Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90

REPLY COMMENTS OF THE AMERICAN CABLE ASSOCIATION ON THE FURTHER NOTICE OF PROPOSED RULEMAKING FOR PHASE I INCREMENTAL SUPPORT OF THE CONNECT AMERICA FUND

I. INTRODUCTION AND SUMMARY

The American Cable Association ("ACA") respectfully submits these reply comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") on potential modifications to the rules governing the award of Connect America Fund ("CAF") Phase I incremental support to price cap local exchange carriers ("LECs").[1] In its initial comments,[2] ACA (1) reviewed the sharply focused objectives set forth by the Commission for the Phase I incremental support program and the interim nature of the program, (2) described the myriad reasons why price cap LECs refused to accept support in the first round, and (3) submitted an extensive analysis about the pool of eligible lower cost unserved locations in price cap LEC territories based on the

[1] *See Connect America Fund*, Further Notice of Proposed Rulemaking, WC Docket No. 10-90, FCC 12-138 (rel. Nov. 19, 2012). ACA notes that on January 24, 2013 it filed reply comments on Public Notices DA 12- 1961 and DA 12-2001 ("NBM Public Notices"), updating and correcting the list of unserved areas on the National Broadband Map for Connect America Phase I incremental support. In those comments, ACA addressed various issues raised in the FNPRM, including the adoption of a formal challenge process. It incorporates those comments herein by reference. *See* Reply Comments of the American Cable Association on Public Notices DA 12-1961 and DA 12-2001, Updating and Correcting the List of Unserved Areas on the National Broadband Map for Connect America Phase I Incremental Support, WC Docket No. 10-90 (Jan. 24, 2013) ("ACA NBM Reply Comments").

[2] Comments of the American Cable Association on the Further Notice of Proposed Rulemaking for Phase I Incremental Support of the Connect America Fund, WC Docket No. 10-90 (Jan. 28, 2013) ("ACA Comments").

geographic and performance data in the National Broadband Map ("NBM") and the CQBAT cost model submitted by the ABC Coalition (price cap LECs), including their proposed definition of lower cost areas where they are not seeking support.[3] ACA then submitted that, consistent with the Commission's objectives and based on ACA's analysis:

- The Commission should not alter its rules for price cap LECs that have more than a sufficient number of eligible lower cost locations based on the 2013 allocation that are not served with broadband service at speeds of 768/200 kbps. These price cap LECs have a sound commercial rationale to use their entire allocation of incremental support of $775 per location.

- The Commission may consider altering its rules for those price cap LECs that have an insufficient number of eligible lower cost locations based on the 2013 allocation not served with broadband service at speeds of 768/200 kbps. In these instances, price cap LECs should be able to use Phase I incremental support to deploy broadband to locations in areas that do not currently receive 4/1 Mbps broadband service but only after the LEC uses its support to deploy broadband to its remaining lower cost unserved locations with at most 768/200 kbps service. By requiring lower cost unserved locations with 768/200 kbps to be served first, ACA's approach helps ensure the Commission's objective for the program is achieved. It also would avoid providing these LECs with surplus funds, which they could use for "non-supported" purposes, thereby harming competitive, high performance infrastructure deployments.

- The Commission does not need to increase the amount of support per location nor does it need to establish a new second-mile fiber component to the program, since under ACA's proposal each price cap LEC will now have more than a sufficient number of lower cost unserved locations. In any event, because these two new proposals provide imprecise estimates of cost and required support, they will distribute support inefficiently and thus should be rejected.

As for distribution of "leftover" 2012 Phase I incremental support, ACA urged the Commission not to add these funds to any 2013 distribution. Rather, the Commission should either add the amount to Phase II distribution or return the money by lowering the contribution

[3] The ABC Coalition set the high-cost benchmark at $80 per location per month. Locations with total costs below this level would be lower cost and not supported under their plan. *See Ex Parte* filing of the AT&T, CenturyLink, Fairpoint Communications, Frontier, National Telecommunications Cooperative Association, OPATSCO, United States Telecom Association, Verizon, Western Telecommunications Alliance, and Windstream, WC Docket No. 10-90 et al., Attachment 1 at 5 (July 29, 2011).

rate paid by consumers. In addition to the rationale ACA set forth in its comments for this position, ACA notes that by adopting its position, it would prevent gaming by price cap LECs that accepted support in 2012 but decide to return it and reclaim that support in 2013 and use it under more lenient amended rules.

