Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
FairPoint Communications, Inc.	)	WC Docket No. 10-90
	)	
Petition for Waiver of Section 54.313(c)	)	WC Docket No. 05-337
of the Commission's Rules, 47 C.F.R. §54.313(c)	)	

PETITION FOR WAIVER TO EXCLUDE IAS, ICLS AND LSS FROM THE REQUIREMENT TO REPURPOSE FROZEN HIGH-COST SUPPORT TOWARD BROADBAND DEPLOYMENT IN 2013 AND BEYOND

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Executive Summary

Section 54.313(c) of the Commission's rules requires the FairPoint LECs to demonstrate that, beginning in 2013, at least one-third of FairPoint's frozen high-cost support was spent on the deployment and operation of broadband. In 2014, the requirement applies to two-thirds of FairPoint's frozen high-cost support. However, these funds already are "spoken for" – they help FairPoint recover investment it already has made in its existing facilities. FairPoint cannot spend the same dollars twice. Effectively, the FCC is requiring FairPoint to spend approximately $9 million of frozen high-cost support twice.

FairPoint therefore requests a waiver of the requirement that the amounts of frozen high-cost support derived from Interstate Access Support ("IAS"), Interstate Common Line Support ("ICLS") and Local Switching Support ("LSS"), approximately $26 million in all, be excluded from the obligations of Section 54.313(c). Absent a waiver, FairPoint will be unduly burdened by the enforcement of this rule, and FairPoint customers will be harmed by end-user rate increases.

FairPoint believes that the requirement to repurpose frozen high-cost toward broadband deployment affects FairPoint to a uniquely burdensome degree. The portions of frozen high-cost support derived from legacy IAS, ICLS and LSS high-cost programs are an especially significant part of FairPoint's interstate revenue requirement. And while FairPoint is classified as a Bell Operating Company ("BOC") in three study areas, the company does not resemble any of the other BOCs in its size, economies of scale, purchasing power, access line density, or overall customer base. Yet the other BOCs stand to gain support under the FCC's Connect America Fund Phase II program, whereas FairPoint expects to lose high-cost support. A waiver is necessary to prevent undue hardship to FairPoint and its customers.

Moreover, FairPoint believes that Section 54.313(c) is at odds with other FCC policies and rules. As such, compliance is an impossibility. Acceptance of frozen high-cost support is not optional for FairPoint. It is funding the company already relied on when investing in its network in previous years. Section 54.313(c) attaches new broadband obligations to this existing source of funding without accounting for the conflict this creates with other principles of ILEC regulation.

A waiver of Section 54.313(c) therefore is justified as to IAS, ICLS and LSS in FairPoint's case. Grant of the requested waiver will better serve the Commission's universal service goals than strict enforcement of the rule.

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FairPoint Communications, Inc. ("FairPoint") hereby requests that the Commission grant a waiver of Section 54.313(c) of its rules[1] to exclude from the

[1] 47 C.F.R. §54.313(c):

> In addition to the information and certifications in paragraph (a) of this section, price cap carriers that receive frozen high-cost support pursuant to § 54.312(a) shall provide:
>
> (1) By July 1, 2013. A certification that frozen high-cost support the company received in 2012 was used consistent with the goal of achieving universal availability of voice and broadband;
>
> (2) By July 1, 2014. A certification that at least one-third of the frozen-high cost support the company received in 2013 was used to build and operate broadband-capable networks used to offer the provider's own retail broadband service in areas substantially unserved by an unsubsidized competitor;
>
> (3) By July 1, 2015. A certification that at least two-thirds of the frozen-high cost support the company received in 2014 was used to build and operate broadband-capable networks used to offer the provider's own retail broadband service in areas substantially unserved by an unsubsidized competitor; and
>
> (4) By July 1, 2016 and in subsequent years. A certification that all frozen-high cost support the company received in the previous year was used to build and operate broadband-capable networks used to offer the provider's own retail broadband service in areas substantially unserved by an unsubsidized competitor.

obligations therein certain portions of FairPoint's frozen high-cost support received by the company in 2013 and subsequent years, specifically the amounts derived from Interstate Access Support ("IAS"), Interstate Common Line Support ("ICLS") and Local Switching Support ("LSS"). Absent a waiver, FairPoint will be unduly burdened by the enforcement of this rule, and FairPoint customers will be harmed by the requirement to repurpose toward broadband deployment the portions of frozen high-cost support derived from those legacy high-cost programs.

