAF Phase II support.

Support to a Single Provider and Prioritization of Support. The Commission has proposed that it generally will award support to a single service provider for each eligible geographic area.¹¹ Therefore, no two carriers will receive support to serve the same area. Such an approach is consistent with the Commission's goal to maximize broadband service while minimizing the total cost.

The Commission also seeks comment on whether funding from the auction should target particular areas for priority treatment, such as areas currently without any broadband service¹² (as opposed to those areas with merely inadequate or ineffective connectivity). Since the Commission's overarching goal is to maximize broadband service and minimize the cost to the fund, no particular areas should be prioritized. Areas with broadband service below the

⁷ See *CAF Order*, ¶ 167.

⁸ See *id.*, ¶ 147.

⁹ See *id.*, ¶ 170.

¹⁰ See *id.*, ¶ 167.

¹¹ See *FNPRM*, ¶ 1195.

¹² See *id.*, ¶ 1193.

threshold established in the *CAF Order* (i.e., 4 Mbps downstream and 1 Mbps upstream speeds) do not have adequate access to the benefits provided by broadband, and thus remain unserved. Therefore, the Commission should not focus its support on areas based on whether the high-cost area has no broadband service or merely inadequate broadband service. Further, the forward-looking cost model should set the reserve price for each area, excluding areas that are served by an unsupported competitor and extremely high-cost census blocks. All high-cost census blocks should receive support within the \$1.8 billion cap set such that prioritization and targeting are unnecessary.

Areas Eligible for Competitive Bidding. ACA generally supports the process as outlined by the Commission for determining areas eligible for support pursuant to the competitive bidding process. As stated in ACA's previous comments, unserved areas should be determined by using the smallest feasible geographic area that can be identified with relative ease, and ACA supports the Commission's proposal to identify unserved areas "at the census block level."¹³ Based on their experiences with the Broadband Stimulus programs, ACA's members believe use of the census block ensures support is most precisely targeted, but it is not overly burdensome.

For the Commission to begin the competitive bidding process in a timely fashion, the Commission should meet its objective of having a forward-looking cost model completed by the end of 2012 and, at the same time, the Commission should propose a list of high-cost census blocks (along with the amount of support for each block). The Commission then should develop within a relatively short time (30 days) a list of high-cost census blocks that exclude both census

¹³ *Id.*, ¶ 1192.

blocks served by an unsupported competitor and extremely high-cost census blocks. This will be the list of census blocks eligible for support.

Once the list of eligible areas is final, the Commission has decided that incumbents will have a right of first refusal to make a state-level commitment to serve all of the eligible census blocks in their territory.¹⁴ Census blocks where the incumbents do not make a state-level commitment are then eligible for a more efficient distribution of support pursuant to competitive bidding. To expedite support in eligible census blocks, the Commission should require incumbents to make their determination within at most 60 days after it releases a final list of eligible high-cost areas.

Definition of Unserved by an Unsupported Competitor. According to the process established by the *CAF Order*, the Wireline Competition Bureau (“Bureau”) will publish the list of eligible census blocks for CAF Phase II support associated with each incumbent price cap carrier within each state and give the public an opportunity to challenge the Bureau’s determination that the eligible census blocks are not served by an unsubsidized competitor.¹⁵ ACA agrees. Providing the public with an opportunity to comment on the proposed list of areas eligible for support and use of the appropriate definition of an unserved area is essential for the Commission to avoid providing support in areas where it is not necessary and could harm competition.

The Commission, however, has not addressed the fundamental issue of defining what it means for an area to be “unserved by an unsupported competitor.”¹⁶ ACA proposes,

¹⁴ See *CAF Order*, ¶ 171.

¹⁵ See *id.*, ¶ 171.

¹⁶ Although the *CAF Order* defines the term “unsubsidized competitor” as a “facilities-based provider of residential terrestrial fixed voice and broadband service,” it does not

based on several factors, that a census block is served by an unsupported competitor if that competitor certifies to the Commission that it provides broadband service (at speeds of at least 4 Mbps downstream and 1 Mbps upstream¹⁷) to at least a majority of the service locations in the census block. First, census blocks are well-established, objective geographic areas that are the “building blocks” for data collection and aggregation by the Census Bureau,¹⁸ and these areas generally have similar deployment characteristics. Second, building a wireline network to serve a majority of locations in a census block represents a significant capital investment and indicates a commitment by the unsupported competitor to serve consumers in that area. Third, if the Commission were to provide support to the incumbent or another competitor in such a census block using CAF funds, the existing unsupported competitor would be placed at an unfair competitive disadvantage and, more importantly for achievement of the Commission’s broadband goals, would have little or no incentive to continue building out broadband service using its own private funding.

To begin competitive bidding auctions in a timely fashion and meet the time requirements for developing the list of census blocks eligible for support pursuant to the forward-looking cost model discussed above, the Commission should separately establish a final list of unserved high-cost census blocks by the end of 2012. To that end, the Commission should

does not define what percentage of the service area must be served by the unsubsidized competitor. *Id.*, ¶ 103.

¹⁷ *See id.*, ¶ 147 (“To fulfill their deployment obligation, carriers must offer broadband service of at least 4 Mbps downstream and 1 Mbps upstream, with latency sufficiently low to enable the use of real-time communications, including VoIP, and with usage limits, if any that are reasonably comparable to those for comparable services in urban areas.”) (internal citations omitted); *see also* ¶ 94. These speeds are also consistent with the national average broadband speed based on the National Broadband Plan’s recommendation. *See* Federal Communications Commission, *Connecting America: The National Broadband Plan* at 135 (2010).

