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: Chief, Wireline Competition Bureau

OPPOSITION OF THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION TO WINDSTREAM ELECTION AND PETITION FOR WAIVER

The Wireless Internet Service Providers Association ("WISPA"), pursuant to Sections 1.415 and 1.409 of the Commission's Rules, hereby opposes the Election and Petition for Waiver ("Petition") filed by Windstream Communications, Inc. ("Windstream") on July 24, 2012.[1] Windstream seeks to "conditionally accept" more than $59 million of the $60.4 million in Connect America Fund ("CAF") Phase I support allocated to it. Windstream wishes to divert those funds from their intended purposes to instead subsidize its construction of "second-mile" fiber. The Wireless Telecommunications Bureau ("Bureau") should not undermine its efforts to accelerate fixed broadband deployment in unserved areas simply because Windstream finds the subsidy to be "insufficient to make deployment economic" under its wireline model.[2] If, however, the Bureau grants Windstream's requested waiver, it should require Windstream to make its subsidized fiber available to unsubsidized last-mile providers on reasonable and non-discriminatory terms, consistent with rules used in other broadband funding programs and with the position taken by WISPA and others in this proceeding.

[1] *See Public Notice*, "Wireline Competition Bureau Seeks Comment on Windstream Petition for Waiver of Certain High-Cost Universal Service Rules," DA 12-1181, rel. July 25, 2012 ("*Public Notice*"). The *Public Notice* established August 24, 2012 as the deadline for filing responsive pleadings. Accordingly, this Opposition is timely filed.
[2] Petition at 2.

Introduction

WISPA represents the interests of wireless Internet service providers ("WISPs") that rely primarily on unlicensed spectrum to provide *unsubsidized* fixed wireless broadband services across the country. Many WISPs have established networks in sparsely populated areas that would otherwise be unserved by wireline technologies such as DSL and cable. In other areas, WISPs compete with wired services, including some subsidized telephony services. Under current interpretations, WISPs that provide standalone broadband services are not entitled to Universal Service Fund ("USF") benefits because they are not "telecommunications carriers" as defined in the Communications Act of 1934, as amended.

In the *USF/ICC Transformation Order*, acting on a proposal submitted by price cap carriers, the Commission established CAF Phase I as an interim program to allow only price cap carriers to "immediately start to accelerate broadband deployment to unserved areas across America."[3] Rather than engage in a detailed cost analysis, the Commission concluded that "[a] carrier accepting incremental support will be required to deploy broadband to a *number of locations* equal to the amount it accepts divided by $775."[4] Though it provided some examples of how unaccepted CAF Phase I funds could be allocated,[5] the Commission authorized no other purpose for CAF Phase I other than the subsidization of broadband to as many unserved locations as possible.

In its Petition, Windstream states that it accepted $653,325 for service to 843 unserved locations, and conditionally elected to accept an additional $59,750,985 if the Commission

[3] *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 an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; and Universal Service Reform – Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) ("*USF/ICC Transformation Order*"), at ¶ 131-132.
[4] *Id.* at ¶ 138 (emphasis added). *See also id.* at ¶ 139 (Commission "not attempting to identify the precise cost of deploying broadband to any particular location").
[5] *Id.* at n.221.

waives Section 54.312(b)(2) of its rules to allow Windstream to use those funds "to deploy second-mile fiber to enable broadband service for rural customers in areas unserved by Windstream and unsubsidized competitors."[6] According to Windstream, the $59 million would be used to construct 1,688 miles of fiber to bring broadband service to 16,981 unserved locations.