Additionally, regardless of whether the Commission amends its Phase I rules, ACA asked the Commission to clarify in this proceeding the interplay among Phase I incremental support, the Phase I obligation to use frozen legacy support to deploy broadband-capable networks, and Phase II "five-year" support to ensure that price cap LECs cannot "double-dip" in utilizing support for unserved locations from more than one program. The need to address this concern has only increased as the price cap LECs continue to ask the Commission to clarify the requirements for use of frozen legacy support.[4]

Finally, in comments on issues raised in the FNPRM but submitted earlier in response to comments of the price cap LECs raising issues related to the NBM,[5] ACA proposed that the Commission adopt the following process for challenging whether areas on the map are properly designated as served or unserved:

- Begin with the presumption that the NBM is correct.[6]
- The incremental support recipient seeking to rebut that presumption should identify the portion of the census block it believes is unserved and provide evidence for that assertion.
- If the Commission determines that the evidence is sufficient to make a prima facie case that the NBM is inaccurate, competitive providers would then have an

4 *See e.g.*, Letter from David Cohen, USTelecom, to Marlene Dortch, FCC, WC Docket No. 10-90 (Jan. 31, 2103).

5 See ACA NBM Reply Comments.

6 This presumption is consistent with the position adopted by the Commission last year in its Second Reconsideration Order. *See Connect America Fund et al.*, WC Docket No. 10-90 et al., Second Order on Reconsideration, 27 FCC Rcd 4648, ¶ 13 (Apr. 25, 2012) ("*Second Reconsideration Order*").

opportunity to rebut the incremental support recipient's showing or the findings of the NBM.

- Use a similar process should a competitive provider challenge the accuracy of a census block on the NBM as served rather than unserved.

The Commission should use this process for new challenges to the NBM for purpose of determining areas eligible for Phase I incremental support. With the issuance of Public Notices DA 12-1961 and 12-2001, the Commission has already initiated a review process, and any decisions it makes about the designation of areas pursuant to this process should stand and not be subject to further challenge.

In these reply comments, ACA discusses discrete issues raised in the submissions by other parties. In particular, it responds to the proposals by the price cap LECs contained in the comments of the United States Telecom Association, the Independent Telephone & Telecommunications Alliance, and the ABC Coalition (jointly, the "Price Cap LEC Comments").[7] In their comments, the price cap LECs, asking the Commission for maximum flexibility to use Phase I incremental support, propose that the Commission amend the Phase I incremental support rules by:

1. Expanding the definition of unserved areas to include census blocks without 4/1 Mbps broadband service, and using the speed tier of 6/1.5 Mbps on the NBM as the proxy for availability of 4/1 Mbps service;

2. Permitting price cap LECs to use Phase I incremental support to build second-mile fiber without having an obligation to serve a minimum average number of unserved locations per fiber mile;

3. Adopting a process whereby price cap LECs can challenge the designation of areas as served on the NBM and which places the burden of proof on the provider claiming it provides service in an area;

7 Comments of the United States Telecom Association, the Independent Telephone & Telecommunications Alliance, and the ABC Coalition, WC Docket No. 10-90 (Jan. 28, 2013).

4. Enabling a price cap LEC that sought a waiver to use incremental support allocated in 2012 to accept such support pursuant to any new rules the Commission adopts for 2013;

5. Adding any "leftover" funds from 2012 to amounts allocated in 2013; and

6. Redistributing any support rejected by a price cap LEC in 2013 to other price cap LECs with a demonstrated need.

As discussed herein, the first two of these proposals are not supported by hard evidence and are inconsistent with the limited nature of the program As such, the Commission should reject these proposals and instead adopt ACA's proposal for expanding eligible areas. The challenge process proposed by the price cap LECs, which as discussed above should only be for areas not already being vetted by the Commission, also needs to be altered by requiring them to first produce probative evidence that the area is unserved. The final three proposals, regarding ways by which they can use unspent or leftover funds, do not serve the best interests of consumers and can lead to gaming of the system and inefficient distribution of support and should be rejected.