¹⁸ *See, e.g.* Random Samplings, The official blog of the U.S. Census Bureau, at: <http://blogs.census.gov/censusblog/2011/07/what-are-census-blocks.html>.

release a Public Notice proposing the list of unserved census blocks with sufficient time for comment by the parties before that date. Parties should be given 30 days to comment on the list.

Reserve Price. Before the reverse auction begins, the Commission should establish a reserve price for each census tract service area (not including extremely high-cost census blocks or census blocks served by an unsupported competitor), which is the minimum price acceptable to serve the census tract.¹⁹ This reserve price should be based on two elements. First, it should reflect the levels of support estimated as part of the development of the forward-looking cost model.²⁰ Second, assuming the Commission adopts ACA's proposed regional auction format, the reserve price also should be based on evidence from prior auctions, which will indicate the degree by which actual bids vary from the reserve price for similarly situated areas. With this new and more precise information about the cost to serve an area, the Commission can then adjust the reserve price for subsequent regional auctions and potentially save the fund money. Finally, the reserve price should ensure that support does not exceed the \$1.8 billion allocated for CAF Phase II in price cap territories.²¹

Aggregation of Census Blocks. Auction participants should bid on proposed service areas based on aggregated eligible census blocks at the census tract level.²² The bids can propose to serve more than one census tract, but each census tract must be bid with a separate price. Therefore, a bidder could bid on several aggregated census tracts and accept support only if it is awarded all of the tracts, however, the Commission's evaluation of winning bidders should be on each individual census tract. Such bidding will allow the Commission to select the

¹⁹ See *FNPRM*, ¶ 1212.

²⁰ See *id.*, ¶ 1212.

²¹ See *id.*, ¶ 156.

²² See *id.*, ¶ 1192.

most efficient bid in each census tract.²³ Bidding should occur over multiple rounds until a clear, lowest bid is provided. However, support should be awarded only if an auction is fully competitive. Even if a bid meets the reserve price and would win for a particular census tract, the Commission should determine, by examining the variance in bids for similarly situated tracts, whether the bidding on the census tract was fully competitive. If the Commission finds that the bidding was not fully competitive, it should establish a new reserve price for the census tract and hold another auction.

Regional Auctions. ACA suggests that, rather than holding a single, nationwide auction, the Commission should hold separate auctions for four to six regions across the country. These auctions should be held sequentially over a relatively brief period with limited time (30 days) between auctions for the Commission to analyze the outcome of the previous auctions and make any adjustments necessary for the next auction and for participants to re-adjust plans based on the auction outcome. This should facilitate greater participation, especially by smaller providers who operate in various regions. In addition, it will increase the efficient distribution of support since the Commission can refine the reserve price based on prior auction results. It also should prove easier to administer. Moreover, this approach may encourage greater participation in the auction process as losing bidders in earlier regional auctions might elect to participate again in a later regional auction.

The auction process should begin with the submission of short-form applications 60 days after the deadline for incumbents to make a state-level commitment. The regional auctions should begin 15 days later and be held in succession to conclude as quickly as possible.

²³ ACA is not opposed to other aggregations of census tracts as long as it can be established that there is an objective method for the Commission to determine the lowest request for support as the winner.

Prospective bidders can conduct due diligence and plan for bidding in all auctions before the start of the process and so there will not be a need for extensive delays between each regional auction.

Service Terms and Renewal. ACA supports the Commission’s proposal to provide auction winners with support for a term of five years.²⁴ At the same time, the Commission should require recipients to initially deploy to 95 percent of the locations in two years rather than five.²⁵ First, this will ensure new service is brought to unserved areas expeditiously. Second, it reflects the experiences of ACA members in deploying broadband plant in geographic areas similar in size to census tracts. Finally, any speed of deployment requirement will be factored into bids.

Auction winners should not receive any preferences or expectancy for renewal after the five year term of support expires, and the Commission should make this clear prior to the auction so that it can be factored into bids.²⁶ Instead, given the dynamic nature of broadband services, applications and customer demands and the limited support available to the Commission, at that time, the Commission should reevaluate the need for support and method of support on a *de novo* basis.²⁷ If any locations continue to require CAF funding, the Commission could, for example, find that there are a sufficient number of locations in a census tract without service and re-auction the support on that basis. Recipients of support in the original auction

²⁴ See *FNPRM*, ¶ 1197.

²⁵ The Commission should grant limited waivers to this requirement if the recipient confronts barriers not known or expected at the time of the bid, *e.g.* inordinate delays in receiving government right of way or other permits or authorization.

²⁶ See *id.*

²⁷ The Commission should re-analyze whether areas are served by an unsupported competitor after the initial service term to determine whether additional support is necessary. Regardless of the method of support chosen, no additional support should be provided in areas that are served by an unsupported competitor at that time.

may have an advantage in that they have already built infrastructure, but it should be clear that they will not receive any preference in any subsequent auction, and bids will be made accordingly. On the other hand, after the original five-year term of support, the Commission may determine that it would be most efficient to provide support via a broadband voucher and permit consumers to select among various broadband providers.²⁸

B. The Competitive Bidding Process Should be Transparent

To ensure that the reverse auction attracts bidders, but also protects the CAF, the process should be transparent. The pool of potential bidders must have detailed knowledge of the bidding requirements ahead of time. Further, it should be clear that only serious bids with adequate support will be considered, and there will be penalties for bidding or performance defaults.

