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

COMMENTS OF AT&T

Windstream Corporation seeks a waiver of the Commission's rules that require Connect America Fund (CAF) Phase I incremental support recipients to deploy broadband service to one unserved location for every $775 in support so that Windstream may use this funding to deploy so-called second mile fiber throughout its service territory.[1] AT&T takes no position on whether the Commission should grant Windstream's petition, but whatever action the Commission takes should be consistent with its goal of using universal service support to encourage the broadest possible availability of broadband to rural and other high cost areas lacking a business case for private investment in broadband networks and services. Achieving that goal will require much broader Commission action than simply resolving Windstream's petition. In particular, it will require the Commission to complete action on reforming its ETC rules, which currently serves as a deterrent to participation in CAF support mechanism, and to provide much greater clarity regarding the obligations and other requirements applicable to carriers that accept support for broadband, such as pursuant to the Commission's incremental support mechanism. As AT&T

[1] Windstream Election and Petition for Waiver, WC Docket Nos. 10-90, 05-337 (filed July 24, 2012) (Petition) (explaining that it proposes to use almost all of the offered incremental support to deploy second mile fiber throughout 15 states in order to provide broadband to approximately 17,000 unserved locations).

made clear when it declined to accept the Commission's initial incremental support offer, despite the Commission's intent to provide "concrete" service obligations associated with that incremental support,[2] the *USF/ICC Transformation Order* left unanswered several important questions about the scope of those service obligations. AT&T became aware of these issues as it was evaluating whether to accept any of the $47.8 million in incremental support offered by the Commission. Even though AT&T declined the Commission's initial incremental support offer,[3] it believes that all parties would benefit and the Commission would be more likely to meet its broadband deployment objective if the Commission provided greater clarity on the issues that we discuss below.[4]

In addition to identifying areas where Commission clarification would be helpful, we provide our recommendations for resolving these matters. Our recommendations are based on the Commission's rule describing incremental support service obligations as well as the principle that no high-cost recipient should be subject to requirements that are undefined or not in effect as of the date when a carrier either is designated an ETC or must elect whether to participate in the particular funding mechanism. Imposing obligations retroactively could materially alter a provider's business case that made its acceptance of CAF support possible.[5]

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[2] *Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 137 (2011) (*USF/ICC Transformation Order* and *FNRPM*).

[3] Letter from Robert W. Quinn, Jr., AT&T, to Marlene H. Dortch, FCC, WC Docket Nos. 05-337, 10-90 (filed July 24, 2012).

[4] Many of these issues could impact CAF Phase II, depending on the implementation timing of this mechanism and when the Commission ultimately concludes the pending FNPRM.

[5] Such a principle is consistent with the incremental support clarification order that the Commission released one month ago. *See Order*, WC Docket No. 10-90, *et al.*, DA 12-1155, at ¶ 8 (WCB rel. July 18, 2012) (finding that it "would be unreasonable and contrary to the Commission's framework for CAF I funding" to require carriers to use the most recent version of the National Broadband Map – as opposed to the version available on April 24 – to determine whether areas are unserved, which could give carriers less than 90 days to evaluate whether and where to accept incremental support).

The rule describing incremental support service obligations states as follows:

> An eligible telecommunications carrier must complete deployment of broadband to two-thirds of the required number of locations within two years of providing notification of acceptance of funding, and must complete deployment to all required locations within three years. To satisfy its deployment obligation, the eligible telecommunications carrier must offer broadband service to such locations of at least 4 Mbps downstream and 1 Mbps upstream, with latency sufficiently low to enable the use of real-time communications, including Voice over Internet Protocol, and with usage caps, if any, that are reasonably comparable to comparable offerings in urban areas.[6]

Based on this rule, which is consistent with the discussion of incremental support obligations in the *Order*,[7] we identify the following issues regarding the scope of an incremental support recipient's service obligations:

