Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	

To: The Commission

APPLICATION FOR REVIEW

Central Texas Telephone Cooperative, Inc. ("Central Texas"),[1] by its attorneys and pursuant to Section 1.115 of the Federal Communications Commission's ("FCC" or "Commission") Rules, hereby files this Application for Review of the Commission's April 25, 2012 Order in the above-captioned proceeding, issued under delegated authority by the Chief, Wireline Competition Bureau ("Bureau").[2]

In the April 25, 2012 *Bureau Order*, the Bureau substantially and extensively revised the original version of its proposed high-cost loop regression analysis model, first announced in a December 2, 2011 Public Notice,[3] used to determine carrier-specific limits on High Cost Loop Support ("HCLS") payments to rate-of-return carriers. Central Texas will experience immediate and substantial harm resulting in a loss of close to $1 million in high-cost support through the end of 2013 if the Bureau's significant and numerous revisions to its regression model are allowed to go into effect. While Central Texas participated in this proceeding in response to the model and inputs released in the initial December 2, 2011 Public Notice, as well as the March 9, 2012 *Peer Review*,[4] Central Texas had

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[1] Central Texas is a rate-of-return, cost-based incumbent local exchange carrier ("ILEC") that provides telecommunications and broadband services to customers in remote, central Texas.
[2] *In re Connect America Fund*, WC Docket No. 10-90, *High-Cost Universal Service Support*, WC Docket No. 05-337, Order, DA 12-646 (April 25, 2012) ("*Bureau Order*").
[3] *Notice Concerning Universal Service Intercarrier-Compensation Transformation Proceeding*, Public Notice, DA 11-1966 (December 2, 2011) ("*Regression Model Public Notice*").
[4] *See* Letter from Patrick Halley, FCC, to Marlene Dortch, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, 03-109, at Apps. B & C (March 9, 2012) ("*Peer Review*").

no opportunity to comment on the revised April 25, 2012 regression model since the Bureau failed to seek comment on the "significant,"[5] "revised,"[6] and "updated"[7] changes to its regression methodology. The Bureau was under the obligation to seek notice and provide an opportunity for comment before establishing in the *Bureau Order* what are effectively new accounting rules for rate-of-return ILECs. The Bureau's failure to do so constituted prejudicial procedural error. In addition, the accounting provisions and revised regression model adopted in the *Bureau Order* are legally suspect and contain flaws and defects that could have been cured prior to the release of the *Bureau Order*.

Central Texas has standing to file this Application for Review. Central Texas will suffer acute and substantial financial harm if the revised regression model rules are allowed to go into effect. As noted above, although it commented on the original regression model, Central Texas could not have commented on the revised regression model due to the absence of notice and opportunity to comment on the significantly revised model. Central Texas specifically requested such notice and opportunity to comment during this proceeding.[8] Central Texas requests that the Commission delay the effective date of the regression model in order to allow for notice and comment on the substantially revised regression model and to cure the flaws of the revised model identified below.

I. Questions Presented for Review

A. The threshold question presented for review is whether the Bureau acted in compliance with the Administrative Procedure Act ("APA") and followed the proper administrative procedures in adopting the revised regression model.

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[5] *See Bureau Order* at ¶¶ 4, 11, and 12 (discussing "significant" "changes" and "improvements" to the regression model).
[6] *See Bureau Order* at ¶¶ 17 – 23, 33, 34, 40, 54, 58, and 69 (noting revisions to the "definitions," overall "methodology," and the "framework" of the new regression model).
[7] *See Bureau Order* at ¶¶ 5, 11, 27, 43, 58, 71, 72, 74, 76, 77, 78, 80, 81, 83, 84, 85, 105, 110, 113, 115, and 117 (noting multiple updates to "boundaries," the overall "methodology," the "formula," the overall "model," and to the "regression" in and of itself.)
[8] *See* Letter from Kenneth C. Johnson, Counsel for Central Texas, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et. al.* (March 23, 2012).

B. Additional questions presented for review are as follows:

1. Whether the Bureau's use of road miles as a proxy for loop length is based on an erroneous finding of fact.

2. Whether the Bureau's use of bedrock adequately captures high costs.

3. Whether the Bureau's use of depreciated plant encourages prudent and efficient investment.

4. Whether the Bureau's use of road crossings is based on an erroneous finding of fact and, as a result, harms the public interest by penalizing remote, rural carriers with long loops.

5. Whether the *Bureau Order* complies with the statutory "predictability" requirement.

II. Factors Warranting Review and Requested Relief

A. The Bureau Cannot Substantially Revise the Regression Model without Undertaking a Notice and Comment Rulemaking Proceeding.

