

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208
	)	
Accipiter Communications Inc. Petition for	)	
Waiver of the Commission’s Rules Implementing	)	
Reform of Universal Service Support	)	

**COMMENTS OF THE  
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION**

The National Telecommunications Cooperative Association (“NTCA”)<sup>1</sup> hereby files comments in the above-captioned proceedings to support the Petition submitted by Accipiter Communications Inc. (“Accipiter”) for a temporary waiver of certain high-cost universal service fund (“USF”) rule changes scheduled to be implemented soon by the Federal Communications Commission (the “Commission”). For the reasons set forth herein, given the sound explanations and detailed evidence provided by Accipiter and in light of the risk of harm to the public interest that could result from application of the rules as of July 1, 2012, the Wireline Competition Bureau (the “Bureau”) should grant Accipiter’s Petition.

Accipiter’s Petition highlights the significant and unreasonably punitive concerns that would arise from application of Section 54.302 of the Commission’s rules (the \$250/line/month cap on support) and the regression analysis-based caps that will limit recovery of certain operating and/or capital expenses. Accipiter explains that it serves over 1,000 square miles of

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<sup>1</sup> NTCA represents more than 570 rural rate-of-return regulated telecommunications providers. All of NTCA’s members are rate-of-return-regulated local exchange carriers, and many of its members provide wireless, video, broadband Internet, satellite, and/or long distance services to their communities; each member is a “rural telephone company” as defined in the Communications Act of 1934, as amended.

rocky desert terrain containing 4,600 inhabited residences,<sup>2</sup> and has described the many challenges it faced in first trying to install networks and reach consumers that other providers had altogether ignored.<sup>3</sup> Accipiter notes that it is in the relatively early stages of growth, deploying networks in these previously unserved areas such that it is now positioned to add customers going forward through relatively smaller incremental capital expenditures and operating expenses.<sup>4</sup>

Accipiter predicts that its ongoing subscriber growth will enable it to reduce its per-line support costs in the relatively near future.<sup>5</sup> Under these circumstances, the application of the overall per-line cap on support to Accipiter would be punitive, penalizing the company largely as a “timing” matter for having taken strides to meet the Commission’s challenge of delivering broadband to unserved areas but not having yet grown large enough to avoid application of that cap. The Petition also indicates that, absent a waiver, Accipiter would be unable to support services to a number of telephone subscribers that have no terrestrial alternative for telephone or broadband, and that the company’s network could not be extended to another subset of premises that today lack access to telephone or broadband.<sup>6</sup> Providing Accipiter with an additional few

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<sup>2</sup> Petition at 6-7.

<sup>3</sup> *Id.* at 9-10.

<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 4. NTCA uses this opportunity to highlight yet again the fundamental (and legally suspect) disconnect between a universal service waiver standard that relies upon consumer loss of voice service as a determining factor (*see Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (“*USF/ICC Order*”), at ¶ 540) and a universal service statute that compels the provision of reasonably comparable services at reasonably comparable rates (*see* 47 U.S.C. § 254(b)(3)), as well with as a broader reform order for which the purported purpose was “to ensure that robust, affordable voice and broadband service, both fixed and mobile, are available to Americans throughout the nation. *USF/ICC Order*, at ¶ 1. Under this waiver standard, it appears that a consumer could experience massive price increases, “unreasonably incomparable” voice and broadband services, or even complete loss of broadband network access without relief.

years within which to comply with the overall per-line cap is reasonable, is clearly in the public interest, and would serve the Commission's and this Administration's oft-professed interest in reaching unserved areas.<sup>7</sup> The Commission should therefore find "good cause" to grant a temporary waiver of section 54.302 of its rules as requested by Accipiter.

