**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 PETITION FOR WAIVER

Stephen E. Coran
Rini Coran, PC
1140 19th Street, NW, Suite 600
Washington, DC 20036
(202) 463-4310
*Counsel to the Wireless Internet Service Providers Association*

October 12, 2012

## Summary

The Wireless Internet Service Providers Association ("WISPA") 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"). The Petition does not demonstrate "special circumstances" and would not benefit the public interest. 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 first 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").

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 *unsubsidized* competitors that have relied on private funding to provide faster broadband speeds. Not only would this be grossly unjust, it also would contravene the express objectives of the CAF program by diverting those funds from "unserved" locations. The Commission should likewise reject this waiver request.

ACS's final waiver request seeks to change the definition of "unserved" based on general allegations about the level of service offered by 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. Such arguments cannot overcome the Commission's previous decisions or the facts demonstrating the lack of any foundation for ACS's waiver request.

Grant of the Petition would be contrary to the public interest. It would provide subsidies to ACS that it already declined so it can receive an exorbitant per-location subsidy. The funds would be better utilized if they were allocated to the RAF, the fund for extremely high-cost areas.

In sum, ACS is not entitled to retain the $2.5 million in excess funds it previously declined to accept. 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 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**.....4

**II. THE COMMISSION SHOULD REJECT ACS'S WAIVER REQUESTS**.....5

**A. The Commission Should Not Increase The $775 Per-Location Subsidy Amount**.....5

**B. The Commission Should Not Waive The Definition Of "Broadband" So That ACS Can Improve Service To Its Own Customers**.....9

**C. The Commission Should Not Waive The Definition Of "Unserved" So ACS Can Obtain Subsidies To Compete With Existing Fixed Broadband Providers**.....11

**Conclusion**.....16

**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 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 Petition for Waiver ("Petition") filed by ACS of Anchorage, Inc., ACS of the Northland, Inc., ACS of Fairbanks, Inc. and ACS of Alaska, Inc. (collectively, "ACS") on September 26, 2012.[1] Long after it accepted its full Connect America Fund ("CAF") Phase I allocation, ACS belatedly asks the Commission to waive its rules so that ACS can use the funds to serve fewer locations at a greater per-location cost, to provide service at speeds that do not meet the Commission's definition of "broadband," or to serve locations that are not shown as "unserved" on the National Broadband Map. The Commission should reject these requests and require ACS to limit its subsidy to $1,676,325, the amount necessary for ACS to deploy fixed broadband service to 2,163 locations at the $775 per-location limit.

[1] *See* Public Notice, "*Wireline Competition Bureau Seeks Comment on Alaska Communications Systems Petition for Waiver of Certain High-Cost Universal Service Rules*," DA 12-1573, rel. Oct. 2, 2012 ("*Public Notice*"). The *Public Notice* established October 12, 2012 as the deadline for filing responsive pleadings. Accordingly, this Opposition is timely filed.

## Introduction

WISPA represents the interests of wireless Internet service providers ("WISPs") that rely primarily on unlicensed spectrum to provide *unsubsidized* fixed wireless broadband services in urban, suburban and rural communities across the country. Many WISPs have established networks that cover large geographic areas in sparsely populated parts of the country that would otherwise be unserved by wireline technologies such as DSL and cable, and are continuing to expand their coverage into more and more unserved areas. In urban areas, WISPs compete effectively with wireline services, including subsidized telephony services. Under current USF interpretations, WISPs that provide standalone broadband services are not entitled to Universal Service Fund ("USF") benefits because they are not deemed "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."[2] 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."[3] The Commission expressly stated that it was "not attempting to identify the precise cost of deploying broadband to any particular

[2] *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.
[3] *Id.* at ¶ 138.

location,"[4] but was merely attempting to establish an interim funding mechanism while the more detailed, cost-based CAF Phase II rules were being considered.

