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 A UNIFIED INTERCARRIER COMPENSATION REGIME	)	**CC Docket No. 01-92**
	)	
FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE	)	**CC Docket No. 96-45**
	)	
LIFELINE AND LINK-UP	)	**WC Docket No. 03-109**
	)	
UNIVERSAL SERVICE REFORM – MOBILITY FUND	)	**WT Docket No. 10-208**

OPPOSITION OF THE INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

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Table of Contents

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OPPOSITION OF THE INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

The Independent Telephone & Telecommunications Alliance ("ITTA") hereby submits its Opposition to the Petitions for Reconsideration filed in response to the November 18, 2011 *Report and Order* issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceedings.[1]

[1] *In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) ("*Order*" or "*FNPRM*," as appropriate).

INTRODUCTION AND SUMMARY

As explained below, the FCC should reject calls to revise its definition of "unsubsidized competitor" for purposes of determining areas that are ineligible for Connect America Fund ("CAF") support. Its current definition, which requires that an unsubsidized competitor provide both voice and broadband service before an incumbent becomes ineligible for CAF funding, furthers important legal and policy objectives. First, it ensures that consumers continue to have access to voice and broadband services when there is no reliable substitute from a competing service provider. Second, it ensures that incumbent carriers are not required to comply with unfunded mandates in the form of continued carrier of last resort ("COLR") obligations without adequate support to meet those obligations.

The Commission also should decline to impose burdensome accountability measures on CAF recipients when existing Commission processes, such as the Eligible Telecommunications Carrier ("ETC") designation process, are sufficient to meet the goals it seeks to achieve. In particular, the Commission should refrain from requiring performance bonds or recoupment of past support for failure to meet build-out obligations, as advocated by ViaSat and WildBlue. Such measures would conflict with the Commission's objective of facilitating rapid broadband deployment in unserved areas because they would have a detrimental impact on the business operations of CAF recipients and would undermine the regulatory certainty needed to support network investment in high-cost areas.

In addition, the Commission should reconsider aspects of the *Order* relating to reporting obligations and caps on capital and operating expenses for rate-of-return ("ROR") carriers, the phase-out of safety net additive support, and the calculation of baseline revenues and the Residential Rate Ceiling under its intercarrier compensation rules. Adopting the recommendations ITTA sets forth below would promote considerations of practicality, fairness, and competitive neutrality and provide the regulatory certainty and flexibility needed to facilitate broad-based participation in the CAF.

I. THE FCC SHOULD RETAIN ITS DEFINITION OF "UNSUBSIDIZED COMPETITOR" FOR DETERMINING AREAS ELEGIBLE FOR SUPPORT

WISPA asks the Commission to replace the term "unsubsidized competitor" with the term "area subject to unsubsidized competition" for purposes of determining whether an area is ineligible for CAF support based on the presence of a competing service provider.[2] The Commission's existing definition requires that both voice and broadband service be provided by the same competing entity, whereas WISPA's proposed definition would consider an area to be subject to unsubsidized competition if both voice and broadband services are available, whether from a single competitor or multiple competing entities.

The Commission should maintain its current definition of "unsubsidized competitor" because of the important legal and policy goals it advances. Were the Commission to adopt the definition proposed by WISPA it would have the effect of stripping away funding from incumbent providers that have made a substantial investment in constructing voice and broadband networks in high-cost areas with the assistance of and in reliance on federal USF dollars. In many cases, without ongoing support, the continued maintenance and expansion of those networks would not be economically feasible. Because the unsubsidized competitor would not be subject to the same COLR obligations as the incumbent provider, adoption of WISPA's proposed definition would put consumers' access to reliable voice and broadband service in high-cost areas served by the incumbent at risk. Moreover, there would be no guarantee that consumers would have access to both voice and broadband services from a competing provider either in areas served by the incumbent or elsewhere in the census block because there may be

[2] Petition for Partial Reconsideration of the Wireless Internet Service Providers Association, WC Docket Nos. 10-90, *et al*. (filed Dec. 29, 2011), at 5.

little or no service area overlap among the non-incumbent providers. Thus, adoption of the definition proposed by WISPA would undermine the Commission's goal of universal voice and broadband access in hard-to-reach areas.

