

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

REPLY COMMENTS OF THE



<p>Matthew M. Polka President and Chief Executive Officer American Cable Association One Parkway Center Suite 212 Pittsburgh, Pennsylvania 15220 (412) 922-8300</p> <p>Ross J. Lieberman Vice President of Government Affairs American Cable Association 2415 39th Place, NW Washington, DC 20007 (202) 494-5661</p> <p>February 17, 2012</p>	<p>Thomas Cohen Joshua Guyan Kelley Drye & Warren LLP 3050 K Street, NW Suite 400 Washington, DC 20007 Tel. (202) 342-8518 Fax (202) 342-8451 tcohen@kelleydrye.com Counsel to the American Cable Association</p>
---	---

SUMMARY

With the creation of the Connect America Fund (“CAF”), the Commission has recognized that the telecommunications industry has changed fundamentally. Broadband is now the critical service that must be made “universal.” Competition among voice and broadband providers is vibrant and growing. As a result, the old ways of providing support are not only inefficient, they are frequently counterproductive both to competition in the market and to the achievement of the Commission’s universal service objectives.

In its initial comments, ACA set forth proposals for the Commission to successfully evolve high-cost support in areas served by price cap carriers, including the design of a competitive bidding process that should be used if and when the incumbents refuse to make state-level commitments. Many other parties supported moving expeditiously toward the competitive allocation of support through the Commission’s proposed competitive bidding process. On the other hand, a number of parties want to “turn back the clock” or at least delay implementation of the new regime, even though the legacy system is clearly broken. It neither serves the needs of consumers nor provides support efficiently or where it is warranted. In addition, half-measures will not achieve the Commission’s universal broadband objectives, especially with the limited, finite funding that is available. In these reply comments, ACA highlights these issues and provides further support for its approach:

Definition and Determination of Areas Served by Unsupported Competitors

- The Commission should define an “area subject to unsubsidized competition” as a census block where facilities-based providers of fixed voice and broadband service not receiving high-cost support offer service to at least a majority of service locations in the census block.
- There should be public comment on the proposed list of areas subject to unsupported competition both for Phase I support based on the National

Broadband Map and for Phase II support based on the forward-looking cost model.

Transition from Legacy Funding to CAF Support

- The Commission should eliminate legacy support for price cap carriers as rapidly as possible in areas (census blocks) where unsupported competitors offer service. The Commission should implement this objective later this year when it plans to complete work on the cost model and determine areas where unsupported competition exists.
- For other areas where there is not unsupported competition, the Commission should continue to provide price cap carriers with Phase I legacy voice funding in census blocks where a Phase II recipient (other than a price cap carrier) receives support until the recipient begins providing service to a majority of the locations in the census block or a Remote Areas Fund recipient begins to provide service in the very high-cost area.

Eligible Telecommunications Carrier (“ETC”) Designation Process

- The Commission should assert full control over the ETC designation process (either by preemption or forbearance) and institute a single, efficient, broadband-focused process and obligations;
- To encourage entities to participate in the reverse auction, the new process should permit auction participants to apply for ETC designation after winning support rather than before placing a bid, and should link ETC obligations to serve in an area with receipt of support.

Competitive Bidding Design

- The Commission should:
 - Focus on adopting rules for the competitive bidding process to allocate Phase II CAF support concurrently with developing the forward-looking cost model so that both can be ready by the end of this year;
 - Determine areas served by broadband on a census block basis and designate a technology and competitively neutral geographic area for competitive bidding, such as census tracts, that can be aggregated by bidders for scale;
 - Require support recipients to provide broadband service meeting the performance requirements proposed by ACA to 95 percent of

locations in their service area within two years, with limited waivers for unforeseen delays within the five year term of support; and

- Provide support for a term of five years and then reevaluate the existence of unsupported competition, the necessity for further support and the appropriate method of support.

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY	2
II. IN PRICE CAP TERRITORIES, THE COMMISSION SHOULD PROPERLY RECOGNIZE THE EXISTENCE AND VALUE OF UNSUBSIDIZED COMPETITION AND ESTABLISH A TRANSPARENT PROCESS TO ACCURATELY DETERMINE WHERE IT EXISTS.....	4
III. IN PRICE CAP TERRITORIES, SUPPORT SHOULD BE ELIMINATED AS SOON AS THE COMMISSION DETERMINES THERE IS UNSUPPORTED COMPETITION IN AN AREA, AN AUCTION WINNER BEGINS PROVIDING SERVICE TO MOST LOCATIONS IN A CENSUS BLOCK OR A REMOTE AREAS FUND RECIPIENT BEGINS TO PROVIDE SERVICE IN THE AREA	7
IV. THE COMMISSION SHOULD ASSERT CONTROL OVER THE ELIGIBLE TELECOMMUNICATIONS CARRIER DESIGNATION PROCESS AND OBLIGATIONS FOR BOTH INCUMBENTS AND COMPETITORS.....	10
A. Providers Should Not Be Required to Obtain ETC Designations Before Participating in the Competitive Bidding Process.....	11
B. Rather Than Taking Half-Measures, the Commission Should Use Its Preemption or Forbearance Authority to Re-Design the ETC Designation Process and Requirements	12
C. Preemption or Forbearance Will Allow the Commission to Streamline and Re-Focus the ETC Designation Process and Obligations to Coincide with the CAF’s Transition to Broadband.....	15
V. THE REVERSE AUCTION SHOULD BE HELD EXPEDITIOUSLY AND DESIGNED IN A TECHNOLOGY AND COMPETITIVELY NEUTRAL MANNER.....	16
A. The Proposed Competitive Bidding Process is the Appropriate Method to Transition CAF Support to a More Efficient Process and It Should Be Instituted At the Beginning of 2013	17
B. Areas Eligible for Support in the Competitive Bidding Process Should Be Based on Census Blocks Aggregated to the Census Tract Level	19
C. Deployment in Each Census Tract Should Occur Within Two Years, With Limited Waivers Available for Unforeseen Delays Within the Five Year Term of Support.....	20
D. The Term of Support Pursuant to the Competitive Bidding Process Should Be Five Years With No Renewal Expectancy.....	22
V. CONCLUSION	23

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

**REPLY COMMENTS OF
THE AMERICAN CABLE ASSOCIATION**

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

¹ See *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*”).