With respect to the regression analysis-based caps on supported operating and/or capital expenses, Accipiter's petition raises concerns similar to those identified in the Application for Review submitted by NTCA and other rural carrier associations (the "Rural Associations") on May 25, 2012.<sup>8</sup> For example, Accipiter rightly notes that the caps fail to distinguish between carriers who face difficult operating circumstances and those that may be "outliers due to waste, fraud or other inefficiencies."<sup>9</sup> Accipiter also highlights the fundamental lack of clarity or transparency in the caps<sup>10</sup> – the reason that the Rural Associations referred to the caps in their Application for Review as a "moving target hidden behind a dark curtain"<sup>11</sup> Indeed, the regression analysis-based caps will make it difficult, if not impossible, for a carrier like Accipiter to understand what data are driving the results and what the carrier can do (if anything) to avoid triggering the caps in subsequent years. Caps that change from year-to-year based upon indecipherable acts and omissions taken two years prior by every carrier in the industry cannot

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<sup>7</sup> See, e.g., *USF/ICC Order*, at ¶ 4. ("There are unserved areas in every state of the nation and its territories, and in many of these areas there is little reason to believe that Congress's desire 'to ensure that all people of the United States have access to broadband capability' will be met any time soon with current policies.") (quoting American Recovery and Reinvestment Act of 2009, Pub L. No. 111-5, 123 Stat. 115, 516, § 6001(k)(2)(D)).

<sup>8</sup> Application for Review of NTCA, *et al.*, WC Docket No. 10-90, *et al.* (filed May 25, 2012) ("*Rural Associations AFR*").

<sup>9</sup> Petition at 25-26; see also *Rural Associations AFR* at 4-6.

<sup>10</sup> Petition at 26.

<sup>11</sup> *Rural Associations AFR* at 17.

be considered useful in encouraging “efficiency” or stimulating “prudent” investment.<sup>12</sup> Finally, Accipiter draws attention to the many serious technical shortcomings of the regression analysis model, including most notably independent variable flaws and study area boundary errors that appear to affect Accipiter in materially adverse ways.<sup>13</sup> As the Rural Associations explained in their AFR, many of these same or similar data errors and other flaws persist within the model, even as altered by the Bureau subsequent to the filing of Accipiter’s Petition:

It is arbitrary and capricious for the Commission to permit these regression formulas to be used in 2012 and 2013 when the underlying model contains significant acknowledged errors. Reviewing courts do not owe judicial deference to agency determinations that are based upon data that the agency knows are incorrect. Requiring carriers to submit petitions to correct such errors in the Commission’s own data improperly places the “burden of disproof” on carriers.<sup>14</sup>

In light of the lack of transparency and predictability within the regression analysis-based caps and the many technical and data-related errors resident within the underlying model, the Commission should act on the Petition for Stay filed by the Rural Associations and decline to apply the caps to *any* carrier as of July 1, 2012. At a minimum, however, Accipiter has made a compelling case that the serious errors in the model as applied to its investments and operations, together with the severe impact that application of the caps would have on its delivery of services to consumers, provide “good cause” and justify the grant of a waiver of the regression analysis-based caps “until at least six months after the [Commission] has made updated regression

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<sup>12</sup> See *Rural Associations AFR* at 15-20.

<sup>13</sup> Petition at 26-31; see also *Rural Associations AFR* at 6-13. In its own subsequent Application for Review, Accipiter identified a series of additional technical shortcomings of the model and resulting caps, including illogical inconsistencies in the relationship between road miles and loop investment costs and the fact that one-off data corrections are likely only to introduce more significant errors elsewhere in the model. Application for Review of Accipiter Communications Inc., WC Docket No. 10-90, *et al.* (filed May 25, 2012).

<sup>14</sup> *Rural Associations AFR* at 7 (footnotes and citations omitted); see also *id.* at 10-13 (describing flaws associated with the variables employed in the underlying model).

analysis cap formulas publicly available *and corrected the errors and incorrect assumptions and methodologies in its regression cap formulas.*”<sup>15</sup>

For the foregoing reasons, the Bureau should grant Accipiter’s Petition.

Respectfully submitted,



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<sup>15</sup> Petition at 2 (emphasis added). The emphasized portion of the request, which was omitted from the Public Notice seeking comment on Accipiter’s Petition, is in fact an essential component for the Bureau to consider; mere public disclosure of the cap formulas without correction of their operation is of little comfort or utility to those adversely affected by the caps or to those carriers that are unaffected today but wonder if they might be affected by the caps a year or two hence.