FILED/ACCEPTED

MAY 25 2012

Federal Communications Commission
Office of the Secretary

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

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APPLICATION FOR REVIEW OF THE BLOOSTON RURAL BROADBAND CARRIERS

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP, on behalf of its clients listed in Attachment A (the "Blooston Rural Broadband Carriers"), and pursuant to Section 1.115 of the Commission's rules, submits this Application for Review of the Wireline Competition Bureau's (WCB) *Regression Order*[1] adopting a quantile regression model for establishing limits or "benchmarks" for high cost loop support. In the *Report and Order and Further Notice of Proposed Rulemaking*, FCC 11-161, released November 18, 2011 (*USF/ICC Order*),[2] the Commission directed the WCB to implement a methodology for "setting the benchmark levels to estimate appropriate levels of capital expenses and operating expenses for each incumbent rate-of-return study area, using publicly available data"[3] based on the framework adopted by the Commission. According to the Commission, "[t]he framework consists of

[1] *In the Matter of Connect America Fund; High-Cost Universal Service Support*, Order, WC Dockets No. 10-90 and 05-337, DA 12-646, released April 25, 2012.
[2] *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;* Report and Order and Further Notice of Proposed Rulemaking, WC Dockets No. 10-90, 07-135, 05-337, 03-109; CC Dockets No. 01-92, 96-45; GN Docket No. 09-51; WT Docket No. 10-208, released November 18, 2011.
[3] *USF/ICC Order* at ¶210.

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benchmarks for prudent levels of capital and operating costs." The Commission also found that the framework will "create structural incentives for rate-of-return companies to operate more efficiently and make prudent expenditures."[4]

In the comments and reply comments submitted on the model, the parties identified a number of issues and problems with the Commission's proposed model, inputs and data. In the *Regression Order*, the WCB adopts certain changes to the model to resolve some of the identified issues. However, in a number of cases, the WCB failed to consider evidence concerning flaws in the model and failed to correct inaccurate data used in the model. As a result, the regression model adopted by the WCB does not meet the objectives set by the Commission in the *USF/ICC Order*.

The rural rate-of-return companies listed in Attachment A are directly and substantially affected by the Commission's benchmarking methodology and the model adopted by the WCB. Accordingly, and as demonstrated below, the Blooston Rural Broadband Carriers ask the Commission to review the WCB's *Regression Order*, revise it as shown herein, and delay implementation of a regression model until the demonstrated flaws can be resolved.

I. <u>The Model is Fatally Flawed Because it Relies on Inaccurate Data</u>

In the *USF/ICC Order,* the Commission directed the WCB to compare companies' costs to those of similarly situated companies. The Commission also directed the WCB to consider certain variables in determining companies that are similarly situated, including geographic measures such as land area.[5] The Commission relied on TeleAtlas data to determine study area boundaries for rural rate-of-return carriers.

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[4] *Id.*
[5] *USF/ICC Order* at ¶ 217.

In comments and reply comments, a number of parties, including the Blooston Rural Broadband Carriers, provided evidence that the TeleAtlas data is inaccurate for many companies and, in some cases, significantly so. For example, the Commission shows the service area for Penasco Valley Telephone Cooperative, Inc. to be 2,331 square miles, whereas its actual service area is almost twice as large at 4,651 square miles.[6] Further, the National Exchange Carrier Association demonstrated that there are errors in geographical mapping data used by the Commission in more than 90 percent of study areas and that an analysis of 357 study areas in the TeleAtlas Database showed that over 22 percent of the study areas boundaries are not accurate within 20 percent.[7]

In spite of evidence that the TeleAtlas data is inaccurate, the WCB refused to modify the study area boundaries before implementing the regression methodology. In support of its position, the WCB states that the only comprehensive wire center boundary data is the data available from TeleAtlas and GeoResults and there is precedent for using the TeleAtlas boundary data. Further, to address errors in the TeleAtlas data, the WCB provides a steamlined, expedited waiver process for carriers affected by the benchmarks to correct errors in their study area boundaries. Data for all carriers will not be corrected until a future date. The waiver process, however, is not sufficient to save the flawed model.

