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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

FILED/ACCEPTED

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*Federal Communications Commission
Office of the Secretary*

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

To the Wireless Telecommunications Bureau:

PETITION FOR WAIVER OF WINDY CITY CELLULAR, LLC

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Dated: April 3, 2012

EXECUTIVE SUMMARY

Universal Service funding has enabled Windy City Cellular, LLC ("WCC") to build a mobile network and provide wireless service on Adak Island in Alaska, one of the most remote and insular areas of the United States. Adak Island is located in an earthquake zone and in the vicinity of an active volcano. The area is mountainous, and is characterized by extreme weather conditions including cyclonic storms, wind gusts in excess of 100 knots, fog storms in the summer, and an average accumulation of more than eight feet of snow.

Taking into consideration all three carriers that provide wireline or wireless voice service in the Adak area, WCC is the only carrier that provides voice service throughout the entire Adak area, including areas that extend into the sea and Aleutian Wilderness where critical services and industries operate. This service has been essential in providing E911 and basic communications services to governmental entities, businesses and the resident population of Adak Island. The entities dependent on WCC service include: The Marine Exchange, which operates on Adak one of the most important vessel tracking receiving sites in Alaska; The Aleut Corporation, which provides fuel to the area and operates other businesses on the island; and the United States Geological Survey ("USGS") Volcano Observatory, which monitors the active volcano on the island. In addition, researchers and subsistence hunters and fisherman rely on WCC service.

The critical service provided by WCC is now in jeopardy. USF funding for WCC was unexpectedly slashed by 84% beginning January 1, 2012, when a \$3,000 annual cap on line support was suddenly implemented six weeks after the *USF/ICC Transformation Order* was issued. If a waiver of the annual cap is not expeditiously granted, the results will be catastrophic for the Adak area: (1) WCC will be forced to cease operating, causing consumers to lose service with no terrestrial alternative, and roaming ability throughout the Adak area will be lost; (2) critical services, government functions, and public safety will be jeopardized; and (3) WCC will

become insolvent, causing the loss of a critical number of jobs for the Adak area. As a result, the cap is having a disproportionate and inequitable impact on WCC. Such consequences are at odds with Commission objectives and do not benefit the public interest.

Moreover, the immediate effective date of the annual cap contradicts one of the Commission's explicit guiding principles from the National Broadband Plan that there should be "no flash cuts" when adopting "Special Access Policies" relating to USF reform.¹ The requested waiver is necessary to ensure that the Administrative Procedures Act and principles of fairness and due process are not violated, and to cure the disproportionate or inequitable impact the cap is already having on WCC.

WCC recognizes the Commission's goal of transitioning from an identical support rule to new recovery mechanisms. WCC has determined that it needs a bare minimum of \$880.09 per line, per month, which is less than half the support it was receiving months ago, in order to cover operating expenses until the transition to Phase II Mobility Funding occurs. WCC is requesting only the amount of support that is necessary given Adak's remote location, volatile climate and extreme weather - not the amount it was previously receiving which it was using to make redundant, expand and improve its service. In summary, WCC requests a time-limited waiver to maintain only the current level of service.

¹ Federal Communications Commission, Omnibus Broadband Initiative, Connecting America: The National Broadband Plan, GN-Docket No. 09-51, at 143 (2010) ("National Broadband Plan") (emphasis added) (stating "New rules should be phased in over a reasonable time period. Policymakers must give service providers and investors time to adjust to a new regulatory regime.").

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To the Wireless Telecommunications Bureau:

PETITION FOR WAIVER OF WINDY CITY CELLULAR, LLC

Windy City Cellular, LLC (“WCC”), pursuant to Section 1.3 of the Commission’s Rules, respectfully requests a waiver of Section 54.307(e) of the Universal Service Fund (“USF”) and Intercarrier Compensation (“ICC”) reform rules adopted by the Commission as part of its *Report and Order* (the “*USF/ICC Transformation Order*”) released on November 18, 2011.²

Specifically, WCC requests a waiver of the Commission’s sudden implementation of the \$3,000

² See *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd 17663, ¶ 508 (2011) (“*USF/ICC Transformation Order*”). The Interim Support for Remote Areas in Alaska rule is to be codified at 47 C.F.R. § 54.307(e)(v).

annual cap on interim USF support, which became effective six weeks after the *USF/ICC Transformation Order* was issued. For WCC, a competitive eligible telecommunications carrier ("CETC") serving a remote and insular area in Alaska, the continued enforcement of this cap, which immediately reduced WCC's USF funding by 84%, will have service-ending consequences for WCC and the entire Adak community. Good cause exists to exempt WCC from the new requirements contained in Section 54.307(e) and to grant WCC a limited waiver of the cap until Phase II Mobility Funding is disbursed. The waiver requested by WCC is limited in time and in support level because WCC is only seeking a portion of its prior USF funding – only what is needed to recover operating expenses and the cost of WCC's prior network investments.

WCC is the only wireless carrier that provides voice service to the entirety of the Adak area in the Aleutian Islands, including areas that extend into the sea and Aleutian Wilderness where critical services, public safety and industries operate (the "Adak area").³ As explained in further detail in this Petition, if a waiver of the annual cap is not granted, WCC service will shut down within six months, and the results will be disastrous for the Adak area: (1) WCC customers will lose service with no terrestrial alternative and no roaming ability outside the downtown area; (2) critical services, government functions, and public safety will be jeopardized; and (3) WCC will become insolvent causing a loss of a critical number of jobs for the area. All of these results are clearly at odds with the Commission's universal service, wireless and public safety goals, and the Administration's goals with respect to job creation.

