

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
	)	
Accipiter Communications Inc. Petition for	)	
Waiver of the Commission’s Rules Implementing	)	
Reform of Universal Service Support	)	

**SECOND AMENDMENT TO PETITION FOR TEMPORARY WAIVER**

Accipiter Communications Inc. (“Accipiter”), by its attorney, hereby submits its Second Amendment to its Petition for Temporary Waiver submitted in the Federal Communications Commission’s (“FCC” or “Commission”) above-referenced dockets on April 18, 2012.<sup>1</sup> Based on the Commission’s ongoing implementation of the *USF/ICC Transformation Order*<sup>2</sup> and Accipiter’s resulting updated financial forecasts, Accipiter now requires a waiver of the \$250 per line cap<sup>3</sup> rule and related regression caps<sup>4</sup> through December 31, 2014. As has been the case since Accipiter first filed its request for waiver, Accipiter is a rapidly growing company so the

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<sup>1</sup> See *in re Connect America Fund, Accipiter Communications Inc. Petition for Waiver of the Commission’s Rules Implementing Reform of Universal Service Support*, Petition for Temporary Waiver, WC Docket No. 10-90 (filed April 18, 2012).

<sup>2</sup> *In re Connect America Fund*, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, (November 18, 2011) (“*USF/ICC Transformation Order*”); See also *in re Connect America Fund*, WC Docket No. 10-90, *High-Cost Universal Service Support*, WC Docket No. 05-337, Order, DA 12-646 (April 25, 2012), (adopting methodology to limit reimbursable capital and operating expenses for HCLS).

<sup>3</sup> 47 C.F.R. § 54.302.

<sup>4</sup> 47 C.F.R. §36.621(a)(5).

Commission's use of outdated, historical line counts for determining Accipiter's universal service support is inaccurate. As discussed and documented below, recent changes in Accipiter's interstate access revenues have adversely affected Accipiter's already precarious financial situation, causing Accipiter to adjust the duration of its request for waiver in this second amendment.

**I. BACKGROUND**

In its original Petition for Waiver, Accipiter requested: 1) a waiver of the \$250 per-line cap until either December 31, 2014 or December 31, 2015; and 2) a waiver of the FCC rules so that the regression caps would not apply to Accipiter until six months after the FCC had made updated regression cap formulas publicly available. In its original Petition for Waiver, Accipiter stressed to the Commission that the waiver it sought was temporary, because Accipiter's ongoing rapid growth would allow Accipiter to grow out of the caps as it added lines.

On April 25, 2012, the Bureau released an Order altering its universal service fund ("USF") methodologies by establishing regression model-based caps.<sup>5</sup> With a newly defined regression model, Accipiter revisited its financial forecast and determined that the company could narrow the scope of its waiver petition. On July 19, 2012, Accipiter filed an Amendment to its Petition for Temporary Waiver,<sup>6</sup> requesting that the Commission use Accipiter's most current line count data as of June 30, 2012 as a replacement variable in the per-line formula and

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<sup>5</sup> *Connect America Fund, High-Cost Universal Service Support*, Order, 27 FCC Rcd 4235 (2012).

<sup>6</sup> *See in re Connect America Fund, Accipiter Communications Inc. Petition for Waiver of the Commission's Rules Implementing Reform of Universal Service Support*, Amendment to Petition for Temporary Waiver, WC Docket No. 10-90 (filed July 19, 2012).

regression formulas for determining the Accipiter's USF limitations. In that petition, Accipiter pointed out that it was appropriate for the FCC to grant "a limited waiver that does nothing more than allow Accipiter to use its current and correct line counts, rather than outdated line counts that do not reflect the company's present circumstances because they fail to account for the robust growth the company has experienced."<sup>7</sup>

The financial forecasts submitted with the July 19, 2012 filing showed that a waiver grant would still significantly limit Accipiter's USF revenues and just barely allow Accipiter to maintain compliance with its loan covenants. In effect, the scope of the waiver requested in the July 19, 2012 filing sought to meet the FCC's requirement that carriers only receive revenues in the "amount above the cap they can show is necessary."<sup>8</sup>

## II. RECENT UNIVERSAL SERVICE CHANGES HAVE ADVERSELY AFFECTED ACCIPITER'S FINANCIAL SITUATION

Since Accipiter's July 19, 2012 filing, Accipiter has experienced significant and unexpected revenue reductions from the National Exchange Carrier Association ("NECA") traffic sensitive pool.<sup>9</sup> Accipiter discussed this issue with the Commission on September 27,

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<sup>7</sup> *Id.* at p. 5.

<sup>8</sup> *USF/ICC Transformation Order*, 26 FCC Rcd at 17839-40, ¶ 278.

<sup>9</sup> 2012 booked revenues have been impacted most notably by NECA traffic sensitive pool "true-ups" for prior periods. The 2011 rate-of-return was revised downward by 3.93 percent, which reduced Accipiter's 2012 revenues by [REDACTED]. The 2012 rate-of-return was revised downward by 2.41 percent, which has reduced Accipiter's 2012 revenues by [REDACTED] so far this year. While Accipiter cannot be certain exactly what changes in pool behavior led to such abnormal revisions in rates-of-return, the most likely explanation is that NECA traffic sensitive pool participants are exhibiting dramatic changes in behavior in reaction to USF/ICC reform. Accipiter did not anticipate such market behavior in its earlier financial forecasts.