Contrary to the requirements of the APA,[9] the FCC never provided Central Texas and other parties the opportunity to comment on a proposed regression model remotely resembling the revised regression model adopted in the *Bureau Order*. The *Bureau Order* contains what is in essence a brand new regression model that will be used as of July 1, 2012 to determine high-cost support levels for rate-of-return carriers. While the Bureau, acting under delegated authority, sought comment on its original proposed model, it never sought comment on the substantially changed and significantly different revised regression model. The revised regression model was a complete overhaul of the previously proposed model and was full of "significant… changes[10] and "revised"[11] and "updated"[12]

[9] 5 U.S.C. § 553(b).
[10] *See Bureau Order* at ¶¶ 4, 11, and 12 (discussing "significant… changes" and "improvements" to the regression model).

alterations, additions, and modifications to the model's assumptions, definitions, algorithms, categories, data sets, inputs, and outputs. The Bureau could have put its revised model out for public comment prior to adopting it in the *Bureau Order*, but it chose not to even after parties counseled the Bureau to do so.[13]

The revised regression model at issue has the full force and effect of the law and is therefore subject to the APA notice and comment requirements.[14] Notice and the opportunity for comment and "sufficient time"[15] to provide comment are the "safety valves in the use of… sophisticated methodology"[16] adopted by an agency. The Bureau's complex, quantile analysis-based revised regression model is just such a "sophisticated methodology" requiring adequate notice and adequate time for examination and comment.

Central Texas and other commenters were illegally kept in the dark about the actual data the FCC "employed in reaching the decisions"[17] it ended up making regarding the substantially revised model. An agency may not engage in "hiding or disguising the information that it employs" when establishing rules.[18] The Bureau provided a working model and related inputs and outputs in the

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[11] *See Bureau Order* at ¶¶ 17 – 23, 33, 34, 40, 54, 58, and 69 (noting revisions to the "definitions," overall "methodology," and the "framework" of the new regression model).
[12] *See Bureau Order* at ¶¶ 5, 11, 27, 43, 58, 71, 72, 74, 76, 77, 78, 80, 81, 83, 84, 85, 105, 110, 113, 115, and 117 (noting multiple updates to "boundaries," the overall "methodology," the "formula," the overall "model," and to the "regression" in and of itself.)
[13] *See* Letter from Kenneth C. Johnson, Counsel for Central Texas, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et. al.* (March 5, 2012); Letter from Kenneth C. Johnson, Counsel for Central Texas, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et. al.* (March 23, 2012); Letter from Michael R. Romano, National Telecommunications Cooperative Association, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et. al.* (March 13, 2012).
[14] *See American Min. Congress v. MSHA*, 995 F.2d 1106, 1109 (D.C. Circuit 1993).
[15] *Nat'l Ass'n of Regulatory Util. Comm'rs ("NARUC") v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984).
[16] *Sierra Club v. Costle*, 657 F.2d 298, 334, 397-98 & n. 484 (D.C. Cir. 1981)(citing cases); *see Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181-82 (D.C. Cir. 1994).
[17] *Conn. Light & Power Co.*, 673 F.2d at 530.
[18] *Id.* at 531.

initially proposed regression model, but such essential information was effectively hidden when the Bureau developed the revised model.

In the *Bureau Order*, the Bureau adopted new, substantive – or "legislative" – rules without affording the public an opportunity to review and comment on them.[19] The new data sets and *Peer Review* of the initially proposed model released by the FCC prior to the release of the *Bureau Order* provided no indication that the radical changes adopted in the *Bureau Order* were even being contemplated.[20] The *Peer Review* gave no indication whether the 17 new data sets were intended to be used at all or, if used, how they would be used, thus making meaningful comment impossible. Moreover, even if the new data sets and *Peer Review* had provided notice of and opportunity for comment on the actions being contemplated by the Bureau, the seven week period between the release of this information and the adoption of the *Bureau Order* failed to provide Central Texas and other parties adequate "time to allow for meaningful commentary"[21] on the revised regression model.

