

**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 SPITwSPOTS INC.
TO PETITION FOR WAIVER**

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Summary

SPITwSPOTS Inc. (“SPITwSPOTS”) strongly opposes the Petition for Waiver (“Petition”) of the Commission’s Connect America Fund (“CAF”) Phase I rules filed by Alaska Communications Systems Group, Inc. and its affiliated incumbent local exchange carriers (collectively, “ACS”). As an unsubsidized provider of fixed wireless broadband services in Alaska that directly competes with ACS, SPITwSPOTS would be severely harmed by grant of the waivers. The Petition does not demonstrate “special circumstances” and the Commission should therefore promptly dismiss or deny the Petition.

In the Petition, ACS seeks to retain more than \$2.5 million in subsidies it timely declined to accept in July 2012. ACS concedes that it failed to review the fixed wireless layer of the National Broadband Map before it accepted its entire Phase I allocation. But instead of accepting its fate and amending its election notice, ACS contrives three alternate waiver requests in an attempt to apply these funds for purposes unintended by the CAF rules. Each of these waivers should be rejected.

ACS seeks a waiver to change the definition of “unserved” based on general allegations about the level of service offered by SPITwSPOTS and other fixed wireless broadband providers. The Commission appropriately relied on the National Broadband Map in refusing to adopt rules that would allow ACS to introduce evidence that would counter the Map’s depiction of “unserved” areas. ACS failed to examine a relevant portion of the Map and accepted funding for which it was not entitled. In attempting to retain those ill-gotten funds, ACS provides no factual support for its claims, instead relying on misstatements, conjecture and innuendo. The accompanying Opposition

contains the Declaration of Aaron Larson, SPITwSPOTS 's President, which demonstrates the falsity of ACS's allegations. ACS's arguments cannot overcome the Commission's previous decisions or the facts confirmed in the Declaration.

ACS alternatively seeks waiver of the definition of "broadband" so it can use the \$2.5 million of declined support to upgrade service to its own customers. This request essentially asks the Commission to fund ACS's efforts to help destroy SPITwSPOTS's business, which is based on hard work private funding to provide faster broadband speeds. Not only would this be grossly unjust and an irresponsible use of federal funding, it also would contravene the express objectives of the CAF program by diverting those funds from "unserved" locations to locations that would compete with SPITwSPOTS.

ACS also seeks waiver of the \$775 per-location limit set out in Section 54.312(b)(2) of the Commission's rules so it can serve 363 locations at an average cost of almost \$7,000 per location. This exorbitant amount is based on a wireline cost model rather than more cost-effective technologies such as fixed wireless. The CAF Phase I rules were not intended to provide such excessive and unprecedented subsidies, a decision the Commission affirmed on reconsideration in an effort to expedite broadband service. If anything, ACS's request confirms that the locations it seeks to serve are in extremely high-cost areas that should be funded through the Remote Areas Fund ("RAF").

In sum, allowing ACS to retain the \$2.5 million in excess funds it previously declined to accept would contravene the important goals of the CAF program and would make the Commission a partner in ACS's attempt to undo the competitive advantage that SPITwSPOTS obtained through hard work and private investment. The Commission should reject ACS's waiver requests and dismiss or deny the Petition.

Table of Contents

	Page
Introduction.....	2
Discussion.....	4
I. THE COMMISSION SHOULD REJECT ACS’S WAIVER REQUESTS...4	
A. <u>The Commission Should Not Waive The Definition Of “Unserved” So ACS Can Obtain Subsidies To Compete With SPITwSPOTS.....</u>	4
B. <u>The Commission Should Not Waive The Definition Of “Broadband” So That ACS Can Improve Service To Its Own Customers.....</u>	9
C. <u>The Commission Should Not Increase The \$775 Per-Location Subsidy Amount.....</u>	11
II. THE COMMISSION SHOULD NOT REWARD ACS FOR ITS FALSE CERTIFICATION AND SHOULD INSTEAD REQUIRE ACS TO RETURN THE PORTION OF THE SUBSIDY THAT IS THE SUBJECT OF THE PETITION.....	14
Conclusion.....	15

network covers. SPITwSPOTS receives no subsidies from the federal government – its service is funded solely through private investment.³

The cost for SPITwSPOTS’ residential service is lower than that of its competitors for comparable tiers of service.⁴ As stated in the attached Larson Declaration, these speeds exceed the highest speed offered by ACS, a point that the National Broadband Map confirms.⁵ SPITwSPOTS can provide these speeds and expand its network footprint because it is able to quickly add capacity to meet consumer demand.