By letter dated July 24, 2012, ACS accepted $4,185,103 in Phase I support, an amount representing its full subsidy allocation.[5] 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.[6]

According to the Petition, 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.[7] ACS states that it "initially overlooked" the presence of fixed wireless broadband providers when it reviewed the National Broadband Map prior to filing its Election Notice.[8] 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.[9] Under this scenario, this would give ACS a subsidy of about *900 percent more* than the amount established and affirmed by the Commission. Secondly, ACS proposes that, in the alternative, the Commission should waive the

---

[4] *Id.* at ¶ 139.
[5] *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").
[6] *Id.* at 2.
[7] *See* Petition at 5.
[8] *Id.* at 15.
[9] *See id.* at 8.

definition of "broadband" so ACS can upgrade service to its own customers at the $775 level. As a final 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.

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.

**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 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

---

[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).

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.

WISPA appreciates that ACS may have "initially overlooked" a layer of the National Broadband Map and that this error may have been unintentional.[13] However, the truth remains that ACS's acceptance of all of the funds was premised on this error and the accompanying false certification, leading to ACS's unjust enrichment at the expense of contributors to the Universal Service Fund ("USF"). ACS 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 scenarios and arguments to waive the rules. To the contrary, ACS should be required to return the $2,508,778 to the Commission.

## II. THE COMMISSION SHOULD REJECT ACS'S WAIVER REQUESTS.

ACS seeks waiver of Commission rules so that it can retain more than $2.5 million to which it is not entitled. Assuming *arguendo* the Commission does not require the return of these ill-gotten funds, it should deny each of these waiver requests.

### A. The Commission Should Not Increase The $775 Per-Location Subsidy Amount.

ACS 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

[13] ACS's belated recognition of the presence of terrestrial fixed broadband providers on the National Broadband Map cannot be deemed "new information" or "changed circumstances" for the benefit of ACS. Petition at 15, 6. The information was available and was included in the National Broadband Map – ACS simply did not consider it until Bureau staff noticed ACS's obvious error and notified ACS of the problem.

Commission's rules.[14] 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."[15] 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."[16] To determine this standard, the Commission considered different cost data, including the ABC Coalition cost model developed by price cap carriers[17] that estimated the per-location cost to be $765.[18] The Commission concluded that $775 for each unserved location "represents a reasonable estimate of an interim performance obligation for this one-time support."[19] On reconsideration, the Commission again rejected efforts to apply carrier-specific criteria to CAF Phase I.[20] The Commission thus expressly declined to create a regulatory framework where ACS and other carriers could obtain interim support based on facts and costs characteristics particular to them and their service areas.

---

[14] *Id.* at 8.
[15] *USF/ICC Transformation Order* at ¶ 137.
[16] *Id.* at ¶ 139.
[17] *See id.* at ¶ 134 and nn. 214, 216.
[18] *See id.* at ¶ 142.
[19] *Id.* at ¶ 144.
[20] *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.

WISPA disputes ACS's claim that "the business case simply cannot be made for those locations under the existing rules."[21] To the contrary, WISPA 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.[22] 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.[23] Although WISPA believes that satellite broadband has inherent latency and other limitations, WISPA 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.

The $5,000 it 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 these amounts may not even provide a full subsidy under the CAF Phase II rules when they are adopted).[24] ACS provides no

---

[21] Petition at 20.

[22] In addition to ACS, Consolidated Communications, Inc. and Hawaiian Telecom accepted the full amount of their allocated Phase I support.

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

[24] Although the Petition is not clear, WISPA 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.

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."[25] 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 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. WISPA believes that WISPs and other non-ETCs should be deemed eligible for RAF funding and, in response to the Commission's suggestion,[26] has asked the Commission to forbear from enforcing its

[25] 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. WISPA has opposed FairPoint's waiver request on grounds that was untimely filed, seeks an excessive amount of support and is contrary to the public interest. *See* Opposition of WISPA to FairPoint Communications, Inc. Petition for Waiver of Sections 54.312(b)(2) and (3) of the Commission's Rules and Conditional Election of Incremental CAF Support, WC Docket Nos. 10-90 & 05-337, filed Oct. 11, 2012. ACS gets nowhere in comparing itself to FairPoint.

[26] *See USF/ICC Transformation Order* at ¶ 1235.

eligibility requirements for purposes of the RAF.[27] WISPs typically provide unsubsidized 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 broadband services economically. The Commission established a minimum of $100 million for the RAF,[28] 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 program 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.