Minimum speed of the broadband service: (1) May an incremental support recipient satisfy its obligation to "offer broadband service to [incremental support-funded] locations of at least 4 Mbps downstream and 1 Mbps upstream" by offering advertised speed tiers in excess of 4 Mbps downstream/1 Mbps upstream? Since the rule requires the broadband service to be "*at least* 4 Mbps downstream and 1 Mbps upstream," (47 C.F.R. § 54.312(b)(4) (emphasis added)) AT&T assumes that an incremental support recipient could satisfy this requirement by making available a 6 Mbps downstream/1.5 Mbps offering, as an example, in addition to offerings that are below 4 Mbps downstream/1 Mbps upstream (e.g., 3 Mbps downstream/768 kbps upstream). We further assume that it was not the Commission's intent to require incremental support recipients to create a 4 Mbps downstream/1 Mbps upstream service offering in the event that they do not already offer one.

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[6] 47 C.F.R. § 54.312(b)(4).

[7] *USF/ICC Transformation Order* at ¶ 147.

(2) May an incremental support recipient rely exclusively on its existing, business as usual performance testing locations and monitoring processes to certify that it "offer[s] broadband service of at least 4 Mbps downstream and 1 Mbps upstream" (*see* 47 C.F.R. § 54.313(b)(2)), notwithstanding the Commission's conclusions in paragraph 111 of its *Transformation Order* and the requirements of § 54.313(a)(11)? AT&T assumes that the answer is "yes," and believes that allowing recipients to rely on their existing network performance testing and monitoring processes would be the only reasonable approach insofar as carriers were required to accept/decline CAF Phase I funding before the Commission took any action on the proposed measurement process under consideration in the Commission's pending *FNPRM* proceeding or in any other proceeding. *See, e.g.*, *FNRPM* at ¶¶ 1013-17. Retroactively applying any such broadband measurement obligations on incremental support recipients could impose significant additional costs that recipients could not have fully anticipated when they accepted incremental support funding, and thus patently would be unfair.

(3) May an incremental support recipient satisfy the minimum broadband speed requirements based on its advertised speeds? Section 54.313(b)(2) requires an incremental support recipient to submit a certification that "it is offering broadband service of at least 4 Mbps downstream and 1 Mbps upstream." By contrast, section 54.313(e)(1) requires a CAF Phase II support recipient to certify that it is providing broadband service to 85 percent of its supported locations "at *actual* speeds of at least 4 Mbps downstream/1 Mbps upstream." *See* 47 C.F.R. § 54.313(e)(1) (emphasis added). AT&T assumes that the difference in the wording of the two requirements was intentional, and thus that incremental support recipients would satisfy their minimum broadband speed obligations based on advertised, as opposed to "actual" speeds.[8] As

[8] In any event, AT&T is not sure, because the Commission has not defined, what it means by the term "actual" speeds.

the Commission knows, mass market broadband providers typically do not guarantee the minimum speeds of their lower speed tier broadband offerings. Rather, these providers offer broadband service at a range of expected speeds. The Commission's experience with its broadband measurement program demonstrates that wireline broadband providers routinely provide speeds very close to the upper end of their advertised speed tiers.[9]

Sufficiently low latency and reasonably comparable usage allowances: May an incremental support recipient assume that it satisfies the sufficiently low latency and reasonably comparable usage allowances set forth in section 54.312(b)(4) if it offers in CAF I funded areas the same nationwide broadband service offerings, which enable real-time communications, on the same terms and conditions it offers in every other area of the country? To the extent an incremental support recipient offers its nationwide broadband service offerings in incremental support-funded areas, that recipient's usage allowances and other terms and conditions in such areas necessarily would be "reasonably comparable" to the terms and conditions in its urban areas. For that reason, an incremental support recipient should not have to alter its broadband latency, usage allowances or other terms and conditions in response to any action that the Commission might take through its *FNPRM* proceeding or in any other proceeding, and also should not have to provide any additional proof that it meets these requirements.