By letter dated July 24, 2012, ACS accepted \$4,185,103 in Phase I support, an amount representing its full subsidy allocation.⁶ In so doing, ACS certified pursuant to Section 54.312(b)(3) that:

(1) the locations that will be served in satisfaction of the deployment requirement associated with these funds . . . are shown as unserved by fixed broadband offered by any provider other than affiliates of Alaska Communications Systems Group, Inc., or an affiliate on the current version of the National Broadband Map (last confirmed on June 25, 2012); [and] (2) that, to the best of the knowledge of Alaska Communications Systems Group, Inc., these locations are, in fact, unserved by fixed broadband.⁷

After filing its Election Notice, Wireline Competition Bureau (“Bureau”) staff informed ACS that hundreds of the census blocks ACS identified in the Election Notice were actually served by fixed wireless broadband providers. According to ACS, it “initially overlooked” the presence of fixed wireless broadband providers when it reviewed the National Broadband Map prior to filing its Election Notice.⁸

³ See Larson Declaration at 3.

⁴ See *id.* at 2 and table attached thereto.

⁵ See *id.* See also <http://www.broadbandmap.gov/internet-service-providers/homer,-alaska/lat=59.6425000000001/long=-151.54833329999997/wireless/> (last visited Oct. 9, 2012).

⁶ See Letter from Amy Gardner, ACS Vice President, Revenue Assurance, to Marlene H. Dortch, FCC Secretary, WC Docket Nos. 10-90 & 05-337, filed July 24, 2012 (“Election Notice”).

⁷ *Id.* at 2.

⁸ Petition at 15.

On September 26, 2012, ACS filed its Petition. Although it would have been ineligible to accept \$2,508,778 of its allocated subsidy, ACS nevertheless argues that it should be permitted to retain these funds under one of three separate scenarios. Under the first scenario, ACS proposes to apply these additional funds so it can deploy service to 363 locations – 115 locations at a cost of \$5,000 and 248 locations at a cost of \$7,800. Under this scenario, ACS would receive a subsidy of about *900 percent more* than the amount established and affirmed by the Commission. Alternatively, ACS asks the Commission to waive the definition of “broadband” so ACS can provide slower-than-broadband speeds to 3,238 locations at the \$775 level. As a third alternative, ACS asks the Commission to waive the definition of “unserved” so it can use the \$2.5 million to deploy service where fixed wireless broadband providers already offer and provide broadband service that meets the Commission’s criteria and is fully disclosed on the National Broadband Map. ACS did not serve a copy of the Petition on SPITwSPOTS, despite the fact that it made statements concerning the alleged level of service SPITwSPOTS provides as the basis for its request for waiver of the definition of “unserved.”⁹

The Commission should deny each of ACS’s alternative requests for waiver. ACS has not demonstrated either that “special circumstances” exist or that grant of any of its requested waivers would be consistent with the public interest. To the contrary, the waiver would contravene the public interest benefits of the CAF Phase I rules.

⁹ In the redacted version of its Petition, ACS does not state that it desires to use CAF Phase I funds to provide service in the areas served by SPITwSPOTS, Ace Tekk Wireless, alasConnect and Yukon Tech. If ACS does intend to deploy in these areas, then it should have served a copy of its Petition on each of these providers so they would have adequate notice and a fair opportunity to submit comments on the Petition, a problem exacerbated by the fact that the Bureau is affording parties only ten days to file responsive pleadings.

Discussion

An applicant seeking waiver of a Commission rule has the burden to plead with particularity the facts and circumstances that warrant such action.¹⁰ Under *WAIT Radio*, a waiver proponent “faces a high hurdle even at the starting gate” to obtain the relief it requests.¹¹ 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.¹² As demonstrated below, ACS fails to meet its burden.

I. THE COMMISSION SHOULD REJECT ACS’S WAIVER REQUESTS.

A. The Commission Should Not Waive The Definition Of “Unserved” So ACS Can Obtain Subsidies To Compete With SPITwSPOTS.

In the Petition, ACS asks the Commission to ignore the National Broadband Map and instead rely on generalized information about the level of service allegedly provided by four fixed wireless broadband providers in order to designate as “unserved” certain areas where broadband service is already being offered. This would be contrary to precedent and would enable ACS to use federal funds to directly compete with a privately-held unsubsidized provider of fixed broadband service. Such a result would be clearly contrary to the public interest.

