

identified the particular census blocks where they intend to deploy Phase I funding, as proposed by their trade association.²

Introduction

The sweeping changes to the Universal Service Fund rules granted broad financial benefits to a distinct class of telecommunications providers, those price cap carriers that have failed to deploy broadband to vast areas within their wire centers.³ Despite the opportunity to obtain significant subsidies in Phase I, a number of carriers elected to decline a portion of their funding allocation and instead have sought subsidies through creative, yet flawed, waiver requests.⁴ WISPA has vigorously opposed each of the waiver requests, and has recommended that the Commission apply the declined funds to the Remote Areas Fund (“RAF”).⁵ Instead of acting on the waiver requests or even acknowledging WISPA’s objections and recommendations, the Commission adopted the *FNPRM* in which it proposes either to open another round of Phase I funding – its preferred choice – or to apply the funds to CAF Phase II, another program designed solely to subsidize eligible telecommunications carriers. The Commission also seeks comment on other proposed mid-course changes to its Phase I rules, including a new definition

² See Comments of the Independent Telephone & Telecommunications Alliance, WC Docket No. 10-90 (Jan. 9, 2013) (“ITTA Unserved List Comments”).

³ *In the Matter of Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, *et al.* (rel. Nov. 18, 2011) (“*USF/ICC Transformation Order*”), at ¶ 4 n.3.

⁴ See CenturyLink Petition for Waiver, WC Docket No. 10-90, *et al.* (June 26, 2012) (“CenturyLink Waiver Petition”); Windstream Election and Petition for Waiver, WC Docket No. 10-90, *et al.* (July 24, 2012) (“Windstream Waiver Petition”); 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 No. 10-90, *et al.* (Sept. 10, 2012) (“FairPoint Waiver Petition”); Petition for Waiver of Alaska Communications Systems, *et al.*, WC Docket No. 10-90, *et al.* (Sept. 26, 2012) (“ACS Waiver Petition”).

⁵ WISPA Opposition to Windstream Waiver Petition, WC Docket No. 10-90, *et al.* (Aug. 24, 2012), at 5 (“WISPA Windstream Opposition”); WISPA Opposition to FairPoint Waiver Petition, WC Docket No. 10-90, *et al.*, filed Oct. 11, 2012, at 8; WISPA Opposition to ACS Waiver Petition, WC Docket No. 10-90, *et al.* (Oct. 12, 2012), at 8. See also Written Ex Parte Presentation from Elizabeth Bowles and Richard D. Harnish to Marlene H. Dortch, FCC Secretary (Aug. 13), at 3.

of “unserved areas”⁶ and a “limited challenge process”⁷ that would seek to identify inaccuracies in the NBM.

WISPA appreciates the Commission’s efforts to provide CAF subsidies to areas that are truly lacking in fixed broadband access. However, when the rules threaten to allow federal subsidies to flow to direct competitors of self-funded wireless Internet service providers (“WISPs”), it creates undue burdens on broadband providers who are forced to protect their investment against subsidized competitors, and it denies funding to remote areas where WISPs could deploy cost-effective wireless broadband. WISPA is compelled to object and to offer recommendations it believes will better satisfy public policy objectives.

Discussion

I. THE COMMISSION SHOULD APPLY DECLINED CAF PHASE I FUNDS TO THE REMOTE AREAS FUND.

The Commission proposes to implement another round of Phase I funding to allocate up to \$185 million in funds that the price cap carriers have already declined under rules adopted in the *USF/ICC Transformation Order*.⁸ As alternative approaches, the Commission suggests it could add the declined funds to Phase II⁹ or reduce the amount of the \$4.5 billion budget established in the *USF/ICC Transformation Order*.¹⁰

The Commission fails to present another alternative, one WISPA recommended on multiple occasions – applying declined Phase I funds to the RAF.¹¹ The intended recipients have

⁶ *FNPRM* ¶¶ 10-12.

⁷ *Id.* ¶¶ 13-16.

⁸ *See id.* ¶ 9.

⁹ *See id.* ¶ 41.

¹⁰ *See id.* ¶ 44.