I. INTRODUCTION AND SUMMARY

With the creation of the Connect America Fund (“CAF”), the Commission has recognized that the telecommunications industry has changed fundamentally. Broadband is now the critical service that must be made “universal.” Competition among voice and broadband providers is vibrant and growing. As a result, the old ways of providing support are not only inefficient, they are frequently counterproductive both to competition in the market and to the achievement of the Commission’s universal service objectives.

In its initial comments, ACA set forth proposals for the Commission to successfully evolve high-cost support in areas served by price cap carriers, including the design of a competitive bidding process that should be used if and when the incumbents refuse to make state-level commitments. Many other parties supported moving expeditiously toward the competitive allocation of support through the Commission’s proposed competitive bidding process. On the other hand, a number of parties want to “turn back the clock” or at least delay implementation of the new regime, even though the legacy system is clearly broken. It neither serves the needs of consumers nor provides support efficiently or where it is warranted. In addition, half-measures will not achieve the Commission’s universal broadband objectives, especially with the limited, finite funding that is available. In these reply comments, ACA highlights these issues and provides further support for its approach:

Definition and Determination of Areas Served by Unsupported Competitors

- The Commission should define an “area subject to unsubsidized competition” as a census block where facilities-based providers of fixed voice and broadband service not receiving high-cost support offer service to at least a majority of service locations in the census block.
- There should be public comment on the proposed list of areas subject to unsupported competition both for Phase I support based on the National

Broadband Map and for Phase II support based on the forward-looking cost model.

Transition from Legacy Funding to CAF Support

- The Commission should eliminate legacy support for price cap carriers as rapidly as possible in areas (census blocks) where unsupported competitors offer service. The Commission should implement this objective later this year when it plans to complete work on the cost model and determine areas where unsupported competition exists.
- For other areas where there is not unsupported competition, the Commission should continue to provide price cap carriers with Phase I legacy voice funding in census blocks where a Phase II recipient (other than a price cap carrier) receives support until the recipient begins providing service to a majority of the locations in the census block or a Remote Areas Fund recipient begins to provide service in the very high-cost area.

Eligible Telecommunications Carrier (“ETC”) Designation Process

- The Commission should assert full control over the ETC designation process (either by preemption or forbearance) and institute a single, efficient, broadband-focused process and obligations;
- To encourage entities to participate in the reverse auction, the new process should permit auction participants to apply for ETC designation after winning support rather than before placing a bid, and should link ETC obligations to serve in an area with receipt of support.

Competitive Bidding Design

- The Commission should:
 - Focus on adopting rules for the competitive bidding process to allocate Phase II CAF support concurrently with developing the forward-looking cost model so that both can be ready by the end of this year;
 - Determine areas served by broadband on a census block basis and designate a technology and competitively neutral geographic area for competitive bidding, such as census tracts, that can be aggregated by bidders for scale;
 - Require support recipients to provide broadband service meeting the performance requirements proposed by ACA to 95 percent of

locations in their service area within two years, with limited waivers for unforeseen delays within the five year term of support; and

- Provide support for a term of five years and then reevaluate the existence of unsupported competition, the necessity for further support and the appropriate method of support.

II. IN PRICE CAP TERRITORIES, THE COMMISSION SHOULD PROPERLY RECOGNIZE THE EXISTENCE AND VALUE OF UNSUBSIDIZED COMPETITION AND ESTABLISH A TRANSPARENT PROCESS TO ACCURATELY DETERMINE WHERE IT EXISTS

In its comments, ACA supported the Commission’s proposal to publish a list of eligible census blocks for CAF Phase II support and give the public an opportunity to challenge the Wireline Competition Bureau’s list of areas that are, or are not, served by an unsupported competitor.² However, ACA also highlighted the fact that the Commission has not defined what it means for an area to be “unserved by an unsupported competitor.”³

Pursuant to ACA’s proposed definition, a census block is served by an unsupported competitor if the competitor “certifies to the Commission that it provides broadband service (at speeds of at least 4 Mbps downstream and 1 Mbps upstream) to at least a majority of the service locations in the census block.”⁴ This definition has a sound basis because the construction of network facilities by a single provider to most of the locations in a relatively limited and homogenous area (*i.e.*, a census block) demonstrates that most, if not all, locations would be able to receive service and that the provision of continued support would harm the

² See Comments of the American Cable Association, WC Docket No. 10-90 et al. at 9 (filed Jan. 18, 2012) (“ACA Comments”).

³ The *Order* states that CAF Phase I support will be transitioned to building and operating broadband-capable networks in areas that are “substantially” unserved by an unsubsidized competitor. See *Order*, ¶ 149. The use of “substantially” is imprecise.

