REDACTED FOR PUBLIC DISCLOSURE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	WC Docket No. 10-90
Petition of Accipiter Communications, Inc.	)	
For Temporary Waiver	)	WT Docket No. 10-208
	)	

OPPOSITION TO PETITION FOR WAIVER

Cox Communications, Inc. ("Cox") hereby opposes the Petition for Waiver (the "Petition") filed by Accipiter Communications, Inc. ("Accipiter") in the above-referenced proceeding.[1] As shown below, Accipiter's petition relies heavily on its inaccurate account of the facts involving Accipiter's efforts to provide service in Vistancia, a subdivision in Peoria, Arizona. Accipiter also fails to meet the requirements for a waiver or to demonstrate that a taking will occur unless a waiver is granted. Given these considerations, grant of a waiver is unnecessary and inappropriate and would frustrate the Commission's goals of an efficient and fiscally responsible Universal Service Fund.

I. Introduction.

Cox is the third largest cable company in the country, and a long-time provider of local telephone services. Cox brought local phone service to its customers beginning in 1997. Today, Cox continues to compete successfully in markets across the country with the provision of local and long distance voice service to more than 2.6 million customers.

Cox's experience in Arizona is particularly relevant to this petition. Cox has held a certificate of public convenience and necessity in Arizona since 1997. Vistancia is a master plan

community in Peoria, Arizona, located roughly 40 miles northeast of Phoenix, that has been under development over the past ten years.[2] Since 2002, Cox has worked closely with the developers of Vistancia (and in the communities Bell Pointe and Festival Ranch-Sun City) to deploy state-of-the-art facilities to the new residents of the emerging communities. Indeed, Cox invested significant private risk capital to bring the latest video, broadband, and telephony services to these neighborhoods at a time when many companies were reluctant to make such a major financial commitment. Today, Cox's plant passes more than **[BEGIN CONFIDENTIAL]**[redacted]**[END CONFIDENTIAL]** homes in Accipiter's service area (while Accipiter's facilities pass only 2,100 in the portion of the Accipiter service area also served by Cox).[3] Constructing these facilities cost Cox more than **[BEGIN CONFIDENTIAL]**[redacted]**[END CONFIDENTIAL]**. Cox constructed and operates that plant without any subsidies from federal or state universal service support programs, and subject to specific build-out obligations under the local franchising agreements for its cable systems.

II. Accipiter Misstates the Facts Concerning Its Competition with Cox in Vistancia.

As Accipiter acknowledges, Cox is a competitor to Accipiter in Vistancia, which is now a fast-growing suburb of Phoenix. Cox has been subject to multiple attacks by Accipiter in Commission proceedings, starting in late 2010. These attacks are premised on the idea that Cox engaged in anticompetitive behavior in Vistancia more than six years ago and therefore has

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[1] *See* Wireline Competition Bureau Seeks Comment on Accipiter Communications, Inc. Petition for Temporary Waiver of Certain High-Cost Universal Service Rules, *Public Notice,* DA 12-712, WC Docket No. 10-90, WT Docket No. 10-208 (rel. May 4, 2012).
[2] *See* Press Release, "Six Valley Home Builders Selected for New Vistancia Community Scheduled to Open in February 2004"(rel. Nov. 29, 2003) *at* http://www.vistancia.com/news/20031129.shtml# (last visited Jun. 5, 2012).
[3] These communities are Vistancia, Festival Ranch-Sun City and Bell Pointe.

prevented Accipiter from competing effectively.[4] The Commission should reject Accipiter's claims.

First, while Accipiter correctly notes that it did allege anticompetitive behavior after Cox entered into an agreement with the developer in Vistancia for placement of facilities, it fails to report that its complaints concerning Cox were settled in 2005. Under that settlement, Accipiter was granted access to conduit, space for facilities, resale rights and a substantial financial payment, money that Accipiter could have used to construct and operate facilities in Vistancia.[5] Thus, this commercial dispute was settled almost *seven* years ago and should no longer be relied on as a reason to justify the type of relief Accipiter is seeking.[6]

Moreover, notwithstanding the terms of the settlement, Accipiter has activated fiber in only a portion of Cox's conduit; never purchased more than five lines via resale at any time; and has not purchased any services for resale in more than two years. At this point, more than six years after a settlement that Accipiter accepted voluntarily, and that included specific terms to address Accipiter's concerns about its ability to construct facilities in Vistancia, it is difficult to credit any complaints about market access. Indeed, because Vistancia still is growing, Accipiter can compete head to head with Cox for new customers in the market.