Moreover, since Section 54.307(e) was implemented within weeks of the *USF/ICC Transformation Order's* release, without notice of the cap and no ability for WCC to prepare for

³ Although there is another wireless carrier operating in Adak, Alaska Wireless, it only operates one cell site in the downtown area and has a much smaller coverage area than WCC. See Exhibit 2.

the change, enforcing the rules is having an immediate "disproportionate or inequitable impact"⁴ on WCC. Applying the cap, so suddenly and without notice, violates the Administrative Procedure Act ("APA") and principles of fairness and due process. Furthermore, it contradicts one of the Commission's explicit guiding principles from the National Broadband Plan for adopting "Special Access Policies" relating to USF reform:

No flash cuts. New rules should be phased in over a reasonable time period. Policymakers must give service providers and investors time to adjust to a new regulatory regime.⁵

However, to the Commission's credit, it understood that the national framework created by the *USF/ICC Transformation Order* could be ill-suited to fit individual circumstances, particularly for carriers serving insular areas of Alaska. It therefore wisely provided for an expedited waiver mechanism to deal with such cases speedily.⁶ WCC respectfully requests such expeditious decision-making in this case. Without limited relief from the cap within the next six months, WCC will be forced to shut down its wireless operations in Adak, stranding wireless consumers and threatening critical service and public safety in the region.

I. BACKGROUND ON WCC AND SERVICE TO THE ADAK AREA.

Adak Island is an isolated island located approximately 1,200 miles southwest of Anchorage, Alaska, in the Aleutian Chain of islands. It is situated near an active volcano and in an earthquake zone. The Adak area is represented on the first map contained in Exhibit 5. The area is characterized by frequent cyclonic storms, winter squalls producing wind gusts in excess

⁴ See *USF/ICC Transformation Order*, ¶ 508.

⁵ Federal Communications Commission, Omnibus Broadband Initiative, Connecting America: The National Broadband Plan, GN Docket No. 09-51, at 143 (2010) ("National Broadband Plan")(emphasis added).

⁶ See *USF/ICC Transformation Order*, ¶ 508.

of 100 knots, extensive fog storms in the summer, and an average accumulated snowfall of 100 inches.⁷ Because Adak has a maritime climate with severe storms and high winds during much of the year, it has limited accessibility only by air or by large oceangoing vessels. In the best of circumstances, commercial air service consists of twice-weekly flights and barges arrive only once a year. Adak is undoubtedly one of the most remote, isolated, and climactically inhospitable communities in the United States. Outside of the downtown area, people travel long distances between points and are dependent on wireless communications for safety, particularly due to severe weather.

The Adak service area covers approximately 61,000 acres and consists of that portion of Adak Island that was formerly a United States Naval Complex (roughly, the northern one-half of the island). In 2004, The Aleut Corporation, one of 13 Alaska Native Regional Corporations created under the Alaska Native Claims Settlement Act of 1971 in settlement of aboriginal land claims, purchased Adak land and facilities under a land transfer agreement with the Department of the Interior and the U.S. Navy/Department of Defense. The area includes one of the most important vessel tracking receiving sites in Alaska, and is part of a vessel tracking network to aid safe, secure, efficient and environmentally sound maritime operations in Alaska.⁸ Much of Adak Island is part of the Alaska Maritime National Wildlife Refuge. Based on the most recent United States census data of 2010, Adak has a total population of 326 (the State of Alaska estimates the population at 331). There is also a large number of contractors in Adak who provide various

⁷ See Density, Geographic Characteristics of Study Area at Exhibit 1; *see also* Letter from City Manager of Adak dated March 27, 2012 (“City of Adak Letter”) at Attachment A.

⁸ See Letter from Marine Exchange of Alaska dated March 28, 2012 (“Marine Exchange Letter”) at Attachment A.

critical and governmental services relating to maritime safety, ordinance disposal, environmental remediation, asset evaluation, wildlife preservation, and environmental monitoring.

WCC's wireline affiliate, Adak Eagle Enterprises ("AEE") rebuilt the Island's telecommunications system after it assumed operation of Adak's telephone service. At the time, the telephone plant, which was installed by the military over the course of several decades, was degraded, outdated, and inadequate for long term, reliable provision of regulated local exchange service to customers. As noted by The Aleut Corporation in a letter that is attached hereto in Attachment A, three mid-size and larger telecommunications carriers were also asked to provide service to Adak in 2003, but all declined.⁹ Instead, AEE took on this role when no other carrier was willing to do so, and now provides modern local exchange, broadband, and Internet services in the Adak area through a digital fiber-optic network. All of the personnel that operate WCC's wireless service also work for AEE to provide wireline service to the Adak area. Both AEE and WCC have unmatched knowledge of the local and transient population's needs and are proud to provide quality communications services to Adak. AEE also will be filing a waiver request with respect to the *USF/ICC Transformation Order* in the coming weeks. Without a waiver, AEE will be forced to shut down operations within twelve months.

WCC was certified as an ETC by the Regulatory Commission of Alaska ("RCA") in December 2008. As part of its certification, RCA determined that designating WCC as an ETC served the public interest because, among other reasons, WCC would be able to improve public safety and provide much needed mobile service to underserved and unserved areas in the remote

⁹ See Letter from The Aleut Corporation dated March 28, 2012 ("TAC Letter") at Attachment A.

Adak area.¹⁰ In 2009, WCC launched wireless service on Adak Island through its Downtown Cell Site. Just last year, WCC completed the construction of the White Alice Cell Site which expanded the coverage area toward the harbor and beyond for incoming sea vessels – which has been critical for the Marine Exchange of Alaska, and maritime safety and emergency response.¹¹

The White Alice Cell site also provides coverage for the far side of the Adak Island for environmental researchers and contractors where coverage was previously blocked by mountains. For 2012, WCC had planned to construct the Clam Lagoon Cell Site, projected to cost \$1 million, to enable network redundancy and prevent service interruptions that would otherwise occur if another cell site experienced operational problems, a result that often occurs because of the severe weather in the Adak area. However, in the wake of the *USF/ICC Transformation Order* and its devastating financial impact on WCC, construction was halted.