I. BACKGROUND

A. Frozen High-Cost Support

Under the FCC's *USF-ICC Transformation Order*, legacy universal service high-cost support programs were terminated as of the end of 2011. For price cap carriers and those rate-of-return carriers affiliated with price cap carriers, including the FairPoint incumbent local exchange carriers ("ILECs"), a new universal service regime was implemented, including new requirements governing high-cost support based on the amount of support distributed under legacy programs, frozen at 2011 levels. Under the new regime, frozen high-cost support ("Frozen CAF") includes amounts based on legacy IAS, ICLS and LSS, as well as high-cost loop support ("HCLS"), high-cost model support ("HCMS") and safety net additive support ("SNA").[2] The Commission envisioned a complete repurposing of high-cost universal service support, previously used to support universal availability of voice services in high-cost areas, to bring broadband services to high-cost areas where it is not available today.

[2] 47 C.F.R. §54.5.

FairPoint ILECs collectively receive Frozen CAF based on all of the legacy support programs listed above. Frozen CAF constitutes a significant portion of the company's revenues. FairPoint received $39.266,868[3] of Frozen CAF support during 2012 and expects the same amount during 2013, assuming that Phase II of the Connect America Fund is not implemented before the end of 2013.[4] Of this total Frozen CAF, $26,775,885 is associated with IAS, ICLS and LSS.

FairPoint ILECs undertake significant spending obligations associated with the receipt of Frozen CAF funding. FairPoint recently announced that it expects its 2012 unlevered free cash flow to be $111 million and its 2012 capital expenditures to be $145 million.[5] The level of funding from Frozen CAF is significant to FairPoint's financial position and to its capital budget, and thus to its continued ability to invest in its networks.

B. Frozen CAF In The Context Of Broader Changes To Universal Service

The *USF-ICC Transformation Order* establishes a path to create a new funding mechanism to support high-cost areas served by price cap carriers, Connect America Fund ("CAF") Phase II, which currently is under development by the Wireline Competition Bureau. The budget for CAF Phase II is up to $1.8 billion annually, [6] a

[3] This amount excludes the support that was associated with Fremont Telcom in Idaho, which was sold on January 31, 2013.

[4] The Commission has not announced when CAF Phase II will be implemented, so for purposes of this filing, FairPoint assumes a full year of Frozen CAF for 2013.

[5] See FairPoint Form 8-K, dated January 30, 2013, filed with the SEC. *See* http://phx.corporate-ir.net/phoenix.zhtml?c=122010&p=irol-SECText&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbmcueG1sP2lwYWdlPTg2ODEyMTEmRFNFUT0wJlNFUT0wJlNRREVTQz1TRUNUSU9OX0VOVElSRSZzdWJzaWQ9NTc%3d.

[6] *See USF-ICC Transformation Order*, para. 25.

significant increase from the legacy support for areas served by price cap carriers. The Commission expressly recognized that more funding would be needed to close the "rural/rural divide."[7]

During the time between the termination of legacy high-cost support as of December 31, 2011, and the initiation of CAF Phase II support at a date yet to be determined, the *USF-ICC Transformation Order* put in place transitional CAF support for price cap carriers. The transitional CAF support mechanisms include Frozen CAF as well as incremental CAF Phase I support. The combined transitional support is intended to enable price cap LECs to continue providing services in high-cost areas and to provide a short-term increase in the support available to price cap carriers[8] until such time as CAF Phase II is implemented.[9]

C. Broadband Spending Obligations Under Section 54.313(c)

When it adopted the *USF-ICC Transformation Order*, the Commission expected that it could be ready to implement CAF Phase II as early as 2013. In the event that it is not, price cap carriers will continue to receive support under the transitional mechanisms of Frozen CAF and incremental Phase I CAF. Broadband deployment obligations were attached to both forms of support. While incremental Phase I CAF support is optional, Frozen CAF – and the attendant broadband obligations described below – is not.