In the *USF/ICC Transformation Order* transforming the USF, the Commission elected to use the Map and data collected from FCC Form 477 to identify unserved geographic areas for CAF Phase I because “[w]e recognize that the best data available at this time to determine whether broadband is available from an unsubsidized competitor at speeds at or above the 4 Mbps/1 Mbps speed threshold will likely be data on broadband availability at 3 Mbps

¹⁰ 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)).

¹¹ 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*”).

¹² 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).

downstream and 768 kbps upstream, which is collected for the National Broadband Map and through the Commission's Form 477."¹³ The Commission stated that while "some have claimed that the National Broadband Map is not completely accurate," use of the Map along with requiring CAF applicants to certify that the area is unserved "is a reasonable and efficient means to identify areas that are, in fact, unserved, even if there might be other areas that are also unserved."¹⁴ The Commission further stated that the Map is "the best data available at this time."¹⁵

In a petition for reconsideration filed by the Independent Telephone & Telecommunications Alliance ("ITTA")¹⁶ and in an ex parte letter filed by ITTA and other incumbent carriers,¹⁷ these parties argued that CAF Phase I recipients should be able to present evidence that the Map is inaccurate because it overstates the amount of fixed broadband coverage. ITTA asked that it be permitted to provide a written certification that there are unserved areas within a census block that are shown on the Map to be served. ITTA also suggested that it should be able to submit "consumer declarations or other supporting evidence" to support a challenge to the Map.¹⁸

In the *Second Order on Reconsideration*, the Commission firmly rejected these arguments. First, the Commission stated that there is no explanation of how a CAF Phase I recipient would know which locations are unserved by another fixed broadband provider.

¹³ *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 ¶ 590.

¹⁴ *Id.* at n.231.

¹⁵ *Id.* at ¶ 590.

¹⁶ See Petition for Reconsideration of the Independent Telephone & Telecommunications Alliance, WC Docket No. 10-90, *et al.*, filed Dec. 29, 2011, at 3.

¹⁷ See letter from Genevieve Morelli, Jeffrey S. Lanning, Kenneth Mason and Eric Einhorn to Marlene H. Dortch, FCC Secretary, WC Docket Nos. 10-90, *et al.*, dated March 6, 2012.

¹⁸ *Id.* at 3.

Second, the Commission observed that it would be time-consuming to obtain customer declarations and that, even so, the customer may not know whether broadband service is offered in the area. The Commission stated that, “[o]n balance, we cannot conclude on the record before us that adopting ITTA’s proposed process, which may not significantly increase the number of locations that are likely to receive new broadband, would serve the public interest.”¹⁹ The Commission added that “[i]ndeed, by shifting deployments to areas where others *do* serve, ITTA’s proposal might lead to *fewer* previously unserved locations receiving service.”²⁰

Notwithstanding the clarity of the Commission’s decision and rationale, ACS asks the Commission to overlook the National Broadband Map – which ACS failed to timely and properly consider – and apparently allow it to apply \$2.5 million to serve areas that are already served by SPITwSPOTS and other fixed broadband providers. ACS doesn’t even bother to obtain declarations or specific information. While SPITwSPOTS cannot speak for the other fixed wireless providers named in the Petition, the allegations about SPITwSPOTS are based on inaccuracies, misleading statements and pure speculation that do not even apply to SPITwSPOTS.

The Petition targets SPITwSPOTS by stating that it purports to cover 9,183 customer locations with a customer base that is smaller than that, and that SPITwSPOTS’ “services suffer from the same limitations identified above for AlasConnect and Ace Tekk.”²¹ The Petition attempts to articulate these limitations.

The factual flaws in the Petition are exposed and explained in Mr. Larson’s attached Declaration. ACS claims that fixed wireless providers “have few customers and

¹⁹ *Second Order on Reconsideration* at 5 (footnote omitted).

²⁰ *Id.* at n.29 (emphasis in original).