There can be no confidence that the model is appropriate or its results are accurate, when a primary data point to determine similarly situated companies is not accurate for <u>all</u> companies, especially because companies are being compared against each other. As an initial matter, without accurate boundary data for all companies, it is not clear that companies have

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[6] Comments of Penasco Valley Telephone Cooperative, Inc., WC Docket 10-90, et al., filed January 18, 2012, at 2.

[7] Comments of NECA, et al, WC Docket 10-90, et al, filed January 18, 2012, at App. D, 2-7.

been grouped appropriately with similarly situated companies, as required by the Commission. Further, it is not possible to test the results of the model without accurate inputs. In the *Regression Order*, the WCB alleges that the changes it adopted to the Commission's original analysis have "significantly improved" the methodology and, in support of its position, states that fewer companies will be impacted by the model adopted by the WCB than under the Commission's proposed model.[8] However, without accurate geographic data for the companies, it is not clear that this is correct.

There also is no valid justification for relying on inaccurate data. In support of its use, the WCB states that the data was used in the Commission's hybrid cost proxy model and to create maps showing certain high cost support areas and areas with competitive carriers in response to requests for the U.S. House of Representatives.[9] The maps provided to Congress, however, were of illustrative value and did not result in direct impacts to carriers. Further, the Commission's hybrid cost proxy model is not applied to rural rate-of return carriers, in part because of the Commission's finding that imprecision in the model would have a greater impact on such small carriers.[10] Accordingly, the fact that the Commission has used the TeleAtlas data in these contexts does not justify its use in this case, where it is an important variable in a model that could skew the results of the model and that will have real, and significant, financial impacts on small, rural carriers.

Providing a waiver process for carriers adversely impacted by the inaccurate data in year one of the model does not cure the defect. As indicated, the boundary data is an important variable in a model that seeks to compare similarly situated companies, and the large percentage

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[8] *Regression Order* at ¶4.
[9] *Order* at ¶25 and fn. 73.
[10] *In the Matter of Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8934, ¶291 (1997).

of inaccurate data for a significant portion of companies could skew the results of the model. In addition, as recognized by the WCB, a waiver is discretionary and may not be granted.[11] In any event, carriers should not be required to expend time and money seeking waivers because the WCB refuses to correct faulty data. It is quite possible that if the correct data was used for all companies, there could be differences in the companies that exceed the 90th percentile, such that certain companies would have no need for the WCB's expedited waiver.

Further, the WCB acknowledges that the data should be and can be corrected and, in fact, the WCB sets forth a process to correct the data prior to 2014. The WCB provides no explanation as to why implementation of the model cannot be delayed until accurate data is available for all companies, except to say that the Commission anticipated that the high cost loop support benchmarks would be implemented for support calculations beginning July 2012.[12] This, however, is an unreasonable and improper justification for relying on faulty data. On the other hand, there will be little or no negative impact to the Commission's goals caused by delay. On the contrary, rural rate-of-return carriers cannot rely on the accuracy of the model results when faulty data is used. Therefore, the use of an inaccurate model is contrary to the Commission's stated goal of applying regression analysis in the first place, namely, to provide incentives to carriers to reduce excessive investment and spending. As demonstrated in the Declaration and Report of Dr. Janice A. Hauge, submitted by the Blooston Rural Broadband Carriers, accurate and appropriate variables must be used in a regression model otherwise, benchmarking risks punishing companies that have made prudent investments.[13]

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[11] *Id.* at fn. 79 and 80.
[12] *Regression Order* at ¶28.
[13] Comments of the Blooston Rural Broadband Carriers, WC Docket 10-90, et al, Declaration and Report of Dr. Janice A. Hauge (Attachment B), filed January 18, 2012, at 5.