¹¹ *See* n.5, *supra*. *See also* Written Ex Parte Presentation of the American Cable Association, the Competitive Carriers Association, the National Cable & Telecommunications Association, WISPA, DISH Network, L.L.C., EchoStar Technologies, L.L.C. and ViaSat, Inc. to Marlene H. Dortch, FCC Secretary, WC Docket No. 10-90 (Dec. 14, 2012), at 3 (“the FNPRM is completely devoid of any discussion of alternatives that the undersigned have presented in various pleadings and ex parte letters, and presents only options that favor incumbents LECs”).

demonstrated that they cannot use the excess funds *under the rules they themselves proposed*.

The solution is not to give them another bite at the apple. Rather, the Commission should acknowledge that \$115 million was successfully allocated to unserved areas at \$775 per location and that the remaining unserved areas do not qualify for Phase I subsidies. If the price cap carriers are to be believed, the cost to serve remaining unserved locations is many times greater - \$3,000,¹² \$4,000,¹³ even \$7,000¹⁴ per unserved location.¹⁵ It would appear from the price cap carriers' own admissions that the unserved locations they purportedly cannot serve with a \$775 subsidy have extremely high costs and would be candidates for the RAF.

The Bureau recently released a Public Notice inviting comment on the RAF.¹⁶ Therein, as in the *USF/ICC Transformation Order*, it characterizes the RAF as a program “to ensure that even Americans living in the most remote areas of the nation, where the cost of providing terrestrial broadband service is extremely high, can obtain service.”¹⁷ The Bureau asks for suggestions on the amount of the subsidy, the administration of the RAF and consumer eligibility for participation in the RAF. WISPA plans to file Comments in response to the *RAF Public Notice* and will reiterate its position that the Commission should allow entities that have not been determined to be “eligible telecommunications carriers” to participate in the RAF program.

¹² See Windstream Waiver Petition.

¹³ See FairPoint Waiver Petition.

¹⁴ See ACS Waiver Petition.

¹⁵ It also bears repeating that there is no restriction in the Commission's rules preventing a price cap carrier from using the \$775 per-location subsidy to offset a portion of the total deployment cost.

¹⁶ See Public Notice, *Wireline Competition Bureau Seeks further Comment on Issues Regarding the Design of the Remote Areas Fund*, DA 13-69 (rel. Jan. 17, 2013) (“*RAF Public Notice*”).

¹⁷ *RAF Public Notice* a 1.

II. IF THE COMMISSION ALLOCATES THE DECLINED FUNDS TO PHASE I, IT SHOULD NOT CHANGE THE RULES.

A. The Commission Should Not Change The Definition Of “Unserved Area.”

Despite the “success”¹⁸ of the “optional”¹⁹ CAF Phase I program in distributing \$115 million in subsidies, the Commission proposes to add a new round of Phase I funding and modify the rules mid-stream. Among the rules it proposes to change is the definition of “unserved area.” Specifically, a census block where broadband speeds of at least 768 kbps downstream and 200 kbps upstream are available would no longer be considered served. Rather, the Commission proposes to fund areas that do not meet a new standard of 4 Mbps downstream and 1 Mbps upstream (using the NBM “proxy” of 3 Mbps/768 kbps).²⁰

WISPA objects to the Commission’s proposal because it attempts to change the rules of CAF Phase I *after* fixed broadband providers have reasonably relied on existing rules as assurance that the Commission will not fund competitors in the unsubsidized areas where they already provide service. The Commission should not now be setting a new and higher broadband speed standard with the only aim being to offer further government subsidies exclusively to price cap carriers. Changing the rules to enable price cap carriers to directly compete against existing, self-funded broadband providers is contrary to the Commission’s stated intent of avoiding subsidizing areas where broadband is already available.²¹

To the extent the Commission nevertheless adopts the change in minimum speeds for served areas, such rule changes must be applied prospectively. Incumbent broadband providers must have an opportunity to upgrade service before suffering the unfairness of finding that their

¹⁸ *FNPRM* ¶ 7, ¶ 9.

¹⁹ *Id.* ¶ 5.

²⁰ *Id.* ¶ 12 & n.17.

²¹ *See, e.g., USF/ICC Transformation Order* ¶ 103.

compliance with existing Commission standards now renders their service inadequate and subjects them to federally-funded competition.