²¹ Petition at 19. This number actually refers to the total population, not the number of locations in the census block. The National Broadband Map reports that SPITwSPOTS covers 5,372 housing units. *See* <http://www.broadbandmap.gov/about-provider/spitwspots-llc/in-state-of-alaska/>.

limited capacity, rely on line-of-sight technology that cannot serve every location, appear to focus in some cases on providing service primarily to business customers, and do little or no advertising in the market.”²² ACS adds that the wireless providers “appear to use unlicensed spectrum and their facilities lack sufficient capacity to deliver substantial service to any significant portion of the locations covered by their service territories shown on the National Broadband Map.”²³ In response to these generalized allegations, Mr. Larson states as follows:

we have a significant amount of the market share in Homer (and perhaps greater in the surrounding rural areas) and are not subject to capacity constraints. Second, by installing access points, we are able to serve nearly every location in a given census block. Third, our focus is on serving primarily residential customers, although we also provide broadband service to businesses. Fourth, SPITwSPOTS advertises regularly on the radio in the Homer market.²⁴

Elsewhere, Mr. Larson explains that “[w]hen necessary to expand service or accommodate growing demand, we have added capacity by using different spectrum, adding access points to facilitate frequency re-use and employing other design and operational techniques that provide us with a competitive edge and ensure a positive customer experience.”²⁵

Clearly, ACS’s allegations about the service SPITwSPOTS provides are way off the mark. Moreover, whether fixed broadband providers utilize unlicensed spectrum to provide service that qualifies as “broadband” is inconsequential – the Commission’s rules make no distinctions between licensed and unlicensed, and ACS cannot arbitrarily impute any such distinction to help its case.

Other claims by ACS also suffer from a lack of factual support or are simply incorrect. For instance, ACS states that “many customers located in areas served only by fixed wireless

²² *Id.* at 5.

²³ *Id.* at 11.

²⁴ Larson Declaration at 3.

²⁵ *Id.* at 1.

broadband providers likely consider themselves unserved, in that broadband service is neither marketed to them nor available in sufficient quantity to reach any substantial portion of the potential customers identified as ‘served’ on the National Broadband Map.”²⁶ Mr. Larson affirms in his declaration that these allegations are untrue with respect to SPITwSPOTS. Likewise, ACS suggests that it is wrong for Ace Tekk Wireless to advertise that it will conduct a site survey before promising service to a potential customer.²⁷ Conducting a site survey is common practice in the fixed wireless broadband industry so that promises about the ability to provide service can be kept. It could be argued that failing to conduct a site survey or determine whether service can be provided – whether wireless, DSL or cable – would be a poor business practice. So ACS’s claim proves nothing. Moreover, as Mr. Larson points out, as a factual matter “it is very rare that SPITwSPOTS cannot provide service to homes and residences inside our coverage area.”²⁸

In sum, ACS’s unsupported conclusions fail to that meet the *WAIT Radio* “high hurdle” standard. As Mr. Larson’s Declaration makes clear, none of ACS’s allegations is true with respect to SPITwSPOTS. When the consequences of granting ACS a waiver would direct government subsidies to a known unsubsidized competitor, the result clearly would be contrary to the public interest and the objectives of this proceeding. The Commission never contemplated that CAF Phase I funds could be used to help a price cap carrier eliminate a competitor that provides privately-funded and cost-efficient broadband service. But that is what ACS is trying to do, and the Commission must not permit it to happen.

²⁶ Petition at 12.

²⁷ *See id.* at 17-18.

²⁸ Larson Declaration at 4.

B. The Commission Should Not Waive The Definition Of “Broadband” So That ACS Can Improve Service To Its Own Customers.

ACS alternatively asks the Commission to allow ACS to upgrade existing service to at least 3,238 customer locations that already receive broadband service at speeds between 768 kbps and 1.5 Mbps.²⁹ ACS claims that using the \$775 per-location subsidy in this manner “would minimize any impact on competition, and provide substantially improved service to customers that would otherwise be limited to minimum broadband speed.”³⁰

Here, ACS essentially admits that it is providing inferior service. These locations already receive broadband service from ACS that satisfies the Commission’s definition. The Commission should not allow ACS to use Phase I subsidies to enable ACS to better compete with existing broadband providers. To quote Mr. Larson, “SPITwSPOTS provides significantly faster speeds than ACS. It has taken our company a great deal of work and expense to provide this level of service, and *we have done this without any subsidy from the federal government.*”³¹

SPITwSPOTS fails to see how using subsidies to fund improved service to ACS’s own customers in areas where it competes with SPITwSPOTS and other fixed broadband providers is consistent with the Commission’s objectives of subsidizing new broadband service to “unserved” locations or the public interest in encouraging – not destroying – private investment in broadband deployment. Notably, ACS does not make any promises on how its customers will share in the upgrade cost by paying higher subscription fees.

