

**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

**THE UNITED STATES TELECOM ASSOCIATION'S
REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION**

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I. INTRODUCTION AND SUMMARY

Pursuant to Section 1.429 of the Commission’s rules and the Commission’s February 3, 2012 Public Notice,¹ the United States Telecom Association (“USTelecom”) respectfully submits this reply to oppositions to its petition seeking reconsideration and clarification of the *Order*.²

¹ 47 C.F.R. § 1.429; Public Notice, Comment Cycle Established for Oppositions and Replies to Petitions for Reconsideration of the *USF/ICC Transformation Order*, DA 12-130 (rel. Feb. 3, 2012).

² *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, FCC 11-161, ¶ 164 (rel. Nov. 18, 2011) (“*Order*”).

Given the transformative nature of the *Order* and the importance of the universal service and intercarrier compensation programs, it is hardly surprising that numerous parties have asked the Commission to reconsider certain aspects of its *Order*. Nor is it surprising that the Commission itself has recognized the need to revisit its reform initiatives.³ Indeed, just this month, the Wireline Competition and Wireless Telecommunications Bureaus released a decision revising and clarifying certain aspects of the *Order*, which addressed a number of issues that were the subject of USTelecom's Petition.⁴

Of the remaining issues upon which USTelecom has requested reconsideration and clarification, some parties oppose USTelecom's Petition without addressing the merits of USTelecom's requests or offering substantive arguments that warrant a response.⁵ In other

³ See, e.g., *Connect America Fund*, Order on Reconsideration, WC Docket No. 10-90, FCC 11-189 (rel. Dec. 23, 2011) (modifying on its own motion two aspects of the *Order*).

⁴ *Connect America Fund*, Order, WC Docket No. 10-90, DA 12-147 (rel. Feb. 3, 2012); United States Telecom Association Petition for Reconsideration and Clarification, WC Docket No. 10-90 (filed Dec. 29, 2011) ("USTelecom Petition"). *But see* Comments of AT&T, WC Docket No. 10-90, at 9-22 (filed Feb. 9, 2012) ("AT&T Comments") (explaining that the Commission should grant those USTelecom requests related to the Commission's new reporting rule for eligible telecommunications carriers ("ETCs") that remain relevant).

⁵ See, e.g., Comments on Request for Reconsideration by the National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel, WC Docket No. 10-90, at 19-21 (filed Feb. 9, 2012) (requesting that the Commission "defer" the issues raised in USTelecom's Petition "until the legal challenges raised in the 10th Circuit are resolved"); T-Mobile USA, Inc. Opposition to Petitions for Reconsideration, WC Docket No. 10-90, at 8 (filed Feb. 9, 2012) (opposing USTelecom's Petition to the extent it seeks "relief that would result in an increase in the total annual level of CAF support or CAF recovery support received by all incumbent LECs in the aggregate"). For example, the National Cable & Telecommunications Association ("NCTA") launches an ad hominem attack against incumbent LECs, which NCTA claims are only interested in perpetuating "ever-increasing government subsidies" and in opposing "virtually all of the decisions [the Commission] made to improve accountability and transition to a broadband-oriented regime." See Comments of the National Cable &

instances, the issues raised in USTelecom's Petition have been fully developed in the comments of incumbent local exchange carriers ("LECs"), and further comments by USTelecom are unnecessary, particularly given the 15-page limit applicable to replies in this proceeding.⁶

Accordingly, USTelecom will devote its reply to highlighting a handful of issues upon which USTelecom requested reconsideration or clarification that have little or no opposition from the industry. First, the Commission should clarify that its broadband deployment timeframes exclude delays due to circumstances beyond the control of the supported carrier. Second, the Commission should make modest changes to its Access Recovery Mechanism ("ARC") for incumbent LECs by: (i) establishing that the baseline revenue calculation for determining a carrier's eligible recovery should be based on billed revenues rather than "collected" revenues; (ii) authorizing residential rates to be compared with the Residential Rate Ceiling at the study area level; (iii) clarifying that the ARC is an interstate charge; and (iv) permitting appropriate recovery of any potential reductions in intrastate originating access charges required in connection with the Commission's intercarrier compensation reforms.

II. THE COMMISSION SHOULD CLARIFY THAT ITS DEPLOYMENT TIMEFRAMES EXCLUDE DELAYS DUE TO CIRCUMSTANCES OUTSIDE THE CONTROL OF THE SUPPORTED CARRIER.

No party opposes USTelecom's request that the Commission clarify that delays resulting from circumstances beyond the control of an eligible telecommunications carrier ("ETC") should toll broadband build-out deadlines associated with support under the Connect America Fund ("CAF"). USTelecom Petition at 26-28. As AT&T correctly observes, deployment milestones

(footnote cont'd.)

