

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
FairPoint Communications, Inc.)	
Petition for Waiver of Section 54.313(c))	
of the Commission's Rules)	

**OPPOSITION OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (NCTA) opposes FairPoint's request for a waiver of the requirement to spend a portion of its frozen legacy support on broadband facilities in areas not served by competitors.¹ As explained in this Opposition, the frozen legacy support rule in Section 54.313(c) of the Commission's rules is necessary to address significant concerns under the legacy universal service high-cost support regime. Because FairPoint has failed to demonstrate that the public interest would be served by waiving that requirement, the Petition should be denied.

I. THE FROZEN SUPPORT RULE IS NECESSARY TO ADVANCE THE COMMISSION'S BROADBAND POLICIES

The *CAF Order* represented a fundamental change in the Commission's approach to supporting the provision of service in high-cost rural areas. For areas served by price cap carriers, the Commission established a long-term plan of distributing all high-cost support through Connect America Fund (CAF) Phase II, which eventually will make support available on

¹ Petition of FairPoint Communications, Inc. for Waiver to Exclude IAS, ICLS, and LSS from the Requirement to Repurpose Frozen High-Cost Support, WC Docket No. 10-90 (filed Feb. 8, 2013) (Petition); *see also* Public Notice, *Wireline Competition Bureau Seeks Comment on the FairPoint Communications, Inc. Petition for Waiver of Certain High-Cost Universal Service Rules*, WC Docket No. 10-90, DA 13-213 (rel. Feb. 14, 2013).

a competitively neutral basis using market-based mechanisms.² In the interim, the Commission will provide price cap carriers with frozen legacy support (at 2011 levels) and up to an additional \$300 million per year in Phase I CAF support.³ In making these changes, the Commission hoped to accomplish a variety of important objectives, including: (1) directing funding to support broadband, rather than just voice service;⁴ (2) directing support to areas not already served by companies that were willing to deploy facilities without a subsidy;⁵ and (3) increasing the accountability of support recipients and the program generally.⁶

The frozen support rule from which FairPoint is seeking relief serves all three of these important policies. In contrast with the legacy regime for price cap carriers, where funding was not conditioned on investing in broadband facilities, the frozen support rule promotes broadband by explicitly requiring that high-cost support recipients spend a portion of their frozen support on “building and operating broadband-capable networks.”⁷ The frozen support rule also more efficiently directs funding than did the legacy regime by explicitly requiring that supported broadband-capable networks be located in “areas unserved by an unsubsidized competitor.”⁸ And because these requirements are explicit, it should be much easier for the Commission to measure the results achieved by this funding than it was under the legacy regime for price cap carriers, which had no mechanism in place to assess whether support was achieving any particular policy goals.

² *Connect America Fund*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17673-74, ¶¶ 23-25 (2011) (*CAF Order*).

³ *Id.* at 17673, ¶ 22.

⁴ *Id.* at 17672, 73, ¶¶ 17, 20.

⁵ *Id.* at 17672, ¶ 16.

⁶ *Id.* at 17675-76, ¶ 31.

⁷ *Id.* at 17722, ¶ 149.

⁸ *Id.*

In sum, the frozen support rule is a perfect example of the many public interest benefits the Commission intended to achieve through the reforms adopted in the *CAF Order*. As described in the next section, FairPoint has not come close to making the case that a waiver of this important rule is warranted and therefore its Petition should be denied.

II. FAIRPOINT HAS FAILED TO DEMONSTRATE THAT THE PUBLIC INTEREST WOULD BE SERVED BY ITS REQUESTED WAIVER

Given the importance of the *CAF Order* reforms, the Commission has stated that it will waive these rules “only in those circumstances in which the petitioner can demonstrate that consumers served by such carriers face a significant risk of losing access to a broadband-capable network that provides both voice as well as broadband today, at reasonably comparable rates, in areas where there are no alternative providers of voice or broadband.”⁹ The Commission explained that this test (and its expectation that petitioners will submit an “accurate picture of the financial operations of the waiver applicant”) does not replace the traditional waiver standard invoked by FairPoint in its Petition,¹⁰ but is intended “to provide guidance in advance to potential applicants of the circumstances that would be persuasive and compelling grounds for grant of a waiver.”¹¹ The Petition, however, does not even mention the waiver process adopted by the Commission in the *CAF Order* and modified in the *Fifth Order on Reconsideration* or make any attempt to demonstrate that it meets the standards set forth in those orders.