Since commencing operations on Adak Island, WCC has made substantial investments to support and grow its network and service offerings so that Adak residents and visitors can have increased access to a comprehensive and reliable mobile service, despite Adak's remote location.¹² As a result, WCC is the only wireless carrier that offers wireless service throughout the entire Adak area, including the sea and Aleutian Wilderness. WCC's coverage serves a vital

¹⁰ *Request by WCC Cellular, LLC for Designation as an Eligible Telecommunications Carrier in the Study Area Served by Adak Eagle Enterprises LLC, d/b/a Adak Telephone Utility*, Regulatory Commission of Alaska, U-08-67, ORDER NO.2 (Dec. 3, 2008).

¹¹ See Marine Exchange Letter at Attachment A.

¹² For example, just last year WCC expended funds to enable cellular voice and data traffic backhaul to the outside world, to open a retail location on the Island to help facilitate customer service, to purchase cellular phones and accessories that were broadband capable for texting and accessing the Internet, to expand its handset offerings to provide additional functionality, and to purchase Special Purpose Vehicles that are able to reach the White Alice Site during the repeated snow storms that are a common part of the winter weather on the Island. See WCC's 2011 Annual ETC Report dated March 30, 2012 at Exhibit 14.

role because it includes areas where no other wireline or wireless alternative exists. The wireless service is particularly vital given the distances between points outside downtown and the severe and unpredictable weather conditions. Thus, if WCC were forced to cease operations, groups such as the Marine Exchange of Alaska, government researchers working for the USGS Volcano Observatory and the U.S. Fish and Wildlife Service, subsistence fishermen, subsistence hunters, and other members of the public that venture outside the downtown area or into any areas without a landline option, would be left without any access to voice services and without any ability to communicate, particularly in times of emergency.

II. THE FCC COULD NOT HAVE INTENDED THE RESULT CAUSED BY THE STRICT APPLICATION OF THE ANNUAL CAP FOR THE ADAK AREA.

As reflected above, WCC is committed to providing reliable, comprehensive coverage to the populations, industries and critical government services, including public safety, that reside in Adak, but changes in the funding structure mandated by the *USF/ICC Transformation Order* will make it impossible for WCC to continue. While there are several reforms in the *USF/ICC Transformation Order* that cause WCC concern, the most immediate and catastrophic change is that CETCs are now capped annually at \$3,000 per line (equating to \$250 per line, per month). This cap explicitly applies to CETCs that are serving remote areas in Alaska:

Interim Support for Remote Areas in Alaska. From January 1, 2012, until December 31, 2013, competitive eligible telecommunications carriers subject to the delayed phase down for remote areas in Alaska shall receive the support, as calculated by the Administrator, each competitive eligible telecommunications carrier would have received under the frozen per-line support amount as of December 31, 2011 capped at \$3,000 per year, provided that the total amount of support for all such competitive eligible telecommunications carriers shall be capped pursuant to subparagraph (A).¹³

¹³ See *USF/ICC Transformation Order*, Final Rule to be codified at 47 C.F.R. § 54.307(e)(v); see also n. 880.

Because the Commission did not provide for a delay or gradual transition in implementing the cap, WCC's disbursement declined in January by 84 percent (from \$136,344 in December 2011 to \$22,356 in January 2012). WCC understands that Adak may be the only community in the United States affected by the cap in this unexpected way. WCC recognizes the Commission's desire to phase down current high-cost funding in order to transition to the Mobility Fund programs, but believes the Commission could not have intended for the annual cap to impose such an immediate, drastic cut on a carrier like WCC.

First, the Commission noted that "[t]here is no indication in the record ... that competitive ETCs need support in excess of \$3,000 per line [per year] to maintain existing service pending transition to the Mobility Fund."¹⁴ However, WCC has been receiving, on average \$1,363 per line, per month to provide wireless service to the people of Adak Island. This substantially higher cost is based on factors that the Commission recognized justifies a flexible approach "to take into account the unique conditions in places like Alaska," such as "remoteness, lack of roads, challenges and costs associated with transporting fuel, lack of scalability per community, satellite and backhaul availability, extreme weather conditions, challenging topography, and short construction season."¹⁵ All of these factors are applicable to Adak. The area is so remote that residents must ship in groceries from Anchorage, which is 1,200 miles away.¹⁶ There are only 16 miles of paved roads in the area – and to reach the cell sites WCC must travel primarily on unpaved, steep, slick and treacherous terrain. It is challenging and expensive to ship in fuel and equipment – a barge arrives once a year, and

¹⁴ *Id.*, ¶ 516.

¹⁵ *Id.*, ¶ 508.

¹⁶ As a point of reference, at the Adak General Store: a ½ gallon of milk costs \$7.99; 16 ounce canned goods are \$4-7 per can; and a gallon of water costs \$15.99.

airplane service is twice per week at best. The area is mountainous, covered in snow for the greater part of the year, covered in fog for much of the summer, has gale winds in all months of the year, and is characterized by extreme and sudden changes in weather.¹⁷

Second, the Commission decided to use a full year of funding to best approximate a carrier's baseline to serve as "a natural starting point for the phase-down of support."¹⁸ Under no circumstances, however, could a baseline which reflects an 84% reduction in funding be considered "a natural starting point" or "a reasonable approximation of the amount that competitive ETCs would currently expect to receive."¹⁹

In addition, the Commission wisely recognized that the unique challenges of serving remote parts of Alaska justify adopting a two-year delay in the phase down of support for such carriers. However, when devising the flash cut annual cap, the Commission failed to appreciate that the very same set of factors that justified a delay in the phase down, are the same ones that necessitate a delay for applying the annual cap to a provider like WCC:

We find persuasive, however, arguments that carriers serving remote parts of Alaska, including Alaska Native villages, should have a slower transition path in order to preserve newly initiated services and facilitate additional investment in still unserved and underserved areas during the national transition to the Mobility Funds. Over 50 remote communities in Alaska have no access to mobile voice service today, and many remote Alaskan communities have access to only 2G services. While carriers serving other parts of Alaska will be subject to the national five-year transition period, we are convinced a more gradual approach is warranted for carriers in remote parts of Alaska. Specifically, in lifting the Covered Locations exception, we delay the beginning of the five-year transition period for a two-year period for remote areas of Alaska. As a result, we expect that ongoing support through the Mobility Fund Phase II, including the Tribal Mobility Fund Phase II, will be implemented prior to the beginning of the five-

¹⁷ See Density, Geographic Characteristics of Study Area at Exhibit 1.

