

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

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	DA 13-284

**REPLY COMMENTS OF
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The Pennsylvania Public Utility Commission (Pa. PUC) files these Reply Comments on Comments filed on March 28, 2013 (March Comments). The March Comments address the Federal Communications Commission (FCC or Commission) Notice of February 26, 2013, seeking input on the service obligations for voice and broadband price cap incumbent local exchange carriers (ILECs) that will be qualified recipients of Connect America Fund Phase II (CAF II) funding, and the determination criteria for unsubsidized competitors.

The Pa. PUC appreciates an opportunity to file Reply Comments. As an initial matter, these Pa. PUC Reply Comments should not be construed as binding on the Pa. PUC in any matter before the Pa. PUC. Moreover, these Pa. PUC Reply Comments could change in response to later events, including Ex Parte filings or the review of other filed Reply Comments and legal or regulatory developments at the state or federal level. Finally, the Pa. PUC's participation in this proceeding is without prejudice to the ongoing appellate litigation that is currently pending between the Pa. PUC, other parties, and the FCC before the U.S. Court of Appeals for the 10th Circuit at Docket Nos. 10-1099 *et seq.*

The FCC Notice raised detailed concerns on two issues. The FCC wants to know what an alternative provider needs to demonstrate that it is an unsubsidized competitor in

an eligible CAF II area sufficient for the price cap ILEC to lose CAF II support. The FCC also wants to know what price cap ILECs potentially eligible for CAF II funding must demonstrate to show compliance with the FCC's Price, Latency, Usage, and Speed (PLUS) rules to receive FCC CAF II support.

Summary of the Pa. PUC Reply Comments

As explained below, the FCC must require a 100% overlay and willingness to serve all consumers as the minimum that must be shown before an unsubsidized competitor's presence warrants any ILEC's loss of any federal support, including CAF II. The states must have express standing to participate in proceedings making those determinations, including challenges.

The adoption of federal technical standards regarding prices, usage levels, latency, and download and upload speeds for retail broadband access services and network facilities for the determination of CAF II eligibility and support issues should be done in close coordination with the states and without preempting state law.

The FCC has already acknowledged that the states will participate and play an inherent role in the oversight and enforcement of the Commission's reformed federal universal service fund (USF) mechanism in its November 18, 2011 *USF/ICC Transformation Order*.¹ The adoption and prescription of such standards can have wider implications for the provision of retail broadband and voice access services by price cap carriers or any carrier regulated by both the FCC and the states, where such implications

¹ *In re Connect America Fund, et al.*, (FCC, Rel. Nov. 18, 2011), WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, *slip op.* FCC 11-161, 26 FCC Rcd 17663 (2011), and subsequent Reconsideration and Clarification rulings (collectively *USF/ICC Transformation Order*), *appeals pending*.

may be beyond the contemplated scope of the relevant Notice and the Commission's statutory authority.²

Summary of the FCC Notice.

The FCC Notice builds upon the FCC's earlier decision to give a price cap ILEC an opportunity to accept, for each state it serves, CAF II support based on a cost model developed by the FCC. The support would be provided for a period of five years in exchange for offering voice and retail broadband access services at FCC-specified standards. A CAF II recipient must provide broadband service at predetermined speeds to 85% of its supported area. A CAF II recipient must provide the same service to all supported locations by the end of the 5th year. Support would be based on a new FCC cost model.

Price must be reasonably comparable in urban and rural areas. The FCC Notice asks how that should be determined. The FCC wants input on whether rate comparability for retail broadband access service offerings should be established as a presumptive standard through the use of nationwide or regional pricing.³

The FCC notes that large terrestrial providers of retail broadband access services of speeds at the Commission specified standard of 4 Mbps upstream / 1 Mbps downstream (4/1 Mbps) have offerings that are in the \$40-\$49.95 per month range. The

² The FCC's broad classification of retail broadband access services *and* network facilities as "information services" still leaves the FCC's express authority to regulate such services and financially support them through the federal USF mechanism in doubt. The adoption of technical standards for CAF II purposes may be perceived as an indirect form of regulation of such services which may collide with applicable and independent state law. Furthermore, the Pa. PUC notes that the FCC has assiduously refrained from classifying retail Voice over the Internet Protocol (VoIP) services — which depend on retail broadband access services and networks — as "information services."