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[7] *See USF-ICC Transformation Order*, para. 7.

[8] The *USF-ICC Transformation Order* abandoned the division between "rural" and "non-rural" high-cost support. Instead, it relies on a division between rate-of-return and price cap carriers, as explained below. *See* note 19 *infra.* For purposes of CAF funding, all of FairPoint's study areas were deemed to be price cap, including those that were and continue to be regulated as rate-of-return carriers for other interstate purposes. *See* page 9 *infra. USF-ICC Transformation Order*, paras. 128-129.

[9] *USF-ICC Transformation Order*, para. 116.

Under Section 54.313(c) of the Commission's rules, FairPoint ILECs will be obligated to demonstrate that they have spent at least one-third of the Frozen CAF they receive during 2013 – approximately $13,841,492 if CAF Phase II is not implemented before the end of 2013 – to "build and operate broadband-capable networks used to offer [their] own retail broadband service in areas substantially unserved by an unsubsidized competitor."[10] Approximately $8,925,295 of that amount is associated with IAS, ICLS and LSS. The 2013 spending obligation associated with IAS, ICLS and LSS for 2013 accounts for more than 6% of FairPoint's 2012 capital spending and more than 8% of FairPoint's annual unlevered free cash flow. These amounts would double and triple for the 2014 and 2015 spending obligations, respectively, unless and until CAF Phase II is implemented.[11]

D. <u>FairPoint's Unique Status Under the *USF-ICC Transformation Order* and FCC Rules</u>

The *USF-ICC Transformation Order* affects all recipients of high-cost funding, but affects FairPoint in unique ways. Prior to the *USF-ICC Transformation Order*, the FairPoint ILECs fell into four categories of regulation and eligibility for high-cost funding programs. First, FairPoint's Bell Operating Company ("BOC") operations in Northern New England were classified as non-rural price cap operations. These study areas qualified for HCMS and IAS based on rules for price cap carriers and non-rural study areas. Second, FairPoint's non-BOC ILECs in Northern New England were classified as rural price cap operations. Pursuant to permission granted to these study areas to convert from cost-based rate-of-return to price cap operations, these study areas

[10] 47 C.F.R. §54.313(c)(2).

[11] 47 C.F.R. §§54.313(c)(3), (4).

qualified for ICLS funding on the basis of frozen per-line ICLS support established at the time of conversion to price caps in 2010, but continued to qualify for HCLS and LSS based on embedded costs.[12] Third, most of FairPoint's non-BOC ILECs operating outside of Northern New England were classified as rural rate-of-return operations settling on a cost basis.[13] These study areas qualified for HCLS, ICLS and LSS on the basis of embedded costs. Fourth, a handful of FairPoint's non-BOC ILECs were classified as rural rate-of-return operations settling on an average schedule basis. These companies qualified for HCLS, ICLS and LSS based on average schedule formulas.

Pursuant to the *USF-ICC Transformation Order*, FairPoint's BOC ILECs are treated as price cap carriers for CAF purposes and as CALLS price cap companies for purposes of the inter-carrier compensation ("ICC") transition. All of FairPoint's non-BOC ILECs are treated as price cap companies for CAF purposes.[14] FairPoint's non-

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[12] *See Petition of Virgin Islands Telephone Corporation, for Election of Price Cap Regulation and Limited Waiver of Pricing and Universal Service Rules; China Telephone Company, FairPoint Vermont, Inc., Maine Telephone Company, Northland Telephone Company of Maine, Inc., Sidney Telephone Company, and Standish Telephone Company Petition for Conversion to Price Cap Regulation and for Limited Waiver Relief; Windstream Petition for Limited Waiver Relief*, Order, 25 FCC Rcd 4824 (2010) ("FairPoint Price Cap Conversion Order").