¹⁸ *USF/ICC Transformation Order*, ¶ 515.

¹⁹ *Id.*

year transition period in July 2014 for remote parts of Alaska, providing greater certainty and stability for carriers in these areas. During this two-year period, we establish an interim cap for remote areas of Alaska for high-cost support for competitive ETCs, which balances the need to control the growth in support to competitive ETCs in uncapped areas and the need to provide a more gradual transition for the very remote and very high-cost areas in Alaska to reflect the special circumstances carriers and consumers face in those communities.²⁰

The Commission stated that the phase down's gradual transition period "is desirable in order to avoid shocks to service providers that may result in service disruptions for consumers."²¹ In WCC's case, the immediate imposition of an 84% reduction in funding before the phase down even begins results in the very kind of shock and service disruption that the Commission attempted to avoid by adopting a delayed, gradual approach for other reforms. Moreover, the immediate effective date of the annual cap contradicts one of the Commission's explicit guiding principles from the National Broadband Plan for adopting "Special Access Policies" relating to USF reform:

No flash cuts. New rules should be phased in over a reasonable time period. Policymakers must give service providers and investors time to adjust to a new regulatory regime.²²

While the Commission adhered to this principle in other reforms adopted by the *USF/ICC Transformation Order*, it neglected to apply this important feature when making the annual cap effective only six weeks after the release date. In this case, adopting a flash cut annual cap not only deprived WCC of a reasonable time period "to adjust to a new regulatory regime," but it also made it impossible for WCC to obtain a waiver of the annual cap based on its

²⁰ *Id.*, ¶ 529.

²¹ *Id.*, ¶ 513.

²² Federal Communications Commission, Omnibus Broadband Initiative, Connecting America: The National Broadband Plan, GN Docket No. 09-51, at 143 (2010) ("National Broadband Plan") (emphasis added).

unique circumstances before it was harmed (beginning in January) by the flash cut change in support.

Furthermore, as the Commission correctly points out, its “statutory obligation runs to consumers” and that it “must target limited public funds in a way that expands and sustains the availability of mobile broadband services to maximize consumer benefits.”²³

In this instance, however, if the annual cap is applied to WCC, the public will lose the benefit of the existing comprehensive and reliable WCC wireless access which enables mobile broadband and covers the entire Adak area. Because WCC is the only carrier capable of providing this expanded coverage, if it goes out of business because of the annual cap, the Commission will be responsible for creating new unserved areas in Alaska. Such a result runs directly counter to the Commission’s statutory responsibility and stated goal of ensuring consumers receive supported services.²⁴

To stay true to the goal of “a more gradual transition for the very remote and very high-cost areas in Alaska to reflect the special circumstances carriers and consumers face in those

²³ *USF/ICC Transformation Order*, ¶ 1136. See also *id.* (identifying “Maximize broadband availability” as a guiding principle for adopting special access policies related to USF reform, noting that “[t]he objective should be to maximize the number of households that are served by broadband meeting the National Broadband Availability Target.”); see also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act; A National Broadband Plan for Our Future*, GN Docket Nos. 09-51, 09-137, Sixth Broadband Deployment Report, FCC 10-129, ¶ 29 (2010) (stating “[t]he goal of the statute, and the standard against which we measure our progress, is universal broadband availability.”); see also *FCC Creates ‘Connect America Fund’ To Help Extend High-Speed Internet To 18 Million Unserved Americans; Creating Jobs & Increased Consumer Benefits*, News Release (Oct. 27, 2011) (stating “the FCC recognizes the growing importance of mobile broadband” making “it an independent universal service objective for the first time in history.”).

²⁴ See *USF/ICC Transformation Order*, ¶ 222.

communities,” the Wireless Telecommunications Bureau (the “Bureau”) should act expeditiously to correct the ongoing harm to WCC and grant this waiver request.

III. GOOD CAUSE EXISTS AND THE PUBLIC INTEREST WILL BE SERVED BY EXEMPTING WCC FROM THE NEW REQUIREMENTS CONTAINED IN SECTION 54.307(e) AND GRANTING THIS WAIVER.

Application of the \$3,000 annual cap to WCC is causing devastating consequences that will quickly undo the tremendous progress that has been made to ensure that Adak Island has a comprehensive and reliable wireless network. Unlike other CETCs in the nation that may have the option of engaging in some belt-tightening measures under the cap while the transition to Mobility Funds is pending, WCC will have no choice but to shut down all operations due to the insurmountable operating costs caused by Adak’s remote area and harsh weather conditions. As a result, if a waiver is not granted: (1) WCC customers will lose service with no terrestrial alternative and roaming ability outside the downtown area; (2) critical services, government functions and public safety will be jeopardized; and (3) WCC will become insolvent, causing the loss of a critical number of jobs for the Adak area.

If the waiver is granted, however, WCC will continue to provide much needed service to this remote area in Alaska, thereby ensuring consumers retain access to service and roaming capabilities, and critical services and public safety functions will be maintained without disruption.²⁵ This result is consistent with the stated objectives of the *USF/ICC Transformation Order*, promotes the public interest, and is justified by the good cause standard.

²⁵ See *id.*, ¶ 1136.

A. Without a Waiver, WCC Customers Will Lose Service With No Terrestrial Alternative and No Roaming Capabilities Outside the Downtown Area.