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[4] *See, e.g.,* Petition at 10; Comments of Accipiter, WT Docket No. 10-90 *et al.,* Apr. 18, 2011, at 5; Application of Review of Accipiter, CC Docket No. 96-45, Oct. 10, 2010, at 4-5, 24-25 (the "Study Area Waiver Application for Review").

[5] It can be noted that there never has been a finding by the Department of Justice or the Arizona Corporation Commission that Cox or the developer in Vistancia engaged in anticompetitive behavior. In an earlier proceeding, Accipiter alleged that Cox had been fined $2 million by the Arizona Corporation Commission in connection with Accipiter's claim. *See* Study Area Application for Review at 5. However, no fine has been levied in that proceeding. *See* Arizona Corporation Commission, Docket No. T-03471A-05-0064.

[6] Accipiter's argument against Cox's preferred provider status also is misplaced. As the Commission has acknowledged, preferred provider arrangements between property owners and service providers are common, and permissible. *See* Promotion of Competitive Networks in Local Telecommunications Markets, *First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57,* 15 FCC Rcd 22983, 22997, n. 72. (2000). This is particularly the case herein given Cox's commitment and investment to deploy state-of–the-art services to these greenfield communities.

In the context of these facts, it becomes apparent that no relief concerning Vistancia and the two other areas served by both Cox and Accipiter, or for any costs associated with Accipiter's efforts to provide service in those areas, is appropriate. Of course, the Commission's own rules anticipate that there will be no high cost support for areas with actual competition and that competitive providers are not entitled to ongoing support at all.[7] Equally important, there is no evidence at all that anything Cox has done in the overlapping service territory has had any impact on Accipiter's need for universal service support.[8]

In any event, there is no reason to believe that Accipiter's ability to compete can continue to be hampered more than six years after Accipiter's dispute with Cox was settled. Cox's success is a result of substantial investment and hard work, not of excluding any competitor from the market. Accipiter has chosen to focus its efforts on seeking to obtain additional benefits and subsidies from the Commission, rather than on competing in the marketplace or even taking advantage of the opportunities it was provided under the settlement with Cox. Thus, the Commission should not consider any matters relating to Vistancia or the other portions of Accipiter's service territory that overlap Cox in determining whether to grant the Petition.

III. Accipiter's Showing Is Not Sufficient to Justify Relief

When the Commission adopted the waiver procedure in the USF-ICC Transformation Order, it stated that it would set a high bar for granting waivers. In particular, the order determined that waivers would be granted "only in those circumstances in which the petitioner

[7] Connect America Fund, *Report and Order and Further Notice of Proposed Rulemaking,* 26 FCC Rcd 17663, 17729, 17767-68 (*"USF-ICC Transformation Order").*

[8] Indeed, Accipiter has disclaimed any interest in receiving high cost support for Vistancia. *See* Study Area Waiver Application for Review at 2.

can demonstrate that the reduction in existing high-cost support would put consumers at risk of losing voice services[.]"[9] Accipiter has not met that burden.

First, by its own account, Accipiter will be affected by the $250 cap for only a short period of time, and perhaps for as little as 21 months.[10] Accipiter's projections show that its ongoing growth will lower its per-line costs over time so that the cap no longer will affect its ability to receive full support.[11] Thus, to demonstrate that a waiver is necessary, Accipiter would need to show that it is unable to survive losses that would be caused by the cap for that brief period. Accipiter has not done so, but simply has asserted that losses would occur. Contrary to Accipiter's implicit assumption, the high cost fund is not a guarantee that a carrier will make a profit at all times, and certainly is not intended to provide subsidies today to support capital expenses during a carrier's growth phase. Indeed, it is typical for new companies to sustain losses during the time that they are developing their customer base.