³ Notice, ¶¶ 14-15, at 4.

FCC inquires whether “a reasonable comparability benchmark” should be set at the higher level of \$60 per month.⁴ The FCC advances the same inquiry with respect to a “reasonable comparability benchmark for voice service” at or below \$37.⁵

Latency must be sufficient to provide for real time applications such as terrestrial “round trip” VoIP. The FCC’s *USF/ICC Transformation Order* initially set a latency standard at 100 milliseconds (ms) to avoid quality of service issues for voice communications. Subsequent research, however, shows that 60 ms may be viable for voice, but less than 160 ms is likely necessary for basic Internet “cloud applications, such as VoIP, web conferencing, and streaming of basic video.”⁶ The FCC Notice asks for input on how to measure compliance with any ms numerical standard, particularly in determining what period constitutes “peak usage” and the frequency and time that such standard testing should take place.

Minimum usage allowance. The FCC seeks additional information on the adoption of a minimum usage allowance for retail broadband access services “for purposes of finalizing the locations that will receive support to be offered to” the price cap ILECs during CAF II.⁷ The FCC also inquires whether such minimum data usage allowances should be set on the basis of specific activities, e.g., online college coursework, secondary schooling, household critical uses including but not limited to online medical consultations, etc. The FCC calculated minimum usage levels range from 20 gigabytes (GB) to 100 GB per month with a suggested adoption of an upper bound limit of 100 GB per month. The FCC is also inquiring whether a lower 60 GB per month

⁴ Notice, ¶ 18, at 5.

⁵ Notice, ¶ 17, at 5.

⁶ Notice, n. 42, at 8, referencing Cisco’s Cloud Readiness Tool.

⁷ Notice, ¶ 20, at 5.

limit be adopted but subject to increase over time because of rising end-user consumer data consumption.⁸

Speed would be based on the 2012 State Broadband Initiative (SBI) data, although comment is sought on using the National Broadband Map data regarding the availability of retail broadband access services at the 6 /1.5 Mbps standard in order to ascertain the eligibility of CAF II supported locations and the presence of unsubsidized competitors.⁹

Discussion

These Pa. PUC Reply Comments build upon prior filings of the Pa. PUC raising concerns about not preempting independent state law and the FCC's ongoing efforts to reform the federal USF support mechanism and intercarrier compensation in order to promote networks capable of providing both voice and retail broadband access services. The Pa. PUC Reply Comments address unsubsidized competitor determinations, potential interference with independent state laws governing intrastate matters, and replacing state mandates with FCC rules.

1. *Unsubsidized Competitor Determinations.* The Pa. PUC supports those comments reflecting its earlier position that no CAF II support should be withdrawn unless there is an evidentiary record showing 100% overlay by an unsubsidized competitor. A determination that there is a 100% network overlay should be established in a proceeding where the states have automatic standing to participate.

⁸ Notice, ¶¶ 21-24 and Chart 1, at 6-7.

⁹ Notice, ¶ 9, at 3.

This concern is supported by the FCC's *2013 Local Competition Report*.¹⁰ Figures 4 and 6 show that wireline cable modem interconnected VoIP is almost exclusively a residential service. Table 11 demonstrates that of America's 60.525 M business access lines, 5.227 M are non-ILEC VoIP lines and only 526,000 VoIP access lines are ILEC-provided. Essentially, what competitive technological alternatives exist for interconnected VoIP, one of the services that the FCC's reforms hope to address, exist overwhelmingly in the residential market.

Moreover, the *2013 Local Competition Report* demonstrates an overwhelming and ongoing reliance on copper and circuit-switched access lines by businesses. If CAF II support or any other federal support is withdrawn in census blocks based on the presence of unsubsidized cable competitors that offer primarily residential service, that loss of support will be particularly harmful to business customers because they most likely will lack the same cable technological alternative. There will be adverse harm to economic development given the critical role of businesses in rural high-cost areas.