While it may be true for the rest of the country that “phasing down and transitioning existing competitive support will not create significant or widespread risks that consumers in areas that currently have service, including mobile service, will be left without any viable mobile service provider serving their area,”²⁶ in the case of WCC, the immediate 84% reduction in funding based on the annual cap is expected to put WCC out of business within the next six months. Because WCC is the only CETC capable of providing voice service throughout the entire Adak area, including the sea and the Aleutian Wilderness, this result clearly “put[s] consumers at risk of losing voice service, with no alternative terrestrial providers available” to provide full coverage.²⁷ See Map at Exhibit 2. This is the precise situation that the Commission had in mind when describing the waiver mechanism in its *USF/ICC Transformation Order*.²⁸

Although there is one other wireless carrier operating in the Adak area, Alaska Wireless, its coverage area, limited to downtown, is significantly smaller than WCC’s service area. See Map at Exhibit 2. Although Alaska Wireless had plans to launch a second cell site to expand its coverage and provide the redundancy needed to increase reliability, it never did so. However, with two fully operational cell sites to provide complete coverage to the area as well as some redundancy needed to ensure reliable access throughout the entire Adak area, WCC reaches all households in Adak as well as critical locations at sea and in the Aleutian Wilderness. Wireless

²⁶ *Id.*, ¶ 522.

²⁷ *Id.*, ¶ 32.

²⁸ *See id.*

access in these more remote locations is particularly vital because there is no alternative that has the capability to replace WCC's service.²⁹

As Exhibit 2 demonstrates, if WCC's service shuts down, there will be no wireless service outside the Alaska Wireless coverage area in downtown Adak. WCC's coverage area is twice as large as the coverage provided by Alaska Wireless. Without WCC service, consumers could either subscribe to Alaska Wireless in the downtown area, or subscribe to the wireline solutions offered by AEE. However, as the map indicates, even the AEE coverage area is not as large as the WCC coverage area. Consequently, without WCC, some customers will be completely without terrestrial voice alternatives (either wireline or wireless). Other customers will be able to switch to Alaska Wireless or to wireline service through AEE (if AEE is able to obtain a waiver and continue providing service). Those customers that choose Alaska Wireless service in downtown will not be able to roam throughout the Adak area if WCC goes out of business.

Given the number of contractors and seasonal workers that come to Adak, principally in the remote areas, roaming ability is crucial to ensure voice access to places where no wireline service is available. The Commission specifically stated in the *USF/ICC Transformation Order* that it would "consider as a factor showings regarding the impact on customers, including roaming customers, if a petitioner is the only provider of CDMA or GSM coverage in the affected area" when evaluating waiver requests.³⁰ WCC is the only provider of wireless services outside the downtown area. Thus, if WCC service shuts down, Alaska Wireless and AT&T

²⁹ Moreover, if AEE is also forced to shut down operations, coverage to Adak will be available only to the downtown area, leaving entities such as the Marine Exchange of Alaska and the USGS Volcano Observatory without wireless coverage and phone service.

³⁰ *USF/ICC Transformation Order*, ¶ 540.

customers that visit Adak (AT&T has a roaming agreement with WCC) will not be able to roam in Adak outside the downtown area, and this includes critical services and public safety that operate solely in the more remote areas. Moreover, if AEE is not granted a waiver of the *USF/ICC Transformation Order's* requirements so that it can continue providing service, the only voice alternative that will be left in Adak will be the Alaska Wireless service which is limited to downtown. Here, the loss of roaming ability in one of the most severe and climactically volatile areas of the United States would be catastrophic.

The loss of service due to the immediate application of the annual cap, both to current customers in remote areas and other consumers who rely on roaming availability, runs directly counter to the Commission's goal of ensuring telecommunications access available to all. A waiver is necessary and should be granted promptly.

B. Without a Waiver, Critical Services, Government Functions and Public Safety Will Be Jeopardized.

In addition to providing the public with essential, life-preserving access to emergency responders, WCC is the only provider of wireless services to critical infrastructure, government functions and public safety entities in the Adak area. Letters from several of these entities, including The Marine Exchange, The Aleut Corporation, and the City of Adak, are attached at Attachment A. As explained by The Aleut Corporation, an Alaska Native Regional Corporation whose shareholders are primarily of Aleut descent, without a waiver the entire Adak area will be in jeopardy:

Without a waiver, the consequences of the FCC Order on AEE and WCC will be felt by nearly the entire island of Adak, including TAC [The Aleut Corporation] and its subsidiaries [which provide fuel to the area], and critical government entities including the U.S. Fish and Wildlife Service, The City of Adak, the Marine Exchange (which is responsible for monitoring fishing vessels in the Bering Sea and the Pacific Ocean), the USGS Albuquerque Seismological Laboratory, and the Alaska Volcano Observatory, as well as government

contractors, tourists, hunters and fisherman. The overall safety, growth and economic development of this remote island will be jeopardized.³¹

Last year, WCC completed the construction of the White Alice Cell Site which expanded its wireless coverage area toward the harbor and beyond for incoming sea vessels. Deployment of this site was critical for the Marine Exchange of Alaska, maritime safety and emergency response.³² The White Alice Cell site also provides coverage for the far side of the Adak Island for environmental researchers and contractors where coverage was previously blocked by mountains. The Marine Exchange of Alaska and Captain Edward E. Page of the U.S. Coast Guard (Retired), offers a helpful perspective on the critical nature of WCC's services for maritime safety:

The Marine Exchange of Alaska . . . has developed a comprehensive vessel tracking network throughout Alaska to aid safe, secure, efficient and environmentally sound maritime operations. One of our most important vessel tracking AIS (Automatic Identification System) receiving sites in Alaska is located in Adak on the White Alice location. This tracking system is relied on by the Coast Guard, State of Alaska and the maritime community to aid maritime safety and emergency response. The operation of this vessel tracking . . . is very dependent on the power and internet connectivity that AEE and Windy City provide. If the FCC Transformation Order is not reversed for Adak, the future of this vessel tracking system is in jeopardy as is the future of the community itself which certainly is not in the best interests of our country.³³

The City of Adak also has weighed in about the need for WCC's service and expertise with respect to an E-911 system for the Adak area.