Second, Accipiter argues that the Commission should support its investment in what Accipiter describes as "suburban density areas."[12] As a general principle, such areas do not need support, and should not be considered in the context of a waiver request. More specifically, though, it is apparent that these areas include the places where Accipiter is competing with Cox, some of which are not even part of the Accipiter incumbent LEC study area. Although Accipiter does not specify where these areas are, it does indicate that only its "rural investment" is in areas where it is the carrier of last resort, suggesting strongly that it has landline competition in the "suburban density areas."[13] If Accipiter actually were intent on serving its rural, high cost

[9] *USF-ICC Transformation Order,* 26 FCC Rcd at 17840.
[10] Petition at 2, 24.
[11] *Id.* at 3.
[12] *Id.* at 18-19.
[13] *Id.* Since Cox provides broadband service everywhere it serves, under the principles adopted in the *USF-ICC Transformation Order,* support should not be made available for those areas. *USF-ICC Transformation Order* at

territory, it would not be diverting investment to these areas. Instead, it would be using those funds to serve the rural population.

These concerns are particularly significant in light of the Commission's specific goals of maintaining fiscal responsibility and accountability in the reformed high cost program.[14] These goals are important for several reasons. In particular, the Commission concluded it was important limit the burden of universal service on consumers, who ultimately pay for the high cost program, and who might not purchase broadband services if those services are too expensive.[15] Unnecessary subsidies also harm competition, which reduces consumer choice and raises costs to consumers. Further, given the limited amount of money in the Connect America Fund, granting waivers that are not strictly necessary could have the effect of denying funding to other applicants and preventing broadband from being made available in areas that otherwise would receive funding. Indeed, it is critical to ensure that high cost support is not used to fund inefficient operations, but only to cover the costs of the provision of service in high cost areas where competitive alternatives are not available.[16]

For these reasons, the waiver process was designed for situations in which compliance with the new rules would cause devastating financial harm for carriers serving areas where there is no chance for competition to emerge. Here, Accipiter has devoted a substantial portion of its resources to serving areas where there already is a competitor, one that is providing service without any subsidy at all. It should not be rewarded for that decision by being granted a waiver.

17767-68 (denying Connect America Fund support to areas where there is overlap with a provider that offers broadband service).

[14] *Id.* at 17670.

[15] *Id.* at 17711 (noting that raising end-user service costs "could undermine our broader policy objectives to promote broadband and mobile deployment and adoption").

[16] *Id.* at 17738 (describing decision to "implement a number of reforms to eliminate waste and inefficiency").

Third, Accipiter neglects to inform the Commission that its own state tariff permits it to charge customers to extend lines when the cost of the line extension exceeds seven times the annualized local service charge.[17] Since Accipiter charges $16.78 per month for residential service, this means that it will charge customers for line extensions that cost Accipiter as little as $1,500.[18] So long as Accipiter is permitted to recover such costs directly from customers, it cannot claim that it will be required to expend extraordinary amounts of money to meet its service obligations.

Fourth, while Accipiter depends on the costs associated with its RUS loans, and on the covenants in those loans, to support its request, it is apparent that those loans, and the "future financing from RUS" that Accipiter anticipates, are being used in part to support investment in areas that are not subject to high cost support. Accipiter says as much in the petition, explaining that its RUS financing is for "a balance of rural and suburban investment." Moreover, in Vistancia (clearly a "suburban density" area), Accipiter has constructed fiber-to-the-home facilities, which require much more investment than other types of facilities. This means that Accipiter's capital costs and its RUS loan financing are disproportionately devoted to areas that should not receive support.[19]

Accipiter, however, does not make any attempt in the Petition to allocate those costs to the suburban areas. Instead, it presents its RUS loans as undifferentiated costs that must be supported by the Connect America Fund. This is improper, and the Commission's waiver process does not allow it to recognize the costs of Accipiter's efforts to compete with another

[17] *See* Accipiter Communications Inc., General Exchange Tariff, Arizona, Construction Charges, § § 1.1, 2.1, Original Sheet 48.
[18] Petition at 8.
[19] Under the Commission's standards, the possibility that Accipiter might have difficulty servicing its RUS loans is not a sufficient showing to justify a waiver. However, even if the standard were much broader and permitted waivers for a mere showing that a default under an RUS loan would result if a waiver were not granted, Accipiter

provider or to account for any losses Accipiter might be sustaining in the "suburban density areas."