Price of broadband service: Would an incremental support recipient that offers its nationwide broadband pricing plans in CAF Phase I funded areas meet the "reasonably comparable" price requirement for such support? To the extent an incremental support recipient offers broadband services in supported areas pursuant to its nationwide pricing plans, the prices

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[9] *See, e.g.*, *A Report on Consumer Wireline Broadband Performance in the U.S.*, FCC's Office of Engineering and Technology and Consumer and Governmental Affairs Bureau, rel. July 19, 2012 (finding that ISPs deliver on average 96% of advertised speeds during peak intervals), *available at* http://www.fcc.gov/measuring-broadband-america/2012/july.

for such services necessarily would be reasonably comparable to the prices it charges in urban areas, and thus should not have to make any adjustments to its prices in response to any action that the Commission might take through its *FNPRM* or in any other proceeding.

Term of incremental support service obligations: When does an incremental support recipient's service obligations cease? Section 54.313(b)(2) requires an incremental support recipient to file a certification with its "next annual report due after three years after filing a notice of acceptance of funding. . . that it is offering broadband service of at least 4 Mbps downstream and 1 Mbps. . . ." Based on language of this requirement, we assume that, after that date (July 1, 2016), an incremental support recipient's service obligations will terminate with no further Commission action required. Thus, if an incremental support recipient decided to cease providing broadband service in an area where it deployed broadband facilities using incremental support funding on or after July 2, 2016, it would be free to do so. And, to the extent it continues to offer broadband service in such area, the rates, terms and conditions would not be subject to any USF-related regulation. As we previously have explained, carriers considering whether to accept CAF Phase I incremental funding have the right to know exactly how long any obligations associated with such funding will remain in affect. Thus, the FCC should immediately affirm that July 1, 2016, is the end-date of any CAF Phase I incremental funding obligations, or, if it is another date, to announce that date.

Geographic scope of incremental support service obligations: What is the geographic scope of an incremental support recipient's service obligations? We assume that the incremental support service obligations apply only to the specific locations that the incremental support recipient identifies and not to any other locations in a particular census block, wire center or study area.

Incremental support reporting requirements: Which reporting requirements in section 54.313 apply to incremental support recipients? Based on the language of the Commission's rules, we assume that an incremental support recipient is required to submit only the two certifications specified in 47 C.F.R. § 54.313(b). To the extent any incremental support recipient already is required to submit annual reports under 47 C.F.R. § 54.313(a) because it receives other, non-incremental support high-cost funding, it may choose to include incremental support-funded areas in such reports, but the Commission should not require it to do so, nor should it require that incremental-funded areas be separately identified in those reports. Requiring providers that receive only incremental support to separately track and report on the items included in section 54.313(a) would be extremely burdensome, with few if any offsetting benefits. For example, requiring such providers to track the number of customer complaints per 1,000 in the likely small number of census blocks where they receive incremental support plainly would make no sense.[10] Thus, if the only high-cost support that a provider receives is CAF Phase I incremental support, its acceptance of such support should not trigger an annual reporting obligation pursuant to section 54.313(a). Rather, providers that receive only incremental support should only have to file the two certifications (one on July 1, 2015 and the second on July 1, 2016) required by section 54.313(b). To the extent that the Commission concludes that a waiver of section 54.313(a) is necessary for such recipients, the Commission should waive that rule on its own motion.

[10] *See also* CTIA and USTelecom Petition for Clarification and Reconsideration or, in the Alternative, for Waiver, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; GN Docket No. 09-51; CC Docket Nos. 01-92, 96-45; WT Docket No. 10-208, at 9 (filed June 25, 2012); AT&T Comments, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; GN Docket No. 09-51; CC Docket Nos. 01-92, 96-45; WT Docket No. 10-208, at 3-6 (filed Aug. 6, 2012) (describing the burdens associated with the Commission applying section 54.313(a) requirements to CAF Phase I providers).