### 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]

WISPA fails to see how using subsidies to fund improved service to "served" locations meets the Commission's objectives of subsidizing new broadband service to "unserved" locations. As even ACS concedes, these locations already receive broadband service from ACS that satisfies the Commission's "broadband" definition. Notably, ACS does not make any promises on how its customers will share in the upgrade cost by paying higher subscription fees.

[27] *See* WISPA's Comments, Docket Nos. 10-90, *et al.*, filed Jan. 18, 2012.
[28] *See USF/ICC Transformation Order* at ¶ 1223.
[29] *See* Petition at 9-11.
[30] *Id.* at 10.

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 information" should "alter the Commission's calculus."[31] This argument misstates the issue and misses the point. First, the Commission fully contemplated that some of the $300 million allocated to Phase I would be declined, so the system is not failing.[32] 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."[33] 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.

The Commission is presented with a choice – help fund ACS's wireline upgrade so it can provide improved service to its own broadband customers, or use the funds via another CAF program to support broadband service to "unserved" locations. To WISPA, the policy choice should be clear, and the Commission correctly made the right choice when it established the rules for Phase I. Providing service to "unserved" locations is the CAF Phase I goal. ACS's request to use Phase I support to upgrade existing service to its own customers should be denied.

---

[31] *Id.*

[32] *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").

[33] 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.

### C. The Commission Should Not Waive The Definition Of "Unserved" So ACS Can Obtain Subsidies To Compete With Existing Fixed Broadband Providers.

The most egregious of ACS's three waiver requests is its plea to use its Phase I allocation to deploy broadband service to locations that are already receiving fixed broadband service that, in ACS's arbitrary and self-serving view, should be ignored for a variety of reasons. ACS essentially 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" 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 privately-held unsubsidized providers of fixed broadband service. ACS's request lacks the support necessary to meet the *WAIT Radio* burden and the result it seeks would be clearly contrary to the public interest.

In the *USF/ICC Transformation Order* transforming the USF, the Commission elected to use the National Broadband 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 downstream and 768 kbps upstream, which is collected for the National Broadband Map and through the Commission's Form 477."[34] 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

[34] *USF/ICC Transformation Order* at ¶ 590.

unserved."[35] The Commission further stated that the Map is "the best data available at this time."[36]

In a petition for reconsideration filed by the Independent Telephone & Telecommunications Alliance ("ITTA")[37] and in an ex parte letter filed by ITTA and other incumbent carriers,[38] 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.[39]

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. 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."[40] The

---

[35] *Id.* at n.231.
[36] *Id.* at ¶ 590.
[37] *See* Petition for Reconsideration of the Independent Telephone & Telecommunications Alliance, WC Docket No. 10-90, *et al.*, filed Dec. 29, 2011, at 3.
[38] *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.
[39] *Id.* at 3.
[40] *Second Order on Reconsideration* at 5 (footnote omitted).

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."[41]

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 allow it to apply $2.5 million to serve areas that are already served by fixed broadband providers. As WISPA[42] and a number of others[43] demonstrated in opposing a similar waiver request filed by CenturyLink, ACS's claims are untrue, are based on speculation and are entirely inappropriate as a substitute for the National Broadband Map.

As an initial matter, ACS names four fixed wireless service providers in its Petition – Ace Tekk Wireless, AlasConnect, SPITwSPOTS and Yukon Tech.[44] Although it is not clear from the redacted version of its Petition, it appears that ACS desires to use the additional $2.5 million to provide service in the areas served by these providers.[45] 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 provide comments on the Petition, a problem exacerbated by the fact that the Bureau is affording parties only ten days to file responsive pleadings.[46] Even CenturyLink served the targets of its waiver petition, and ACS should be held to the same standard.

---

[41] *Id.* at n.29 (emphasis in original).
[42] *See* WISPA's Opposition to CenturyLink's Petition for Waiver, WC Docket No. 10-90, *et al.*, filed July 12, 2012.
[43] *See, e.g.*, Opposition of Inventive Wireless of Nebraska, LLC to Petition for Waiver, WC Docket Nos. 10-90, *et al.*, filed July 12, 2012; Opposition of Ranch Wireless, Inc. to Petition for Waiver, WC Docket Nos. 10-90, *et al.*, filed July 12, 2012; Opposition of Broadband Corp. to Petition for Waiver, WC Docket Nos. 10-90, *et al.*, filed July 12, 2012.
[44] *See* Petition at 17-19.
[45] If ACS does not intend to deploy in these areas, then its overly general and technically inaccurate allegations are doubly irrelevant to its Petition.
[46] Each of the Public Notices establishing pleading cycles for the CenturyLink, Windstream and FairPoint waiver petitions afforded parties 30 days to file responsive pleadings.