Courts have held that any substantive change to a rule requires notice and opportunity for comment, especially if the adopted rule does not resemble the proposed rule. In *U.S. Telecom Ass'n v. FCC*, the U.S. Court of Appeals for the District of Columbia Circuit noted that "new rules *that work substantive changes* to prior regulations are subject to the APA's procedures."[22] Seeking comment on the initially proposed regression model is insufficient to satisfy the APA since the Bureau made such enormous changes to its initially proposed regression model. Consistent with *U.S. Telecom Ass'n v. FCC*, the Bureau is required to provide notice and allow opportunity for comment pursuant to the APA when an adopted rule "represents a substantive change from the rule announced."[23] For the many

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[19] Legislative rules are subject to the APA's notice and comment requirement. 5 U.S.C. § 553(b).
[20] *See Peer Review* at 2.
[21] *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530-31 (D.C. Cir. 1982).
[22] *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005), citing *Sprint Corp. v. FCC*, 315 F.3rd 369, 374 (D.C. Circuit 2003) at 34 (emphasis in original).
[23] *U.S. Telecom Ass'n v. FCC*, 400 F.3d at 39.

carriers who found they were financially harmed by the revised model but were unharmed under the proposed model,[24] succinct and measurable "substantive change" is undeniable. Longstanding precedent instructs that "[n]otice is sufficient . . . if the parties have not been '*deprived of the opportunity to present relevant information by lack of notice that the issue was there*.'"[25] Multiple parties, if not the entire rate-of-return carrier industry, were blindsided by the wide-ranging changes made to the initially proposed model and were given no notice and opportunity to comment on the financial impacts and other issues related to use of the revised model. Accordingly, the revised regression model is unlawful until it is properly vetted under proper notice and comment procedures. Central Texas requests relief in the form of the Commission delaying the adoption of the revised regression model and directing the Bureau to seek proper notice and comment on the revised model adopted in the *Bureau Order*.

B. The Bureau's Road Miles Proxy Is Based on an Erroneous Finding of Fact.

Central Texas and numerous other carriers informed the Commission that loop length is a major driver of loop cost.[26] Taking this input into account, the Bureau properly concluded that "[b]ecause most cable follows roads, it is reasonable to believe that the number of road miles in a study area is a good proxy for the cabling required to serve that area."[27] The Bureau also concluded that "cable generally follows roads, so the number of road miles in a study area should correlate with the cabling required to serve that area."[28] Central Texas agrees with these conclusions, but notes that, contrary to the Bureau's intentions, the revised regression model, in practice, *reduces* support for

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[24] *See, e.g., Bureau Order* at p. 47, Appendix B (where Arctic Slope Telephone went from being unaffected by the proposed model to having its allowable cost per loop ("CPL") trimmed by $199 per line).
[25] *WJG Tel. Co., Inc. v. FCC*, 675 F.2d 386, 389 (D.C. Cir. 1982) (citations omitted); *see Fla. Power & Light Co. v. Nuclear Regulatory Comm'n*, 846 F.2d 765, 771 (D.C. Cir. 1988) (emphasis added).
[26] *See Bureau Order* at ¶ 21.
[27] *See Id.* at ¶ 21.
[28] *See Id.* at ¶ 86.

Central Texas and other carriers as their road miles increase. The *Bureau Order* adopts road miles as a proxy that, in theory, takes into account the Bureau's recognition of the higher costs associated with long loops.[29] However, for carriers with long loops and Bureau-recognized higher costs such as Central Texas, the revised regression model calculates road miles as a negative coefficient. In other words, the more road miles served by a carrier (the proxy for long loop length), the lower its capital expenses ("capex") and operating expenses ("opex") thresholds become. Thus, the revised regression model's use of road miles as a proxy has the opposite and unintended effect of penalizing rather than rewarding carriers that experience high costs due to long loop lengths.

The Bureau's road miles proxy is mathematically flawed and based on an erroneous factual assumption since the road miles proxy for longer loops is actually behaving like a proxy for shorter loops. Central Texas requests relief in the form of the Commission directing the Bureau to use road miles as a positive indicator of high costs.

C. The Regression Model Algorithm's Lowering of the Capex Threshold When Bedrock is Present Harms the Public Interest by Deterring Carriers from Making the Economically Prudent Decision to Bury Cable.

The *Bureau Order* correctly recognizes that the presence of close-to-the-surface bedrock leads to increased costs.[30] Central Texas's service area is characterized by rocky cliffs and thick surface bedrock.[31] Central Texas uses rock cutters to bury cable plant, leading to higher capital expenses. Central Texas balanced the costs of using aerial cables against the costs of burying cable and determined that it costs less overall to bury cable, rather than constantly maintain and replace aerial cable in the windy, tough, varmint-ridden Texas terrain. Unfortunately, this economically prudent engineering decision results in necessarily higher capital expenditures for Central Texas. By keeping

[29] *See Id.* at ¶¶ 21 and 86.
[30] *See Id*. at ¶ 70.
[31] *See* Letter from Kenneth C. Johnson, Counsel for Central Texas, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et. al.* (March 5, 2012).

its cable maintenance costs low, Central Texas receives no credit from the regression model for doing so even though it has much lower operational expenditures. As a result, under the revised regression model, Central Texas is severely harmed by its higher, yet prudent, capital expenditures. This result is a deterrent to employment of an overall cost-cutting strategy.