Short Form Application. ACA agrees with the Commission's proposal to use a two-stage application to vet providers that wish to participate in the auction.²⁹ The initial (or short-form) application should include sufficient information to ensure the provider is bona fide, i.e. at least minimally qualified. This application should include relevant information about the bidding entity's ownership, affiliations and any agreements with other bidders. Further, such criteria also should include an initial certification by a potential bidder that it has sufficient financial resources and the technical capability to undertake the construction of facilities necessary to offer the broadband service.³⁰ Further, the applicant should be required to submit documentation from a financial institution showing that the applicant has sufficient financial

²⁸ See Comments of the American Cable Association, WC Docket No. 10-90 et al at 36-37 (filed Apr. 18, 2011) ("ACA April 2011 Comments").

²⁹ See *FNPRM*, ¶ 1214.

³⁰ See *id.*, ¶ 1200.

wherewithal to pay any bidding penalty that may be imposed. As discussed above, the short-form applications should be submitted within 60 days after the deadline for incumbents to assert or decline the right of first refusal.

Small Business Bidding Preference. The Commission requests comment on a potential bidding preference for small businesses.³¹ Although providing bidding preferences of any kind is not entirely in keeping with the goal of the reverse auction to provide broadband services at the lowest cost per unit, ACA supports a small bidding credit for small businesses to promote innovation and robust competition in the bidding process. Further, there should be no concern about the financial or technical capability of small business providers since these providers would need to submit the same certifications as all other entities as part of the application process.

Long Form Application. The Commission proposes that it use a long-form application to conduct due diligence on winning bidders, including a demonstration that they are legally, technically and financially qualified,³² and ACA agrees. ACA believes that the determination of auction winners should be based only on objective factors. The Commission should require winning bidders to provide detailed information and make firm commitments before being certified as eligible to receive support and before funds are disbursed.

First, a winning bidder must confirm the ownership information provided in its pre-auction application or update that information, as appropriate. Second, a winning bidder should be required to submit a detailed project description that describes the network, identifies the proposed technology, demonstrates that the project is technically feasible, and describes each development phase of the project. Third, a winning bidder should certify to the availability of

³¹ See *id.*, ¶ 1213.

³² See *id.*, ¶ 1217.

funds for all project costs that exceed the amount of support to be received from the CAF and that it will comply with all program requirements. The proposed Mobility Fund auction on which the price cap territory auction is based also includes this requirement.³³ Fourth, the winning bidder should be required to post financial security as a condition to receiving support to ensure that it has committed sufficient financial resources to meet program obligations.³⁴ The financial security should not be in the form of a lien or other security interest in the applicant's assets or facilities because most providers' financing arrangements with financial institutions will not permit the financial institution to be second in line behind a government agency.³⁵

Within 60 days of notification by the Commission to an entity that it has submitted the lowest bid in each regional auction, the entity should submit its long-form application. ACA recognizes that the Commission has required that long form applications be submitted in a shorter timeframe, but that was for spectrum auctions where post-auction information requirements were relatively limited. In contrast, for the CAF reverse auction, a winning bidder will need to submit substantial detail regarding the project, network and proposed technology. Therefore, applicants will need additional time. The Commission should then review as expeditiously as possible the long-form applications and conduct due diligence on winning bidders. At the same time, winning bidders should apply for and receive ETC designations under the Commission-controlled process proposed below. Once the applications

³³ See *CAF Order*, ¶ 455.

³⁴ Consistent with ACA's recommendation that the Commission provide a small bidding credit for small businesses, any financial security requirements should not be disproportionately burdensome for small entities.

³⁵ ACA does not oppose financial security in the form proposed for the Mobility Fund auction, which requires that the winning bidder provide an irrevocable stand-by Letter of Credit equal to the amount of support. See *id.*, ¶ 444.

are approved and ETC status is granted, the Commission can begin providing high-cost CAF support.

Bidding and Performance Penalties. Finally, to ensure the integrity of the auction process, if the Commission finds that a winning bidder is not sufficiently capable and qualified to provide service in the high-cost area and did not bid in good faith, it should impose a penalty on that bidder, including monetary forfeitures.³⁶ Further, the Commission should impose a default payment on winning bidders that do not meet the performance requirements discussed below.³⁷ Such measures are necessary to protect the process from abuse and to ensure that the greatest number of high-cost locations are actually served with effective broadband service for the amount of support provided.³⁸

C. The Reverse Auction Process Should be Competitively Neutral

The competitive bidding process described above is designed to maximize the public benefits of broadband service by efficiently using the limited funds available. To be most effective, the reverse auction should be a nationally uniform process and be designed to attract as many bidders as possible. Fortunately, there are many more facilities-based (or potentially facilities-based) competitors for broadband service than there have traditionally been for wireline

³⁶ See *FNPRM*, ¶ 1218. ACA has proposed that, as part of the short form application, applicants provide documentation from a financial institution showing that they have the financial wherewithal to pay this penalty.

³⁷ See *id.*, ¶ 1218. The Mobility Fund auction requires that the irrevocable stand-by Letter of Credit include an additional percentage of the support amount that can be used for such a default payment. See *CAF Order*, ¶ 444. Again, ACA does not oppose this form of financial security; however, the Commission should not require any form of a primary lien or similar security against the applicant's assets or facilities.

³⁸ Consistent with ACA's recommendation that the Commission provide a small bidding credit for small businesses, any financial security requirements should not be disproportionately burdensome for small entities.

voice telephony service. Therefore, the potential pool of competitive bidders is much greater, and the process should be open to all equally.