Rather than implement a faulty model and waste the time and money of carriers and the Commission with possibly unnecessary waivers, the WCB should correct the geographic data for all carriers before adopting a regression model. Accordingly, implementation of the model should be delayed until accurate geographic data is obtained for all carriers.

II. The WCB's Model Will Not Achieve the Commission's Stated Objectives

In their comments and reply comments, the Blooston Rural Broadband Carriers demonstrated that by applying the regression model year after year, the model will create a "race to the bottom" in terms of carriers' ability and incentive to invest in modern, broadband capable networks. As a result, the model is contrary to the Commission's stated goal of promoting the advancement of broadband capable networks. As explained in the Declaration and Report of Dr. Hauge, the consecutive application of the model across time will ultimately reduce high cost loop receipts to near zero. Dr. Hauge found that not only is this a novel application of a regression model, but also, as a matter of public policy and the professional literature on benchmarking, this is at odds with its use. Dr. Hauge cited economic literature on the subject that firms "must have a reasonable assurance of cost recovery of prudently incurred costs, must continue to invest and must not diminish service quality to cover costs[fn omitted]."[14]

Dr. Hauge also presented alternative techniques that should be considered in addition to regression analysis and demonstrated that instead of using the proposed benchmarking to automatically reduce payments, it should be used to trigger a harder look, such as the HHI used by the Department of Justice in market concentration cases.[15] Dr. Hauge, however, found that the Commission's plan includes none of these important benchmarking tools. Instead the

[14] *Id.* at p. 4.
[15] *Id.* at p.5.

Commission's methodology simply zeros out HCLS receipts in all study areas across time, which is not a proper use of benchmarking.

In the *Regression Order*, the WCB ignores these arguments and this flaw in the Commission's use of regression analysis is not addressed. Moreover, initial runs of the model appear to confirm Dr. Hauge's argument, whereby the consecutive application of the model across time reduces high cost loop receipts to near zero. For example, one company's attempt to project the impact of the model shows a small impact in 2013, which increases to an impact of over $1 million by 2015 and over $2 million by 2019.[16] The projected impact to the company is interesting in two ways. First, the projected impact in later years is far greater under the WCB model than under the Commission's proposed model, although both models show no impact in 2012. Second, the projected impact is driven entirely by investment in broadband facilities already made by the company. Accordingly, there seems to be little that the company can do to modify the impact of the model. Needless to say, annual impacts at this level ultimately will drive this company out of business.

In their comments and reply comments, the Blooston Rural Broadband Carriers argued that the Commission was inappropriately using the regression model as a prudency review. The above example shows the practical, harmful effect of arbitrarily determining that investment is not prudent based on a regression model. Although it is obvious, the Commission ignores that carriers cannot "undo" investment already made. For the carriers impacted because of capital investments in broadband facilities, there is no ability to correct, modify or change the alleged

[16] The changing nature of the model makes it hard to determine with any certainty the effects of the caps over time. However, in an effort to assess the potential effect of the caps in future years, the model coefficients and all data except the companies' own projections were held constant.

inefficient investment. In this regard, the model, which presumes certain investments were "inefficient" and, without further review, simply reduces support, is nothing more than an arbitrary punishment. Accordingly, at a minimum, the Commission should adopt the alternative techniques presented by Dr. Hauge for implementation in addition to a regression model (modified to correct the flaws identified in the WCB's model). As shown by Dr. Hauge, benchmarking should not be used to automatically reduce payments. Rather, it should be used only to trigger a harder look.

III. Additional Flaws in the Model Must be Corrected

In comments and reply comments, the Blooston Rural Broadband Carriers demonstrated that the model's results could not be substantiated because of the dearth of information provided in Appendix H, including information testing whether the 90th percentile is the correct percentile cut-off. As shown by the Blooston Rural Broadband Carriers, and supported by the Declaration and Report of Dr. Hauge, insufficient information was provided with respect to the selection of the 90th percentile as the cut-off, coefficient estimates for alternative percentiles, and details supporting cut-offs at different values and, accordingly, there was no justification for the 90th percentile cut-off. Rather, it appeared that the Commission simply selected a cost cut-off, rather than using the data to determine an appropriate cost cut-off of study area "outliers" with unjustified high costs.