Discussion

An applicant seeking waiver of a Commission rule has the burden to plead with particularity the facts and circumstances that warrant such action.[7] Under *WAIT Radio*, a waiver proponent "faces a high hurdle even at the starting gate" to obtain the relief it requests.[8] Such a waiver is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.[9]

Windstream fails to meet its burden. It has not demonstrated "special circumstances," only that, in its limited view, it cannot economically deploy service to more than 843 locations even with a $775 per-location subsidy. Its circumstances are no more special than those faced by other price cap carriers that either accepted Phase I funding or declined to accept funding for business reasons. Moreover, allowing Windstream to divert $59 million dollars for second-mile use to serve only 16,981 locations would not serve the public interest. That level of funding amounts to a whopping $3,518 per location, far above the Phase I subsidy level the Commission established.

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[6] Petition at 6.
[7] *See Columbia Communications Corp. v. FCC,* 832.F.2d 189, 192 (D.C. Cir, 1987) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968)).
[8] *See WAIT Radio v. FCC,* 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) ("*WAIT Radio*").
[9] *See NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

For the reasons described herein, the Petition should be dismissed or denied. If, however, the Bureau decides to grant the Petition, Windstream should be required to make its funded fiber infrastructure available to all unsubsidized broadband Internet service providers on reasonable and non-discriminatory terms. This interconnection obligation will promote unsubsidized last-mile service to unserved and underserved areas and will foster competition in areas where Windstream and other providers offer broadband service.

I. THE BUREAU SHOULD REJECT WINDSTREAM'S REQUEST TO USE CAF PHASE I FUNDS TO DEPLOY SECOND-MILE FACILITIES.

In the *USF/ICC Transformation Order*, the Commission established Phase I of the CAF "to provide an immediate boost to broadband deployment in areas that are unserved by any broadband provider."[10] The Commission added that, "[f]or this interim program, we are not attempting to identify the precise cost of deploying broadband to any particular location. Instead, we are trying to identify an appropriate standard to spur immediate broadband deployment to as many unserved locations as possible, given our budget constraint."[11] To determine this standard, the Commission considered different cost data, including the ABC Coalition cost model developed by Windstream and other price cap carriers[12] that estimated the per-location cost to be $765.[13] The Commission concluded that $775 for each unserved location "represents a reasonable estimate of an interim performance obligation for this one-time support."[14]

WISPA disputes Windstream's claim that the $775 funding level is "insufficient."[15] Windstream now claims that it can serve only 843 locations with the $775 subsidy and seeks to

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[10] *USF/ICC Transformation Order* at ¶ 137.
[11] *Id.* at ¶ 139.
[12] *See id.* at ¶ 134 and nn. 214, 216.
[13] *See id.* at ¶ 142.
[14] *Id.* at ¶ 144.
[15] Petition at 2.

re-purpose the allocation to accept $3,518 per location to construct second-mile fiber infrastructure that will enable broadband service to 16,981 unserved locations – less than a quarter of the locations intended by Windstream's allocated subsidy. Windstream's economic analysis is based solely on the estimated costs of wireline and fiber technology,[16] and it apparently did not consider the costs of other technologies, such as fixed wireless, that likely would be more economical to deploy. Had it done so, Windstream would have a lower cost basis and thus would have been able to serve a larger number of unserved locations.

By contrast, Frontier Communications, another price cap carrier, accepted all of its available Phase I funding. At the time of its election, Frontier announced an agreement with Hughes Network Systems, LLC to partner on providing satellite-delivered broadband to rural areas.[17] To the extent Frontier plans to use satellite technology to satisfy its CAF Phase I obligations, WISPA submits that, unlike Windstream, Frontier looked beyond its traditional wireline cost model to find a more efficient and economical way to provide broadband service to rural Americans. The Bureau should not be deceived into believing that Windstream's claim of "insufficiency" is accurate in light of the availability of other technologies that have lower deployment costs.