ACS attempts to bolster its argument by stating that the CAF Phase I “mechanism is currently falling substantially short of achieving the Commission’s goals” and that this “new

²⁹ See Petition at 9-11.

³⁰ *Id.* at 10.

³¹ Larson Declaration at 3.

information” should “alter the Commission’s calculus.”³² This argument misses the point and misstates the issue. First, the Commission fully contemplated that some of the \$300 million allocated to Phase I would be declined, so the system is not failing.³³ Rather, \$115 million will be used to support rapid deployment of broadband service to “nearly 400,000 residents and businesses in rural communities who currently lack access to high-speed Internet.”³⁴ Second, by focusing only on the Phase I “mechanism,” ACS ignores the overall stated benefits of broadband deployment to “unserved” locations that are the bedrock of the Connect America Fund, including CAF Phase II and the RAF.

Mr. Larson’s Declaration clearly articulates the egregious injustice that would result from grant of ACS’s request to waive the “broadband” definition:

I believe it is totally unfair for the federal government to subsidize ACS so that it can catch up to our service. To the extent the waiver of the definition of “broadband” would enable ACS to better compete with us, this would be grossly unfair and would have a harmful impact on our business. I do not believe that federal subsidies should be used in this manner.³⁵

Providing service to truly “unserved” locations is the CAF Phase I goal. Federal funds should not be used in contravention to the rules to help destroy competitors like SPITwSPOTS that have relied on hard work and private funds to achieve marketplace success. ACS’s request to use Phase I support to upgrade existing service to its own customers should be denied.

³² *Id.*

³³ See *USF/ICC Transformation Order* at ¶ 138 (“[t]o the extent incremental support is declined, it may be used in other ways to advance our broadband objectives pursuant to our statutory authority”). See also “Big Telcos Cite Prior Plans, ‘Uncertainty’ About Future Obligations, in Rejecting Broadband Support,” *Communications Daily*, July 26, 2012 (citing FCC official as stating the Commission “never expected all \$300 million to be accepted – and if it had been, then that would have meant the conditions weren’t stringent enough”).

³⁴ News Release, “FCC Kicks-Off ‘Connect America Fund’ With Major Announcement: Nearly 400,000 Unserved Americans in Rural Communities in 37 States Will Gain Access to High-Speed Internet Within Three Years,” rel. July 25, 2012.

³⁵ Larson Declaration at 3-4.

C. The Commission Should Not Increase The \$775 Per-Location Subsidy Amount.

ACS alternatively seeks waiver of Section 54.312(b)(2) so it can obtain a 900 percent increase in the per-location level of Phase I support established and affirmed by the Commission so that it can deploy subsidized service to 363 additional locations. According to ACS, it “cannot support a business case for broadband to a majority of the locations that would be required” under the Commission’s rules.³⁶ ACS fails to demonstrate that there are “special circumstances” warranting such a waiver.

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.”³⁷ 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.”³⁸ To determine this standard, the Commission considered different cost data, including the ABC Coalition cost model developed by price cap carriers³⁹ that estimated the per-location cost to be \$765.⁴⁰ The Commission concluded that \$775 for each unserved location “represents a reasonable estimate of an interim performance obligation for this one-time support.”⁴¹ On reconsideration, the Commission again rejected efforts to apply carrier-specific criteria to CAF

³⁶ *Id.* at 8.

³⁷ *USF/ICC Transformation Order* at ¶ 137.

³⁸ *Id.* at ¶ 139.

³⁹ *See id.* at ¶ 134 and nn. 214, 216.

⁴⁰ *See id.* at ¶ 142.

⁴¹ *Id.* at ¶ 144.

Phase I.⁴² The Commission thus declined to create a regulatory framework where ACS and other carriers could make a showing based on facts and costs particular to them and their service areas.

SPITwSPOTS disputes ACS's claim that "the business case simply cannot be made for those locations under the existing rules."⁴³ To the contrary, SPITwSPOTS believes that ACS may not be able to make a business case to provide *wireline* broadband to the unserved locations. There is no indication that ACS even considered the costs of other technologies, such as fixed wireless, that likely would be more economical to deploy. Had it done so, ACS would have a lower cost basis and thus would be able to serve a larger number of unserved locations with the \$775 per-location support amount.