⁴ ACA Comments at 10.

development of competition.⁵ As ACA noted in its comments, if the Commission were to provide support to the incumbent or another competitor in such a census block, the existing unsupported competitor would be placed at an unfair competitive disadvantage and would have little or no incentive to continue building out broadband service using its own private funding.⁶

In its comments and its petition for reconsideration, the Wireless Internet Service Providers Association (“WISPA”) argues that the Commission should not provide CAF support in any area with unsupported competition provided by one or more competitors.⁷ ACA agrees. Therefore, in its opposition to several petitions for reconsideration, ACA proposed a slightly revised definition – “an ‘area subject to unsubsidized competition’ should be defined as a census block where facilities-based providers of fixed voice and broadband service not receiving high-cost support offer service to at least a majority of service locations in the census block.”⁸ As long as consumers have options for voice and broadband service, it is unimportant whether the

⁵ The Commission is seeking comment on how to adjust support levels for rate-of-return carriers where there is greater than 75 percent overlap between a rate-of-return carrier and unsubsidized competitors and the National Cable & Telecommunications Association (“NCTA”) has supported the 75 percent threshold. *See Order*, ¶ 1061, 1071, 1075 (citing Comments of the National Cable and Telecommunications Association, WC Docket No. 10-90 et al. at 12 (filed Aug. 24, 2011)). That proposal is based on service in a study area rather than a census block. Since a census block is much smaller than a study area, having infrastructure necessary to serve a majority of locations in the census block is more likely to result in service to the remaining locations than is existing infrastructure to serve a majority (or even 75 percent) of locations in a study area. In addition, as ACA has said, removing high-cost support in areas where there is an unsupported competitor substantially serving the area will allow the unsupported competitor(s) to deploy infrastructure to the remaining locations more quickly because they will no longer have to compete with a government-supported provider.

⁶ *See ACA Comments* at 10.

⁷ *See Petition for Partial Reconsideration of the Wireless Internet Service Providers Association*, WC Docket No. 10-90 et al. at 7 (filed Dec. 29, 2011) and *Comments of the Wireless Internet Service Providers Association*, WC Docket No. 10-90 et al. at 18 (filed Jan. 18, 2012) (“WISPA Comments”).

⁸ *Opposition of the American Cable Association*, WC Docket No. 10-90 et al. at n.10 (filed Feb. 9, 2012) (“ACA Opposition”).

competition is provided by a single competitor or a number of competitors. In either circumstance, providing CAF support in that location would be wasteful and counterproductive.⁹

CenturyLink seeks to limit the number of areas that are considered to be served by unsupported competition and therefore proposes that in such areas competitors must provide “complete, or near complete, coverage of the locations within the area.”¹⁰ CenturyLink argues that if this requirement is not met, no provider will receive support to serve the locations unserved by the competitive provider.¹¹ CenturyLink’s proposal would undermine the competition provided by the unsupported competitor and would waste funds that could be used in areas with little or no unsubsidized competition. Further, the loss of support does not mean previously unserved areas will continue to go unserved. Rather, by placing the incumbent and the unsupported competitor(s) on equal footing to serve locations in the area, there will be increased efforts by all providers to serve all locations more efficiently. This is because the formerly supported service provider may invest more private funds in its network to retain customers and the unsupported competitor that already serves a majority of locations in the area

⁹ ACA wishes to make clear that it supports providing high-cost funding to all locations that do not have broadband service at the designated performance levels. At the same time, it is essential that the high-cost program not provide support to a location where an unsupported competitor provides the required broadband service. Providing support in such a situation harms the integrity of the program by undermining competition and by wasting the limited government funding that is available. The Commission is thus particularly challenged to develop an approach that meets or at least properly balances all of these objectives within each census block. One potential solution is to award support on a much more granular basis than census blocks. The Commission in its development of the cost model is endeavoring to enable this more precise determination. Another solution would involve the use of services delivered via satellite. Because of the importance of this problem to the existence and operation of the fund, the Commission needs to fashion more refined policies. ACA intends to work with the Commission in that process.

¹⁰ CenturyLink Comments at 12.

¹¹ *See id.* at 12-13.

will have an opportunity to invest its private funds to reach the remaining locations because it is no longer competing against a supported incumbent.

The Commission has largely set forth the appropriate process for determining the areas where there is unsupported competition. ACA believes the Commission can make the determination using a streamlined process. First, the Commission should seek public comment on the National Broadband Map's ("NBM's") determination of areas that are served and unserved for purposes of providing Phase I support. Parties have raised concerns that the NBM is not accurate.¹² Therefore, to ensure that the process is transparent and based on accurate, current evidence, the Commission should seek comment on the determinations of the NBM. In addition, the Commission should likewise seek comment on the list of areas that are unserved by unsupported competition before allocating Phase II support, as it has proposed to do.¹³

III. IN PRICE CAP TERRITORIES, SUPPORT SHOULD BE ELIMINATED AS SOON AS THE COMMISSION DETERMINES THERE IS UNSUPPORTED COMPETITION IN AN AREA, AN AUCTION WINNER BEGINS PROVIDING SERVICE TO MOST LOCATIONS IN A CENSUS BLOCK OR A REMOTE AREAS FUND RECIPIENT BEGINS TO PROVIDE SERVICE IN THE AREA

Under the Commission's proposal for CAF Phase II, auction winners are required to provide adequate broadband service to 85 percent of the locations in their service area by the end of the third year of support.¹⁴ Based on the experiences of its members who have deployed broadband networks, ACA has proposed requiring auction winners to provide service to 95

¹² See Comments of United States Telecom Association, WC Docket No. 10-90 et al. at 8-9 (filed Jan 18, 2012) ("USTA Comments") ("If a third-party source (such as NTIA's National Broadband Map) is initially used for identification [of areas with competitive overlap], there must be a challenge or appeal process to deal with situations where that map is not accurate.") and Petition for Reconsideration of the Independent Telephone and Telecommunications Alliance, WC Docket No. 10-90 et al. at 3 (filed Dec. 29, 2011).