Inability of states to impose obligations on incremental support recipients: Can states impose any additional conditions or obligations, including service quality and reporting requirements, on an incremental support recipient that would increase its costs or would alter the business case that made acceptance of this support possible?[11] Given the unique nature of the CAF Phase I incremental support mechanism, under which the funding per location is strictly limited and the obligations were, in the Commission's words, supposed to be "concrete," we assume that the Commission did not intend to permit a state to modify or otherwise expand these obligations in a way that could affect the business case for accepting such funding. If states could, for example, require an incremental support recipient to provide broadband service at speeds of 6 Mbps downstream and 1.5 Mbps upstream, to lower its broadband prices or to track and report information for certain locations in areas where it is receiving incremental support, they could significantly increase the costs of providing such services, undermining a service provider's ability to fulfill the location commitments that the Commission required upon accepting incremental support funding. Unless the Commission is absolutely clear that states have no authority to impose any condition or obligation on incremental support recipients, regardless of whether the state provides its own funding to cover the additional obligation it has imposed, no recipient can be sure of what its service obligations are. Permitting states to add to the Commission's service obligations thus would create a level of uncertainty that many, if not

[11] In its pending Petition for Reconsideration, USTelecom pointed out that the Commission's decision not to make broadband a supported service had several consequences and it asked the Commission to clarify that, among other things, states may not impose additional conditions on an ETC's provision of broadband service. *See* USTelecom Petition for Reconsideration, WC Docket No. 10-90, *et al.*, at 24-25 (filed Dec. 29, 2011). AT&T agrees. As a non-supported service, states have no authority to impose any conditions or obligations on a CAF recipient's provision of broadband service and nothing in the *TOPUC* decision requires the Commission to rule otherwise. *See Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 418 (5th Cir. 2001) (*TOPUC*).

all, providers would be unwilling to accept and certainly could endanger any carriers ability to meet the Commission's obligations.

Relationship of incremental support service obligations with ETC obligations: When is an incremental support recipient permitted to relinquish its ETC designation? Based on the language of the rules, we assume that, while an incremental support recipient must be an ETC to accept the funding and must remain an ETC until it completes broadband deployment to all of the required locations (*see* 47 C.F.R. § 54.312(b)(4)), it could relinquish its ETC designation immediately upon completion of its deployment. Thus, if an incremental support recipient completed its broadband deployment in two years, not three, it could relinquish its ETC status in incremental support-funded areas after two years. To be clear, we believe that even if an incremental support recipient relinquished its ETC designation, it still would be required to satisfy its incremental support broadband service obligations in these areas until July 1, 2016, but it could do so as a non-ETC.

Necessity of ETC reform: While not an incremental support-specific issue, AT&T encourages the Commission to adopt ETC reform as recommended by AT&T and others prior to offering further CAF support to eligible providers. There is an inherent mismatch between the goals and design of all the new CAF mechanisms and the legacy ETC requirements that casts a significant pall over the otherwise groundbreaking reform the FCC has adopted. Unless and until the Commission updates those ETC requirements, the uncertainty over what obligations apply to support recipients will prevent the CAF mechanisms from reaching their potential. On a going forward basis, any such service obligations should be limited to defined high cost areas, for defined periods of time and for defined amounts of support. CAF recipients' ETC designations should be tailored to these defined terms and conditions, and should terminate

contemporaneously with the support and service obligations. The Commission also should develop a plan to address legacy ETC designations that provides for these ETC designations to sunset, given the significant universal service policy changes the Commission has adopted. AT&T has suggested several options, which it discussed at length in filings it made earlier this year.[12] We do not repeat those arguments here but we reiterate the importance of the Commission acting quickly to reform its ETC rules, which currently serve as a deterrent to participation in CAF support mechanisms.

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We respectfully request the Commission to clarify the scope of an incremental support recipient's service obligations, as discussed above. All parties – even those ineligible for incremental support – will benefit by greater Commission clarity about the scope of any CAF support mechanism's service obligations and we expect that Commission consideration of these types of issues now may inform future Commission offers of CAF support.

Respectfully Submitted,

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[12] *See, e.g.*, AT&T Comments, WC Docket No. 10-90 *et al.*, at 3-17 (filed Jan. 18, 2012); AT&T Comments, WC Docket No. 10-90 *et al.*, at 3-9 (filed Feb. 9, 2012).