Telecommunications Association, WC Docket No. 10-90, at 4-8 (filed Feb. 9, 2012) ("NCTA Comments"). Not surprisingly, USTelecom strongly disagrees with NCTA's rhetoric.

⁶ *Connect America Fund*, Order, WC Docket No. 10-90, DA 11-2063 (rel. Dec. 23, 2011).

can be missed for a variety of reasons over which an ETC has no control – including delays associated with the local zoning and permitting process and environmental and historic preservation reviews – and, unless an ETC is excused for missing a deadline under such circumstances, “otherwise willing CAF participants will sit on the sidelines”⁷

While agreeing that the Commission should waive deployment deadlines due to “delays beyond the supported carrier’s control,” the American Cable Association (“ACA”) asserts that such a waiver should be limited “to interim deployment coverage deadlines” and should not result in an “extension of the five year term” for CAF Phase II support.⁸ The Commission should reject this arbitrary limitation.

As part of CAF Phase II, price cap ETCs accepting a state-level commitment must deploy broadband services to at least 85 percent of covered high-cost locations by the end of the third year and to all supported locations by the end of the fifth year. *Order* ¶ 160. A recipient of CAF Phase II support must certify that these deployment milestones have been met, and the failure to meet these milestones would expose the ETC to possible liability.⁹

If a CAF Phase II recipient fails to meet a deadline because of delays beyond its control, that failure should be excused, regardless of the deadline involved. It would be arbitrary for the Commission to refuse to extend the 100 percent / five-year deadline that a CAF Phase II recipient is unable to meet due to, for example, a protracted local permitting process, when the

⁷ AT&T Comments at 31.

⁸ Opposition of the American Cable Association, WC Docket No. 10-90, at 12 (filed Feb. 9, 2012) (“ACA Opposition”).

⁹ See 47 C.F.R. § 54.313(e); *cf.* *Order* ¶ 147 (“Carriers failing to meet a deployment milestone [for CAF Phase I] will be required to return the incremental support distributed in connection with that deployment obligation and will be potentially subject to other penalties, including additional forfeitures, as the Commission deems appropriate”).

85 percent / three-year deadline that the recipient is unable to meet for the same reason is subject to extension.

While arguing that a waiver or extension of the five-year term “would undermine the potential to ensure support is awarded efficiently and performance requirements meet relevant market conditions,” ACA Opposition at 12, ACA’s argument is unconvincing. The milestones for implementing the Commission’s reforms are important, but the Commission anticipated that some of these targets may not be met, including the five-year term of CAF Phase II support. Accordingly, the Commission held that, if a “market-based mechanism” for the distribution of CAF support in price cap areas “is not implemented by the end of the five-year term of CAF Phase II, the incumbent ETCs will be required to continue providing broadband with performance characteristics that remain reasonably comparable to the performance characteristics of terrestrial fixed broadband service in urban America, in exchange for ongoing CAF Phase II support.” *Order* ¶ 163. Thus, waiving or extending the five-year broadband deployment deadline that a supported carrier is unable to meet due to circumstances beyond its control would not undermine the Commission’s reform efforts, notwithstanding ACA’s claims to the contrary.

III. THE COMMISSION SHOULD MAKE MODEST CHANGES TO THE ACCESS RECOVERY MECHANISM FOR INCUMBENT LOCAL EXCHANGE CARRIERS.

A. The Commission Should Establish The Baseline Revenue Calculation For Determining The Eligible Recovery For Price Cap Carriers Based On Billed, Not “Collected” Revenues.

Other than NCTA, parties addressing the issue support USTelecom’s request that the Commission reconsider its decision to use “collected” instead of billed revenues when calculating “Price Cap Baseline Revenues” for purposes of determining the Eligible Recovery of

a price cap carrier.¹⁰ As noted by AT&T, the use of “collected” revenues “inevitably will understate actual revenues because it sometimes takes months or even years to collect revenues that were properly billed due to disputes or other factors.” *See* AT&T Comments at 46.

In opposing USTelecom’s request, NCTA’s endorsement of “collected” revenues is based on a false premise – namely that price cap carriers are “not entitled” to revenues that are “disputed” or otherwise not collected.¹¹ That fact that a customer may dispute a price cap carrier’s invoice says nothing about whether that dispute is meritorious. As CenturyLink correctly observes, price cap carriers routinely confront “situations where the billings are legitimate and ultimately collected, but only after a protracted dispute.” CenturyLink Opposition at 27. CenturyLink provides a single but significant example of Sprint’s refusal “to pay millions of dollars in access billing” that it lawfully owed, which is hardly an isolated incident. *See id.* (citing decision in which federal district court held that Sprint’s justification for refusing to pay the disputed access charges “defy credibility” and that Sprint’s defense was “founded on post hoc rationalizations”).