[13] *See Berkshire Telephone Corporation, Big Sandy Telecom, Inc., Bluestem Telephone Company, Chautauqua and Erie Telephone Corporation, Chouteau Telephone Company, Columbine Telecom Company, C-R Telephone Company, The El Paso Telephone Company, Ellensburg Telephone Company, FairPoint Communications of Missouri, Inc., Fremont Telcom Co., The Germantown Independent Telephone Company, GTC, Inc., Marianna and Scenery Hill Telephone Company, Odin Telephone Exchange, Inc., The Orwell Telephone Company, Peoples Mutual Telephone Compnay, Sunflower Telephone Company, Inc., Taconic Telephone Corp., YCOM Networks, Inc.* Petition for Conversion to Price Cap Regulation and for Limited Waiver Relief, WC Docket No. 12-71 (filed March 1, 2012) ("FairPoint Cost Companies Price Cap Conversion Petition"). Fremont Telcom Co. has been effectively removed from this petition due to its January 31, 2013 sale to Blackfoot Telephone Cooperative, Inc.

[14] *USF-ICC Transformation Order*, para. 129.

BOC ILECs in Northern New England are treated as non-CALLS price cap companies for ICC transition purposes. FairPoint's non-BOC ILECs outside of Northern New England (both cost-based and average schedule companies) are treated as rate-of-return carriers for ICC transition purposes. As of the date the *USF-ICC Transformation Order* was adopted, FairPoint was the only company whose cost-based rate-of-return ILECs were treated as price cap carriers under the CAF rules. (There were a few average schedule companies affiliated with other price cap carriers that since have been allowed to convert to price cap regulation.)

II. GOOD CAUSE EXISTS FOR WAIVER OF THE COMMISSION'S RULES

The Commission may waive a rule for good cause shown.[15] More specifically, the Commission may exercise its discretion to waive a rule where, due to special circumstances, deviation from the general rule would better serve the public interest than strict adherence to the general rule.[16] The Commission may take into account consideration of hardship, equity, or more effective implementation of overall policy on an individual basis.[17] As demonstrated herein, the relief requested by FairPoint is necessary both to prevent undue hardship to FairPoint and its customers and to ensure that enforcement of Section 54.313(c) as written does not undermine broader Commission policies, including both its policies promoting universal service and its pricing policies.

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[15] 47 C.F.R. § 1.3.

[16] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

[17] *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

III. FairPoint ILECs Will Be Unduly Burdened, and Customers Will Be Harmed, By the Requirement To Repurpose Frozen IAS, ICLS and LSS Toward Broadband

A. The FairPoint ILECs Face Unique Hardships As CAF Is Implemented

One of the Commission's primary purposes in transforming legacy universal service high-cost support programs was to better target finite support amounts to high-cost locations that have been unserved or underserved under legacy programs. For example, the Commission estimated that rate-of-return ILECs previously received 83% of the available high-cost funding while serving 25% of the high-cost locations throughout the United States while price cap carriers served 75% of the locations but received only 17% of the funding – causing what the Commission calls a "rural/rural divide."[18] The *USF-ICC Transformation Order* addresses this discrepancy, at least in part, by generally maintaining high-cost funding for rate-of-return carriers and increasing funding for price cap carriers.[19] FairPoint estimates that after CAF Phase II is implemented, funding for areas served by price cap carriers will increase from 17% of

[18] *USF/ICC Transformation Order* ¶ 130 (noting that price cap companies "serve more than 83 percent of the people that lack broadband, many of whom live in areas that are just as low density and remote as areas served by rural companies"); ¶ 158 (stating that more than 83 percent of unserved locations are in price cap areas, yet such areas receive just 25 percent of high-cost support).

[19] The *USF-ICC Transformation Order* generally continue to recognize important differences between carriers that predominantly serve high-cost areas and carriers that serve a combination of high-cost and lower-cost areas. This difference had been reflected in separate high-cost program mechanisms for rural and non-rural ILECs. Under the *USF-ICC Transformation Order*, this difference largely is captured in separate programs for rate-of-return carriers and price cap carriers. CAF funding for rate-of-return carriers, which tend to serve only high-cost areas, generally continues to be based on embedded costs while funding for price cap carriers, which tend to serve both high-cost and lower-cost areas, is model-based. *See USF-ICC Transformation Order*, paras. 613 and 129, note 203.

