

**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

**REPLY COMMENTS OF
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION 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**

The Wireless Internet Service Providers Association (“WISPA”), pursuant to Sections 1.415 and 1.409 of the Commission’s Rules, hereby submits Reply Comments regarding the Election and Petition for Waiver (“Petition”) filed by FairPoint Communications, Inc. (“FairPoint”) on September 10, 2012.¹ The Commission previously determined that the Connect America Fund (“CAF”) Phase I subsidy level should be fixed at \$775 per location, and FairPoint fails to prevent “special circumstances” that would warrant grant of its untimely waiver request that seeks more than \$4,000 in subsidies per location. To determine the appropriate disposition of the unused Phase I funds, the Commission should invite public comment so that it has a complete and open record upon which to base its decision.

¹ See Public Notice, “Wireline Competition Bureau Seeks Comment on FairPoint Communications Petition for Waiver of Certain High-Cost Universal Service Rules,” DA 12-1473, rel. Sept. 11, 2012 (“Public Notice”). The Public Notice established October 26, 2012 as the deadline for filing Reply Comments. Accordingly, these Reply Comments are timely filed.

Discussion

I. THERE IS NO SUPPORT IN THE RECORD FOR GRANT OF THE REQUESTED WAIVER.

In its Petition, FairPoint seeks to conditionally accept \$2.8 million in Phase I subsidies that it previously declined. Nearly 45 days after the election deadline, FairPoint asks the Commission to allocate these declined funds so it can deploy broadband service to 697 unserved locations in Maine. If its waiver is granted, FairPoint would obtain a subsidy of \$4,062 per location, nearly six times more than the \$775 subsidy level the Commission established and affirmed.

In addition to WISPA,² the National Cable & Telecommunications Association (“NCTA”)³ and the American Cable Association (“ACA”)⁴ opposed the Petition. NCTA states that “[w]hile Fairpoint is not willing to build to new locations at the \$775 per location offered by the Commission, apparently it would be willing to reach additional unserved locations in its territory if it is provided with \$4000 per new location.”⁵ Both ACA and NCTA point out that the Commission considered various different possibilities in establishing the \$775 per-location subsidy, but rejected these other alternatives based on evidence in the docket.⁶ They also state that the Commission anticipated that price cap carriers would not accept the full amount of the

² See Opposition of the Wireless Internet Service Providers Association 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 (“WISPA Opposition”).

³ See Opposition of the National Cable & Telecommunications Association to FairPoint’s Petition for Waiver of Certain High-Cost Universal Service Rules, WC Docket Nos. 10-90 & 05-337, filed Oct. 11, 2012 (“NCTA Opposition”).

⁴ See Comments of the American Cable Association on the FairPoint Communications, Inc. Petition for Waiver of 47 C.F.R. § 54.312(b)(2) and (3) and Conditional Election of Incremental CAF Support, WC Docket Nos. 10-90 & 05-337, filed Oct. 11, 2012 (“ACA Comments”).

⁵ NCTA Opposition at 3.

⁶ See ACA Comments at 4; NCTA Opposition at 3-4.

subsidy allocated to them, and even suggested that remaining unserved areas in their wire centers might be better suited for CAF Phase II.⁷

Two price cap carrier trade associations support grant of the Petition, but offer no new information to help FairPoint's cause. After re-hashing the Petition, USTA argues that denial of the waiver request would leave "unspent" the \$2.8 million in additional subsidies as well as private investment.⁸ As WISPA and others have made clear, it is not necessary for the declined funds to be unspent, just that they not be used for excessive subsidies within the CAF Phase I program. If \$775 per location is too small of a subsidy for FairPoint, then, as the Commission contemplated, service to some of the unserved locations can be subsidized through CAF Phase II and the Remote Areas Fund ("RAF"). It is also an overstatement for USTA to state that private investment will be unspent. To the contrary, it is FairPoint's choice to not invest in deploying service to unserved locations – no one is compelling FairPoint to provide service only if it receives subsidies. And the void created by FairPoint's choice could be filled by other fixed broadband providers that invest their own capital.

ITTA's defense of FairPoint fares no better. It alleges "that rural Americans in FairPoint's territory will be denied the benefits of broadband for the foreseeable future while the Commission continues to address how to structure and implement CAF Phase II reform."⁹ This assertion ignores the fact that FairPoint elected to not serve these locations in the first place and that only FairPoint can deploy service in these areas if it obtains an excessive subsidy. These claims are unproven. Moreover, even if FairPoint obtained its additional support, there is no

⁷ *See id.* at 3.