Costs associated with bedrock should allow room under the capex cap. Unfortunately, the FCC's regression model algorithm raises the opex threshold and lowers the capex threshold when bedrock is present, thus ignoring Central Texas's prudent capital expenditures. Central Texas requests relief in the form of the Commission directing the Bureau to raise the capex threshold for carriers that make a justifiable engineering decision to bury cable in order to keep opex costs low. In the alternative, the Commission should direct the Bureau to allow carriers with considerable room under the opex threshold to offset the amount from the capex threshold.

D. Penalizing the Efficient Use of Depreciated Plant Unfairly Harms Carriers with Extensive Depreciated Plant and is Inconsistent With the Bureau's Stated Intent that its Rules Encourage Prudent and Efficient Investment.

Central Texas has consciously and efficiently deployed its network to use its older copper cable in conjunction with new fiber optic facilities. The Bureau's decision to penalize carriers with a higher depreciated plant to total plant ratio[32] is based on an erroneous assumption of fact. This decision does not accurately consider prudent investments made by carriers and unfairly impacts companies like Central Texas with large asset bases who consciously choose to maximize the value of historical investments. Had Central Texas simply replaced useful, yet aging plant two years ago – a decision that is inherently wasteful and imprudent – it would have more room under the capex cap. Such a result would be contrary to the Commission's intention that the Bureau develop incentives so that rate-of-return carriers "invest prudently and operate efficiently."[33]

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[32] *See Bureau Order* at ¶ 21.
[33] *See USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 17744-45, ¶ 219.

As a large company with a high percentage of depreciated plant, Central Texas's substantial high-speed broadband expenditures for new plant fail to significantly move its depreciated plant to total plant ratio. Consequently, this depreciated plant ratio, while based on readily available data and easy to calculate, fails as a reliable predictor of excessive spending for high-cost support needs. Central Texas requests relief in the form of the Commission directing the Bureau to eliminate or reduce the penalty that depreciated plant has on the capex threshold.

E. The Road Crossings Variable is Based on the Erroneous Assumption that Fewer Road Crossings Equates to Reduced Costs.

The Bureau determined that the number of road crossings in a carrier's area is an indicator of "scale" and resulting higher costs.[34] While road crossings can increase costs, a lack of roads, and therefore crossings, is a characteristic of remote, rural areas, as well as an indicator of longer loops. As the Bureau notes, long loops correlate to higher costs.[35] The current road crossing algorithm penalizes rural carriers in remote areas with extremely long loops like Central Texas, contrary to the Bureau's intent that road crossings capture the "scale" and inherently higher costs of large carrier service areas. This is especially problematic when combined with the contrary results of the road mile proxy, discussed above. The combination of the road mile and road crossing regression components in the revised model works against the rural carrier with long loops like Central Texas. Rather than allowing additional costs based on "scale," this combination punishes carriers with "scale." Central Texas requests relief in the form of the Commission directing the Bureau to adopt a road crossing algorithm that reflects that less road crossings may correlate with longer loops and inherently higher costs.

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[34] *See Bureau Order* at ¶ 84.
[35] *See Id*. at ¶¶ 21 and 86.

F. The *Bureau Order* Fails to Comply with Section 254(b)(5).

Section 254(b)(5) of the Communications Act of 1934, as amended, requires "specific and predictable support mechanisms."[36] The *Bureau Order* is anything but predictable due to the dynamic, annually changing nature of the regression model caps. When the support a company receives is also affected by what a statistically "similarly-situated" company spends, future support based on current expenditures is highly uncertain. Central Texas requests relief in the form of the Commission directing the Bureau to work with rate-of-return carriers and their associations to develop a more static model containing a reasonable amount of certainty allowing carriers to predict future high-cost support based on current and near-future expenditures.

III. Conclusion

For the reasons set forth herein, Central Texas respectfully requests that the Commission grant this Application for Review and delay the imposition of the revised regression model in order to allow proper notice and opportunity for comment and to cure the flaws discussed above.

Respectfully submitted,

CENTRAL TEXAS TELEPHONE COOPERATIVE, INC.

By: */s/ Caressa D. Bennet*

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Dated: May 25, 2012

[36] 47 U.S.C. § 254(b)(5).

CERTIFICATE OF SERVICE

I, Colleen von Hollen, of Bennet & Bennet, PLLC, 6124 MacArthur Blvd., Bethesda, MD 20816, hereby certify that a copy of the foregoing Application for Review was served on this 25th day of May 2012, via electronic mail, unless otherwise indicated, on those listed below:

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