In certain instances, customers simply fail to pay a price cap carrier’s invoices even though the charges are undisputed. For example, a federal district court in Vermont recently denied injunctive relief to Level 3 in a tariff dispute with an incumbent LEC, holding that Level 3 had not acted in good faith by engaging in “[a] deliberate practice of withholding payment for

¹⁰ *See* USTelecom Petition at 30-31; Opposition of Independent Telephone & Telecommunications Alliance at 12 (use of “collected” revenues is “unfair and unworkable”) (“ITTA Comments”); Opposition of CenturyLink at 25-26 (use of “collected” revenues “is both impossible to implement and effectively deprives carriers of the opportunity to recover lost ICC revenues in the manner intended”) (“CenturyLink Opposition”).

¹¹ *See* NCTA Comments at 16 (arguing that baseline revenues should be based on collected revenues because “[t]o do otherwise would allow price cap incumbent LECs to receive universal service support for revenue to which they were not entitled”).

undisputed charges” invoiced by the incumbent LEC.¹² According to the court, “in the face of a mounting financial dispute between the parties,” which was the result of Level 3’s disputing approximately \$7.9 million in invoiced charges, “Level 3 deliberately increased the amount in controversy by failing to pay undisputed charges” on certain 2010 and 2011 invoices in full, which resulted in its improperly withholding payment of an additional approximately \$569,000.¹³ Unfortunately, the Commission’s use of “collected” revenues provides perverse incentives for carriers either to dispute or simply fail to pay price cap carriers’ 2011 bills – at least through March 31, 2012 – since doing so would harm their price cap regulated competitors by reducing the amount of their recovery for lost intercarrier compensation revenues.

NCTA’s claim that price cap carriers “should not be awarded additional recovery mechanism support simply because it may be inconvenient” to allocate between “billed” and “collected” revenue misses the point. NCTA Opposition at 16. First, as USTelecom explained – and no party disputes – it would be difficult, if not impossible, to allocate “collected” revenues between originating and terminating access as would be required by the Commission’s formula. *See, e.g.*, ITTA Comments at 13; CenturyLink Opposition at 26. There is no justification – and NCTA offers none – for requiring that price cap carriers create a new and unduly burdensome manual process to perform a one-time calculation, particularly when doing so would conflict with the Commission’s stated goal of intercarrier compensation reform to provide a measure of “certainty” through predictable revenue streams. *See Order* ¶ 36.

¹² *Level 3 Communications, LLC v. Telephone Operating Company of Vermont, LLC, Northern New England Telephone Operations, LLC*, 2011 U.S. Dist. LEXIS 144770, *48-49 (D. Vt. 2011).

¹³ *Id.* at *49.

Second, as several parties accurately note, the use of “collected” revenues “punishes carriers because it double counts the effect of uncollectible revenues,” since some amount of “end user ARC charges that are designed to recover the access shift will also prove to be uncollectible.” CenturyLink Opposition at 27-28; *see also* ITTA Comments at 13 (“basing the access revenue baseline on ‘collected’ revenues has the effect of double counting uncollectible revenue because the access recovery charge intended to allow carriers to recover a portion of their costs from retail consumers will also end up in uncollectible status”). NCTA completely ignores this issue, which further undermines the Commission’s use of “collected” revenues in determining a price cap carrier’s eligible recovery.

B. The Commission Should Reconsider The Level At Which Residential Rates Are Compared With The Residential Rate Ceiling.

Those parties addressing the Residential Rate Ceiling support USTelecom’s request that the Commission permit calculating the ceiling for an incumbent LEC on a study area basis for those charges, such as localized EAS and E911 fees, that can vary from jurisdiction to jurisdiction within a study area.¹⁴ The calculation of the Residential Rate Ceiling on a study area basis is consistent with the Commission’s rules and its historic approach to regulating rates on a per-study area basis. *See* CenturyLink Opposition at 23-25.

Furthermore, as CenturyLink correctly points out, the Commission’s customer-by-customer approach is an “administrative nightmare” to implement given the rate variations that exist in some rates within a study area. CenturyLink Opposition at 25. Indeed, CenturyLink has provided examples of the rate variations that exist within study areas of two of its states, which

¹⁴ USTelecom Petition at 31-32; *see* ITTA Opposition at 13-14; CenturyLink Opposition at 23-25.

illustrate the difficulties of attempting to implement the Residential Rate Ceiling on a customer-by-customer approach. *Id.*, Appendix A.

USTelecom concurs with ITTA that the Commission's customer-by-customer approach "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." ITTA Opposition at 13. Given that the Residential Rate Ceiling fully protects individual customers, such a result would be unduly punitive, which warrants reconsideration of this issue.