⁸ Comments of the United States Telecom Association, WC Docket Nos. 10-90 & 05-337, filed Oct. 11, 2012 ("USTA Comments"), at 4. *See also* Comments of the Independent Telephone & Telecommunications Alliance in Support of FairPoint Communications, Inc.'s Petition for Waiver, WC Docket Nos. 10-90 & 05-337, filed Oct. 11, 2012 ("ITTA Comments"), at 5.

⁹ ITTA Comments at 4.

assurance that it will complete Phase I buildout before Phase II funds are made available or before another broadband provider deploys in those locations such that they no longer would be “unserved.” ITTA thus continues to propagate the “false choice” that FairPoint presented the Commission¹⁰ – give FairPoint six times more money than it is entitled to receive or consumers in its wire centers will not have access to broadband. What FairPoint is really saying is that the wireline business model it chose does not support the deployment of cost-effective broadband to unserved areas. That does not demonstrate “special circumstances” as required under the Commission’s standards. The Commission should reject FairPoint’s “counteroffer” to the Commission for *six times more* support than the per-location amount to which it is entitled under rules.¹¹

II. THE COMMISSION SHOULD INVITE PUBLIC COMMENT ON HOW TO APPLY UNUSED CAF PHASE I FUNDS.

ACA and NCTA offer suggestions on how the Commission should use declined CAF Phase I funds.¹² ACA outlines a proposal that would change the eligibility requirements for a new round of Phase I funding so that cable operators and other non-price cap LECs can participate.¹³ NCTA suggests that unused Phase I funds could be repurposed for other uses such as broadband adoption programs or reducing the contribution factor, as stated in the *USF/ICC Transformation Order*.¹⁴

¹⁰ WISPA Opposition at 8.

¹¹ NCTA Opposition at 3. WISPA also fails to see why the Commission should approve the waiver request *before* FairPoint’s litigation with the Maine Public Utilities Commission is resolved. *See* USTA Comments at 5. That litigation, which provides clarity on FairPoint’s decision to only seek funding to deploy service to locations in Maine that it may have been required to serve pursuant to its merger, could require FairPoint to build out *without* CAF subsidies. The Commission’s waiver process should not be used as FairPoint’s Plan B.

¹² *See* ACA Comments at 5-6; NCTA Opposition at 4.

¹³ *See* ACA Comments at 6.

¹⁴ *See* NCTA Comments at 4, citing *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

WISPA requests that the Commission invite public comment on how it should apply the declined CAF Phase I funds. There is at least \$185 million in unused Phase I funds and there is the possibility of a second Phase I funding round. Further, there are differing views on eligibility and how use of those funds would best support the public interest, but there is no complete record on which the Commission can make a reasoned and informed decision. By inviting public comment, the Commission can best determine, in an open and transparent manner, who should be eligible for additional CAF Phase I funding and how unused Phase I funds should be used.

WISPA agrees with ACA that any new Phase I support should be “awarded only in areas where non-incumbent providers are not offering service today,” but takes strong exception to ACA’s suggestion that the determination of such “unserved” areas should rely on the National Broadband Map “*and supplemental information submitted by providers.*”¹⁵ As WISPA has consistently stated – and as the waiver requests of CenturyLink and others make clear – the Commission should not allow intended CAF recipients to rely on extraneous data that would result in protracted proceedings in which existing broadband providers are forced to respond to non-specific claims, speculation, innuendo and surmise. The Commission wisely elected to rely solely on the National Broadband Map, and the waiver requests filed by CenturyLink, Windstream, FairPoint and ACS confirm the prescience and wisdom of that decision.

Rulemaking, WC Docket Nos. 10-90, *et al.*, FCC 11-161 (rel. Nov. 18, 2011) (“*USF/ICC Transformation Order*”), at n.221.

¹⁵ ACA Comments at 6 (emphasis added).

Conclusion

The record demonstrates that FairPoint's Petition should be denied. FairPoint has not "special circumstances" warranting a per-location subsidy in excess of \$4,000. The *WAIT Radio* waiver standard dictates dismissal or denial of the Petition.

Respectfully submitted,

October 26, 2012

**WIRELESS INTERNET SERVICE
PROVIDERS ASSOCIATION**

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

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