

**Before the
Federal Communications Commission
Washington, DC 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
THE AMERICAN CABLE ASSOCIATION
ON THE WINDSTREAM ELECTION AND PETITION FOR WAIVER**

The American Cable Association (“ACA”) respectfully submits these comments in response to the *Petition* of Windstream Communications, Inc. (“Windstream”) for a waiver of certain provisions in 47 C.F.R. § 54.312(b), which were adopted by the Commission in last year’s *Connect America Fund Order*.¹ More specifically, Windstream asks for a waiver (1) “of the requirement to connect to one unserved location for every \$775 in incremental support it receives” and (2) “so that it might use Connect America Fund Phase I incremental support to deploy second-mile fiber.”² Windstream submitted the *Petition* at the same time it elected to accept a minimal amount of Phase I support and conditionally accept the remainder based on the whether the Commission grants its waiver.³

¹ See Windstream Election and Petition for Waiver, WC Docket No. 10-90 et al. (filed July 24, 2012) (“*Petition*”); see also Wireline Competition Bureau Seeks Comment on Windstream Petition for Waiver of Certain High-Cost Universal Service Rules, WC Docket Nos. 10-90, 05-337, Public Notice, DA 12-1181 (July 25, 2012) (“Public Notice”) and *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); *pets. for review pending sub nom. In Re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 18, 2011) (“*Connect America Fund Order*”).

² See Public Notice at 1.

³ See Letter from Eric Einhorn, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. (July 24, 2012).

In the *Connect America Fund Order*, the Commission established the Phase I support program as a “transitional distribution mechanism”⁴ that would “provide an immediate boost to broadband deployment in areas that are unserved by any broadband provider”⁵ while the Commission was developing the Phase II support regime.⁶ The program has sharply defined, “concrete broadband deployment obligations.”⁷ Carriers electing to receive support in areas where they are eligible “will be required to deploy broadband to a number of locations equal to the amount it accepts divided by \$775.”⁸ The Commission arrived at this support amount by examining submissions from a variety of sources, including estimates of per-location costs from specific price cap carriers,⁹ the cost model developed by the ABC Coalition (of which Windstream is a member)¹⁰ and the cost model used in developing the National Broadband Plan.¹¹ The Commission concluded that “\$775 per location figure represents a reasonable estimate of an interim performance obligation for this one-time support.”¹² Moreover, the Commission’s program contemplated that “carriers that cannot meet our broadband deployment requirement may decline to accept incremental support or may choose to accept only a portion of the amount for which they are eligible.”¹³ In sum, the Phase I incremental support program is

⁴ *Connect America Fund Order*, ¶132.

⁵ *Id.*, ¶137.

⁶ *Id.*, ¶132.

⁷ *Id.*, ¶137.

⁸ *Id.*, ¶138.

⁹ *Id.*, ¶143.

¹⁰ *Id.*, ¶142.

¹¹ *Id.*, ¶141.

¹² *Id.*, ¶144.

¹³ *Id.*

limited both in time¹⁴ and in its aim, and it does not seek “to create a new source of ongoing support.”¹⁵

Various price cap carriers, including Windstream,¹⁶ and their trade associations sought reconsideration of different provisions in the rules for the Phase I program. Windstream specifically asked the Commission to alter the requirement that a price cap carrier accepting support deploy broadband service “to a number of unserved locations equal to the amount each carrier accepts divided by \$775.”¹⁷ Windstream later offered an alternative to this proposal, proposing that it be permitted to use Phase I support for deployment of second-mile fiber in unserved areas.¹⁸

On April 25, 2012, the Commission simultaneously announced support amounts for CAF Phase I incremental support for price cap LECs¹⁹ and issued a *Second Reconsideration Order* addressing the petitions to reconsider portions of its rules (§ 54.312(b)) regarding the requirements for use of Phase I support.²⁰ In that order, the Commission declined the request from Frontier Communications and Windstream “to relax the nationwide deployment requirement and...to establish carrier-specific requirements.”²¹ The Commission concluded that

¹⁴ The Commission noted that it may extend the program for another brief period if the Phase II regime is not ready. *See Connect America Fund Order*, ¶148.

¹⁵ *Connect America Fund Order*, n. 227.

¹⁶ *See Frontier Communications Corp. and Windstream Communications, Inc., Petition for Reconsideration and/or Clarification*, WC Docket Nos. 10-90 et al. (Dec. 29, 2011).

¹⁷ *Connect America Fund et al.*, WC Docket No. 10-90 et al., Second Order on Reconsideration (Apr. 25, 2012), ¶5 (“*Second Reconsideration Order*”).

¹⁸ *See Letter from Jennie Chandra, Windstream Communications, Inc., to Marlene H. Dortch, Secretary, FCC*, WC Docket No. 10-90 et al. (Mar. 21, 2012).

¹⁹ *Wireline Competition Bureau Announces Support Amounts for Connect America Fund Phase One Incremental Support*, Public Notice, WC Docket Nos. 10-90, 05-337, DA 12-639 (Apr. 25, 2012).

²⁰ *See Second Reconsideration Order*.

²¹ *Id.*, ¶20.