First, as discussed further below, to attract the greatest number of qualified bidders for the reverse auction, the Commission should require bidders to seek ETC designation after winning the auction, rather than before they submit a bid. Further, while the Commission has proposed in the *CAF Order* and the *FNPRM* to respect the role that the states have traditionally played in designating ETCs and imposing requirements on them, that role is no longer necessary or beneficial with respect to the deployment of broadband services, which are information or advanced services as opposed to traditional voice telephony telecommunications services. ACA agrees with AT&T that the Commission should assert its exclusive jurisdiction to establish a new ETC designation process for distribution of CAF funds to support broadband. State jurisdiction over the ancillary voice service component should be preempted to design a nationally uniform auction process and effectively administer the federal funds for broadband. States can continue to play a role in designating voice service ETCs and imposing requirements only to the extent that they provide state funding for such voice services and the requirements are consistent with the public interest obligations imposed by the Commission.³⁹

1. Auction Winners Should Obtain ETC Status Before Receiving Awarded Funds

ACA has consistently advocated that to maximize the value of the CAF, the Commission should allow all qualified providers to participate in the reverse auction. That includes incumbent carriers that may have declined a state-level commitment covering the area.⁴⁰

³⁹ Should states wish to support broadband deployment, any obligations must be consistent with the public interest obligations required by the Commission and funded directly by the state.

⁴⁰ See *FNPRM*, ¶ 1201.

Further, the Commission should not limit participation in the reverse auction to carriers that are designated as ETCs under the legacy ETC framework designed to support traditional voice telephony services.⁴¹ The current ETC qualification rules can be burdensome, and could inhibit qualified bidders – particularly smaller providers that have demonstrated the capability and expertise to offer advance broadband service in unserved areas – from participating in the reverse auction. Allowing all qualified bidders to participate in a uniform reverse auction process – where public interest requirements are well-defined and complete and where recipients of support must certify to comply with such requirements – will maximize the number of participants and advance the Commission’s objective of driving access to affordable broadband services in unserved areas as efficiently as possible.

As described above, bidders should be required to affirm their credentials as part of the initial short-form application, including a certification of financial and technical qualifications. Some commenters have argued in the context of a similar requirement for short-form applications in the Mobility Fund reverse auction that a certification of financial and technical qualifications is duplicative given the proposed requirement to obtain an ETC designation prior to submitting a short-form application and bid.⁴² ACA agrees that the two requirements may be duplicative, however, the certification of qualification should be preferred over prematurely requiring ETC applications and designations. The reason is the same reason that the Commission gave in response to comments arguing that the certification of financial and technical qualification should instead be a more detailed demonstration of such qualifications – undertaking such a time-consuming process at the short-form stage could result in substantial

⁴¹ See ACA April 2011 Comments at 26.

⁴² See *CAF Order*, ¶ 402 (citing Comments of T-Mobile USA, Inc., WT Docket No. 10-208 at 14-15 (filed Dec. 16, 2010)).

delays. Similarly, requiring bidders to submit ETC applications and obtain such authorizations before bidding could result in substantial delays or cause providers to miss out on the auction, reducing the number of bidders and the competitiveness of the auction.

AT&T has asserted that the submission of an ETC application should not be a prerequisite to participation in the auction; rather, each provider that prevails in the auction should instead apply for designation as a CAF ETC after winning and before receiving the awarded support.⁴³ ACA agrees. Requiring broadband providers to apply for ETC status only after their bids are accepted would both encourage participation in the bidding process by eliminating a premature (and, at that time, unnecessary) regulatory classification and ensure that providers do not “find [] themselves designated [as ETCs], and subject to the obligations that go along with being designated, in areas where they do not win support.”⁴⁴ As a matter of fundamental fairness broadband providers should be designated as CAF ETCs only in those census tracts for which they actually receive CAF funding.

The Commission is well within its authority to maximize the potential pool of bidders in the reverse auction by allowing all qualified bidders to participate in the auction, and requiring winning bidders to obtain an ETC designation before receiving the awarded support. Section 214(e)(1) of the Communications Act states that a “common carrier designated as an eligible telecommunications carrier...shall be eligible to *receive universal service support* in accordance with Section 254.”⁴⁵ The statute uses the word “receive” rather than “seek” and thus

⁴³ See Comments of AT&T, WC Docket No. 10-90 et al at 101 (filed Apr. 18, 2011) (“AT&T April 2011 Comments”).

⁴⁴ AT&T April 2011 Comments at 101-102 *citing* Connect America Fund, WC Docket No. 10-90 et al, FCC 11-13, ¶ 319 (rel. Feb. 9, 2011).

⁴⁵ 47 U.S.C. § 214(e)(1) (emphasis added). Section 254(e) similarly states that ETCs “shall be eligible to *receive* specific Federal universal service support.” 47 U.S.C. § 254(e) (emphasis added).

does not dictate when a carrier participating in a competitive bidding process for universal service support must submit an ETC application or receive such ETC designation, except that it must be before the carrier receives the support.

2. The Commission Has the Authority to Design the ETC Designation Process for Broadband Service and Should Assert Exclusive Jurisdiction Over the ETC Process for the Ancillary Voice Telephony Services

Although carriers that win the competitive bidding process should be required to obtain ETC status before receiving universal service support, it is time for the Commission to assert full control over a new ETC designation process. Such exclusive jurisdiction is appropriate to support the new direction of the Universal Service Fund to focus on broadband deployment and to facilitate a successful competitive bidding process. The existing state ETC designation process is inherently burdensome because it potentially requires that carriers file multiple applications, the Commission does not control the timing of decisions, and states often impose burdensome requirements that could severely affect provider's bids in the reverse auction or performance afterwards.⁴⁶ There is an urgent policy need as well as statutory support for the Commission to revise the ETC designation process for CAF support distributed pursuant to competitive bidding.