With the recent arrival of Icicle Seafoods in the community, as well as recognizing other opportunities that have begun to materialize on Adak Island, the City has acknowledged that its 911 system needs to be severely improved . . . The City has reached a point where the existing 911 system has been fully maximized and is not capable of further expansion. To the extent practical, we have sought

³¹ TAC Letter at Attachment A.

³² See Marine Exchange Letter at Attachment A.

³³ *Id.*

to integrate WCC's cellular network in order to provide for E-911 services, however the City lacks the institutional knowledge of newer 911 systems . . . [911 service] is essential, especially as we are inside of an extremely active volcanic, earthquake and severe weather zone. Due to the severity, there are times the City cannot monitor certain areas of town or its facilities. We have sought to utilize the WCC network to start utilizing remote monitoring, yet efforts to stymie the operations of [AEE and WCC] threatens to undermine the city's ability to efficiently deploy staff and resources.³⁴

In addition to The Aleut Corporation, the Marine Exchange, and the City of Adak, WCC provides essential wireless services to the Coast Guard, the U.S. Fish and Wildlife Service, and the USGS Albuquerque Seismological Laboratory which are engaged in environmental remediation, wildlife preservation, and public safety. WCC also provides wireless service to the following:

- The Alaska Volcano Observatory (AVO), which is a joint program of the USGS, the Geophysical Institute of the University of Alaska Fairbanks (UAFGI), and the State of Alaska Division of Geological and Geophysical Surveys (ADGGS). AVO uses federal, state, and university resources to monitor and study Alaska's hazardous volcanoes, to predict and record eruptive activity, and to mitigate volcanic hazards to life and property by providing timely and accurate information on volcanic hazards, and warnings of impending dangerous activity, to local, state, and federal officials and the public.
- The TAC fueling port and crew transfer facility for foreign fishing fleets.
- Icicle Seafood, which runs and operates the fish processing on the island, a primary employer and economic source for the Adak area.
- Alaska Airlines

If WCC is not granted a waiver, the consequences for the foregoing critical services, industries, governmental entities, public safety resources and industrial enterprises in the Adak area will be devastating.³⁵

Equally serious are the public safety consequences for residents of Adak if WCC service is shut down. WCC is the sole provider of wireless services beyond the downtown Adak area,

³⁴ City of Adak Letter at Attachment A.

³⁵ *See id.*

including the sea and the wilderness where subsistence hunting and fishing primarily occurs. Currently, WCC subscribers in these remote areas can access emergency services by dialing 911 on their handset. The emergency call is routed through WCC's soft switch to the local Public Safety Answering Point ("PSAP") on Adak Island. However, if WCC is no longer able to provide wireless service, no voice service, including emergency calls, will be possible from these locations. In rural Alaska, the connection to emergency services can be the difference between life and death.

WCC is a model example for how USF support has been used to successfully turn a remote island with no hope of mobile access, into an area where essential, life-preserving access to wireless service is possible, whether downtown, in the wilderness, or out at sea. The wireless access provided by WCC is the underpinning for important public safety functions, research endeavors, jobs, and day-to-day living for the Adak area. For all of these reasons, good cause exists for the Bureau to grant this waiver request.

C. Without a Waiver, WCC will become Insolvent and Critical Jobs In The Adak Area Will Be Lost.

The Commission specifically stated in the *USF/ICC Transformation Order* that it would consider whether its reforms would cause a carrier to become insolvent when determining the necessity for a waiver.³⁶ Without a waiver of the annual cap, WCC predicts it will run out of money within six months and will, therefore, be unable to continue providing service.

If WCC becomes insolvent, not only will its wireless service cease, but the wireline service provided by WCC's affiliate, AEE, will suffer. WCC and AEE each rely on the same small staff, which is shared between the companies. If WCC is forced to go out of business, AEE will not be able to afford the full cost of keeping shared employees. AEE will have no

³⁶ *USF/ICC Transformation Order*, ¶ 540.

choice but to cut its already lean workforce of 13 employees down to 8 employees – a 1/3 reduction in workforce. As the City of Adak noted in its letter of support:

We expect that [WCC and AEE] would collectively be driven into bankruptcy within 12 months, impacting the Rural Utilities Service (“RUS”) fund by forcing default on loans extended to AEE. Furthermore, at least six (6) people on Adak Island, compris[ed] of highly skilled individuals, will be terminated which will result in a significant hit to the local economy. This community can ill afford another setback to community development and sustainability.³⁷

Clearly, the consequences of applying the cap to WCC, without a waiver, are far reaching for the Adak area, and good cause exists for the Bureau to expeditiously grant this waiver request.

IV. GRANTING WCC’S WAIVER REQUEST IS NECESSARY TO ENSURE THAT THE ADMINISTRATIVE PROCEDURE ACT AND PRINCIPLES OF FAIRNESS AND DUE PROCESS ARE NOT VIOLATED.

The Commission created an expedited waiver program to address situations where “specific proposals have a *disproportionate or inequitable impact* on any carriers (wireline or wireless) serving Alaska.”³⁸ As previously explained, granting WCC’s waiver request will avoid the demise of WCC and loss of vital communications services to consumers in the Adak area. Moreover, as discussed below, granting WCC’s waiver request is also necessary to ensure that the Administrative Procedure Act (APA) and principles of fairness and due process are not violated.

A. The Proposed Rule Failed to Provide Adequate Notice and Opportunity for Comment Regarding the \$3,000 Cap.

Under the APA, an agency may make changes in its proposed rules, but only where such changes are a “logical outgrowth” of the proposal. “In order for a final rule to be a ‘logical outgrowth’ of a proposal, however, the agency must have provided proper notice of the proposal.

³⁷ See City of Adak letter at Attachment A.

³⁸ *USF/ICC Transformation Order*, ¶ 508 (emphasis added).