Additionally, the FCC's imposition of unfunded mandates in the form of continued service obligations on the incumbent without adequate support raises serious constitutional implications. Historically, regulated service offerings have been provided based on a commitment by regulators to allow the service provider a reasonable opportunity to earn a fair return on its investment.[3] Although the Commission has the authority to alter or eliminate support programs and there is no constitutional right to guaranteed government-subsidized profits, the Commission is bound by the Takings Clause of the U.S. Constitution to ensure that regulated entities are afforded the opportunity to earn a reasonable rate of return based on regulated assets and costs.[4] The Commission should refrain from adopting WISPA's proposed definition because it would conflict with this important constitutional principle.

II. EXISTING COMMISSION PROCESSES AND ENFORCEMENT MEASURES ARE SUFFICIENT TO ENSURE ACCOUNTABILITY OF CAF RECIPIENTS

ViaSat and WildBlue urge the Commission to implement burdensome accountability measures for ILECs that make a statewide election to receive CAF support, arguing that the *Order* creates "the potential for… abuse" because there are "no consequences for failing to use that funding appropriately."[5] Among other things, ViaSat and WildBlue ask the Commission to require all price cap ILECs to post a performance bond for each state in which they elect to

[3] *See Federal Power Comm. v. Hope Natural Gas Co.*, 320 U.S. 591, 600-03 (1944); *see also Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, ¶ 127 (1990).

[4] *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989).

[5] Petition for Reconsideration of ViaSat, Inc. and WildBlue Communications, Inc., WC Docket Nos. 10-90, *et al*. (filed Dec. 29, 2011), at 13.

receive support and to forfeit past or future CAF support should they fail to meet relevant milestones.

The Commission should refrain from adopting the measures advocated by ViaSat and WildBlue because they are unduly burdensome, overly broad, and inconsistent with the goals of the CAF. As ITTA pointed out in its January 18 comments filed in response to the *FNPRM*, existing federal and state accountability mechanisms, namely the ETC designation process, are sufficient to ensure that CAF recipients are financially viable and using CAF funds responsibly.[6] Imposing additional obligations, such as requiring the issuance of performance bonds, is unnecessary and would have a negative impact on the business operations of CAF recipients. From a practical standpoint, companies may have limited capacity to issue performance bonds under existing credit agreements. A federal regulatory obligation to add a performance bond to a company's portfolio would restrict its flexibility to conduct its business by reducing the company's ability to transact with commercial entities that require a performance bond.

Furthermore, issuing a performance bond is expensive, typically involving both an upfront fee and an ongoing maintenance fee, which reduces cash flow and impacts financial covenants to which the company is subject. For publicly-traded companies, performance bonds are viewed as outstanding debt by investors and analysts, which affects the company's debt ratings and likelihood of default. Finally, performance bonds reduce a company's liquidity as every dollar committed to a performance bond reduces availability under the company's revolving credit facility.

Given these constraints, most companies seek an alternative to issuing a performance bond, and terminate existing performance bonds when possible. In short, the burdens associated

[6] Comments of the Independent Telephone & Telecommunications Alliance, WC Docket Nos. 10-90, *et al*. (filed Jan. 18, 2012), at 10-14.

with a regulatory obligation to obtain a performance bond cannot be justified, particularly when the ETC designation process constitutes a much a more reasonable means for ensuring compliance with CAF recipients' public interest obligations.

Similarly, the Commission's existing investigation and complaint procedures are sufficient to police and punish violations of the Commission's rules. The adoption of draconian penalties, such as recoupment of past support that carriers were entitled to receive, would undermine the regulatory certainty that is necessary for significant investment in the deployment of voice and broadband-capable networks in high-cost areas. Indeed, if potential CAF recipients are faced with the possibility that the Commission might require forfeiture of past support amounts for failure to meet build-out obligations, particularly if due to circumstances beyond their control, they may be discouraged from participating in the CAF program altogether. That result would be entirely inconsistent with the Commission's goal of rapid deployment of broadband services to as many unserved consumers as possible.

III. THE COMMISSION SHOULD RECONSIDER SEVERAL ASPECTS OF ITS CAPS ON CAPITAL AND OPERATING EXPENSES

NECA, *et al*. maintain that the Commission's decision regarding the application of caps on recovery of capital expenditures (CAPEX) and operating expenses (OPEX) by ROR carriers prejudge important issues prior to allowing interested parties the opportunity to comment and present evidence regarding potential impacts. NECA, *et al*. urge the Commission to reconsider those specific determinations.[7] ITTA agrees with NECA, *et al*. that the Commission's intended application of caps on recovery of CAPEX and OPEX for high-cost loop support (HCLS) is not

[7] Petition for Reconsideration and Clarification of the National Exchange Carrier Association, Inc., Organization for the Promotion and Advancement of Small Telecommunications Companies, and Western Telecommunications Alliance, WC Docket Nos. 10-90, *et al*. (filed Dec. 29, 2011), at 9-13 ("NECA, *et al.* Petition").

rational or consistent with basic administrative law principles and should be modified in several respects.