⁴⁶ The Commission recognizes that having to obtain multiple ETC designations will likely be burdensome and time-consuming. With respect to ETC designations for participating in the Remote Areas Fund, nationwide satellite broadband providers could be forced to go to all fifty states for an ETC designation or an affirmative statement that the state does not have jurisdiction over the provider. The Commission asks, "to the extent that providers may seek to serve remote areas in multiple states, can and should the Commission establish a streamlined process whereby the Commission could grant providers a multi-state or nationwide ETC designation?" See *FNPRM*, ¶ 1235. Although the example of a nationwide satellite provider having to seek a determination from all fifty states is the most absurd example of how a state-run ETC designation process is unworkable, the same is true for competitive bidders that would be required to seek individual ETC designations in multiple states in order to receive CAF support.

The Commission seeks to design a competitively neutral reverse auction that is nationally uniform and efficiently disburses federal funds to ensure broadband service meeting public interest requirements is brought to all high-cost and unserved areas of the country. In other words, the Commission's standards and processes are all that are required to meet its objectives. Thus, there is no need to allow states to continue to impose different ETC designation processes and timelines, as well as ETC obligations on recipients of support. In fact, permitting states to impose their own requirements would be inconsistent with, and counterproductive to, the Commission's goals.

Further, if auction participants are required to obtain ETC designations from the states prior to submitting a bid (which ACA opposes), onerous state ETC requirements would likely result in fewer participants in the auction and a less efficient distribution of the limited CAF funds. Because states have no authority to impose obligations on carriers' broadband services, which are jurisdictionally interstate,⁴⁷ such requirements would likely be limited to obligations on the carriers' voice telephony services. Since the voice services are ancillary to the overriding broadband goals of the CAF, the Commission should not allow state voice service obligations to hamper a successful competitive bidding process to distribute federal support for broadband.

In addition, if auction winners are required to seek traditional state ETC designations, states could impose burdensome and unexpected requirements that affect the carrier's ability to meet the performance requirements for the amount of support provided. The potential for such additional requirements, which auction participants would not know at the time

⁴⁷ See *Preserving the Open Internet: Broadband Industry Practices*, GN Docket No. 09-191, *Broadband Industry Practices*, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17970, FCC 10-201, ¶ 121, n. 374 (2010) ("*Net Neutrality Order*") ("The Commission historically has recognized that services carrying Internet traffic are...generally subject to federal regulation.").

they submit their bids, would affect (increase) the amounts bid, resulting in a less transparent and less effective competitive bidding process.⁴⁸ If states wish to impose additional deployment or performance requirements, they should only be permitted to do so if they provide the necessary support to allow the carrier to meet the requirements, and the Commission has the ability to ensure the requirements are consistent with its regulatory regime.

In the *CAF Order*, the Commission decided not to simply add broadband to the list of supported services pursuant to Section 254(c).⁴⁹ Rather, the Commission asserted independent authority to support broadband with universal service funds under the Section 706 directive to “encourage the deployment...of advanced telecommunications capability to all Americans.”⁵⁰ The Commission further found that since it has determined, pursuant to Section 706(b), that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion, the Commission is compelled to “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”⁵¹

To promote the deployment of broadband service on a timely basis, the Commission determined that federal universal service funding should be re-directed from primarily supporting legacy voice services to removing barriers to broadband infrastructure

⁴⁸ If the Commission is unwilling to assert exclusive jurisdiction over the ETC designation process, it should impose strict limits on state processes and requirements. The FCC should review a single ETC application per applicant and propose to grant the application subject to objections filed by the applicable state public utilities commissions. Grounds for objection should be limited to gross unfitness for status as an ETC. The states should be required to object within at most 30 days of a tentative Commission decision to grant ETC status to an applicant.

⁴⁹ See *CAF Order*, ¶ 65.

⁵⁰ 47 U.S.C. § 1302(a). See also *CAF Order*, ¶ 66-73. “Advanced telecommunications capability” is defined as “high-speed, switched, broadband telecommunications capability.” 47 U.S.C. § 1302(d).

⁵¹ 47 U.S.C. § 1302(b). See also *CAF Order*, ¶ 66.

investment. To facilitate an efficient and effective competitive bidding process and broadband deployment, the Commission should assert exclusive control over a new ETC designation process for the new broadband-focused CAF. The new ETC designation process should be run by the Commission rather than the states so that winning bidders can submit a single ETC application to the Commission, which can be granted on an expedited, or at least timely and controlled, basis. All ETC obligations should be known before the reverse auction begins and should be tied to the performance requirements as discussed below.

The Commission's assertion of independent authority to support broadband gives it the necessary authority to establish a new ETC process.⁵² First, since the Section 214(e) ETC designation process applies to telecommunications services, it need not apply to the Commission's distribution of CAF Funds to support broadband, which is an information or advanced service.⁵³ Therefore, the Commission is free to establish a new ETC designation process tied to winning bidders' receipt of CAF funding to support broadband rollout.

The Commission, however, also requires recipients of CAF funding to provide voice telephony service, which is a telecommunications service.⁵⁴ The requirement to provide voice telephony service, however, is ancillary and subordinate to the CAF's focus on supporting broadband infrastructure. The Commission recognized that much of the supported voice service is likely to be provided over jurisdictionally interstate broadband facilities as interconnected

⁵² ACA recognizes that the Commission decided in the *CAF Order* that its assertion of independent authority under Section 706(b) does not excuse seekers of support from the need to seek ETC designation pursuant to Sections 254 and 214. *See CAF Order*, ¶ 73. However, ACA asserts that this decision is unnecessary and inefficient with respect to the competitive bidding process for price cap territories and should be re-examined.

⁵³ *See AT&T April 2011 Comments* at 107.

⁵⁴ *See CAF FNPRM*, ¶ 1203 and *CAF Order*, ¶ 75.