ILEC funding to about 47% of ILEC funding, although price cap carriers will continue to serve 75% of rural locations throughout the nation.[20]

The news is not equally good for all price cap ILECs, however. Current indications are that CAF Phase II will impose a hardship for FairPoint. As noted above, all of FairPoint's ILECs are treated as price cap companies for CAF purposes. Because of the disparate high-cost support programs for rate-of-return and price cap ILEC operations, bringing FairPoint's rate-of-return study areas under price cap CAF funding is likely to result in high-cost funding for those carriers that will be significantly below that received under the prior cost-based mechanisms. FairPoint estimates that, using the model filed by ABC Group and based on the ABC Group proposed funding target of $2.2 billion for price cap carriers, funding for FairPoint's non-BOC rural study areas will be *decreased* from about $31 million annually in 2011, to about $15 million annually after the implementation of CAF Phase II funding.[21] FairPoint is the *only* ILEC holding company that operates both price cap companies and cost-based rate-of-return companies today, and faces elimination of the HCLS, ICLS and LSS of all of its rate-of-return companies when CAF Phase II is implemented. In light of the difference between the cost of serving exclusively rural areas (as the FairPoint non-BOC ILECs do) and the cost of serving a mix of high-cost and lower-cost areas (as price cap carriers

[20] The *USF-ICC Transformation Order* addresses up to $1.8 billion of funding for areas served by price cap carriers and $2.0 billion of funding for areas served by rate-of-return carriers. *USF-ICC Transformation Order*, paras. 25-26.

[21] There is no guarantee that FairPoint will accept the CAF Phase II funding. If FairPoint refuses the CAF Phase II funding for study areas in individual states, the CAF Phase I frozen high cost support continues until such time as the funding is awarded to a carrier through a reverse auction process.

typically do), the CAF regime puts FairPoint at a significant disadvantage relative to other price cap companies.

B. Enforcement of Section 54.313(c) With Respect To IAS, ICLS and LSS Will Unduly Burden the FairPoint ILECs

Frozen CAF rules require that price cap ILECs (and rate-of-return companies affiliated with them) certify that they used at least *one-third* of all Frozen CAF received in 2013 to build and operate broadband (at parameters meeting the Commission's standards) in areas substantially unserved by an unsubsidized competitor.[22] Unless CAF Phase II is implemented first, price cap ILECs must demonstrate that they used at least *two-thirds* of all Frozen CAF received in 2014 in the same manner, and in subsequent years *all* frozen high-cost support.[23] FairPoint expects to receive $39,266,868 of Frozen CAF support during 2013, as noted above. Of this, $26,775,885 is associated with IAS, ICLS and LSS. It is as to the latter amount that FairPoint requests a waiver of the broadband spending requirements of Section 54.3131(c) of the FCC's rules.

In the absence of a waiver, FairPoint would be unable to recover sufficient revenues to continue investing in its network at current levels, even though it likely would raise end-user rates to the extent permitted to make up a portion of the amount it is forced to divert to broadband deployment. The impact on FairPoint is explained below according to each category of support FairPoint receives.[24]

[22] 47 C.F.R. §54.313(c)(2).

[23] 47 C.F.R. §§54.313(c)(3), (4).

[24] Appendix A attached hereto shows the expected per-line impacts in 2013 of the one-third broadband spending obligations associated with IAS, ICLS and LSS as set forth in Section 54.313(c) of the Commission's rules. The impacts include the amount of increased ARCs and CAF-ICC that would be required if one-third of the LSS is diverted under the one-third broadband spending obligation instead of being used to reduce Eligible Recovery.

- IAS: FairPoint receives $3,311,784 of Frozen CAF associated with IAS. This amount is received by FairPoint's BOC ILECs operating in Maine, New Hampshire and Vermont. FairPoint files a combined interstate tariff for these three study areas, with uniform SLC rates for these study areas. To recoup revenues diverted under the one-third broadband spending obligation ($1,103,928) for 2013, FairPoint would increase the subscriber line charge ("SLC") for primary residential lines in these study areas by $0.11 per line per month, from $6.15 to $6.26 per line per month.