Furthermore, the FCC has not yet conclusively resolved the issue of what happens when an unsubsidized competitor has a very partial and limited presence in a census block of a rural high-cost area (census block "contamination").¹¹ If CAF II support was to be eliminated on this basis for an ILEC with COLR obligations for this particular census block, the ILEC will lack the necessary incentives to even adequately maintain the existing wireline network. This can easily result in quality of service issues to the detriment of existing wireline service end-user consumers and the corresponding need for

¹⁰ Compare California Public Utilities Commission (CPUC) Comments, pp. 5-6 with *FCC Local Competition Report* (January 2013) Figure 6 (cable modem technology accounts for 23.904 M in interconnected VoIP connections of the 26.799 M served by non-ILEC providers) and Figure 4 (of America's 143.525 M wireline retail local telephone service connections, 36.659 M are interconnected VoIP and, of that, only 5.753 M are ILEC and non-ILEC business customers).

¹¹ The Pa. PUC understanding is that although under certain initial FCC determinations such a census block would be declared as ineligible for CAF support, the FCC has invited further comment and has not yet conclusively ruled on this issue.

increased regulatory vigilance and enforcement by the responsible state public utility commission.

The Pa. PUC believes that the FCC can only withdraw CAF II support where there is 100% network overlay by an unsubsidized competitor and its ability and express willingness to serve all customers. Those threshold determinations must be based on evidentiary proceedings and the states must have automatic standing to participate in any such proceeding.

Consequently, the Pa. PUC supports the American Cable Association (ACA) comments on an overall process for challenging determinations that an area is unserved¹² but only if the states have automatic standing to participate in any challenge. The Pa. PUC does not agree with ACA that the FCC should only include those census blocks that are “completely unserved” on the National Broadband Map (NBM).¹³ This means that the FCC must adopt a position that CAF II or federal USF funding will not be withdrawn in any supported area if only a portion of that supported area is served by an unsubsidized competitor.

Any other approach would effectively classify a census block or supported area as served if less than 100% of the census block were served. This runs the risk of repeating the earlier broadband availability assessment practice in which a whole county was considered served if one customer in that county subscribed to a retail broadband access service. While that situation has since been corrected by the FCC’s 6th *Broadband Availability Report* (2009) in which a county is considered served if at least 1% of the residents of a county subscribe to retail broadband access service,¹⁴ the FCC should move

¹² American Cable Association Comments, pp. 1-3.

¹³ American Cable Association Comments, p. 2.

¹⁴ See FCC *Sixth Broadband Availability Report* (April 2010), Para. 21, pp. 14-15 (one customer purchasing service is insufficient as a measure of broadband availability). *Contra* NTCA

cautiously when defining what a fully served area is. Again, this means that the FCC must adopt a position that support is not going to be withdrawn in any supported area if only a portion of that supported area is served by an unsubsidized competitor.

Furthermore, broadband mapping data is often less than perfect in precisely ascertaining the presence and the scope of unsubsidized competitor operations that provide retail broadband access services in a particular census block.¹⁵

The Pa. PUC also believes that the presence of any unsubsidized competitor sufficient to cause the withdrawal of CAF II support from a CAF II recipient must be linked with a demonstration that that the competitor's network is 100% deployed throughout the supported area (census block or tract or whatever measure is used), and that the competitor will provide service to each and every consumer with comparable services at comparable rates.

These additional mandates are required to close the gap between supported ILECs who have Carrier of Last Resort (COLR) obligations and those unsubsidized competitors who do not. Moreover, such an approach addresses the very important role wireline backhaul services has given, as the CTIA comments correctly point out, for the deployment of wireless broadband as a distinct consumer preference.¹⁶

The Pa. PUC also agrees with the comments of the National Telecommunications Cooperative Association (NTCA) *et al.* comments stressing the importance of universal service, a data-driven evidentiary process, and avoiding policies that lock rural areas into

Comments, p. 5, n. 8 citing Time Warner filing of January 9, 2013 (“a census block is “served” if a current customer is, or a former customer received within 7-10 days earlier, service.”).

¹⁵ See also NTCA Comments at 3 and n. 5.

¹⁶ CTIA Comments, pp. 1 and 10-12.

service levels less robust than those evolving in urban areas.¹⁷ The state and federal requirements applicable to a CAF II supported provider that is subject to COLR obligations inclusive of universal service must be required as preconditions equally applicable to an unsubsidized competitor before that competitor's presence warrants withdrawing CAF II support.

Without these conditions, an unsubsidized competitor's presence will result in carriers losing CAF II support without regard to COLR obligations. That will create disparate rates and varying service levels across the nation or within a state. Absent the complete negation of COLR and universal service, the disparities that will arise will be the byproduct of artificial economic advantages possessed by an unsubsidized competitor with lesser obligations compared to a supported provider with COLR mandates.