VoIP service.⁵⁵ Therefore, to hold a successful reverse auction and effectively support broadband infrastructure without allowing onerous state ETC requirements to hamper the process, the Commission should preempt the states' role in ETC designation or forbear from applying Sections 214(e) and 254(e) of the Act to CAF reverse auction support recipients. In fact, Section 706(a) compels the Commission to "encourage the deployment...of advanced telecommunications capability to all Americans...by utilizing...regulatory forbearance...or other regulating methods that remove barriers to infrastructure investment."⁵⁶

Preemption. Federal preemption of the states' role in ETC designation would be an "other regulating method" that would effectively remove barriers to broadband infrastructure investment by permitting the Commission to design a successful competitive bidding process that can efficiently and effectively support broadband deployment. As explained by AT&T, the Commission has two options for preemption of states' role in designating ETCs: Section 254(f) and a traditional preemption analysis.⁵⁷

Section 254(f) provides that a state may "adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service" and "adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms."⁵⁸ The federal universal service support mechanisms have changed. As discussed above, requiring competitive bidders to potentially

⁵⁵ See *CAF Order*, ¶ 63 ("Increasingly, however, consumers are obtaining voice services not through traditional means but instead through interconnected VoIP providers offering service over broadband networks.").

⁵⁶ 47 U.S.C. § 1302(b).

⁵⁷ See AT&T April 2011 Comments at 64-70.

⁵⁸ 47 U.S.C. § 254(f).

seek ETC designations from multiple states and be subject to state voice telephony-related requirements to receive CAF broadband-focused funding would reduce the efficiency and effectiveness of the CAF's competitive bidding process and hinder the Commission's support for advanced telecommunications services. If states wish to impose requirements on the voice services of existing ETCs or the ancillary voice component of CAF winning bidders' broadband infrastructure, the states can do so consistent with Section 254(f) using state universal service funds. However, pursuant to Section 254(f), the states may not "rely on or burden" the new "federal universal service support mechanisms."

The Commission could alternatively preempt the states' role in ETC designation pursuant to a traditional forbearance analysis. That analysis generally states that federal policies should preempt state policies where it is impossible or impractical to implement both.⁵⁹ Further, it is proper for the Commission to consider the economic burden of complying with both state and federal requirements when conducting the analysis.⁶⁰ AT&T has presented evidence that it would not be economically feasible to roll out broadband service and meet state legacy voice service obligations at the same time.⁶¹ The economic burden of complying with state ETC designation processes and regulatory requirements (*e.g.*, minimum quality of service, emergency capabilities, outage reporting, consumer protection) for the ancillary voice component of broadband facilities supported by the CAF is far too great. The Commission's interest in

⁵⁹ See *Net Neutrality Order*, ¶ 121, n. 374 ("Where as here, 'it is not possible to separate the interstate and intrastate aspects of the service,' the Commission may preempt state regulation where 'federal regulation is necessary to further a valid federal regulatory objective, i.e., state regulation would conflict with federal regulatory policies.'" (citing *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 578 (8th Cir. 2007) and *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986)).

⁶⁰ See *Minn. Pub. Utils. Comm'n*, 483 F.3d at 578-9 ("It was proper for the FCC to consider the economic burden of identifying the geographic endpoints of VoIP communications in determining whether it was impractical or impossible to separate the service into its interstate and intrastate components.").

⁶¹ See AT&T April 2011 Comments at 66.

fostering maximum competition in the reverse auction for distribution of CAF support directly conflicts with the economic burden imposed by state ETC requirements, which would result in fewer bidders in the auction.⁶² Therefore, the Commission should exert exclusive federal control over the designation of ETCs for purposes of the competitive bidding process.

Forbearance. Section 706(a) also suggests that the Commission could use regulatory forbearance to encourage the deployment of advanced telecommunications. Section 10(a) of the Communications Act provides that “the Commission shall forbear from...any provision of this Act...if the Commission determines that” enforcement is not necessary to ensure that practices and prices are just and reasonable or to protect consumers, and that forbearance is in the public interest.⁶³

As discussed below, CAF recipients should be required to provide broadband and voice service at rates reasonably comparable to rates in urban areas.⁶⁴ Further, Section 254(b)(3) of the Act separately addresses this requirement.⁶⁵ Therefore, independent state obligations to ensure just and reasonable prices are unnecessary. In addition, state designation of ETCs and state ETC obligations are not necessary to protect consumers. The legacy high-cost support system is being transitioned to a new structure to support broadband services with an ancillary voice component. Legacy state ETC obligations are outdated under the new regime, and the CAF requirement that supported carriers provide voice telephony service and meet performance obligations will adequately protect consumers.

⁶² See *Minn. Pub. Utils. Comm’n*, 483 F.3d at 580-1 (“Competition and deregulation are valid federal interests the FCC may protect through preemption of state regulation.”)

⁶³ 47 U.S.C. § 160(a).

⁶⁴ See *CAF FNPRM*, ¶ 1206.

⁶⁵ See *CAF Order*, ¶ 84 (“We will consider rural rates for voice service to be ‘reasonably comparable’ to urban voice rates under section 254(b)(3) if rural rates fall within a reasonable range of urban rates for reasonably comparable voice service.”).

Finally, the public interest is served by the Commission's execution of a successful and efficient competitive bidding process designed to attract the greatest number of bidders and allocate limited funds in a manner that will maximize the extent of broadband service in high-cost and unserved areas for the lowest total cost. As discussed above, the Commission should eliminate onerous state ETC processing delays and requirements and create a new, transparent ETC designation process in order to meet the Commission's goals for the competitive bidding process. Therefore, the Commission should forbear from applying Sections 214(e) and 254(e) of the Act to winning bidders in the reverse auction. Instead, it should create a new more efficient and more transparent ETC designation process designed to complement the transition to support for broadband services.