¹³ See Order, ¶ 171 and ACA Comments at 9-11 (supporting this proposal).

¹⁴ See Order, ¶¶ 1207, 160.

percent of locations in the service area by the end of the second year of support.¹⁵ Under either proposal, there is a gap before the auction winner will provide broadband service to the vast majority of locations¹⁶ and legacy high-cost funding should be continued in areas where there may be a substantial loss of service.

USTA's proposal to address this transition concern is for the Commission to continue providing Phase I legacy voice support to price cap carriers and phase it down over five years.¹⁷ Further, USTA argues that Phase I support should continue as long as state requirements, such as Carrier of Last Resort ("COLR") remain.¹⁸ ACA agrees that incumbent price cap carriers should not be subject to state obligations like COLR in areas where they lose Phase I support due to the existence of unsupported competition.¹⁹ However, a five year phase down of such support is excessive. Price cap carriers would continue to receive legacy support, albeit at a diminishing level, either in areas where unsupported competition exists or where they have elected not to serve on a state-wide basis, they did not win support through a competitive bidding process, and another provider receiving support offers voice service. Consequently, the USTA proposal is contrary to the Commission's goals, providing excessive and unwarranted legacy USF high-cost support rather than moving forward toward the more efficient and

¹⁵ See ACA Comments at 13, 33.

¹⁶ This period could be longer dependent on waivers granted due to circumstances beyond the supported carrier's control, such as local zoning and permitting delays. See *infra* Section V.C.

¹⁷ See USTA Comments at 9.

¹⁸ See *id.* at 8.

¹⁹ See Comments of the National Cable & Telecommunications Association, WC Docket No. 10-90 et al. at 15 (filed Jan 18, 2012) ("NCTA Comments") ("NCTA believes the Commission overstated the effect of state regulation on incumbent LECs...while incumbent LECs often point to their carrier of last resort obligations, these obligations are at best ill-defined and any buildout obligation typically is mitigated by line extension charges.").

competition-driven process for the CAF set out in the *Order*.²⁰ Further, it would strain the CAF budget because it fails to propose a way to pay for carryover Phase I support under the strict CAF funding limits.

Alternatively, CenturyLink proposes to require the winner of competitively-awarded support to “immediately assume the full CAF service obligations for the awarded area that would have applied to the incumbent...”²¹ This proposal ignores the fact that any winner of the reverse auction must have at least some time to build out its network. ACA has proposed that such auction winners be required to serve at least 95 percent of locations within two years, but it would be unusual for any provider to immediately take on the service obligations of the incumbent the day after winning the auction.

As a realistic middle ground, ACA submits that, consistent with the Commission’s aims, price cap carriers should continue to receive Phase I legacy voice funding in a census block only until it is determined that the census block is served by unsupported competition,²² an auction winner begins providing service to a majority of the locations in the census block,²³ or a Remote Areas Fund recipient begins to provide service in the very high-cost

²⁰ *See id.* at n.23 (“The Phase I mechanism is guaranteed to overcompensate incumbent LECs, and therefore waste limited funds, because it is based on the predicted cost of the highest-cost wire centers, yet price cap incumbent LECs will be able to use this support to build to the lowest-cost wire centers...Moreover, to the extent this excess funding is used to compete in areas served by unsubsidized competitors, it undermines the Commission’s policy goal of targeting support only to those areas where it is needed.”)

²¹ CenturyLink Comments at 14.

²² This occurs when the cost model has been completed and the list of census blocks where unsupported competition exists is final (ideally at the end of this year at the latest). *See* ACA Opposition at 6-8.

²³ ACA has proposed a system whereby the Commission receives quarterly reports on the status of the auction winner’s construction so that the Phase I support recipients will have adequate notice of where support will be terminated in the next quarter. *See* ACA Opposition at 8-9.

area.²⁴ In this manner, legacy Phase I support continues only as long as it is necessary, saving the fund money that can be used to bridge the gap until the Phase II competitive bidding winner can begin providing service to a majority of locations in an area.

IV. THE COMMISSION SHOULD ASSERT CONTROL OVER THE ELIGIBLE TELECOMMUNICATIONS CARRIER DESIGNATION PROCESS AND OBLIGATIONS FOR BOTH INCUMBENTS AND COMPETITORS

In its comments, ACA urged the Commission to “assert full control over a new ETC designation process” either by preemption or forbearance.²⁵ It provided a compelling policy rationale and a legal basis to support such an action. Other parties also supported the need for the Commission to take this step and further bolstered the legal basis for it. This step is necessary to attract the greatest number of bidders, maximize the use of scarce high-cost funding and successfully transition USF support for traditional voice service to CAF support for broadband deployment.

ACA’s comments focused on how the Commission can avoid discouraging potential competitive bidders so that it can hold an efficient and successful reverse auction to distribute CAF Phase II support. ACA’s concerns with respect to the ETC designation process and ongoing requirements are threefold: (1) that requiring auction participants to obtain ETC status to participate in the auction rather than after winning support would discourage many competitive providers from participating²⁶; (2) that competitive providers could be subject to ETC obligations in an area without receiving support, which would also discourage participation

²⁴ Again, ACA proposes a system whereby Phase I support recipients receive adequate notice before loss of support. *See* ACA Opposition at 9.