- ICLS: FairPoint receives $17,921,145 of Frozen CAF support associated with ICLS. This funding is received by FairPoint's non-BOC ILECs. FairPoint's SLC rates in these areas are already at the maximum rate levels allowed by FCC rule. Therefore, the one-third broadband spending obligation would result in *unrecovered interstate common line costs* for these study areas ($ 5,973,715). FairPoint does not expect to be able to recover these costs through intrastate rate increases, given that the costs are assigned to the interstate jurisdiction.[25]

- LSS: FairPoint receives $5,542,956 of Frozen CAF associated with LSS. This funding is received by FairPoint's non-BOC ILECs. This revenue is counted against the Eligible Recovery amounts that otherwise would be recovered through additional end-user access recovery charge ("ARC") and CAF-ICC amounts under the Commission's rules. To recoup revenues diverted under the one-third broadband spending obligation ($1,847,652) for 2013, FairPoint could increase the ARC (in study areas where the ARC rates are not already the maximum) by up to $.50 for Residential and Single Line Business customers and up to $1.00 for Multi-Line Business customers. FairPoint estimates that the average ARC increase for impacted study areas would be $0.11 per line per month for Residential and Single Line Business customers and $0.23 per line per month for Multi-Line Business customers. In addition, 2013 CAF-ICC for all FairPoint study areas combined would increase by an estimated $1,161,772.

- HCLS and HCMS: FairPoint receives $6,627,201 of Frozen CAF associated with HCMS and $5,456,070 of Frozen CAF associated with HCLS. These are categorized as "expense adjustments" and are considered reductions against jurisdictionally *intrastate* revenue requirements. The obligation to spend one-third of these amounts in accordance with Section 54.313(c) could be recovered, in theory, through state rate proceedings or pricing options. FairPoint therefore

[25] Were FairPoint permitted to increase SLC rates to recover the amount of 2013 diverted ICLS support, FairPoint estimates that SLC rate increases would range from $1.32 to $6.82 for the affected study areas, with an average increase of $3.64 per line per month. This increase would double to $7.28 per line per month, on average, in 2014 when the broadband spending obligation is two-thirds of Frozen CAF. Starting in 2015, when the broadband spending obligation is 100 percent, SLC rates would be increased by an estimated $10.92 per line per month, but for the SLC rate caps.

does not seek relief from the one-third broadband spending obligation associated with HCMS or HCLS.

- SNA: FairPoint receives $407,712 of frozen high-cost support associated with SNA. FairPoint is not seeking relief from the one-third broadband spending obligation associated with SNA.

In sum, without a waiver of the obligation to divert one-third of the amounts previously received as IAS and LSS, FairPoint would be forced to raise end-user rates (through a combination of SLC and ARC increases) on all subscribers. Without a waiver of the obligation to divert one-third of the amount previously received as ICLS, FairPoint would face under-recovery of nearly $6 million for 2013 alone. These outcomes constitute undue hardship, and do not serve the Commission's goals.

IV. ENFORCEMENT OF THE ONE-THIRD BROADBAND SPENDING REQUIREMENT AS WRITTEN WILL BRING FCC RULES INTO CONFLICT

A. Repurposing IAS and ICLS For Broadband Conflicts With Their Intended Use To Support Interstate Common Line Costs

The revenues from IAS and ICLS are intended to support the interstate portion of ILEC common line costs, helping to ensure that regulated rates for voice services (including exchange access services) remain reasonable and affordable. Under the legacy high-cost support regime, rural ILECs were eligible for ICLS, to fund their interstate common line revenue requirement (assuming that SLCs were at the maximum rates allowed by FCC rule).[26] The counterpart of ICLS for price cap carriers was IAS. From a theoretical standpoint, the functions of IAS and ICLS are identical, to provide adequate revenue to the ILEC while limiting the amount recovered from end-users through SLCs.