Whether through preemption or forbearance, there is statutory support and a pressing policy need for the Commission to develop a new ETC designation process to support a nationally uniform competitive bidding process, attract as many competitive bidders as possible and maximize CAF support for broadband infrastructure in high-cost areas.

III. THE MINIMUM PERFORMANCE REQUIREMENTS MUST ENSURE THAT UNSERVED AREAS PROMPTLY RECEIVE AFFORDABLE BROADBAND SERVICE AT SPEEDS THAT ARE EFFECTIVE TO MEET FORWARD-LOOKING CUSTOMER DEMANDS

ACA agrees that the performance requirements proposed by the Commission will serve to promote the deployment of advanced telecommunications services to high-cost and unserved areas of the country with two significant exceptions. First, the broadband speeds proposed by the Commission would not be effective to meet consumers' current and future demands. Second, based on the use of census tracts as the service area for support recipients and the experiences of ACA members in deploying infrastructure, the build out time line should be

accelerated. Recipients should provide service at the initial broadband speeds to 95 percent of locations within two years.

Background. The Commission has proposed that the auction winners receiving CAF support should be subject to the same performance requirements with respect to speed, latency and capacity as providers that assert the right of first refusal to support determined by the forward-looking cost model.⁶⁶ Those requirements must be reasonably comparable to the broadband services available in urban areas.⁶⁷ The Commission has therefore proposed that auction winners provide initial minimum broadband speeds of 4 Mbps downstream and 1 Mbps upstream,⁶⁸ latency sufficiently low to enable use of real-time applications like VoIP⁶⁹ and capacity limits reasonably comparable to limits for offerings in urban areas (*e.g.*, at least 10 GB of data per month).⁷⁰ The Commission, however, seeks comment regarding whether the minimum performance requirements should be relaxed to allow providers using additional technologies to be potentially eligible for support.⁷¹

The Commission further proposes that auction winners should be subject to the same deployment milestones that apply to providers that assert the right of first refusal and make a state-level commitment.⁷² Therefore, the Commission proposes that by the end of the third year, recipients “must offer at least 4 Mbps/1 Mbps broadband service to at least 85 percent of

⁶⁶ See *FNPRM*, ¶ 1203.

⁶⁷ See *CAF Order*, ¶ 91.

⁶⁸ See *id.*, ¶ 94.

⁶⁹ See *id.*, ¶ 96.

⁷⁰ See *id.*, ¶¶ 98-99.

⁷¹ See *FNPRM*, ¶ 1204.

⁷² See *id.*, ¶ 1207.

their high-cost locations” in the service area.⁷³ By the end of the fifth year, recipients “must offer 4 Mbps/1 Mbps broadband service to all supported locations, and at least 6 Mbps/1.5 Mbps service to a number of supported locations to be specified.”⁷⁴ Finally, the Commission proposes that support recipients provide service to as many locations as request service in their service area⁷⁵ and provide service at rates reasonably comparable to those in urban areas. Those rates will be based on a methodology to be defined by the Wireline Competition Bureau and the Wireless Telecommunications Bureau, and an annual survey of urban broadband rates to be conducted by the Bureaus.⁷⁶

Required Speeds. ACA does not seek to have the Commission amend its decision to adopt an initial broadband speed target of 4 Mbps/1 Mbps, although there is sufficient evidence to indicate that those speeds are not comparable to those provided to the average user in urban areas today. However, after discussions with ACA members on their deployment experiences, and because census tracts are relatively compact service areas, the Commission should mandate by all recipients of support in price cap areas deployment at these speeds to 95 percent of locations within a two year period – as opposed to the five years proposed by the Commission.⁷⁷ In addition, the Commission should revisit and amend its requirement that recipients of support in price cap areas provide 6 Mbps/1.5 Mbps broadband service to an

⁷³ See *CAF Order*, ¶ 160.

⁷⁴ See *id.*, ¶ 160. For whatever speed and deployment requirements are mandated, the Commission should specify them precisely prior to the auction so that bidders can incorporate those requirements into their bids.

⁷⁵ See *FNPRM*, ¶ 1205.

⁷⁶ See *id.*, ¶ 1206 and *CAF Order*, ¶¶ 113-14.

⁷⁷ As noted earlier (n. 25), waivers may be granted when unforeseen and uncontrollable events occur.

unspecified number of locations by the end of year five. This requirement clearly does not reflect expected market offerings and shortchanges consumers in these areas.

The Commission correctly informed carriers in the *CAF Order* that “carriers receiving CAF Phase II support should expect to offer service with increasing download and upload speeds over time.”⁷⁸ Requiring CAF recipients to commit to provide service at forward-looking higher speeds will help ensure that areas receiving support will have access to high-performance service necessary to access critical applications and content into the future.

Many cable providers are currently providing broadband service to millions of customers at speeds of more than 18 Mbps downstream and almost 5 Mbps upstream on average.⁷⁹ In fact, a recent study found that Comcast and Charter delivered average download speeds of 17.19 Mbps in 2011, with Cablevision providing 16.40 on average, Cox 15.76 Mbps, Time Warner 14.41 Mbps and Insight 14.22 Mbps.⁸⁰ Further, a provider of satellite broadband service recently announced that it will provide speeds up to 10 Mbps downstream and 3 Mbps upstream starting next month.⁸¹ In addition, the Commission’s recently released Broadband Speed Guide found that the minimum downstream speed a household needs for adequate broadband performance is 6 to 15 Mbps if more than two users or devices are accessing basic

⁷⁸ *CAF Order*, ¶ 191.