²⁵ *See* ACA Comments at 21.

²⁶ *See id.* at 18.

in the auction²⁷; and (3) that the existing ETC designation process is inherently onerous because it potentially requires that carriers file multiple applications, involves delays not under the Commission's control and often includes burdensome requirements.²⁸

A. Providers Should Not Be Required to Obtain ETC Designations Before Participating in the Competitive Bidding Process

As ACA explained in its initial comments, the Commission has ample authority within the letter of Section 214(e)(1) of the Communications Act to permit bidders to participate in the auction and only obtain ETC status if they win.²⁹ AT&T agrees that providers should apply for ETC designation after they win the auction, not before participating.³⁰ On the other hand, CenturyLink and the Independent Telephone and Telecommunications Alliance (“ITTA”) argue that providers should be required to obtain ETC designation prior to bidding for support.³¹ CenturyLink provides no reasoning or support for this position other than that it will ensure that bidders are qualified. ITTA reiterates the qualification argument and further adds that new competitors “may have no or a limited track record of successfully providing voice or broadband service in hard-to-serve areas.”³²

First, the Commission has other means of ensuring that bidders are qualified, and, if they win the auction, comply with all public interest requirements. For instance, the Commission's short form application, including a certification of financial and technical

²⁷ See *id.* at 20.

²⁸ See *id.* at 21.

²⁹ See *id.* at 20-21. Section 214(e)(1) says ETC shall be eligible to *receive* support, not *seek* support.

³⁰ See Comments of AT&T, WC Docket No. 10-90 et al. at 101 (filed Apr. 18, 2011).

³¹ See Comments of CenturyLink, WC Docket No. 10-90 et al. at 14 (filed Jan. 18, 2012) (“CenturyLink Comments”) and Comments of the Independent Telephone and Telecommunications Alliance, WC Docket No. 10-90 et al. at 16 (filed Jan. 18, 2012) (“ITTA Comments”).

³² ITTA Comments at 16.

qualifications, can ensure that bidders are qualified to participate in the auction.³³ The Commission also can impose penalties on any bidder that misrepresents or otherwise does not participate in good faith with an intention to deploy a network and offer service.

In addition, given new entry by wireline and wireless providers over the past decades, there are likely as many non-ETCs qualified to provide voice and broadband service in hard-to-serve areas (*e.g.*, cable providers) as there are ETCs. For example, cable operators are the nation's leaders in broadband deployment, currently reaching 93 percent of all households,³⁴ including in many hard-to-serve areas, and having a larger share of the market. Because these non-ETCs have an extensive track record of successfully deploying and operating networks to provide broadband and voice service, the Commission should want to encourage their participation in the auctions to ensure funding is distributed most efficiently and consumers receive the best service. In sum, there are strong policy justifications for reorienting the current ETC process so that auction participants do not endure the onerous state ETC designation process, or take on service obligations before truly being eligible for CAF support. This is especially the case when there are much more practical and less burdensome qualification options at the Commission's disposal.

B. Rather Than Taking Half-Measures, the Commission Should Use Its Preemption or Forbearance Authority to Re-Design the ETC Designation Process and Requirements

The Commission should assert full control over the ETC designation process so there is a nexus between ETC obligations to serve in an area and receipt of support to serve that area. In their comments, the price cap carriers are primarily and greatly concerned that they not

³³ See ACA Comments at 19 (noting that some commenters have argued that the ETC designation and certification of financial and technical qualifications are duplicative).

³⁴ See NCTA Industry Data on Availability, available at <http://www.ncta.com/StatsGroup/Availability.aspx>.

be subject to ETC requirements in areas where their high-cost support is phased out.³⁵ ACA believes this is a legitimate concern.³⁶ In effect, their concern and the concern of competitive providers described herein are “two sides of the same coin.” At the very least, the Commission should, as it has proposed, include in the rule a statement that “designation may be conditional subject to the receipt of CAF Phase II Competitive Bidding support.”³⁷ However, for this protection to have effect, the Commission should replace “may” with “shall.” Otherwise, assuming the Commission fails to take charge of the ETC process as ACA proposes, the states will not necessarily follow this important caveat.

Further, ETC designations have proven to be difficult to relinquish. As noted by Verizon, “state ETC relinquishment proceedings can often be contentious and often can languish for months, or longer, despite a clear statutory requirement to liberally allow ETCs to relinquish their designations.”³⁸ Verizon further described how Maine required Verizon Wireless to provide free handsets, construct new cell sites and provide Lifeline-like benefits in order to relinquish its ETC status.³⁹ For many competitive providers such examples will convince them that participation in the auction is simply not worth the risk of a potential “unfunded mandate.”

³⁵ See Comments of AT&T, WC Docket No. 10-90 et al. at 3 (filed Jan. 18, 2012) (“AT&T Comments”); Comments of Verizon, WC Docket No. 10-90 et al. at 3 (filed Jan. 18, 2012) (“Verizon Comments”); Comments of Windstream Communications Inc. on Sections XVII.A-K, WC Docket No. 10-90 et al. at 33 (filed Jan. 18, 2012) (“Windstream Comments”); USTA Comments at 6-7.