Moreover, Cox notes that Accipiter has acknowledged that merely failing to make a profit does not result in a default under its RUS loans. Instead, negative net income triggers a requirement to submit a recovery plan to RUS, which presumably will show that Accipiter will return to positive cash flow and net income relatively quickly, as that is what Accipiter has told the Commission will happen.[20]

For this reason, any Commission analysis of the waiver request – indeed, of any waiver request – also should account for the potential for Accipiter's RUS loans to be modified. As the National Cable and Telecommunications Association has documented, there are reasons to be concerned that RUS loans were made without regard for the likelihood of universal service reform, despite the Commission's commitment to streamline and refocus high cost support.[21] Given that so many RUS loans were made based on unreasonable expectations about likely Commission action, it is reasonable to conclude that RUS will choose to modify those loans rather than send the companies into default and recover less than it would under a modification.

Individually and collectively, these considerations make it impossible for the Commission to grant the waiver.

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would not have made the necessary showing to justify a waiver. All Accipiter has shown is that it would be required to make a report to RUS on how it would meet its loan obligations. *Id.* at 20.

[20] Petition at 20.

[21] *See, e.g.*, Comments of the National Cable and Telecommunications Association, WC Docket 10-90, WT Docket No .10-208, filed Mar. 14, 2012, at 5-6. For instance, and as NCTA notes, more than $400 million in new RUS loans were made in the period between the adoption of the *USF-ICC Transformation Order* and the date it was released, when there was still considerable uncertainty as to the specific requirements of the order.

IV. A Waiver Is Not Necessary to Avoid a Taking.

Accipiter also argues that a waiver is required to avoid a taking under the Fifth Amendment to the Constitution.[22] Accipiter has not demonstrated that a taking will occur.

The standard for determining whether a regulatory action results in a taking is clear, and quite narrow: The regulation must effectively destroy the value of the property being regulated.[23] A taking does not occur if a regulation causes a temporary dislocation or reduces profits below anticipated levels. In fact, in *Duquesne Light Co.,* the Supreme Court approved a change in state law that disallowed investment that already had been made in reliance on previous decisions that would have included that investment in the rate base.[24] And, as the Supreme Court noted in *Duquesne Light Co.,* there is no specific requirement to use a particular method to determine what rates are reasonable.[25] Here, there are at least two reasons why Accipiter will not be subject to a taking as a result of the cap.

First, Accipiter's own showing does not indicate that it will be forced out of business without a waiver. Instead, Accipiter has shown that its support will drop below the $250 per line per month cap in a relatively short time. Given the temporary nature of the loss, it is not apparent that it would force Accipiter out of business.

Second, the Petition shows that much of Accipiter's cost structure is not a result of its supported services offerings, but of its decision to enter competitive markets, such as Vistancia. Those costs, including the associated costs of Accipiter's RUS loans, are not cognizable in a takings analysis, since they are entirely unaffected by the changes in the rules. For that matter, in a takings analysis, Accipiter's claim that it will incur costs to continue to expand its services also

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[22] *Id.* at 21-22.
[23] *See, e.g., Duquesne Light Co. v. Barasch,* 488 U.S. 299, 307 (1989), *FPC v. Hope Natural Gas,* 320 U.S. 591 (1944).
[24] *Duquesne Light Co.,* 488 U.S. at 313.
[25] *Id.* at 315.

is irrelevant, as a takings analysis considers the impact of a regulation on the ability of an entity to continue as a going business, not on its ability to expand.

III. Conclusion

For these reasons, the Commission should deny the Petition.

Respectfully submitted,

By ___/s/_____
J.G. Harrington

Counsel for Cox Communications, Inc.

Dow Lohnes PLLC
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036-6802
(202) 776-2000

June 5, 2012

CERTIFICATE OF SERVICE

I, Sandra Dallas Jeter, hereby certify that on this 5th day of June, 2012, I caused a copy of the foregoing "Opposition to Petition for Waiver" to be served via hand delivery or first-class mail, postage prepaid, upon the following:

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Abdel Eqab
Telecommunications Access Policy Division
Wireline Competition Bureau
445 12th Street, S.W., Room 5-B431
Washington, D.C. 20554

Charles Tyler
Telecommunications Access Policy Division
Wireline Competition Bureau
445 12th Street, S.W., Room 5-A452
Washington, D.C. 20554

Patrick Sherrill
President and Chief Executive Officer
Accipiter Communications, Inc.
2238 W. Lone Cactus Drive
Suite 100
Phoenix, Arizona 85027

/s/
Sandra Dallas Jeter