As NECA, *et al*. point out, the adoption of a regression analysis-based mechanism to limit CAPEX and OPEX recovery is premature in light of the fact that the Commission is seeking comment on the proper methodology for setting caps in the *FNPRM* phase of this proceeding. In the *FNPRM*, the Commission notes that "[a] specific methodology for calculating individual company caps for HCLS is set forth in Appendix H" and it "seek[s] comment on using this methodology to impose limits on reimbursement" for support.[8] This is the correct approach. Indeed, the Administrative Procedure Act (APA) requires the Commission to give interested parties a reasonable opportunity to provide input and mandates that it consider that input in making its determination. However, although the Commission properly has requested comment on operation of the caps, it has negated whatever input it may receive and prejudged the outcome of its deliberations by adopting a regression-based analysis. As NECA, *et al*. correctly note, the Commission's "firm conclusion to utilize regression analyses … leaves no room to argue that other approaches might be used in whole or in part … to achieve the kinds of constraints sought by the Commission."[9] The Commission should reconsider its decision to utilize a regression analysis to develop the caps and state instead that it will consider a regression analysis approach based on the comments it receives in response to the *FNPRM*.

The Commission's premature decision to adopt a regression analysis-based methodology is particularly unfortunate because it is important that the methodology used to determine the caps on CAPEX and OPEX adequately account for all important cost factors affecting the capital and operating expenses incurred by ROR carriers. Importantly, the variables identified by the

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[8] *FNPRM* at ¶ 1079.

[9] NECA, *et al.* Petition, at 9-10.

Commission in the *Order* are not adequate. The regression analysis adopted by the Commission takes into account number of loops, number of housing units, and geographical measures such as land area, water area, and number of census blocks,[10] but it fails to take into account several other potentially critical factors such as population growth rate, the level of network modernization that has been completed and the environmental, legal and regulatory environment in a particular study area.

Regardless of the methodology the Commission employs to implement CAPEX and OPEX caps, however, it should provide carriers with a reasonable opportunity to absorb the new rules and make appropriate adjustments to their business plans. Specifically, the Commission should adopt a transition period during which ROR carriers can gain an understanding of the new rules and the resulting impacts on their operations before the caps take effect and carriers are required to make investment and spending decisions based on the new methodology. In addition, the Commission should take steps to ensure that its waiver process is workable and takes into account all factors that may cause similarly situated carriers to incur different CAPEX and OPEX levels so that carriers that need to rely on the process can obtain meaningful and timely relief.

IV. THE COMMISSION SHOULD RECONSIDER THE IMPOSITION OF ONEROUS REPORTING REQUIREMENTS ON RATE-OF-RETURN CARRIERS

NECA, *et al.* and Comporium ask the Commission to reconsider its decision to require all privately-held ROR carriers that receive CAF support to file complete, audited financial reports for each study area (including for non-regulated revenue) by April 1 of each year.[11] ITTA agrees with these parties that this requirement is unduly burdensome, costly, and impractical for ROR

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[10] *FNPRM* at ¶ 1081.

[11] *Order* at ¶¶ 598-99.

carriers. As NECA, *et al.* note, virtually all ROR carriers have been designated as ETCs and must comply with state monitoring and reporting requirements relating to their financial qualifications.[12] The Commission should continue to defer to the state commissions with respect to imposing and enforcing such obligations. Thus, to the extent the Commission imposes a federal financial reporting obligation, it should apply only to those ETCs designated by the Commission pursuant to Section 214(e)(6) of the Communications Act.

Furthermore, any federal financial reporting obligation the Commission imposes should reflect the business realities faced by ROR carriers and should minimize the burden and expense associated with compliance. As Comporium observes, carriers with multiple study areas under common ownership or control typically utilize consolidated financial reports in the ordinary course of business.[13] A requirement for CAF recipients to prepare an audited report for each supported study area will substantially increase their operating expenses.[14]

Consistent with the Commission's objective of avoiding unnecessary administrative and economic burdens on CAF recipients,[15] the Commission should give ROR carriers maximum flexibility in complying with any federal financial reporting obligation. Rather than requiring ROR carriers to submit extensive audited financial data for every study area where they receive CAF support, the Commission should allow companies with multiple study areas under common ownership or control to submit basic, consolidated financial schedules (balance sheet, profit and

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[12] NECA, *et al.* Petition at 22-23.