The necessary predicate ... is that the agency has alerted interested parties to the possibility of the agency's adopting a rule different than the one proposed."³⁹

Here, the Commission's proposed rule described transitioning CETC support to the CAF by reducing the interim cap on CETC support in five equal installments, with the initial 20 percent reduction to occur in 2012.⁴⁰ Further, the Commission sought comments regarding the creation of a waiver process, including "any information that would permit the Commission to identify any areas in which consumers would not have access to mobile service as a result of a uniform transition of [CETC] funding to the CAF."⁴¹ No mention was made of a baseline support amount or specific cap amount that would be implemented.

In the *USF/ICC Transformation Order*, the Commission adopted a "baseline support amount," capped annually at \$3,000 per reported line.⁴² The proposed rule lacked even a hint of the cap and, as a consequence, the Commission failed to meet the "logical outgrowth" standard for its final rule. More specifically, here, the Commission's rulemaking process did not "alert interested parties," such as WCC, of the possibility that it may adopt such a rule, especially one that could put those in very unique circumstances out of business in just a few months. Thus, because the Commission failed to provide adequate notice, implementation of the service-ending

³⁹ *Sprint Corp. v. FCC*, 315 F.3d 369, 375-76 (D.C. Cir. 2003) (internal quotations omitted).

⁴⁰ *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 11-13, 26 FCC Rcd 4554, ¶ 248 (2011) ("Proposed Rule").

⁴¹ *Id.*, ¶¶ 250-54.

⁴² *USF/ICC Transformation Order*, ¶ 515.

\$3,000 cap does not pass muster under the APA's notice and comment requirements.⁴³ Granting WCC's request for waiver will rectify the lack of notice.

B. By Failing To Consider Relevant Factors During Its Rulemaking, the Commission Acted In a Manner That is Arbitrary and Capricious In Applying the \$3,000 Cap To High-Cost Entities Serving Remote Areas, Such As WCC.

It is a longstanding tenet of administrative law that an agency must consider all the "relevant factors" when taking action to avoid a court finding that it has acted in a manner that is "arbitrary and capricious," under Section 706(2)(A) of the APA. For example, in the seminal *Citizens to Preserve Overton Park v. Volpe* case,⁴⁴ the Supreme Court held that in addition to examining an agency's statutory authority, a reviewing court must consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."⁴⁵ Further, in *Florida Power & Light Co. v. Lorion*, the Court held that an agency action should typically be remanded, if the "agency has not considered all relevant factors."⁴⁶

Here, the Commission undoubtedly invested significant time and resources in developing the \$3,000 cap. However, for the reasons described above, it is unfathomable that it was the Commission's intent to put carriers such as WCC that serve remote, high-cost areas out of business (*See* Section II herein) or to create new unserved areas. Under these circumstances, it is reasonable to conclude that the Commission simply did not take into account or was not aware of

⁴³ 5 U.S.C. § 553(b).

⁴⁴ 401 U.S. 402 (1971).

⁴⁵ *Id.* at 416.

⁴⁶ 470 U.S. 729, 744 (1985).

certain relevant factors, specifically the facts and circumstances leading to the extreme and immediate impact on very unique carriers, like WCC, when developing the cap.

This apparent failure to consider all the relevant factors associated with setting the \$3,000 cap means that the Commission's action may be deemed arbitrary and capricious under Section 706(2)(A) of the APA. Conversely, the Commission's utilization of a waiver process, as requested here, can address the unique situation presented by Adak and avoid a potentially time-consuming and costly remand.

C. As Applied To WCC, the \$3,000 Cap Violates Principles of Fairness and Due Process.

The immediate and high impact imposition of the cap violates principles of fairness and due process in the case of WCC and Adak. In its proposed rule, the Commission described a 20% annual decrease in funding over five years. But when the rule was finalized, WCC was hit with an immediate 84% decrease in support. This material and unexpected change in the transition plan is patently unfair and violates traditional principles of due process, especially for a small organization of limited resources that is serving a remote and insular Alaska community. As described above, WCC has played by the rules, provides valuable service to the entire Adak community, built and provided communications service as required by the RCA and the FCC, and met its obligations under the pertinent federal and state regulations.

WCC understands the need to reconsider its strategies in light of a changing universal service support picture, but WCC and its customers on a remote Alaskan island now stand at the brink of disaster. With forethought and wisdom, the Commission anticipated such extreme circumstances and provided for a fair resolution through individual waivers. WCC's dire situation is just the type anticipated by the Commission. Granting WCC's request for a waiver will avoid an unfair and inequitable result – the stated intent and purpose for such waivers.

V. REQUESTED RELIEF

Waiver is justified in this case because, as the *USF/ICC Order* provides, WCC “can demonstrate that the reduction in existing high-cost support would put consumers at risk of losing voice service, with no alternative terrestrial providers available to provide voice telephony.”⁴⁷ Without question, imposition of Section 54.307(e) under these circumstances will create new unserved areas and roaming service gaps, will impose a hardship on WCC and the population of Adak Island, and will cause an end result that is at odds with the Commission’s universal service and wireless goals to make more mobile wireless service available, especially in remote areas, for the general population and for public safety.

A. WCC Is Entitled to Expedited Review.

The Commission created an expedited waiver program to address WCC’s particular situation in which a specific reform has “a disproportionate or inequitable impact” on a carrier serving Alaska.⁴⁸ Because WCC has very significant fixed costs associated with the need for extensive investment to provide modern telecommunications to the remote area of Adak, there is no amount of cost cutting that can bring costs in line with the drastic revenue reduction from the FCC’s reforms. Moreover, customers cannot be expected to pay the extreme rates that would be required to make up the shortfall. The cost to each customer of the wireless voice and data service offered by WCC would have to increase by \$885 per month just to cover WCC’s operating expenses. This is prohibitive. The harm to WCC caused by the annual cap is exacerbated by the fact that the Commission did not provide for a delay or gradual transition in its implementation, as it did for other reforms. As already mentioned, WCC’s disbursement

⁴⁷ *USF/ICC Transformation Order*, ¶ 32.