II. THE PRICE CAP LECS PROPOSALS TO EXPAND ELIGIBLE AREAS OR PROVIDE SUPPORT FOR SECOND-MILE FIBER ARE UNSUPPORTED BY DATA AND SHOULD BE REJECTED

ACA has combed through the Price Cap LEC Comments searching for data providing sufficient support for their proposals to expand the areas eligible for Phase I incremental support or use of support for second-mile fiber and finds none. Their proposed wholesale expansion of eligible areas to those lacking 4/1 Mbps broadband is supported only by rhetoric. For instance, they claim such an expansion "would rectify the shortcomings of classifying only areas without 768/200 service as 'unserved.'" But, these are not "shortcomings;" rather, they are the Commission's inherent objectives for the program – use incremental support to bring broadband to those areas most in need.[8]

In contrast, in its comments,[9] ACA gathered location data for each of the major domestic price cap LECs to estimate whether they have a sufficient number of lower cost unserved locations where they could use incremental support at the level established in the Commission's rules – $775 per location. From this data, ACA determined that AT&T, Fairpoint, and Verizon appear to have more than a sufficient number of lower cost unserved locations with broadband service at speeds of 768/200 kbps for which they would have a sufficient commercial incentive to use their allocation of incremental support of $775 per location and hence, there is no basis for the Commission to alter its rules. As for CenturyLink, Frontier, and Windstream, ACA found that the number of locations where these LECs could use incremental support of $775 per location exceeded the number of lower cost unserved locations without 768/200 kbps broadband service. For these three price cap LECs, there is a rationale for expanding the pool of eligible unserved locations to those without 4/1 Mbps broadband service. However, to ensure that the Commission's original objective of bringing service to those "most in need" locations will be achieved, any expansion needs to be conditioned on a price cap LEC first deploying broadband

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8 *See e.g.*, *Second Reconsideration Order*, ¶ 20.

Regarding the price cap LEC proposal to use 6/1.5 Mbps as the proxy for areas unserved by 4/1 Mbps broadband, this proposal is subservient to their initial proposal to expand eligible areas to include areas unserved by 4/1 Mbps broadband. As set forth in ACA's initial comments, price cap LEC have more than a sufficient number of lower cost locations shown on the NBM lacking broadband at speeds of 3 Mbps/768 kbps (the proxy for 4/1 Mbps service) for which they could use incremental support and thus expanding the proxy to 6/1.5 Mbps is not necessary. In addition, even if the Commission determines to increase the eligible areas to those without 4/1 Mbps broadband, it is not necessary to expand further. The price cap LECs comments are based on the technical limitations of DSL networks. Cable networks, however, operate based on a different technology and do not have the same restrictions on upstream speeds as DSL networks. Thus, if a cable provider is portrayed on the NBM as having 3 Mbps/768 kbps broadband service, it should not be assumed that it is not providing 4/1 Mbps service. This means the effect of increasing the proxy to 6/1.5 Mbps would be to designate census blocks where cable operators provide service of 4/1 Mbps as unserved when in fact they are served. As such, the Commission should reject it.

9 *See* ACA Comments at 10-15.

to all (or virtually all) of its lower cost unserved locations not receiving 768/200 kbps broadband service.[10]

As for the proposal to use incremental support for second-mile fiber, the price cap LECs submitted a declaration estimating the average cost of fiber feeder deployment on a per-mile basis and the cost of electronics needed to connect a location.[11] However, they did not address at all the Commission's inquiry about variance in cost.[12] As ACA demonstrated in its comments, there is in fact a great variance in the cost of second-mile fiber builds,[13] which, if support is based only on the average cost for a build, would result in the price cap LECs having easy opportunities to reap a windfall by deploying second-mile fiber only in areas where the cost for the build is less than the average cost. The price cap LECs also do not discuss the Commission's question about the amount of matching support they should be required to make.[14] Again, ACA discussed this issue in its comments and showed that the Commission has no evidence that can be used to ensure a match results in the efficient distribution of support.[15]