[13] Petition for Clarification and/or Reconsideration of Rock Hill Telephone Company d/b/a Comporium, Fort Mill Telephone Company d/b/a Comporium, PBT Telecom, Inc. d/b/a Comporium, and Citizens Telephone Company d/b/a Comporium, WC Docket Nos. 10-90, *et al.* (filed Dec. 29, 2011), at 3 ("Comporium Petition").

[14] Comporium's accounting firm estimates that it would cost an additional $200,000 to develop separate audit reports for each Comporium study area. Comporium Petition at 4. That amount is not insignificant for smaller companies like Comporium.

[15] *See Order* at ¶ 601.

loss and supporting schedules) that pertain exclusively to regulated operations and are certified by an officer of the company.

And given that not all ROR companies prepare audited financials in the regular course of business, the Commission should provide carriers with alternative options to satisfy their reporting obligations. ITTA applauds the Commission's recent clarification that it will allow Rural Utilities Service ("RUS") borrowers to submit the annual financial reports they provide to RUS in lieu of audited financial statements.[16] ITTA urges the Commission to further revise its rules to allow carriers to meet their reporting requirements by filing the same financial information they provide to state regulators that require the submission of annual financial data. CAF recipients also should be eligible for a waiver from any penalties associated with non-compliance with the federal financial reporting obligation if they cannot meet the filing deadline for good cause (e.g., circumstances beyond their control).

In addition, the Commission should set a reasonable and practical filing date (e.g., October 15) instead of the current April 1 deadline for any required financial reporting. While the Commission recently clarified that the 2012 deadline would be extended to allow sufficient time for carriers to comply following Paperwork Reduction Act approval, ITTA submits that the deadline should be extended until October not only for this year, but also all future reporting years.[17] It is difficult and expensive to obtain auditing services during the January 1 to April 1 timeframe because accounting firms are focused on year-end financial reports and audits for

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[16] *In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund,* WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51, WT Docket No. 10-208, Order, DA 12-147, ¶ 14 (rel. Feb. 3, 2012) ("*February 3 Clarification Order*").

[17] *Id.* at ¶ 13.

publicly-traded companies as well as corporate and individual tax returns. Companies can realize cost savings and efficiencies by commencing the audit process for CAF reporting after April 15 so a later filing deadline would allow CAF recipients to utilize their resources in a more prudent manner.

Finally, the Commission should ensure that the information ROR carriers are required to file in connection with any federal financial reporting obligation remains confidential.[18] Such reports will undoubtedly contain sensitive, proprietary financial information that submitting parties do not routinely make available for public inspection. Because public disclosure of such information would likely result in substantial competitive harm to the parties who submit it, parties should be able to seek confidential treatment of the information pursuant to the Commission's rules and the Freedom of Information Act.[19]

V. SAFETY NET ADDITIVE SUPPORT SHOULD BE PHASED OUT AT THE SAME PACE AS THE IDENTICAL SUPPORT RULE

Under the *Order*, safety net additive support for certain incumbent local exchange carriers will be phased out over a two-year period.[20] ITTA agrees with US Telecom that the Commission should reconsider this change and allow a longer phase-out for such support based on concerns of equity and fairness.[21] Competitive ETCs will continue to be able retain safety net additive support for a full five years as the Commission phases out the identical support rule.[22] This result is unfair and contrary to established policy that the universal service fund "must treat

[18] *See Order* at ¶ 602.

[19] *See* 47 C.F.R. § 0.457(d); 5 U.S.C. § 552(b)(4).

[20] *Order* at ¶ 252.

[21] Petition for Reconsideration of the United States Telecom Association, WC Docket Nos. 10-90, *et al*. (filed Dec. 29, 2011), at 28-29 ("US Telecom Petition").

[22] *Order* at ¶ 519.

all market participants equally."[23] To avoid such inequity in implementation of the CAF, the Commission should phase out ILEC safety net additive support over the same five year period applicable to competitive ETCs under the identical support rule phase-out.

In addition, the Commission should bear in mind that changing the rules mid-course could have a negative impact on the broadband deployment goals it seeks to achieve. Companies eligible for safety net additive support formulated long-term business plans, made investment decisions, and incurred costs based on the expectation of receiving safety net additive support in return. With the rapid reduction in such support, funds earmarked to support those investment decisions, including broadband deployment plans, will no longer be available. Thus, a two-year phase-out of safety net additive support for ILECs would jeopardize both previous and future investment in broadband networks, which would undoubtedly have a disproportionate impact in the rural and high-cost areas that need it most.