The WCB's *Regression Order* does not address these arguments or provide any support for the 90th percentile cut-off. The WCB also has not supported a conclusion that falling outside the 90th percentile means a company is inefficient. Rather, in support of using the 90th percentile, the WCB states that "using the 90th percentile with the modifications adopted today leads to approximately the same number of study areas with capped costs as would have been the

case if we were to use the 95th percentile with the Appendix H methodology." [17] In other words, the WCB has concluded that using the 90th percentile as the cut-off for the new model is appropriate because it yields the same result as using the 95th percentile as the cut-off for the old model. The WCB offers no explanation as to why this comparison justifies the selection of the 90th percentile as the cut-off point; indeed, it does not. Rather, this explanation simply confirms Dr. Hauge's analysis that there is no justification for the 90th percentile cut-off, other than it produces the Commission's desired result in terms of universal service support reductions for rural rate-of-return carriers. Clearly, there has been no link established between being inefficient and being above the 90th percentile. Therefore, the adoption of this cut-off is arbitrary.

Finally, the WCB model lacks transparency and plausibility and, therefore, should not be adopted at this time. When considering the adoption of the hybrid cost proxy model, the Commission established a number of parameters for consideration of a model, including all underlying data should be verifiable and outputs plausible and the model must include the capability to examine and modify the critical assumptions.[18] As shown herein, the WCB's model relies on inaccurate data; the WCB has not provided its methodology or support for selecting the 90th percentile; the WCB has not shown how it grouped carriers as "similarly situated;" and the results of the model are not plausible. The Blooston Rural Broadband Carriers note that before adopting the hybrid cost proxy model, the Commission evaluated a number of competing models, examined numerous variables and data sets, and subjected every step of the process to numerous rounds of comments and workshops over a number of years. It is hard to understand why the Commission apparently believes it is more important to quickly implement a flawed

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[17] *Regression Order* at ¶34.
[18] *In the Matter of Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8913, ¶250 (1997).

model in this case, rather than get it right, especially when the Commission has acknowledged that an imprecise model applied to rural rate-of-return carriers could have a serious, harmful effect.[19] Accordingly, more work and analysis needs to be done before a regression model can be adopted and applied to rural rate-of-return carriers.

IV. CONCLUSION

As shown herein, the WCB's rush to judgment has produced a flawed model and *Regression Order* that lacks reasoned decision making. Before adopting a regression model, all errors in the model and data must be corrected, including the boundary data for all carriers; the selection of the 90th percentile must be explained; and the plausibility of the results must be confirmed. Further, even with these changes, a regression model should be used only to trigger a harder look to determine whether a carrier's costs were truly "inefficient." Accordingly, the Blooston Rural Broadband Carriers ask the Commission to review the WCB's *Regression Order*; reverse its adoption of a regression model; and delay the implementation of a regression model until the issues identified herein are addressed.

Respectfully submitted,

THE BLOOSTON RURAL BROADBAND CARRIERS

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[19] *Id.* at 8934, ¶ 291.

Attachment A

The Blooston Rural Broadband Carriers

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Midstate Communications, Inc.
Midvale Telephone Exchange, Inc.
Penasco Valley Telephone Cooperative, Inc.
Prairie Grove Telephone Company
Spring Grove Communications
Smithville Telecom, LLC
Star Telephone Company Inc.
Terral Telephone Company
Triangle Telephone Cooperative Association, Inc.
Venture Communications Cooperative
Walnut Hill Telephone Company, Inc.
West Texas Rural Telephone Cooperative, Inc.

Certificate of Service

The undersigned hereby certifies that on the 25th day of May, 2012, a copy of the forgoing **Application for Review of the Blooston Rural Broadband Carriers** was served via U.S. Mail, postage prepaid, to the following:

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