By contrast, Frontier Communications, another price cap carrier, accepted all of its available Phase I funding.⁴⁴ 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.⁴⁵ Although SPITwSPOTS believes that satellite broadband has inherent latency and other limitations, SPITwSPOTS observes that, unlike ACS, Frontier looked beyond its traditional wireline cost model to find another way to provide broadband service to rural Americans. The Commission should not be deceived into believing ACS's claim that the \$775 per-location subsidy level is insufficient in light of the availability of other technologies that may have lower deployment costs and the fact that many WISPs provide high-quality fixed broadband to rural areas without federal subsidies.

⁴² See *In the Matter of the 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, Universal Service -- Mobility Fund*, WC Docket Nos. 10-90, *et al.*, Second Order on Reconsideration, 27 FCC Rcd 4648 (2012) ("*Second Order on Reconsideration*"), at ¶¶ 19-23.

⁴³ Petition at 20.

⁴⁴ In addition to ACS, Consolidated Communications, Inc. and Hawaiian Telecom accepted the full amount of their allocated Phase I support. See *id.* at 7, n.28.

⁴⁵ See Frontier-Hughes Press Release, available at <http://investor.frontier.com/releasedetail.cfm?ReleaseID=694544> (last visited July 25, 2012).

The \$5,000 ACS seeks for 115 locations and the \$7,800 it seeks for 248 locations far exceed any amount the Commission has considered for CAF Phase I (and it is likely that these amounts will provide a full subsidy under the CAF Phase II rules when they are adopted).⁴⁶ ACS provides no information in its Petition on how it arrived at these exorbitant amounts. As Sprint Nextel explained in opposing Windstream’s waiver petition, “it would be irresponsible and arbitrary to throw out this [\$775 per-location] figure and replace it with such a far higher amount without even the semblance of a financial analysis or even a cursory check for reasonableness.”⁴⁷ The same holds true here – even more so because the level of support ACS seeks is so large.

Further, there is an inherent hypocrisy in ACS’s arguments. On one hand, it readily accepted the full amount of its subsidy allocation without qualification. On the other hand, once it was informed by Bureau staff that SPITwSPOTS and other fixed wireless providers were present in many areas, it claims it cannot build a business case to deploy broadband service to unserved locations. This leads to the inevitable conclusion that ACS’s certification was made not “to the best of its knowledge,” but rather on a premise – take the money, then figure out how to spend it. The certainty encompassed by the Commission’s interim CAF Phase I procedures were carefully crafted to avoid this occurrence.

Finally, if the per-location cost is so high that ACS cannot make an economic business case using its wireline cost model, then perhaps these areas should be deemed “remote areas” and funded under the Remote Areas Fund (“RAF”) instead of CAF Phase I. In response to the Commission’s suggestion,⁴⁸ the Wireless Internet Service Providers Association (“WISPA”) has

⁴⁶ Although the Petition is not clear, SPITwSPOTS assumes that these 363 locations are located within areas shown as “unserved” on the National Broadband Map as opposed to “unserved” based on some other definition.

⁴⁷ Comments of Sprint Nextel Corporation, WC Docket Nos. 10-90 & 05-337, filed Aug. 24, 2012, at 2. ACS’s statement that the level of support it seeks is “generally consistent” with the per-location amount sought in FairPoint’s waiver request serves to compare the degree of egregiousness embodied in their respective waiver requests. Petition at 9. ACS gets nowhere in comparing itself to FairPoint.

⁴⁸ See *USF/ICC Transformation Order* at ¶ 1235.

asked the Commission to forbear from enforcing its eligibility requirements for purposes of the RAF so that WISPs and other non-ETCs can be deemed eligible for RAF funding.⁴⁹ WISPs typically provide unsubsidized fixed wireless service at a cost that is lower than DSL and cable. In some extremely high-cost areas fixed wireless broadband technology may be the only terrestrial technology platform that can deliver fixed broadband services economically. The Commission established a minimum of \$100 million for the RAF,⁵⁰ so it has the flexibility to increase funding for that program.

In sum, allowing ACS to use \$2.5 million to deploy broadband to 363 locations at an extremely high cost would be a poor use of CAF Phase I funds. The public interest would be better served by re-allocating those funds to the RAF, the fund established to subsidize extremely high-cost areas. ACS's Petition makes clear that, under its cost model, the 363 locations are in extremely high-cost areas and should not be funded under CAF Phase I.