Moreover, Windstream fails to provide a convincing case that designating unaccepted funds for second-mile infrastructure will enable consumers to "cross the digital divide *in the near future*, rather than continue to wait for the possibility to do so at some later time."[18] Windstream offers no timeline for the proposed deployment of its fiber and installation of the connections to the claimed number of locations. There is no assurance that Windstream will provide service

[16] *See id.* at 14-15, n.36; Declaration of Mike Skudin (Attachment 6 to Petition) at 2 (discussing cost and distance to install fiber).
[17] *See* Frontier-Hughes Press Release, available at http://investor.frontier.com/releasedetail.cfm?ReleaseID=694544 (last visited July 25, 2012).
[18] Petition at 3 (emphasis added).

sooner than it might otherwise be provided using CAF Phase II, the Remote Areas Fund ("RAF") and private investment funds. Windstream's cursory conclusion does not meet the "high hurdle" required for its waiver to be granted.

Finally, if the per-location cost is so high that Windstream cannot make an economic business case using its wireline cost model, then perhaps these areas should be deemed "remote areas" and funded under the RAF instead of CAF Phase I. WISPs and other non-ETCs should be deemed eligible for such funding. In response to the Commission's suggestion,[19] WISPA has asked the Commission to forbear from enforcing its eligibility requirements for purposes of the RAF.[20] WISPs typically provide fixed wireless service at a cost that is lower than DSL and cable. In some areas fixed wireless broadband technology may be the only terrestrial technology platform that can deliver fixed wireless broadband services economically. The Commission established a minimum of $100 million for the RAF,[21] so it has the flexibility to increase funding for that program.

In sum, Windstream's Petition is predicated on a fiber cost model that artificially inflates the per-location deployment costs. Windstream presents the Bureau with the false choice of either waiving the rules to enable supposedly faster deployment or "consign[ing] these thousands of rural Americans to more years of waiting for the benefits of broadband."[22] In fact, the choice is between re-allocating Phase I funds from a price cap carrier so it can build high-cost fiber over some undefined timeline, or allowing those funds to be used by other providers that rely on more cost-effective technology to quickly deploy broadband. Windstream has not shown that there are

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[19] *See USF/ICC Transformation Order* at ¶ 1235.
[20] *See* WISPA's Comments, Docket Nos. 10-90, *et al.*, filed Jan. 18, 2012.
[21] *See USF/ICC Transformation Order* at ¶ 1223.
[22] Petition at 3.

special circumstances warranting grant of its requested waiver or that such waiver would be consistent with the public interest.

II. IF THE COMMISSION GRANTS THE WAIVER, IT SHOULD REQUIRE WINDSTREAM TO MAKE ITS FACILITIES AVAILABLE TO UNSUBSIDIZED COMPETITORS ON REASONABLE AND NON-DISCRIMINATORY TERMS.

WISPA urges dismissal or denial of Windstream's Petition, as described above. If, however, the Bureau grants the waiver and re-allocates more than $59 million for Windstream's second-mile fiber infrastructure, such waiver should be conditioned on the requirement that Windstream make its subsidized facilities available to unsubsidized fixed broadband providers on reasonable and non-discriminatory terms and conditions. This requirement would be consistent with federal policy and would help ensure that other fixed wireless broadband providers can gain access to federally supported infrastructure to further accelerate broadband deployment and affordable service to consumers.

WISPA has previously commented on the lack of affordable second-mile facilities in rural areas,[23] and the ability to access almost 1,700 miles of fiber infrastructure will, in some areas, help alleviate the second-mile shortage. Requiring Windstream to enable other broadband providers to interconnect to the subsidized fiber infrastructure would help speed broadband deployment consistent with the goals of CAF Phase I.

Conditioning waiver on interconnection would be consistent with a proposal the Commission is considering in the rulemaking proceeding. In the *USF/ICC Transformation*

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[23] *See* WISPA Comments filed Feb. 20, 2007 in *Unlicensed Operation in the TV Broadcast Bands; Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket Nos. 04-186, 02-380, 21 FCC Rcd 12266 (rel. Oct. 18, 2006), at 5. Rules were adopted in *Amendment of Part 101 of the Commission's Rules to Facilitate Use of Microwave for Wireless Backhaul and Other Uses and to Provide Additional Flexibility to Broadcast Auxiliary Service and Operational Fixed Microwave Licensees*, 26 FCC Rcd 11614 (2011).

