

March 29, 2012

Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Communication: *In the Matter of Connect America Fund, WC Docket No. 10-90 et al.*

Dear Ms. Dortch:

The American Cable Association (ACA) and the National Cable & Telecommunications Association (NCTA) submit this response to the *Ex Parte* letter filed on March 6, 2012 by the Independent Telephone & Telecommunications Alliance, CenturyLink, Frontier Communications, and Windstream Communications proposing modifications of the Commission's rules dealing with CAF Phase I incremental support for price cap incumbent local exchange carriers (incumbent carriers or LECs).¹ ACA and NCTA urge the Commission to reject the proposed changes. They are inconsistent with the Commission's intent that Phase I incremental support be used "to provide an immediate boost to broadband deployment in *areas that are unserved by any broadband provider.*"² In addition, the proposals further bias the Phase I incremental support regime in favor of the incumbent carriers, thereby harming competitors, including by discouraging competing providers from expanding their existing networks.

The CAF Phase I mechanism provides \$300 million exclusively to price cap incumbent LECs for the purpose of providing "an immediate boost to broadband deployment in areas that are unserved by any broadband provider."³ Although proposals submitted by the incumbent LECs formed the basis of the Commission's Phase I regime, these carriers nevertheless have asked the Commission to reconsider key elements of the mechanism, including revising the allocation of funds among carriers and changing to a company-specific level of support per

¹ See *Ex Parte* Communication, WC Docket No. 10-90 et al. (filed Mar. 6, 2012) ("March 6th *Ex Parte*") and *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) ("*CAF Order*").

² *CAF Order*, ¶ 137 (italics added).

³ *Id.*

unserved location.⁴ Now they seek further changes, asking the Commission to expand the scope of areas where funding may be used to include partially-served (and presumably lower cost) census blocks.

ACA and NCTA have expressed major concern with the adopted CAF Phase I mechanism.⁵ Because it provides support exclusively to price cap LECs regardless of whether alternative providers could serve the relevant area while receiving a lower level of support (or even no subsidy at all), CAF Phase I support violates the principle of competitive neutrality and spends limited funding inefficiently. Notwithstanding these significant flaws, because the Commission limited Phase I support to only wholly unserved census blocks, it at least limited the damage to competition since it would not result in overbuilding of an area where a cable operator currently provides service or has immediate plans to do so.

Expanding the scope of the CAF Phase I mechanism as proposed in the March 6th letter heightens the concerns that ACA and NCTA have regarding that mechanism.⁶ First, because the proposed changes would enable price cap carriers to receive support for unserved locations in census blocks where non-incumbents offer broadband service, they significantly increase the likelihood that support will be provided in an area where a competitive provider already provides, or plans to provide, service. The Commission's efficient allocation of scarce CAF dollars is based in large part on its decision not to provide support to carriers in areas where there is unsupported competition.⁷ However, the price cap carriers' proposals would enable them to receive incremental support to serve unserved locations in a census block even where a non-incumbent fixed provider offers service to most locations. The provision of incremental support to the incumbent in those instances would breach any notion of competitive neutrality and undermine private investment. It also would be a waste of scarce universal service funding because these partially served census blocks are the areas that are most likely to experience private investment. In adopting the CAF Phase I mechanism and limiting it to unserved census blocks, the *CAF Order* specifically recognized that companies "have been steadily expanding

⁴ See Petition for Reconsideration and/or Clarification of Frontier Communications Corp. and Windstream Communications, Inc., WC Docket No. 10-90 et al. at 12-20 (filed Dec. 29, 2011).

⁵ See, e.g., Comments of the National Cable & Telecommunications Association, WC Docket No. 10-90 et al. at 10 (filed Jan. 18, 2012).

⁶ The proposed modifications address three types of "partially served" census blocks: (1) blocks where the relevant incumbent price cap carrier is the only fixed broadband provider; (2) blocks where at least one non-incumbent provider offers the requisite broadband service; and (3) blocks that are improperly identified as being served by a non-incumbent provider. For each of these situations, the price cap carriers propose both procedural and substantive changes to the Commission's rules enabling them to obtain CAF Phase I incremental support to serve unserved locations within these partially served census blocks.

⁷ See *CAF Order*, ¶ 170.

their broadband footprints . . . and we expect such deployment will continue.”⁸ Indeed, earlier this month Chairman Genachowski specifically encouraged cable operators to build in such areas, using high-cost support obtained through competitive bidding where necessary.⁹

Second, in seeking to determine which locations are unserved, the proposals raise a variety of serious evidentiary questions. First, it is not clear precisely how the price cap LECs plan to demonstrate that a census block is only partially served, since the National Broadband Map (NBM) data is generally collected on a census block basis. Second, it is not clear that they would be required to demonstrate the extent of existing coverage in the census block. Third, the proposal is highly asymmetric, imposing more rigorous requirements on competitors’ abilities to challenge an assertion that a particular census block is partially served, with less stringent requirements for incumbent carriers seeking support for those locations.

The lack of clarity and the inequitable evidentiary burdens substantially increase the likelihood that funding will be directed to areas where service already is available or where broadband providers would be willing to extend it without subsidy. ACA and NCTA submit that, if the Commission is to alter the method to identify areas that are unserved in the *CAF Order*, it must establish a transparent and equitable process that places equal burdens of proof on all parties and permits equal opportunities to rebut evidence. The Commission should start with the presumption that the NBM is correct. An incumbent LEC that seeks to rebut that presumption must identify the portion of the census block it believes is unserved, and it must provide evidence for that assertion. Interested parties would then be given a limited opportunity to rebut the incumbent’s showing or the findings of the NBM. Because this process is essentially the same approach that NTIA used in awarding ARRA funding, it should be familiar to most parties and relatively straightforward to implement.

⁸ *Id.*, ¶ 137.

⁹ See, e.g., Jennifer Whalen, *FCC Chair Says Universal Service Fund Won't Subsidize Competition*, Fierce Cable (Mar. 12, 2012), <http://www.fiercecable.com/story/fcc-chair-says-universal-service-fund-wont-subsidize-competition/2012-03-14>.

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For all of these reasons, the Commission should reject the proposed modifications contained in the price cap carriers' March 6th *Ex Parte* filing.¹⁰

Respectfully submitted,

_____/s/ Ross J. Lieberman_____
Ross J. Lieberman
Vice President of Government Affairs
American Cable Association

_____/s/ Steve Morris_____
Steve Morris
Vice President and Associate General
Counsel
National Cable & Telecommunications
Association

¹⁰ If the Commission wants to alter its Phase I incremental support regime to cover locations in partially-served census blocks, the most efficient and equitable mechanism would be to award support to any provider that deploys broadband plant to an unserved location.