II. THE COMMISSION SHOULD NOT REWARD ACS FOR ITS FALSE CERTIFICATION AND SHOULD INSTEAD REQUIRE ACS TO RETURN THE PORTION OF THE SUBSIDY THAT IS THE SUBJECT OF THE PETITION.

In its Election Notice, ACS unequivocally certified that it would use the CAF Phase I funds for deployment to areas shown as unserved on the National Broadband Map and that, to the best of its knowledge, these locations are unserved by fixed broadband as a matter of fact. On the basis of this certification, the Commission allocated more than \$4 million in subsidies at \$775 per location for ACS's Phase I deployment.

SPITwSPOTS appreciates that ACS may have "initially overlooked" a layer of the National Broadband Map and that this error may have been unintentional. However, the truth remains that ACS's acceptance of all of the funds was premised on this error and the

⁴⁹ See WISPA's Comments, Docket Nos. 10-90, *et al.*, filed Jan. 18, 2012.

⁵⁰ See *USF/ICC Transformation Order* at ¶ 1223.

accompanying false certification, leading to ACS's unjust enrichment at the expense of contributors to the Universal Service Fund ("USF"). It should not now be permitted to capitalize on its error by retaining the subsidies it accepted under false pretenses and then contriving a set of arguments to waive the rules. To the contrary, ACS should be required to return the \$2,508,778 to the Commission.

Conclusion

ACS's Petition should be denied because it has accepted funds to which it is not entitled and does not demonstrate "special circumstances" under the *WAIT Radio* standard.

Respectfully submitted,

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Declaration of Aaron Larson

My name is Aaron Larson, and I am the President of SPITwSPOTS Inc. ("SPITwSPOTS"), a fixed wireless broadband service provider based in Homer, Alaska. I am making this Declaration in support of SPITwSPOTS' Opposition to a Petition for Waiver ("Petition") filed by Alaska Communications Systems Group, Inc. and its affiliated incumbent local exchange carriers (collectively, "ACS"). I hereby certify under penalty of perjury that the statements of fact set forth in this Declaration are true and correct to the best of my knowledge, information and belief.

1. SPITwSPOTS uses a variety of unlicensed spectrum bands, including the 900 MHz, 2.4 GHz, 3.65 GHz and 5 GHz bands. Our service is primarily residential, but we also serve small and large businesses in the Homer area. We provided coverage and speed information to Connected Nation, the state's mapping contractor, and the online version of the National Broadband Map accurately depicts our coverage areas.

2. SPITwSPOTS utilizes a network composed of approximately 30 tower and rooftop locations with a total of 74 access points that are registered with Connection Nation. When necessary to expand service or accommodate growing demand, we have added capacity by using different spectrum, adding access points to facilitate frequency re-use and employing other design and operational techniques that provide us with a competitive edge and ensure a positive customer experience.

3. We serve approximately 885 subscribers in the Homer area and the rural areas surrounding Homer. We estimate that we serve 10-14 percent of the residences within the Homer city limits and approximately 17 percent of the households that our network covers. Our main competitors are ACS and General Communication, Inc. ("GCI"), but in

some rural areas we compete with other fixed wireless broadband providers. In many rural areas, fixed wireless is the only feasible solution to provide fixed broadband service because of the higher costs associated with deploying DSL and cable service.

4. SPITwSPOTS offers all of its customers speeds of at least 4 Mbps downstream and 1 Mbps upstream (though some subscribe to lower-tier services. In areas where we compete with ACS, our service is almost always faster and our monthly fees are lower. One example is in Homer, where the National Broadband Map (as of 12/31/11) shows that SPITwSPOTS offers much faster speeds than ACS, GCI or AT&T. The attached table compares the download speeds and prices offered by SPITwSPOTS, ACS and GCI.

5. I have read ACS's Petition. On page 19, ACS specifically names SPITwSPOTS and states that our service "suffer[s] from the same limitations identified above." Despite the fact that ACS makes allegations about our company, it did not provide us with a copy of the Petition. It is possible that the other fixed wireless broadband providers named in the Petition – Ace Tekk Wireless, AlasConnect and Yukon Tech – do not even know about the Petition and therefore may not be able to timely file their own responses. I think that ACS should be required to immediately provide a copy of its Petition to each of the other providers and afford them a fair and reasonable opportunity to respond.