[23] *See* Comments of WISPA, WT Docket Nos. 10-153, 09-106 and 07-121, filed Oct. 25, 2010; Reply Comments of WISPA, WT Docket Nos. 10-153, 09-106 and 07-121, filed Nov. 22, 2010.

Order, the Commission invited comment on a joint proposal by Public Knowledge and Benton Foundation ("PK/Benton") to require CAF recipients to make their interconnection points and backhaul capacity available so that consumers in unserved high-cost communities could access these assets and "self-provision" broadband service.[24] WISPA endorsed the PK/Benton proposal, and its implementation here would provide the same benefits in the areas where Windstream plans to deploy its funded fiber.

If the Bureau elects to grant this conditioned waiver, it must ensure that the interconnection obligation does not become a vehicle through which Windstream can impose unreasonable terms, charge exorbitant rates and/or employ delaying tactics. To provide guidance and reduce the potential for unreasonableness and delay, the Bureau should adopt the definition and description of "interconnection" that the Department of Agriculture and the Department of Commerce used in conditioning broadband loans and grants under the Broadband Initiatives Program ("BIP") and the Broadband Technology Opportunities Program ("BTOP") under the American Recovery and Reinvestment Act of 2009.[25] In the Notice of Funds Availability ("NOFA"), the agencies required all BIP and BTOP recipients to:

> offer interconnection, where technically feasible without exceeding current or reasonably anticipated capacity limitations, on reasonable rates and conditions to be negotiated with requesting parties. This includes both the ability to connect to the public Internet and physical interconnection for the exchange of traffic.[26]

The NOFA further explained that a funding recipient "may satisfy the requirement for interconnection by negotiating in good faith with all parties making a bona fide request. The

[24] *See* Comments of Public Knowledge and Benton Foundation, WC Docket No. 10-90, *et al.*, filed Aug. 24, 2011. *See also* Comments of New America Foundation's Open Technology Initiative, Media Access Project, Access Humboldt, Rural Mobile & Broadband Alliance, and Center for Media Justice, WC Docket No. 10-90, *et al.*, filed Sept. 6, 2011, at 8-14 ("NAF/OTI Comments").
[25] American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115 (2009). *See also* NAF/OTI Comments at 9.
[26] Broadband Initiatives Program; Broadband Technologies Opportunities Program; Notice of Funds Availability, 74 Fed. Reg. 130 at 33111 (2009).

awardee and the requesting party may negotiate terms such as business arrangements, capacity limits, financial terms, and technical conditions for interconnection."[27]

As a broadband stimulus awardee, Windstream has already agreed to these obligations, and therefore should have no objection to doing so here. Accordingly, if the Bureau grants Windstream's Petition, it should require Windstream, as a condition of the re-allocation of its subsidies, to allow unsubsidized fixed broadband providers to interconnect to the funded fiber infrastructure on reasonable and non-discriminatory terms and conditions.

Conclusion

Windstream's Petition does not meet the *WAIT Radio* standard and should be dismissed or denied. Assuming *arguendo* the Bureau grants the waiver, it should require Windstream to make its subsidized second-mile infrastructure available to unsubsidized fixed broadband providers on reasonable and non-discriminatory terms and conditions.

Respectfully submitted,

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[27] *Id.* In addition, the Commission should require any new fiber that Windstream builds using CAF Phase I funding to be accessible at fiber nodes or cabinets that are geographically close to the unsubsidized broadband provider's physical plant. Such access should include available transport to the newly constructed fiber if the newly constructed fiber does not connect to Windstream's central office or other easily accessible location. This will ensure that access by other broadband providers to any subsidized fiber infrastructure does not require the other broadband provider to construct new fiber to a distant pole splice point or network node.