⁴⁸ *Id.*, ¶ 508

declined by 84 percent (from \$136,344 in December 2011 to \$22,356 in January 2012) the first month after the annual cap took effect. As a result, without a waiver, WCC anticipates that its wireless service on Adak will shut down within the next six months. It is urgent that this waiver request be resolved expeditiously.

B. Granting a Waiver That is Limited in Time and Support Level Will Allow WCC to Continue Service During the Transition and Is Consistent With Commission Objectives.

WCC has ceased its efforts to provide a more reliable service due to the changed regulatory landscape, and it will no longer construct an additional cell site at Clam Lagoon to provide network redundancy and mitigate signal degradation caused by the notoriously harsh weather of the Adak area. However, more critically, the massive and immediate reduction in monthly support will force current operations to cease altogether. Without grant of a limited waiver, all of WCC's efforts to build and maintain a modern wireless telecommunications system in the remote and insular Adak area will come to a grinding halt and substantial portions of the Adak area will become unserved. Furthermore, if WCC is forced to cease operations, a tremendous amount of resources and investment dollars will be wasted. WCC has consistently made substantial investments to increase redundancy and expand coverage in the Adak area. WCC's second cell site, White Alice, which has been operational for only a few months, was built at substantial cost to achieve these long-term goals. Yet, without a waiver, this just-built site, along with all of WCC's other investments made to increase consumer access and service in Adak, will become unused and wasted.

As noted, WCC is requesting a waiver that is limited in two respects. First, it seeks waiver of the cap only until the Commission transitions to the Connect America Fund ("CAF") programs so that it can remain operational at current levels. Specifically, WCC only needs some

portion of the USF support it was previously receiving until Phase II Mobility Funds are disbursed, not indefinitely.

Second, WCC understands the Commission's desire to move away from the identical support rule and is therefore not seeking a waiver to allow it to receive the same the amount of USF it was previously receiving.⁴⁹ Furthermore, as evidenced by its work stoppage for Clam Lagoon, WCC is not looking for support above the cap "to expand deployment and service offerings to new areas."⁵⁰ Instead, WCC is requesting, for a limited period of time, only the amount of support that is necessary to cover its operating expenses less its revenues, to maintain the sites it already operates to provide wireless service to Adak residents, workers, and visitors, and to ensure critical services and public safety are not jeopardized. Specifically, WCC seeks support of \$880.09 per line, per month, which is approximately half of what WCC had been receiving under the identical support rule. The annual amount of support sought represents a five-year average of what WCC will need each year to receive a return on its ratebase and cover its operating expenses, depreciation expenses and taxes. In calculating this figure, WCC used a 10% return on investment as the return element in the development of the revenue requirement. From the total revenue requirement, the revenues generated from customers sales and service were used to lower the support amount necessary for WCC to stay in business.

As demonstrated by the financial forecast in Exhibits 7 and 8, this level of recovery does not allow WCC to act in any of the ways the Commission has prohibited in the USF/ICC Transformation Order, such as to over earn or store excess cash for additional plant investment. Instead, WCC is merely requesting recovery of the frozen revenue requirement until the details

⁴⁹ *Id.*, ¶ 278.

⁵⁰ *Id.*, ¶ 523.

of Mobility Phase II funding are confirmed and WCC can determine the CAF support it will be eligible to receive under the new recovery mechanism. Significantly, this means that even if WCC is able to increase line counts, WCC will receive no more money from the Universal Service Fund.⁵¹ This formula sets a predictable revenue recovery level going forward with the built-in assurance that WCC will not be earning more than is necessary to keep its business afloat and to secure the existing needed cell coverage for customers in the Adak area.

WCC hopes its effort to comply with the Commission's expectations by requesting a time-limited and support-limited waiver to maintain only the current level of service, will allow the Bureau to grant the requested waiver quickly.

VI. CONCLUSION

For all the reasons stated in this Petition, the Bureau should expeditiously grant WCC's request for waiver of the annual cap for interim support for remote areas of Alaska.

An expedited waiver of the \$3,000 annual cap is necessary to ensure that WCC can continue its essential wireless operations that provide the residents, workers, and visitors of the insular, weather-challenged Adak area access to comprehensive, reliable voice service. Without the waiver, wireless service in Adak will be limited to the downtown area only, while the most remote areas in Adak where telecommunications service is critical - including at sea and the Aleutian Wilderness - will be without voice service altogether.

The Commission could not have intended to set back the tremendous progress that has been made with USF support to provide the people in Adak with critical voice service by imposing a cap that would force the only wireless carrier operating outside the downtown area to

⁵¹ Any increase in line count will only drive the cost per line down, not the total revenue recovery up.

go out of business. Instead, the Commission failed to consider WCC's unique situation in which its annual expenses substantially exceed \$3,000 per line due to the unavoidably high operating costs of providing service in the remote, inhospitable Adak area.

As this petition demonstrates and the attached exhibits support, good cause exists and the public would be served by the Bureau's grant of WCC's requested waiver. Without the waiver, the consequences for this insular area will be devastating and inconsistent with Commission objectives: (1) WCC customers will lose service within six months with no terrestrial alternative and no roaming capabilities outside the downtown area; (2) critical services, government functions and public safety will be jeopardized; and (3) WCC will become insolvent and critical jobs in the Adak area will be lost. Moreover, the immediate imposition of the annual cap contradicts one of the Commission's guiding principles from the National Broadband Plan that new USF rules should be "phased in over time" to provide service providers and investors an opportunity to adjust. Furthermore, given the lack of notice concerning the \$3,000 cap, along with the immediate imposition of the cap, the requested waiver is necessary to ensure that the APA and principles of fairness and due process are not violated and to cure the "disproportionate or inequitable impact" the cap is already having on WCC.

By expeditiously granting a waiver that is limited in both time and level of support, the Bureau will balance the Commission's goal of reducing funding levels based on the inefficiencies in the current USF system with the needs of a carrier serving a remote, insular area in Alaska to receive support higher than the \$3,000 cap simply to stay afloat until it can access funds under Phase II of the Mobility Fund.

Respectfully submitted,

/s/

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