B. Any Challenge Process Should Be Implemented *After* Carriers Have Elected The Areas They Intend To Serve.

The Commission also proposes a “limited challenge process” by which incumbent broadband providers and prospective Phase I recipients can submit to the Bureau alleged inaccuracies on the NBM.²² The Commission has, on at least two occasions, rejected efforts to establish a challenge process for identifying inaccuracies on the NBM.²³ WISPA has supported the use of the NBM as the sole source of information about “unserved areas,” stating that “while the Map may in some limited instances be imperfect, it could just as easily understate, as overstate, the presence of fixed broadband service in an ‘unserved’ area.”²⁴ The Comments filed in response to the *Unserved List Public Notice*²⁵ confirm this fact.²⁶ Now, without any explanation about why its previous NBM conclusions have suddenly become invalid and contrary to the public interest, the Commission has not only proposed a challenge process, but apparently has already started one.

Even before the deadline for filing Comments in response to the *FNPRM*, the Commission instructed the Bureau to begin the challenge process. Rather than waiting until after

²² *FNPRM* ¶ 14.

²³ See *USF/ICC Transformation Order* ¶ 144; *In the Matter of Connect America Fund*, Second Order on Reconsideration, WC Docket No. 10-90, *et al.* (rel. Apr. 25, 2012), ¶¶ 19-23.

²⁴ WISPA Opposition to Petitions for Reconsideration, WC Docket No. 10-90, *et al.* (Feb. 9, 2012), at 5.

²⁵ See Public Notice, *Wireline Competition Bureau Seeks Comment on Areas Shown as Unserved on the National Broadband Map for Connect America Phase I Incremental Support*, DA 12-1961 (rel. Dec. 5, 2012); Public Notice, *Wireline Competition Bureau Updates the List of Potentially Unserved Census Blocks in Price Cap Areas and Extends the Deadline for Comment on the List*, DA 12-2001 (rel. Dec. 10, 2012) (collectively, “*Unserved List Public Notice*”).

²⁶ See, e.g., Comments of Myakka Communications, Inc., WC Docket No. 10-90 (Jan. 9, 2013) (evidence that NBM understates coverage provided by WISP); Letter from Comcast Corporation, WC Docket No. 10-90 (Jan. 9, 2013) (evidence that NBM understates coverage of large cable company); Comments of Cimarron Telephone Company, L.L.C., Cross Telephone Company, L.L.C., and The Pottawatomie Telephone Co., L.L.C., WC Docket No. 10-90 (Jan. 9, 2013) (evidence that NBM understates coverage provided by independent telephone companies); Comments of Panhandle Telephone Cooperative, Inc., WC Docket No. 10-90 (Jan. 9, 2013) (evidence that NBM understates coverage provided by telephone cooperative).

rules were adopted or the new version of the NBM was available, in the *Unserviced Areas Public Notice* the Bureau established reporting deadlines of January 9, 2013 for Comments and January 24, 2013 for Reply Comments. As ITTA cogently explained, the deadlines imposed by this process are “arbitrary and imprudent. . . . The *FNPRM* makes clear that the parameters of the challenge process have not been set and will not be determined until the Commission reviews parties’ comments and issues a final order.”²⁷

The Comments filed in response to the *Unserviced List Public Notice* demonstrate that much of the evidence of alleged inaccuracies in the NBM did not meet the Commission’s directives. For instance, evidence of overstated coverage was not accompanied by a “detailed explanation of why the commenter believes the areas are inaccurately reported.”²⁸ Other commenters failed to provide testing methodology or engineering certifications.²⁹ In many cases, commenters did not serve copies of their Comments on affected parties, despite the Commission’s strong suggestion that they do so.³⁰ In short, interested parties have already illustrated the major problem with a challenge process, and the value of the information the Bureau received for making funding decisions is minimal at best. But the problem remains – where will the Bureau draw the line between what constitutes adequate proof and what does not?

If the Commission adopts its challenge process, WISPA suggests that two improvements be implemented for the process to be fair and to avoid imposing undue burdens on broadband providers. Necessarily, any challenge process must rely on evidence and a standard of proof to show that the NBM is inaccurate. Most importantly, the Commission and the Bureau need to

²⁷ ITTA Unserviced List Comments at 2.

²⁸ *FNPRM* ¶ 15.

²⁹ *See id.* ¶ 16.

³⁰ *See id.*

have a very high level of certainty before they subsidize any areas alleged to be unserved on the NBM and thereby avoid enabling federally-funded competition to an unsubsidized competitor.