In deciding whether to grant the Petition, the Commission must start with the fact that granting the requested waiver unquestionably would reduce the level of broadband investment in areas that do not have broadband today. The frozen support rule explicitly requires a certain type

⁹ *Connect America Fund*, WC Docket No. 10-90 *et al.*, Fifth Order on Reconsideration, 27 FCC Rcd 14549, 14557, ¶ 21 (2013) (*Fifth Order on Reconsideration*).

¹⁰ Petition at 7, citing *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. 1969).

¹¹ *Fifth Order on Reconsideration*, 27 FCC Rcd at 14556-57, ¶ 19.

of investment (i.e., broadband) in a certain type of geographic area (i.e., areas not served by an unsubsidized competitor). Granting a waiver of the rule necessarily means that millions of dollars in legacy support would be spent by FairPoint on other investments (i.e., not broadband) and/or in other areas (i.e., areas that already are served by unsubsidized competitors). Such an approach is fundamentally inconsistent with the goals that the Commission identified in the *CAF Order*.

FairPoint argues that a waiver is needed because it is being made to spend this frozen support twice – once on common line costs and a second time on broadband deployment in unserved areas – and that it does not have the ability to recover all of those costs.¹² There are a number of flaws with this line of argument.

First, FairPoint’s argument that it is required by the legacy rules to spend money on common line costs is inaccurate. FairPoint is a price cap carrier, and as such, the Commission’s legacy rules do not rely on a review of the costs the company has incurred. Simply put, there is no obligation that it spend the money it receives on common line facilities.¹³ Indeed, this lack of any affirmative obligation to spend high-cost support in furtherance of Commission policies (and the corresponding lack of accountability) was one of the major shortcomings of the legacy regime that the frozen support rule begins to address.

Second, while the frozen support rule does require FairPoint to spend money on broadband, the obligation is limited to the money received for that purpose, i.e., there is no obligation for the company to spend shareholders’ money on broadband in areas with no

¹² Petition at 13.

¹³ It appears that FairPoint’s real concern is that it might not be able to “provide investors with a return on funds already committed.” *Id.* at 17. But the Petition includes no evidence regarding the returns that FairPoint’s investors are earning and the Commission has no obligation to guarantee the adequacy of those returns in any event because FairPoint is a price cap carrier.

unsubsidized competitors. In contrast with CAF money, which is conditioned on achieving particular results that may depend on the investment of some private capital,¹⁴ the obligation imposed on FairPoint here is simply to spend \$13 million of the \$39 million it receives from the government in a particular way.¹⁵

Given the limited conditions attached to the receipt of frozen legacy support, there is no merit to FairPoint's suggestion that it will be forced to incur costs that it has no ability to recover.¹⁶ The Petition focuses almost exclusively on FairPoint's ability to recover these costs through Subscriber Line Charges and largely ignores the question of whether it would be able to recover the costs through its retail rates.¹⁷ But those retail rates are entirely unregulated by the Commission, which explicitly stated that carriers should "look for ways to reduce costs and increase revenues" before seeking a waiver of the new high-cost support rules.¹⁸ Consequently, even if the frozen support rule required the company to invest shareholders' money in broadband-capable facilities, which it does not, there is no basis on which the Commission could accept FairPoint's assertion that it has no ability to recover from its customers any costs that exceed the amount of subsidy it receives from the high-cost program.

¹⁴ For example, companies that accepted the first round of CAF Phase I funding must deploy service to a specified number of unserved locations, even if the actual cost of deployment exceeds the amount of support.

¹⁵ Petition at 3, 5.

¹⁶ *Id.* at 10-12.

¹⁷ FairPoint does suggest that it would be precluded from increasing rates "by the constraints of the market, where end-users do have choices." Petition at 13. This admission only serves to reinforce the importance of enforcing the frozen support rule as adopted, which begins to phase out the practice of subsidizing incumbent LECs in areas where competitors are willing and able to serve without a subsidy.

¹⁸ *Fifth Order on Reconsideration*, 27 FCC Rcd at 14557, ¶ 21.

CONCLUSION

The Commission's decision to require price cap LECs to devote a portion of their frozen legacy support to deployment of broadband in areas not served by competitors was a sound policy that achieves a number of important objectives. Because FairPoint has neither met the requirements for obtaining a waiver of the new high-cost support rules, nor identified any way in which the public would be served by waiving this requirement, the Commission should deny the petition.

Respectfully submitted,

/s/ Steven F. Morris

Steven F. Morris
Jennifer K. McKee
National Cable & Telecommunications
Association
25 Massachusetts Avenue, NW – Suite 100
Washington, DC 20001-1431

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