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10 Based on additional data, ACA showed that there is an additional reason to require that price cap LECs build to the existing universe of lower cost locations prior to expanding the universe of locations that may be eligible for Phase I funding – minimizing the opportunity for these LECs to receive a windfall. According to the CQBAT model, there are a great many lower cost unserved locations without 4/1 Mbps service that would require substantially less support than lower cost unserved locations without 768/200 kbps broadband. For instance, ACA's analysis shows that AT&T has more than 1 million lower cost locations without 4/1 Mbps service. More than 89% of these have estimated costs that are below the overall median cost for providing broadband service to unserved locations, and more than 9% of these have estimated costs that are less than one-half the median cost for providing broadband service to unserved locations. The other LECs have similar cost characteristics. *See* ACA Comments at 13-14.

11 *See* Price Cap LEC Comments, Appendix 1, Declaration of Peter Copeland.

12 *See* FNPRM, ¶ 19.

13 *See* ACA Comments at 16-17.

14 *See* FNPRM, ¶ 27.

15 *See* ACA Comments at 17-18.

In addition to not responding to these serious issues, the price cap LECs reject any requirement to connect a minimum number of unserved locations – because "the minimum number of customers served by any second-mile fiber deployment can vary considerably, depending upon the company and the geographic area it serves."[16] ACA does not disagree that that the number of customers "can vary considerably." In fact, the point raised by the price cap LECs only serves to highlight the point that the entire second-mile proposal is riddled with significant problems.

The price cap LECs counter the "unserved locations" proposal by offering to certify that they are using incremental support "to deploy broadband facilities on their routes in a manner intended to maximize benefits to unserved locations."[17] The Commission of course should not accept this proposal, which is the antithesis of a data-driven process. It would substitute a "trust us" approach for measurable outcomes and would almost certainly result in the Commission not achieving its broadband deployment objectives and support being distributed inefficiently. Finally, ACA notes the National Cable & Telecommunications Association's analysis of this issue, part of which shows, based on a prior proposal by Windstream estimating it would serve ten unserved locations, that support per unserved location would soar to $3600 – far in excess of the current requirement of $775.[18]

III. THE COMMISSION SHOULD ESTABLISH AN EQUITABLE PROCESS FOR CHALLENGING DESIGNATIONS ON THE NATIONAL BROADBAND MAP

The price cap LECs propose to restart the challenge process the Commission has already

[16] Price Cap LEC Comments at 23.

[17] *Id.* at 24.

[18] *See* Comments of the National Cable & Telecommunications Association, WC Docket No. 10-90 at 8 (Jan. 28, 2013) ("NCTA Comments").

initiated and institute a four step process for challenging designations on the NBM.[19] ACA responds to each step below:

> 1. Price Cap LEC Proposal: The Commission should first issue an order modifying the standard for eligible areas to 4/1 Mbps (and use 6/1.5 Mbps as the proxy for such areas on the NBM) and then issue a revised list of eligible census blocks.[20]
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> ACA Response: ACA does not oppose the Commission instituting a second challenge process for Phase I support, so long as the Commission proceeds with the process it has already undertaken pursuant to DA 12-1961 and DA 12-2001, and areas addressed in that process are not re-opened in any new challenge process. However, as discussed above, the Commission may wish to consider expanding the eligible areas in limited instances to include those without 4/1 Mbps service so long as areas without 768/200 kbps service are first served. At the same time, it would be inappropriate to use 6/1.5 Mbps areas as a proxy, particularly for areas served by cable operators.
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> 2. Price Cap LEC Proposal: As in 2012, the Bureau should issue a list with allocation amounts and provide price cap LECs with reasonable time to decide on the amount of funding to accept and the locations where they intend to build.[21]
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> ACA Response: Unlike in 2012, to ensure the price cap LEC s are accountable, in advance of receiving support, they should provide the Commission with a list of the specific unserved locations – and not just census blocks – where they intend to use support to deploy broadband.
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> 3. Price Cap LEC Proposal: When a price cap LEC informs the Commission of the amount of support it will accept and identifies census blocks where it proposes to use that support, it can challenge whether any of those census blocks are correctly designated as "served" on the NBM. The price cap LEC would need to "submit appropriate evidence supporting its claims," after which providers claiming to serve that areas "would bear the burden of providing affirmative evidence of service in such areas, including engineering analyses and customer billing records."[22]
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> ACA Response: First, as discussed above, the Commission should complete the process of reviewing NBM designations already underway. Once it completes vetting those