2012.<sup>10</sup> These revenue reductions are such that without a waiver [REDACTED]  
[REDACTED]. Realizing this prospect and armed with better information concerning the impacts of USF/ICC reform upon Accipiter's financials, Accipiter has updated its financial forecasts and, based on these current forecasts, has no reasonable alternative but to request a modification of the scope of its waiver. To maintain operations, Accipiter now requires a waiver of the application of the \$250 per line rule and related regression caps until December 31, 2014.

In support of this amendment to its waiver request, Accipiter updates its financial forecasts in two exhibits. Exhibit 1 demonstrates the scenario where Accipiter does not receive the requested waiver. Exhibit 2 demonstrates the scenario where Accipiter does receive the requested waiver.

Exhibit 1 clearly shows that Accipiter [REDACTED]  
[REDACTED]  
[REDACTED].

Exhibit 2 shows that grant of the waiver will allow Accipiter to maintain adequate cash flow and remain in compliance with its RUS loan covenants by maintaining its TIER above 1.0. During the period from 2012 through 2014, Accipiter should easily achieve adequate line counts to fall within with the newly established USF line limitations.<sup>11</sup>

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<sup>10</sup> See Letter from Kenneth C. Johnson, Counsel for Accipiter, to Marlene H. Dortch, FCC, WC Docket No. 10-90, (October 1, 2012).

<sup>11</sup> As of September 30, 2012, Accipiter's regulated working loop count is [REDACTED]  
[REDACTED]. Accipiter anticipates that its regulated loop count will reach a point where the Accipiter is within USF line limitations by [REDACTED]

(continued...)

Compared to Accipiter's July 19, 2012 filing, it is clear that the downward revision in interstate access revenues requires that Accipiter now receive the USF revenues that would be provided through a waiver of the \$250 per line cap and regression caps through December 31, 2014. It is worth noting that Accipiter's updated financial forecast also shows that Accipiter has revised its forecasted customer revenues upward and is currently operating below its prior forecast on discretionary operating expenses. Accipiter has demonstrated its capability to grow its subscriber base and customer revenues while moderating operating expenses. As this trend continues, Accipiter will fall within the FCC per line caps.

### III. GRANT OF THE WAIVER IS IN THE PUBLIC INTEREST

The Commission may waive any of its rules if the petitioner shows "good cause."<sup>12</sup> In its *USF/ICC Transformation Order*, the Commission specifically anticipated that certain carriers would require a waiver of its new USF rules in circumstances where waiver of such rules would be necessary and in the public interest and where an ETC can demonstrate that, without additional universal service funding, its support would not be sufficient to achieve the purposes of Section 254 of the Act.<sup>13</sup> Furthermore, a waiver may be granted if: 1) the waiver would better

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(..continued)

 Accipiter notes that the FCC's methodology will not recognize this line count until the 2013 year-end line counts are reported for 2015 revenues.

<sup>12</sup> 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

<sup>13</sup> *USF/ICC Transformation Order* at ¶¶ 539-540.

serve the public interest than would application of the rule; and 2) special circumstances warrant a deviation from the general rule.<sup>14</sup>

As noted above, Exhibit 1 shows that without a waiver, [REDACTED]  
[REDACTED]. Under this scenario  
Accipiter's customers, many of whom have no alternative terrestrial provider available,<sup>15</sup> would  
be at risk of losing voice and broadband services. Such a result would be contrary to Section 254  
of the Act.<sup>16</sup> [REDACTED]  
[REDACTED]. In  
contrast, Exhibit 2 shows that grant of the requested waiver will allow Accipiter to continue  
paying its RUS debt, maintain essential services to rural subscribers, expand its line counts in the  
service area, and grow into compliance with the FCC line limitations.<sup>17</sup> Clearly the public  
interest is served through grant of the requested waiver.

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<sup>14</sup> *Northeast Cellular*, 897 F.2d at 1166.

<sup>15</sup> [REDACTED]

<sup>16</sup> See 47 U.S.C. § 254(b)(5) (requiring “predictable and sufficient” universal service support mechanisms).

<sup>17</sup> As discussed above, Accipiter, unlike most rate-of-return carriers, is a rapidly growing company and the FCC's use of inaccurate line counts results in insufficient universal service support for Accipiter. Accipiter's special circumstance as an expanding company warrants deviation from rules intended for carriers with stagnant or receding line counts.

**IV. CONCLUSION**

For the foregoing reasons, Accipiter urges the Commission to act expeditiously to grant Accipiter a limited waiver of the application of the \$250 per-line cap rule and related regression caps until December 31, 2014.

Respectfully submitted,

**ACCIPIITER COMMUNICATIONS INC.**

By: */s/ Kenneth C. Johnson*

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November 1, 2012

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**REDACTED COPY – FOR PUBLIC INSPECTION**

EXHIBIT 1

Accipiter Communications Inc.

No Waiver

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EXHIBIT 2

Accipiter Communications Inc.

Waiver Approved