³⁶ States are beginning to rescind ETC obligations, such as carrier-of-last-resort, however, the Commission should not wait for the individual states to undertake reform at their own pace. See Matt Squire, OHIO – Senate Committee to Consider Amendments to Deregulation Bill, Telecommunications Report, State Newswire, Feb. 10, 2012 and Tiffany Parks, *Phone Industry Backs Bill to Remove Outdated Regulations*, Akron Legal News, Feb. 1, 2012, available at <http://www.akronlegalnews.com/editorial/2782>.

³⁷ See proposed Section 54.5.

³⁸ See Verizon Comments at 13.

³⁹ See *id.*

In its attempts to give the Commission as many options as possible to address the problem of ETC designation with respect to the new CAF, AT&T argues that the Commission could simply reinterpret Section 214 of the Communications Act.⁴⁰ In that way, the Commission could direct states to redefine the ETC service areas of non-rural carriers to remove areas where the ETC is not receiving support or reinterpret Section 214(e)(1) to mean that an ETC only has obligations in areas where it is supported.⁴¹ Unfortunately, as the Massachusetts Department of Telecommunications and Cable (“MA DTC”) states, it is the state commission that establishes an ETC’s service area according to Section 214(e)(2).⁴² The statute does not say the state commissions establish the service area according to direction by the Commission.

Although AT&T makes a compelling argument, there is no need for the Commission to strain its statutory interpretation when there are clearer and more appropriate avenues for the Commission to assert full control over the ETC designation process. Further, the comprehensive overhaul of high-cost support to transition the nation’s universal service focus to broadband is not a time for half-measures. AT&T is correct that “section 254 grants the Commission broad authority to implement the entire federal universal service program, of which ETC designations form only a small part.”⁴³ In addition, as AT&T, ACA and others have asserted, the Commission has authority to preempt state authority where, as here, the states “rely on or burden” the “federal universal service support mechanisms,” or it would be impossible or impractical to implement both federal and state policies.⁴⁴

⁴⁰ See AT&T Comments at 8.

⁴¹ See *id.* at 8.

⁴² See Comments of the Massachusetts Department of Telecommunications and Cable, WC Docket No. 10-90 et al. at 27 (filed Jan. 18, 2012) (“MA DTC Comments”).

⁴³ AT&T Comments at 11.

⁴⁴ See ACA Comments at 26.

Further, the Commission was given explicit authority in the Communications Act to forbear from provisions of the statute (including state ETC designation) if it 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.”⁴⁵ ACA explained in its comments how each element of the forbearance analysis is met in this case. Either preemption or forbearance are clear statutory avenues for the Commission to assert exclusive control over the ETC designation process, which is only a “small part” of the entire federal universal service program, but which will have an important impact on the effectiveness of the competitive bidding process and the transition to support for broadband deployment.

C. Preemption or Forbearance Will Allow the Commission to Streamline and Re-Focus the ETC Designation Process and Obligations to Coincide with the CAF’s Transition to Broadband

The time has come for the Commission to replace the inherently burdensome, fractured, and counterproductive ETC designation process with a single, efficient, broadband-focused process is through preemption or forbearance. The broadband providers that win support and obtain ETC status should not be subject to traditional, legacy ETC obligations when the CAF is focused on a transition to broadband deployment. As AT&T explained, “[c]ontinuing to apply legacy eligible telecommunications carrier (ETC), carrier of last resort (COLR) and other regulatory requirements designed for a world of circuit-switched voice services in a monopoly environment is a recipe for failure, and guarantees that the Commission will have to rely on significantly greater CAF support amounts, rather than private investment, to close most of the current gap between served and unserved areas.”⁴⁶

⁴⁵ *Id.* at 27 and 47 U.S.C. § 160(a).

⁴⁶ *See* AT&T Comments at 2.

The Commission has decided to shift the focus of high-cost support to broadband, and so ETC obligations should likewise focus on broadband, which the states have no role in regulating.⁴⁷ In the past decade, incumbent carriers have lost significant market share for voice services and today sign up only a minority of new subscribers. On the other hand, as noted above, cable providers are the nation's leaders in broadband service, both in terms of service quality and market share. These trends are poised to continue. The legacy ETC designation process that was designed for the circuit-switched voice world is counterproductive to instituting an effective competitive bidding process for broadband support. The Commission should take control of a new ETC designation process designed with the needs and goals of CAF support for broadband at its heart.

The Commission should, at the very least, design an ETC designation process in line with the proposal submitted by NCTA.⁴⁸ NCTA's proposal calls for the Commission to "streamline the ETC designation process" by limiting the criteria that the state commissions can consider and how long they have to consider them.⁴⁹ Such measures would hopefully at least convince competitive providers that they will not be overburdened with legacy voice application processes and obligations by participating in the reverse auction.

V. THE REVERSE AUCTION SHOULD BE HELD EXPEDITIOUSLY AND DESIGNED IN A TECHNOLOGY AND COMPETITIVELY NEUTRAL MANNER

The Commission should move expeditiously to adopt rules for the competitive bidding process to allocate Phase II CAF support while it is developing the forward-looking cost

⁴⁷ See ACA Comments at 22.

⁴⁸ See NCTA Comments at 13.

⁴⁹ See *id.* ACA advocated for a similar alternative approach in its comments. See ACA Comments at n.48.

model so that both can be ready by the end of this year. The commenters largely agree that areas served should be determined on a census block basis, and ACA urges the Commission to designate a technology and competitively neutral geographic area for competitive bidding, such as census tracts. Further, as ACA has proposed, support recipients should provide broadband service meeting the performance requirements to 95 percent of locations in their service area within two years with limited waivers for unforeseen delays within the five year term of support. Finally, recipients should receive support for a term of five years, and the Commission should then reevaluate the existence of unsupported competition, the necessity for further support and the appropriate method of support.