C. The Commission Should Clarify That The ARC Is An Interstate Charge.

Those parties addressing the issue support USTelecom's request that the Commission make clear that the ARC is an interstate charge, even though it may include the recovery of intrastate access revenues and reciprocal compensation revenues in connection with the transition to a bill-and-keep intercarrier compensation regime.¹⁵ Such clarification is necessary to ensure the correct regulatory oversight of the ARC at the federal rather than the state level and the correct allocation of ARC revenues for universal service contribution purposes. *See* AT&T Comments at 44; CenturyLink Opposition at 36.

D. The Commission Should Permit Appropriate Recovery Of Any Reductions in Intrastate Originating Access That May Potentially Be Required In Connection With The Commission's Intercarrier Compensation Reforms.

Some parties are disputing whether the Commission intended to eliminate intrastate originating access charges for calls that originate on the PSTN and terminate on VoIP facilities.¹⁶

¹⁵ US Telecom Petition at 32-33; *see* AT&T Comments at 44; CenturyLink Opposition at 36.

¹⁶ *Compare* Windstream and Frontier Petition for Reconsideration and/or Clarification, WC Docket No. 10-90, at 21 (filed Dec. 29, 2011), and Comments of Cbeyond, Inc., EarthLink, Inc., Integra Telecom, Inc., and tw telecom inc., WC Docket No. 10-90, at 3-5 (filed Feb. 9, 2012)

Regardless of how this issue is ultimately resolved, the Commission should provide for appropriate recovery through the CAF for any lost originating intrastate access revenues associated with PSTN-to-VoIP traffic, as USTelecom requested. *See* USTelecom Petition at 39. No rational basis exists to treat any such lost originating intrastate access revenues from mandated rate reductions differently from lost terminating access revenues that already have been deemed eligible for cost recovery.¹⁷

The only parties opposing USTelecom's request are a group of competing carriers that argue that permitting recovery from the CAF for lost revenues resulting from any elimination of intrastate originating access charges for PSTN-to-VoIP traffic would jeopardize the CAF budget and would disadvantage competitive LECs. Joint Comments at 5. Neither of these arguments is sufficient to justify denying incumbent LECs recovery if further rate reductions are mandated.

First, to the extent that the Commission did not already account for recovery of any potentially mandated originating access reductions, the current CAF budget represents the Commission's "predictive judgment as to how best to allocate limited resources *at this time.*" *Order* ¶ 123 (emphasis added). However, the Commission anticipated the need to "revisit and adjust ... the appropriate size" of the CAF budget "based on market developments, efficiencies realized, and further evaluation of the effect of these programs in achieving our goals." *Id.* Thus, the fact that the Commission has established a budget for the CAF that may have to be

(footnote cont'd.)

("Joint Comments"), with AT&T Comments at 38-39 and Opposition of Verizon, WC Docket No. 10-90, at 7-11 (filed Feb. 9, 2012).

¹⁷ Even those parties claiming the Commission's new intercarrier compensation regime applies to all traffic that originates and/or terminates in IP format do not appear to dispute that an incumbent LEC should be entitled to seek appropriate recovery through the CAF for lost intrastate originating access charges. *See, e.g.,* Opposition of Level 3 Communications, LLC, WC Docket 10-90, at 5-6 (filed Feb. 9, 2012); NCTA Comments at 14-16.

revisited and adjusted cannot justify denying appropriate recovery to an incumbent LEC for lost revenues associated with the potential elimination of originating intrastate access charges.

Second, in declining to provide competitive LECs with an explicit recovery mechanism for lost intercarrier compensation revenues, the Commission reasoned that, unlike incumbent LECs, competitive carriers' end-user charges generally are not subject to rate regulation, "and therefore those carriers are free to recover reduced access revenue through regular end-user charges." *Order* ¶ 864. Furthermore, according to the Commission, competitive LECs, unlike incumbent LECs, typically are not subject to carrier-of-last-resort obligations "and thus generally "can elect whether to enter a service area and/or to serve particular classes of customers (such as residential customers) depending upon whether it is profitable to do so without subsidy." *Id.* Given that it may be possible for competitive LECs to recover lost access revenues from their end users and to decide which customers to serve, the Joint Commenters' claim that they would be disadvantaged if incumbent LECs were permitted appropriate recovery of lost originating intrastate access revenues rings hollow.

IV. CONCLUSION

For the foregoing reasons, the Commission should grant USTelecom's Petition for Reconsideration.

Respectfully submitted,

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February 21, 2012

CERTIFICATE OF SERVICE

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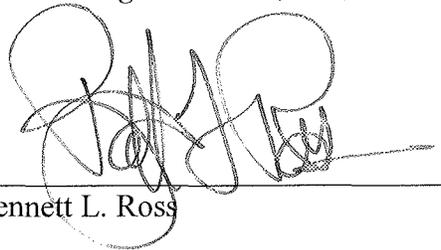
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A handwritten signature in black ink, appearing to read "Bennett L. Ross", is written over a horizontal line. The signature is stylized and somewhat illegible.

Bennett L. Ross