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[19] ACA rejects the price cap LEC's proposal in whole to the extent that it requires entities that already submitted data and information to the Commission in response to the challenge process Public Notices (DA 12-1961 and DA 12-2001) to have to resubmit data and information based on a new challenge process for an expanded area. Small and mid-sized members of ACA spent considerable time and effort to file this data, and it would be burdensome to ask them to devote additional time to this process.

[20] *See* Price Cap LEC Comments at 20.

[21] *See id.*

[22] *Id.*

areas, the NBM should control, and no further challenges should be permitted. As for any other areas, before seeking information from a provider claiming to serve an area, the Commission should vet the evidence filed by the price cap LEC to ensure it is sufficiently probative. This would avoid placing an unfair burden on smaller, competitive providers. It also should provide the competitive provider an adequate time to collect the necessary information and file it with the Commission.

4. Price Cap LEC Proposal. The Bureau would make a "reasoned decision, based on the evidence before it, on whether the challenged areas are in fact served."[23]

ACA Response: ACA generally agrees with the price cap LEC proposal. It notes that the Commission should proceed on the basis that the NBM is accurate unless the price cap LEC provides sufficient evidence that is unrebutted by a competitive provider.

IV. THE COMMISSION SHOULD APPLY UNACCEPTED 2012 AND 2013 PHASE I INCREMENTAL SUPPORT TO THE PHASE II PROCESS OR RETURN IT TO CONTRIBUTORS

In its initial comments, ACA submitted that it would be most consistent with the public interest for the Commission to apply "leftover" 2012 incremental support either to the Phase II regime, where a cost model or reverse auctions would allocate support more efficiently, or return it to universal service fund contributors.[24] In contrast, the price cap LECs want access to 2012 Phase I incremental support that was not accepted by them, as well unaccepted 2013 support, and have proposed a variety of ways for them to access it:

- Price cap LECs that filed waiver petitions should be able to access their unused 2012 support "under whatever new paradigm the Commission may adopt in this proceeding."[25]
- 2012 support allocated to a price cap LECs that did not accept the support and did not file a waiver petition should be added to the general pool of support for 2013.[26]
- 2013 support not accepted by a price cap LECs should be reallocated for access by other price cap LECs.[27]

23 *Id.*

24 *See* ACA Comments at 19-21.

25 Price Cap LEC Comments at 27.

26 *See id*. at 28.

In addition to the rationale set forth in its initial comments, ACA opposes the price cap LECs' proposals for the following reasons:

1. Just because the Commission alters its rules to award support in 2013 does not necessarily mean it would grant the price cap LEC's request for a waiver to access 2012 support. Each waiver was premised on specific arguments and should be judged accordingly. The rationale for changing rules prospectively may be completely different, having no direct relationship to the grounds for the waiver request.

2. Permitting any access to "leftover" 2012 support may lead to gaming by a price cap LECs that accepted support and then returns the funding so it may benefit by more lenient rules for awarding 2013 support.

3. Providing a price cap LEC with an additional allocation of support when another price cap LEC rejects 2013 support would harm consumers in unserved locations of the LEC rejecting support.[28]

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27 *See id.*

28 *See* NCTA Comments at 6-7 ("The proposal…to redirect money from areas where the incumbent LEC does not accept it and give it to other incumbent LECs is particularly egregious and should be a non-starter. Universal service support is meant to benefit *consumers*, not incumbent LECs. If consumers in a certain area lack basic broadband, the Commission should design a support distribution mechanism that has a better chance of providing those consumers with service.").

Respectfully submitted,

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