ACS first alleges 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."[47] 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. Moreover, aside from general conjecture and innuendo, ACS presents no information to show that the fixed wireless providers named in its Petition are capacity constrained. ACS's failure to apply its general allegations to the relevant and specific facts of this case speaks volumes about the weakness of its assertions.[48]

ACS's claims against the named fixed wireless broadband providers fare no better. It concedes that the service offered by Ace Tekk Wireless and AlasConnect meet the Commission's definition of broadband. It concedes that the National Broadband Map shows coverage by each provider. Its sole argument is that it "believes" that Ace Tekk Wireless serves 600-700 customers near Fairbanks[49] and it "understands" that AlasConnect serves 800 customers[50] – but it provides no information to support its "belief" and "understanding." Its claims about SPITwSPOTS and Yukon Tech are even thinner, consisting of a single conclusory sentence that "[t]heir services suffer from the same limitations identified above for AlasConnect

---

[47] Petition at 11.

[48] ACS cites WISPA's Comments in the Section 706 proceeding to support its claims. *See id.* at 16. Again, ACS is attempting to convert general statements about fixed wireless providers into specific arguments to prop up it waiver request. Another red herring its ACS's discussion about the obligations of interconnected VoIP providers to comply with service discontinuance rules. *See id.* at 16-17. Broadband providers are not subject to these rules unless they separately provide interconnected VoIP service. ACS makes no claim that the four fixed wireless providers it names in its Petition ever provided interconnected VoIP or failed to comply with service discontinuance rules – it only cites an irrelevant "high profile shuttering." *Id.* at 17. As befitting its pleading style, ACS fails to demonstrate the significance of this discussion.

[49] *Id.*

[50] *Id.* at 18.

and Ace Tekk."[51] Moreover, the definition of "unserved" is predicated on whether broadband service is offered in a specific area, not whether residents and businesses in that area actually choose to subscribe to the available broadband services. So even if ACS's "belief" and "understanding" is correct, it proves nothing.

ACS provides no support for its claim 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' on the National Broadband Map."[52] ACS also falsely criticizes the existing fixed wireless providers for posting an announcement that they will conduct a site survey to determine whether and to what extent a particular location may be able to receive service. Although there may be a few physical locations where local conditions or terrain (*i.e.*, a 100-year old tree or a multi-story office building) may block wireless signals, ACS never offers any information about the percentage of those potential customers that can or cannot receive service. Rather than providing factual information to support its assertion, ACS again disingenuously relies on innuendo and conjecture.

In sum, ACS's unsupported conclusions fail to meet the *WAIT Radio* "high hurdle" standard. Despite the obvious shortcomings in its arguments, it appears that ACS spent a substantial amount of time "investigating the service offered" by other providers after filing its Election Notice,[53] but very little time investigating the facts underlying the certification in its Election Notice. ACS should not be entitled to retain $2.5 million of CAF Phase I funds as a reward for its failure to initially consider information on the National Broadband Map that it now asks the Commission to disregard in favor of speculation, innuendo and surmise. Further, the

[51] *Id.* at 19.
[52] Petition at 12.
[53] *Id.* at 11.

Commission should not permit ACS to substitute its own definitions of "broadband" and "unserved" in order to obtain federal subsidies that would be used to enable ACS to directly compete with unsubsidized, privately-funded broadband providers. ACS has not presented evidence warranting the extraordinary relief it requests, and the Commission therefore should deny the Petition.

## 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,

October 12, 2012

**WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

By: */s/ Elizabeth Bowles, President*
*/s/ Matt Larsen, FCC Committee Chair*

Stephen E. Coran
Rini Coran, PC
1140 19th Street, NW, Suite 600
Washington, DC 20036
(202) 463-4310
*Counsel to the Wireless Internet Service Providers Association*