A. The Proposed Competitive Bidding Process is the Appropriate Method to Transition CAF Support to a More Efficient Process and It Should Be Instituted At the Beginning of 2013

As ACA discussed in its comments, the Commission has found in awarding spectrum through auctions over the past 15 years that a competitive process can be instituted quickly and allocate a limited resource more efficiently than any administrative process.⁵⁰ The competitive bidding process is relatively straightforward, and the Commission can develop appropriate rules, based largely on its current proposals, by the end of this year. AT&T argues that auctions are untested and urges the Commission to wait until next year after the Mobility Fund Phase I auction to address rules for the CAF Phase II reverse auction.⁵¹ Such delays simply continue the *status quo* Phase I legacy support for carriers such as AT&T, to the detriment of the Commission's efficient distribution of limited funds.

In addition, CenturyLink argues that the Commission should "place its primary focus on insuring that the model-determined support and corresponding build-out timeline

⁵⁰ See ACA Comments at 2.

⁵¹ See AT&T Comments at 33-34.

properly incent price cap carriers to assume the state-level commitment.”⁵² Although developing the forward-looking cost model is an important endeavor, there is no reason that the Commission cannot undertake that process and develop competitive bidding rules at the same time. Further, CenturyLink’s proposal to focus on the cost model to the detriment of the competitive bidding process would cause the CAF to forego the competitive efficiencies that will be realized from having competing providers bid for the least support to provide the best broadband service. In addition, without competitive bidding, incumbents that forego the state-level commitment would continue to receive support without an obligation to provide broadband service. That would slow the overall deployment of broadband infrastructure.

CenturyLink’s focus on the cost model to the detriment of competitive bidding assumes that the price cap carriers are in the best position to deploy broadband in high-cost areas using CAF support. The MA DTC explicitly argues that “price cap carriers are better positioned to build out broadband at the lowest cost due to the presence of their existing infrastructure.”⁵³

These arguments should be rejected. First, this assumption ignores existing broadband competition and the potential for greater competition in high-cost areas. Cable providers have significant existing infrastructure and are constantly expanding their plant. As a result, they are the industry leaders in broadband deployment, both with respect to households served (*i.e.*, 93 percent)⁵⁴ and performance.⁵⁵ Such experienced broadband providers should be

⁵² CenturyLink Comments at 11.

⁵³ MA DTC Comments at 10.

⁵⁴ See NCTA Industry Data on Availability, available at <http://www.ncta.com/StatsGroup/Availability.aspx>.

⁵⁵ 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. According to data from independent testing firm Ookla, cable operators delivered the fastest average

permitted to compete on equal footing with incumbents for CAF support to deploy broadband in the most efficient manner possible. Second, since incumbents will no longer receive support in areas subject to unsupported competition, areas adjacent to those served by supported competitors will be prime candidates for service by non-incumbents. Finally, even if competitive providers do not win the reverse auction in a particular census tract, their participation will ensure that support is provided more efficiently than simply relying on the cost model.

B. Areas Eligible for Support in the Competitive Bidding Process Should Be Based on Census Blocks Aggregated to the Census Tract Level

In its comments, ACA reiterated its position that unserved areas should be determined using the smallest feasible geographic area that can be identified with relative ease and supported the Commission’s proposal to identify unserved areas at the census block level.⁵⁶ The commenters generally agree with this approach, however, they differ with respect to the appropriate geographic area for competitive bidding. ACA proposed that auction participants bid on service areas based on aggregated eligible census blocks at the census tract level.⁵⁷ Some price cap carriers have argued in favor of bidding on wire centers, potentially as a default with an opportunity for parties to challenge use of a particular wire center.⁵⁸ This would put a clear burden on non-price cap carriers and is not competitively neutral.⁵⁹ ACA would be willing to

broadband download speeds in 2011 – with major MSOs easily blasting by rival telco and satellite Internet services.

⁵⁶ See ACA Comments at 8 and *Order*, ¶ 1192.

⁵⁷ See ACA Comments at 11.

⁵⁸ See *e.g.*, Windstream Comments at 21.

⁵⁹ NCTA Comments at 12 (“To maximize the number of participants in any bidding process, the Commission should award support on a competitively and technologically neutral basis, such as by census blocks, rather than by geographic areas specific to incumbent LECs, such as study areas.”).

entertain other proposals for competitive bidding geographic areas, as long as they are competitively neutral, like ACA's census tract approach.

Several parties also claim that census tracts are “too small to be practical”⁶⁰ or that they do not have sufficient scale.⁶¹ ACA proposed that a bidder could bid on several aggregated census tracts in order to provide scale, but that each census tract would be evaluated individually so that the least support possible is provided in each census tract. This method combines the bidder-defined and the census-tract approaches. Further, ACA's cable operator members indicate that they would have little problem extending their existing broadband plant on a census tract basis. In sum, ACA has proposed a technology and competitively neutral approach to competitive bidding that defines underserved areas by census block and then permits bidders to define their areas based on census tracts, including in packages of several census tracts for scale.

C. Deployment in Each Census Tract Should Occur Within Two Years, With Limited Waivers Available for Unforeseen Delays Within the Five Year Term of Support

ACA asserted in its comments that the Commission should grant limited waivers of the initial two year deployment deadline for delays due to government right of way or other permits or authorization.⁶² In its petition for reconsideration, USTA urged the Commission to “clarify that delays resulting from circumstances beyond an ETC's control will toll any CAF

⁶⁰ CenturyLink Comments at 13. CenturyLink simply makes a declaratory statement that census blocks and census tracts are too small without providing any support or reasoning for this conclusion.