[26] *See* 47 C.F.R. §§ 54.901 and 69.104.

From a practical standpoint, given the difference in the costs of serving rural and non-rural areas, the application of IAS and ICLS is somewhat different. IAS often allowed price cap carriers to bring SLC rates below the FCC caps. In light of the much higher costs typically experienced by rate-of-return carriers, ICLS exclusively has been used to provide recovery for costs that exceed SLC rate caps. Therefore, while price cap carriers may be able to recover repurposed IAS funding through increases to SLC rates, while remaining under the SLC rate caps, such an option simply is not available to companies formerly classified as rural rate-of-return carriers. For example, FairPoint estimates it would need to increase SLC rates by about $10.92 per line per month for all customer classes to recover ICLS amounts that it will be repurposing to broadband buildout.[27] Such a rate increase would be precluded by FCC rule, as well as by the constraints of the market, where end-users do have choices, even if they are imperfect substitutes for ILEC services.

In practical terms, therefore, the Commission is asking FairPoint to spend the frozen high-cost support amounts associated with ICLS twice: first toward the common line costs FairPoint's rate-of-return ILECs historically recovered through ICLS, and now a second time toward deployment and operation of broadband in areas substantially unserved by an unsubsidized competitor. This FairPoint cannot do. This conundrum would translate to a deficit of nearly $6 million in 2013 alone, in the absence of a waiver.

[27] *See supra* note 21.

B. Repurposing ICLS and LSS For Broadband Conflicts With The Intended Purpose To Keep End-User Rates Reasonable

Rate-of-return carriers associated with price cap carriers are treated as price cap carriers for CAF purposes. For these carriers, ICLS and LSS are frozen just like IAS. Under the Commission's rules, both ICLS and LSS effectively allow the Commission to cap interstate end-user charges – the SLC and the ARC – at rates deemed reasonable.

ICLS is the equivalent of IAS for rate-of-return carriers, used to recover the interstate common line revenue requirement and to keep SLC rates at or below the caps. LSS support is a portion of interstate switched access revenue requirement. Because rate-of-return carriers associated with price cap carriers fall under the rate-of-return ICC transition, the frozen LSS support is used to reduce their Eligible Recovery. Therefore, for rate-of-return carriers, the requirement to spend one-third of ICLS and LSS on broadband during 2013 would effectively result in a requirement to spend those dollars twice.

Both ICLS and LSS historically helped ensure that ILECs could maintain services in rural high-cost areas without excessive pressure on end-user rates. Asking FairPoint to spend the frozen ICLS and LSS amounts on broadband deployment conflicts with the expectation that FairPoint will maintain voice service at current levels while FairPoint's SLCs and ARCs will remain under the caps. Something has to give.

C. The Commission's Rules Governing the Intended Use of IAS, ICLS and LSS Appear To Be Internally Inconsistent

As described above, FairPoint hereby seeks a waiver of Section 54.313(c)'s broadband spending requirements to prevent undue hardship and harm to FairPoint and its customers. In addition, waiver is warranted to avoid bringing this Commission rule favoring broadband buildout into direct conflict with the Commission's rules and policies governing price cap ILEC pricing. Put simply, enforcement of this rule would appear to mandate that price cap ILECs spend the same dollars *both* on recovery of their existing interstate costs and on broadband in new locations. FairPoint respectfully submits that this is an impossibility.

A close read of the FCC's rules reveals that the Commission may not have intended ILECs to spend the same dollars twice, as it were. While Section 54.5 clearly defines IAS, ICLS and LSS as part of frozen high-cost support,[28] and Section 54.313(c) clearly applies the one-third broadband spending requirement for 2013 to all frozen high-cost support, other rules suggest that ILECs are intended to continue using IAS, ICLS and LSS as they currently are used. For example, in the *USF-ICC Transformation Order*, the Commission emphasized that IAS would continue to be treated as it previously had been, in calculating interstate common line rates:

> we specifically note that while carriers receive support under CAF Phase I, the amount of their frozen high cost support equal to the amount of IAS for which each carrier was eligible in 2011 as being received under IAS, including, but not limited to, for the purposes of calculating interstate rates *will be treated as IAS for purposes of our existing rules*.[29]

This guidance suggests that carriers are required to use "an amount equal" to what they received under legacy IAS in the same manner they did pre-*USF/ICC Transformation Order*—that is, toward recovery of their interstate common line revenue requirement,

[28] 47 C.F. R. § 54.5. *See also USF-ICC Transformation Order*, para. 133 (all legacy universal service program funding is included in the term "frozen support").