First, the standard of proof for any changes to the NBM must be higher than the “more probable than not” standard proposed in the *FNPRM*.³¹ If the responses to the *Unserved List Public Notice* stand for anything, they demonstrate the contrast between the weak and flimsy evidence offered by some and the indisputable evidence offered by others. The proposed “more probable than not” standard is too low, too inexact and too subject to interpretations that would incorrectly “correct” accurate information. WISPA urges the Commission to make changes to “unserved areas” on the NBM only where the evidence is “clear and convincing.” The Commission should adhere to the evidentiary criteria proposed in the *FNPRM*, and only alter the NBM’s conclusions where such evidence is “clear and convincing.”

Second, WISPA agrees with ITTA that the “challenge process should occur once price cap carriers have identified the particular areas where they would like to use CAF Phase I incremental support. This would minimize the burden on all parties – including the Bureau – by limiting challenges to the specific locations that matter.”³² There is no reason for either incumbent providers or price cap carriers to be part of a process that considers the entire universe of unserved census blocks when the specific carriers may only seek funding for a subset of the unserved areas. By implementing a challenge process that is triggered after the carriers identify the census blocks they propose to serve with Phase I subsidies, the Bureau will consider proposed changes only to those areas that are the subject of a funding request.

These recommendations present a sound and reasonable approach to how the Commission should address areas of the NBM that purportedly overstate or understate fixed

³¹ *Id.*

³² ITTA Unserved List Comments at 3.

broadband availability. To the extent the Commission adopts a limited challenge process, these proposals should be adopted.

III. IF THE COMMISSION ALLOWS CAF PHASE I FUNDS TO BE USED FOR “MIDDLE MILE” FACILITIES, IT SHOULD REQUIRE RECIPIENTS TO ALLOW “LAST-MILE” BROADBAND PROVIDERS TO INTERCONNECT.

The Commission suggests that, as an alternative, declined CAF Phase I funds could be used to support middle-mile fiber construction.³³ WISPA has strongly opposed Windstream’s efforts to use its Phase I allocation to deploy fiber,³⁴ and reiterates its opposition to any use of funds that would allow price cap carriers to use funds in a manner contrary to the fundamental purpose of CAF Phase I – deployment of broadband to unserved locations.

If the Commission nevertheless decides that it is consistent with the public interest to use federal subsidies to support middle-mile projects instead of deployment to unserved locations, it should require recipients to allow last-mile providers to interconnect to the funded network. WISPA incorporates herein by reference its proposal from the WISPA Windstream Opposition, where WISPA explained that “[t]his requirement would be consistent with federal policy and would help ensure that other fixed wireless broadband providers can gain access to federally supported infrastructure to further accelerate broadband deployment and affordable service to consumers.”³⁵ WISPA further proposed that the Commission should adopt the rules used for the Broadband Initiatives Program and the Broadband Technology Opportunities Program implemented under the American Recovery and Reinvestment Act of 2009,³⁶ which requires recipients of federal funds to:

offer interconnection, where technically feasible without exceeding current or reasonably anticipated capacity limitations, on reasonable rates and conditions to

³³ See *FNPRM* ¶ 18.

³⁴ See WISPA Windstream Opposition.

³⁵ *Id.* at 7.

³⁶ See American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115 (2009).

be negotiated with requesting parties. This includes both the ability to connect to the public Internet and physical interconnection for the exchange of traffic.³⁷

WISPA further pointed out that, broadband stimulus awardees, including Windstream, are already required to comply with these obligations, so it should be familiar and easy for carriers to follow the same rules and procedures as a condition to receiving federal funds through the Commission's processes.

Conclusion

Price cap carriers had the option to accept or decline Phase I funds and should not be given a second opportunity to obtain subsidies under new rules that undoubtedly favor them, to the detriment of unsubsidized broadband providers. Instead, declined funds should be applied to the Remote Areas Fund under rules that allow WISPs to obtain subsidies. However, if the Commission implements a second Phase I funding round, it should maintain its existing definition of unserved area and ensure that any challenge process is both fair and limited to the areas where carriers intend to use subsidies.

Respectfully submitted,

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³⁷ Broadband Initiatives Program; Broadband Technology Opportunities Program; Notice of Funds Availability, 74 Fed. Reg. 130 at 33111 (2009). *See also* WISPA Windstream Opposition at 9 n.27 (providing further details for physical interconnection).