⁶¹ See MA DTC Comments at 16 (“The Commission should select the Bidder-Defined Approach since it gives bidders greater flexibility in aggregating census blocks that leverage their economies of scale and scope.”)

⁶² See ACA Comments at n.25, 74.

broadband build-out deadlines established in the Order.”⁶³ Such delays, according to USTA, include “inevitable construction delays caused by local zoning, permitting authorities, and the like.”⁶⁴ Windstream argues that “simply obtaining pole attachments can delay fiber deployment projects for a year or more.”⁶⁵ Although ACA agrees that such unforeseen delays warrant waivers, the USTA proposal needs to be limited.

Limited waivers of the penetration deadlines are not unreasonable if sufficient proof of the problem is provided, as well as evidence that the supported carrier exercised diligence to address the issue. However, such limited waivers should only apply to interim deployment coverage deadlines during the five year term of support. The Commission should not grant a waiver or extension of the five year term since this would undermine the Commission’s ability to ensure that support is awarded efficiently and performance requirements meet relevant market conditions. Instead, the Commission should determine at the end of the five year term whether providing broadband service to any locations not served by the support recipient will require further support or if further support is unnecessary (*e.g.* an unsubsidized competitor can offer service meeting the Commission’s performance obligations).⁶⁶ Further, if additional support is necessary, the Commission can determine what is the best competitive method to provide that support (*e.g.* auctions, vouchers).

⁶³ Petition for Reconsideration of the United States Telecom Association, WC Docket No. 10-90 et al. at 26 (filed Dec. 29, 2011) (“USTA Petition”). In its comments, USTA argues that penalties for failure to meet build-out requirements should not be imposed if they are due to delays beyond the ETC’s control. *See* USTA Comments at 22.

⁶⁴ USTA Petition at 27.

⁶⁵ Windstream Comments at 30.

⁶⁶ *See* ACA Comments at 13-14.

D. The Term of Support Pursuant to the Competitive Bidding Process Should Be Five Years With No Renewal Expectancy

In its comments, ACA supported the Commission’s proposal to provide support to auction winners for a term of five years based on the experience of its members in deploying and operating broadband networks across the country.⁶⁷ However, ACA asserted that auction winners should have no expectation or preference for renewal after the five year term is up.⁶⁸ This is because the broadband market is so dynamic that it cannot be known whether additional support will be needed after five years or if there will be unsupported competition in additional areas at that time. In a market as dynamic as broadband communications, more cost effective alternatives or new technologies could arise within five years. Further, the Commission should not determine now how best to distribute any further support that is necessary after five years. The Commission may determine at that time, possibly as a result of its experience with the Remote Areas Fund, that it would be more efficient to provide the next round of support by voucher.

Windstream argues for a ten year term of support due to the “economic realities of network building.”⁶⁹ In ACA members’ experience, the broadband networks necessary to serve 95 percent of locations in each eligible area can be completed in two years, and many other broadband deployment programs have had deadlines as short as one year.⁷⁰ Further, the

⁶⁷ See *id.* at 13.

⁶⁸ See *id.*

⁶⁹ Windstream Comments at 22-23.

⁷⁰ The State of Maine’s ConnectME Authority broadband support program requires eligible applicants to complete projects within one year of funding unless a waiver is granted due to unique or unforeseen circumstances. See CMR 99-639-101 (2012). In addition, the MassBroadband 123 project’s Request for Applications for Last-Mile Broadband Solutions included a one year project completion deadline. See p.3 http://www.massbroadband.org/mbi_rfp/last_mile/2011-MBI-09_Soln_LastMileSolutions_Apr11.pdf.

Commission should not commit to providing limited CAF funding for ten years in areas that may receive unsupported competition in five years or less. The five year term gives the Commission an important opportunity to reevaluate whether additional support is necessary, or if private investment has continued to spread unsupported competition further into supported territories. Whereas withdrawing CAF support in such areas after five years would encourage the new unsubsidized competitor(s), a ten year term of support would ward off unsupported competitors because they would see no opportunity on the horizon to compete on a level playing field.

V. CONCLUSION

With the adoption of the *Order* last fall, the Commission took a major step towards reorienting high-cost support so that it matches the needs of broadband consumers and the new and dynamic industry structure. The Commission itself recognizes that, even with this great stride, much work needs to be accomplished. In these comments, ACA urges the Commission to eschew the proposals of commenters who seek to “turn back the clock” or timidly move forward. These proposals will undermine the Commission’s aims. Instead, the Commission should adopt policies that will enhance the chances that the new regime will benefit broadband consumers. ACA believes its policies proposed herein meet that goal.

Respectfully submitted,

Thomas Cohen

<p>Matthew M. Polka President and Chief Executive Officer American Cable Association One Parkway Center Suite 212 Pittsburgh, Pennsylvania 15220 (412) 922-8300</p> <p>Ross J. Lieberman Vice President of Government Affairs American Cable Association 2415 39th Place, NW Washington, DC 20007 (202) 494-5661</p> <p>February 17, 2012</p>	<p>Thomas Cohen Joshua Guyan Kelley Drye & Warren LLP 3050 K Street, NW Suite 400 Washington, DC 20007 Tel. (202) 342-8518 Fax (202) 342-8451 tcohen@kelleydrye.com Counsel to the American Cable Association</p>
---	---