[29] *USF-ICC Transformation Order*, para. 152. Section 54.312(a)(3) of the Commission's rule also provides: "a carrier receiving frozen high cost support under this rule *shall be deemed to be receiving IAS and ICLS* equal to the amount of support to which the carrier was eligible under those mechanisms in 2011." 47 C.F.R. §54.312(a)(3) (emphasis added).

rather than to deploy and operate broadband in unserved locations. If IAS is intended to be used in 2012 and subsequent years just as it was prior years, as suggested by the quoted passage, then there is no impossibility, and the Commission merely should clarify that IAS is not included in the requirements of Section 54.313(c). Otherwise, however, there is direct conflict between the pricing rules and the requirements of Part 54.

V. IN THE CASE OF FAIRPOINT, WAIVER OF THE ONE-THIRD BROADBAND SPENDING REQUIREMENT WOULD BETTER SERVE THE PUBLIC INTEREST THAN ENFORCEMENT OF THE RULE AS WRITTEN

FairPoint believes that special circumstances exist to grant the requested waiver. FairPoint would be uniquely affected by the enforcement of Section 54.313(c) as written. FairPoint faces a shortfall of more than $7.8 million in its non-BOC study areas if forced to spend at least one-third of its ICLS and LSS on broadband. While FairPoint could make the showing with respect to its IAS and make up the difference in revenues through SLC increases, customers would be harmed by such an increase, and FairPoint's ability to remain competitive in its BOC study areas would be threatened.

Nor is there any indication that the broadband constructed and operated with frozen high-cost support would produce sufficient new revenue to make up the difference. If that were the case, it would appear that the support would not be necessary in the first place – the Commission's CAF supports broadband operations only in areas where the business case otherwise would not support such investment. Moreover, this is not merely a short-term problem. While other price cap ILECs stand to gain support upon implementation of CAF Phase II, FairPoint expects to lose funding for its non-BOC study areas.

In this case, deviation from the general rule would better serve the public interest than strict adherence to the general rule.[30] With IAS, ICLS and LSS excluded, FairPoint still would devote a substantial portion of Frozen CAF to construction and operation of broadband in areas substantially unserved by an unsubsidized competitor. Moreover, FairPoint would be able to continue to maintain current services and provide investors with a return on funds already committed. In the absence of a waiver, FairPoint's ability to have access to sufficient funds to support future investment that is expected by the Commission and planned by the company would be negatively impacted. Waiver, in this case, would thus further the Commission's universal service goals.

Grant of the requested waiver also would avoid hardship that otherwise would occur because FairPoint would be expected to use the same frozen support amounts to both extend new broadband services and continue supporting existing voice services. To the extent that the Commission intended that broadband should supplant traditional local exchange and access services, it should have changed its rules and preempted state requirements so that ILECs could discontinue the local exchange and exchange access services no longer supported by federal high-cost funding. This the Commission has declined to do. [31]

Finally, in the absence of a waiver, FairPoint believes that it cannot comply with both Section 54.313(c) and the Commission's intended purposes for IAS, ICLS and

[30] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

[31] *See USF/ICC Transformation Order,* para. 75.

LSS. In the interest of equity, and to more effectively implement the FCC's overall policies, the Commission should grant the requested waiver in this case.[32]

V. CONCLUSION

For the foregoing reasons, a waiver of Section 54.313(c) is appropriate to prevent undue hardship and to better serve the Commission's policies. Expedited processing is requested to facilitate network planning and efficient use of resources.

Respectfully submitted,

/s/

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[32] *See WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.