VI. INTERCARRIER COMPENSATION BASELINE REVENUES SHOULD BE CALCULATED BASED ON BILLED, NOT COLLECTED, REVENUES

ITTA agrees that the Commission should reconsider its decision to use "collected" revenues when determining Eligible Recovery pursuant to the baseline revenues calculation.[24] The current approach is unfair and unworkable for a variety of reasons. First, it results in a permanent reduction in the access revenue baseline for the entire six-year intercarrier compensation transition period by relying exclusively on revenue collected in 2011, even though

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[23] *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 616 (5th Cir. 2000). ITTA notes that the Commission recently clarified certain rules applicable to competitive ETCs in the interest of providing regulatory parity. Specifically, the FCC clarified that the $3,000 per loop annual baseline for the phase-down of competitive ETC support is applicable to the competitive ETC at the incumbent study area level. *February 3 Clarification Order* at ¶ 15. According to the FCC, "[t]his clarification ensures that, consistent with the Commission's stated rationale, the competitive ETCs' baselines are commensurate with the adjustments to the support provided to incumbents serving the same areas." *Id*.

[24] *See, e.g., Order* at ¶ 880.

carriers may have lawfully billed (and may ultimately collect) a higher amount. It is unfair to penalize carriers by reducing their Eligible Recovery simply because they have been unable to collect on amounts tied up in billing disputes that may later be resolved in their favor. The percentage of uncollected revenues could account for 10 percent or more of the total amount billed by a carrier in a given year, which translates to a significant reduction in Eligible Recovery that cannot be made up elsewhere. This unfair result is further compounded by the fact that basing the access revenue baseline on "collected" revenues has the effect of double counting uncollectable revenue because the access recovery charges intended to allow carriers to recover a portion of their costs from retail customers will also end up in uncollectable status.

Second, calculating baseline revenues based on "collected" revenues poses several administrative challenges for carriers. As US Telecom points out, there is no systemized process for allocating interstate switched access revenues between "billed" and "collected" revenues. In some cases, it may also be difficult for carriers to distinguish between revenues for originating and terminating access as the Commission's formula requires.[25] Rather than using revenues "collected" to determine intercarrier compensation baseline revenues, the Commission should allow carriers to use "billed" interstate switched access revenues for purposes of this calculation.

VII. THE $30 RESIDENTIAL RATE CEILING SHOULD NOT BE CALCULATED ON A CUSTOMER-BY-CUSTOMER BASIS

The *Order* requires calculation of the "Residential Rate Ceiling" on a customer-by-customer basis.[26] However, it would be much more reasonable for the Commission to allow calculation of the Residential Rate Ceiling based on an average across the carrier's study area (or on a more granular level, such as an exchange), as billing systems allow. As US Telecom points out, the Commission's pricing rules generally recognize the efficacy of implementing rules on a

[25] US Telecom Petition at 30.

[26] *Order* at ¶ 914.

study area basis.[27] And from a practical standpoint, it would be extremely burdensome for carriers to monitor individual customer charges in a supported area to ensure that no single customer pays more than $30 for service.

There are certain charges that vary from jurisdiction to jurisdiction within a study area, such as 911 fees, and the Commission's rules would require carriers to implement costly billing system upgrades to keep track of these variances simply to ensure that a single customer in a supported area does not exceed the benchmark. This approach is administratively unworkable and would have the effect of eliminating support for entire areas based on the rates charged to a few customers, even though the rates charged to most customers may actually fall below the ceiling.

Calculating the Residential Rate Ceiling based on an average of costs across a study area or a smaller area would provide more benefit to consumers and be more consistent with the Commission's aim of universal broadband availability because it would ensure that support for the expansion of broadband networks is available to more areas that need it. Thus, rather than requiring carriers to calculate the Residential Rate Ceiling on a customer-by-customer basis, the Commission should take the more workable and practical approach of allowing carriers to apply the ceiling on a study area or more granular basis, depending on billing system capabilities.

[27] US Telecom Petition at 31.

CONCLUSION

For the reasons provided above, ITTA respectfully requests that the Commission adopt its recommendations regarding areas that should be eligible for CAF support, accountability mechanisms relating to CAF recipients' public interest obligations, the imposition of reporting obligations and caps on capital and operating expenses for ROR carriers, safety net additive support phase-out, and the calculation of baseline revenues and the Residential Rate Ceiling for intercarrier compensation purposes.

Respectfully submitted,

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