“nothing in the petitions for reconsideration calls the Commission’s conclusion into question or suggests that any other nationwide number would be more appropriate.”²² The Commission also rejected Windstream’s alternative proposal, despite agreeing that “deploying second-mile fiber is a worthwhile endeavor.”²³ The Commission stated that the Phase I program “is not intended to be a long-term program or to serve all broadband deployment needs.”²⁴ That is the purpose of the Phase II regime.²⁵

The Windstream *Petition* now before the Commission is substantially similar to its reconsideration petition and related alternative proposal. It seeks a waiver of the \$775 per location requirement and the ability to use support to deploy second-mile fiber. Windstream attempts to distinguish its waiver proposal from its reconsideration proposal on deploying second-mile fiber to underserved locations by focusing on the unserved locations that would receive broadband.²⁶ However, Windstream acknowledges that the waiver also would produce collateral benefits since the second-mile facilities “would improve service to currently *underserved* customers by bringing fiber closer to their homes.”²⁷ In other words, the second-

²² *Id.*, ¶18. See also *id.*, ¶17, which emphasizes the transitional nature of Phase I as the Commission develops a cost model to determine Phase II support (“In adopting the \$775 figure, the Commission recognized that, in the absence of a fully developed cost model, the choice of a per-location support amount necessarily involved an exercise in judgment. The Commission weighed a variety of considerations, including the fact that resources for this interim mechanism were limited and the goal to ‘spur immediate broadband deployment to as many unserved locations as possible.’”).

²³ *Id.*, ¶¶22-23.

²⁴ *Id.*, ¶23.

²⁵ *Id.*

²⁶ See *Petition*, n. 3 (“This proposal should be viewed as a complement to Windstream’s prior proposal that would permit price cap carriers to focus CAF Phase I support on deploying second-mile fiber to underserved locations that otherwise would lack access to any fiber-based broadband service.”). See also *id.*, n. 36.

²⁷ *Id.* at 15.

mile facilities would not just be used for service to unserved locations.²⁸ In essence, any distinction between this petition and the reconsideration petition is not material since both seek to fundamentally alter the Phase I requirements.

ACA understands Windstream’s frustration with the Phase I program. Windstream serves higher-cost unserved locations,²⁹ but it finds that there is not a sound business case to deploy to these locations with support of only \$775 per location. Windstream’s solution, however, is to effectively rewrite the Phase I requirements. As such, it has already been rejected by the Commission in the *Second Reconsideration Order*, and it does not provide sufficient cause to change the fundamental nature of the Phase I program via a waiver petition. This is especially the case because Windstream’s second-mile fiber would be deployed in underserved areas, that is, areas where other providers already offer service.

In its *Petition*, Windstream refers to the fact that the Phase I program would be extended if the Phase II regime is not finalized.³⁰ ACA submits that the Phase I program is flawed – not in the overall objective “to provide a boost to broadband service deployment in the near term” to unserved areas with very low broadband speeds,³¹ but rather in the determination of the areas

²⁸ Apparently the issue of whether Windstream would use Phase I support in areas other than those that are unserved was raised by Chairman Genachowski’s legal advisor in a recent meeting with Windstream. Windstream states that it “did not consider underserved locations in its analysis.” This statement, however, is not inconsistent with the additional collateral benefits that would be reaped in underserved areas from deploying second-mile fiber. *See Ex Parte* Letter from Malena Barzilai, Windstream Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. (Aug. 13, 2012).

²⁹ *See Petition*, Attachment 6, ¶6 (“Windstream now faces per-location costs that substantially exceed those that it would have faced had it not already invested so aggressively in broadband already.”).

³⁰ *See Petition* at 14.

³¹ *Second Reconsideration Order*, ¶26.

where support is to be provided to achieve this aim.³² Given the fact that cable operators are accelerating the pace at which they are deploying networks and bringing broadband service to increasingly more rural (less dense) areas,³³ the Commission should ensure that any new Phase I support is awarded only in areas where non-incumbent providers are not offering service today – as determined both by the National Broadband Map and supplemental information submitted by providers – or where it is clear they have no incentive or capability to do so.³⁴ This would encourage private sector deployments and effectively target scarce support to the highest-cost areas where there is no commercial business case. Should it extend the program, ACA suggests that the Commission use this opportunity to address its concerns as well as those raised by Windstream in its *Petition*.³⁵

In conclusion, as Windstream notes, “Unfortunately, the CAF Phase I rules as written incongruously permit the use of the funding only in relatively *low-cost* areas.”³⁶ Windstream has spent much time over the past year advocating for an alternative mechanism by which to award

³² ACA, for instance, commented that the Commission should not permit price cap carriers to serve unserved locations in census blocks where non-incumbent providers offered broadband service and recommended that the Commission establish a more rigorous process to ensure a location is unserved. *See Ex Parte* Letter from Ross Lieberman, American Cable Association, and Steve Morris, National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. (Mar. 29, 2012) and Opposition of the American Cable Association, WC Docket Nos. 10-90 et al. (Feb. 9, 2012) at 13.

³³ *See e.g. Ex Parte* Letter from Thomas Cohen, Counsel for the American Cable Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. (Mar. 19, 2012) and *Ex Parte* Presentation of Mediacom Communications, WC Docket No. 10-90 et al. (June 11-12, 2012).

³⁴ ACA, for instance, recommends that the Commission exclude the provision of support in census blocks that are adjacent to operating territories of non-incumbents.

³⁵ The Commission should not increase the amount of support per location without first receiving additional and sufficient data and conducting a more precise analysis. Any increase in the amount should be accompanied by additional accountability measures to ensure the support is only used for the intended purpose, including a requirement that the carrier declare at the time it receives support the specific locations it plans to serve.

³⁶ *Petition* at 2.

Phase I support. However, the Commission has rejected Windstream’s proposal twice – once in the *Connect America Fund Order* and again the *Second Reconsideration Order*. In the text of both, the Commission has rightly emphasized the limited nature of the Phase I program, which only enables price cap carriers and no other entities to obtain support, and its focus on developing a cost model under which it would award substantially more support for the far-reaching Phase II regime. In its *Petition*, Windstream provides no new rational for the Commission to change course, and consequently, the *Petition* should not be granted.

Respectfully submitted,



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