6. I find many of the statements in the Petition to be inaccurate, misleading or inapplicable to SPITwSPOTS. Overall, the Petition relies on general statements, not specific facts. I also noticed that the Declaration of Amy L. Gardner that is attached to the Petition does not support any of these statements, so they lack credibility in that

respect as well. Given these defects, SPITwSPOTS asks the FCC to dismiss or deny ACS's requested waivers of the Connect America Fund ("CAF") Phase I rules.

7. On page 5 of the Petition, ACS generally claims that:

[a]lthough these providers have few customers and limited capacity, rely on line-of-sight technology that cannot serve every location, appear to focus in some cases on providing service primarily to business customers, and do little or no advertising in the market, the "Terrestrial Fixed Wireless" layers of the National Broadband Map shows these providers as having unbroken coverage across many of the census blocks where ACS had intended to deploy new wireline broadband Internet access services.

These allegations (which are essentially repeated on page 11) do not apply to SPITwSPOTS. First, as stated above, we have a significant amount of the market share in Homer (and perhaps greater in the surrounding rural areas) and are not subject to capacity constraints. Second, by installing access points, we are able to serve nearly every location in a given census block. Third, our focus is on serving primarily residential customers, although we also provide broadband service to businesses. Fourth, SPITwSPOTS advertises regularly on the radio in the Homer market.

8. On page 10 of the Petition, ACS seeks a waiver of the definition of "broadband" so that it can use a portion of CAF Phase I funding allocation to upgrade service to its customers. Here, ACS essentially admits that it is providing inferior service. As the National Broadband Map shows, SPITwSPOTS provides significantly faster speeds than ACS. It has taken our company a great deal of work and expense to provide this level of service, and *we have done this without any subsidy from the federal government*. I believe it is totally unfair for the federal government to subsidize ACS so that it can catch up to our service. To the extent the waiver of the definition of "broadband" would enable ACS to better compete with us, this would be grossly unfair

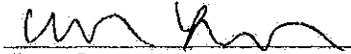
and would have a harmful impact on our business. I do not believe that federal subsidies should be used in this manner.

9. On page 12, ACS states that "many customers located in areas served only by fixed wireless broadband providers likely consider themselves unserved, in that broadband service is neither marketed to them nor available in sufficient quantity to reach any substantial portion of the potential customers identified as 'served.' ACS provides no factual support for these statements and, as stated above, they are untrue with respect to SPITwSPOTS.

10. On pages 17-18, ACS criticizes Ace Tekk Wireless for conducting a site survey before promising service. In our experience, it is very rare that SPITwSPOTS cannot provide service to homes and residences inside our coverage area.

11. ACS argues that it is just too expensive for it to deploy fixed broadband service to remote locations. SPITwSPOTS is a growing fixed provider that uses cost-efficient wireless technology without any federal subsidies. In Alaska, wireless is the only feasible solution to reach much of the rural areas. SPITwSPOTS has shown that even in the more urban areas we are able to offer higher speeds and better service than ACS because we are able to roll out the latest technology rapidly and add capacity at a fraction of the cost as ACS's wireline technology.

12. In conclusion, ACS's general allegations about fixed wireless broadband service are simply incorrect when applied to SPITwSPOTS. ACS should not be entitled to a waiver of the rules when the foundation of its argument is factually incorrect and misleading. The FCC should dismiss or deny the Petition.



Aaron Larson

10-10-12

Date

Download	SPITwSPOTS	ACS	GCI*	GCI Data Caps	GCI Overage Fees
320Kbps D/L		\$49.00			
1Mbps		\$69.00			
2Mbps	\$59.00				
3Mbps		\$89.00			
4Mbps	\$84.00	\$89.00			
6Mbps	\$94.00				
7Mbps		\$99.00			
10Mbps	\$104.00	\$109.00	\$29.99	10,000Megabytes	\$0.01 Per Megabyte
12Mbps			\$49.99	60,000 Megabytes	\$0.008 Per Megabyte
15Mbps	\$154.00		\$59.99	100,000 Megabytes	\$0.006 Per Megabyte
18Mbps			\$79.99	150,000 Megabytes	\$0.004 Per Megabyte
20Mbps	\$205.00				
22Mbps			\$109.99	200,000 Megabytes	\$0.002 Per Megabyte
25Mbps	\$250.00				

*Company has Data Caps