⁷⁹ See Cisco, *Entering the Zettabyte Era*, June 1, 2011, at 10, 13, available at http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/VNI_Hyperconnectivity_WP.html.

⁸⁰ See Todd Spangler, *Cable Had Fastest Broadband Downloads in 2011: Net Index*, Multichannel News, Jan. 13, 2012, available at http://www.multichannel.com/article/479061-Cable_Had_Fastest_Broadband_Downloads_In_2011_Net_Index.php.

⁸¹ See *DISH Bundles TV Service with ViaSat’s Next-Generation High-Speed Satellite Broadband*, DISH Network Press Release, Jan. 9, 2012, available at <http://press.dishnetwork.com/press-releases/dish-bundles-tv-service-with-viasat-s-next-generation-nasdaq-dish-0838380>. See also Mark Seavy, *ViaSat to Launch Satellite-Based Excede Broadband Service*, Communications Daily at 12-13 (Jan. 12, 2012).

functions and one high-demand application.⁸² Finally, according to a study of broadband pricing trends in 2010 and 2011, offered downstream speeds overall have increased 77 percent and cable providers have increased download speeds by 95 percent on average.⁸³

American consumers continue to demand higher-speed broadband services, and they subscribe to services where speeds are effectively doubling every two to three years. The broadband speeds that will be necessary for consumers in high-cost areas to telecommute, run their businesses and connect to others in the same manner as those in currently served urban areas will undoubtedly exceed 4 Mbps/1 Mbps or 6 Mbps/1.5 Mbps over the course of the five year term of service in the areas served by price cap carriers. The Commission should fulfill its statutory duty under Section 254(b)(3) and require providers to offer broadband service that reflects this reality.

To ensure that the broadband speeds it requires of all recipients of Phase II CAF support in price cap areas truly meets the current and future needs of consumers, the Commission should issue a Public Notice later this year seeking comment from the industry about the speeds that should be required for the final three years of the support period. This will enable the Commission, prior to the proposed election by price cap carriers and initiation of competitive bidding, to issue a decision setting forth amended speeds that truly reflect those the most efficient provider will soon be offering, consumers in supported areas should receive, and therefore recipients of support should be obligated to provide. ACA will review the current broadband speeds as part of that process, but it notes that, based on the broadband services

⁸² See FCC Household Broadband Guide, available at <http://www.fcc.gov/guides/household-broadband-guide>

⁸³ See *Android Users Rely on Provider Networks More Than iPhone, iPad Users, Presenter Says*, TR Daily (Jan. 9, 2012) (Study findings presented by Paul Heimann, product manager at Telogical Systems, which collects video and broadband pricing information, at Team Lightbulb's Broadband Unlimited conference track in Las Vegas).

provided by its members and other current market evidence, the Commission should require recipients of support in price cap areas to commit to provide service within the final three years of the five year term at national forward-looking broadband speeds of at least 16 Mbps downstream and 4 Mbps upstream.

Relaxation of Minimum Performance Requirements. ACA submits that the minimum performance requirements should not be relaxed to expand the competitive bidding process to additional technologies that are not able to meet the minimum speeds or other criteria proposed. As detailed above, even the broadband speeds proposed are not adequate to meet consumer demands and therefore are not adequate to meet the statutory requirement that consumers in high-cost areas have access to advanced telecommunications and information services that are reasonably comparable to those services provided in urban areas.⁸⁴ Although parties might submit bids requesting lower support amounts, relaxing the performance requirements would result in service that is ineffective to allow consumers to access critical applications and content, and inadequate to meet the requirements of the Communications Act.

Deployment Deadlines and Rates. As discussed above, ACA accepts the Commission's proposal to set the initial broadband speed target at 4 Mbps/1 Mbps but proposes that auction winners be required to deploy to at least 95 percent of locations in their (census tract) service area by the end of the second year and, at increased speeds the Commission should establish later this year, to 95 percent of locations by the fifth year. ACA does not believe that supported carriers should be required to provide service to all locations.⁸⁵ Often because of geographic or topological issues or because of government-imposed requirements, there may be a very small number (i.e., less than 5 percent) of locations in a census tract that may prove

⁸⁴ See 47 U.S.C. § 254(b)(3).

⁸⁵ See *FNPRM*, ¶ 1205.

inordinately expensive or otherwise impossible to serve. Even recipients of CAF high-cost support should not be required to construct broadband infrastructure to reach, for example, a single dwelling at the top of a mountain.

Finally, ACA agrees that the supported broadband service should be provided at rates reasonably comparable to those in urban areas, as determined by the Commission or the Bureaus. The Bureaus should conduct the survey of urban rates and set a nationwide broadband rate for the 4 Mbps/1 Mbps service in the first two years and a nationwide rate for the increased speed service in the next three years of the term of service. Setting the rate before the auction begins will allow applicants to bid knowing the expected revenue from the broadband service at each level of performance requirement. These requirements, and service at the speeds proposed above, will ensure that consumers living in high-cost and unserved areas of the country will receive affordable and effective broadband service as a result of the competitive bidding process.

IV. CONCLUSION

The Commission has proposed a competitive bidding process for price cap territories that, with some improvements, can work to support broadband deployment to high-cost unserved areas of the country. To ensure a successful reverse auction with as many competitive bidders as possible, however, the Commission should take full ownership of the process by revising the ETC designation requirements. Further, the Commission should require CAF recipients to commit to provide broadband service at forward-looking speeds for the final three years to the support period so that areas receiving support have access to the high-

performance service necessary to access critical applications and content into the future.

Respectfully submitted,



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