Negative disparities are markedly different from the positive diversity arising from competition. The Pa. PUC recognizes that the former is to be avoided and that the latter represents the reconciliation of COLR obligations inclusive of universal service with competition. Since the Pa. PUC must also reconcile universal service goals and COLR obligations with competition under independent state law, the Pa. PUC cannot support a federal result that overturns the statutory goals of the Pennsylvania General Assembly.

Consequently, the Pa. PUC believes that an unsubsidized competitor seeking to have CAF II or any other federal support withdrawn must demonstrate that it has a network capable of serving, and that they are willing to serve all customers in, an area where CAF II support is proposed to be withdrawn. The unsubsidized competitor must be required to comply with applicable state and federal policy mandates similar to those imposed on a CAF supported ILEC recipient with a COLR obligation. Otherwise, an unsubsidized competitor can avoid the higher operational costs associated with public

¹⁷ NTCA Comments, p. 1-2, 5, and 8-9.

policy mandates imposed under independent state law even if they relate to 911/E911 access, telecommunications relay service (TRS), universal service, intercarrier compensation, or protected services provided under tariff.¹⁸

2. *Interference with State Laws Governing Intrastate Matters.* The Pa. PUC supports those comments reflecting its earlier concern that the FCC's efforts, however commendable, to promote VoIP and broadband networks or services cannot be imposed on intrastate networks or services. Federal mandates cannot undermine Pennsylvania's independent determination, through its VoIP Freedom Act (intrastate regulation of retail VoIP and IP-based services), and Chapter 30 legislation for statewide broadband deployment by participating rural and non-rural ILECs.

The FCC Notice fails to ask how the states can continue to abide by state law related to intrastate VoIP or networks and services, including *inter alia* 911, reliability, interconnection, universal service, and Telecommunications Relay Service (TRS), if federal mandates replace them. The Pa. PUC recognizes that the proposed technical standards may be viewed as replacing, and hence preempting, independent state laws, particularly where state laws prescribe the regulation of "terms and conditions" of retail VoIP or IP-based services. This may directly or indirectly include matters like speed, usage, pricing, and latency of retail broadband and voice access services.

The Pa. PUC supports those comments reiterating its view that the FCC efforts should be limited to interstate telecommunications and broadband networks or services and not intrastate equivalents. The FCC cannot extend its primary jurisdiction to all

¹⁸ Compare FCC Notice with 73 Pa .C.S. § 2251.4 (prohibition on the regulation of rates, terms, or conditions of service for retail VoIP or IP-enabled services) and § 2251.6 (prohibition inapplicable to 911/E911 access, TRS, universal service fund fees, switched network access rates or other intercarrier compensation, or rates, terms, and conditions for protected service provided under tariffs subject to the approval of the Pa. PUC).

intrastate communications on the theory that it has an ancillary effect on matters within the FCC's primary jurisdiction. *Iowa Utilities v. FCC*, 525 U.S. 366, 381 (1999).

Any FCC action should be confined within its limited interstate authority and universal service. While any FCC standard might serve as a benchmark for states desiring to pursue similar or identical requirements, the FCC standards must not become a mandate which renders state jurisdiction invalid merely because the FCC concludes it may have an ancillary effect on its jurisdiction – in this case determining what constitutes an unsubsidized competitor.

Any other approach would harm that dual-sovereignty recognized in Section 152(b), 47 U.S.C. § 152(b) and federal precedent. *See Louisiana P.S.C. v. FCC*, 476 U.S. 355 (1986); *AT&T v. FCC*, 525 U.S. 366 (1999).

3. *Replacing State Mandates with FCC Rules .*

The Pa. PUC suggests that the FCC should explicitly state that its adoption of the contemplated technical standards regarding the evaluation of price cap ILEC eligibility for CAF II support does not connote the adoption of guidelines of how the relevant retail broadband and voice access services should be regulated. Such an explicit acknowledgment will further avoid potential legal conflicts with applicable independent state laws.

Price for retail broadband and voice services provided by a CAF II recipient must be set on a statewide basis and not some undefined “regional” or a “national” standard. States, not regions or the nation alone, are the legal institutions reflected in constitutional law. States with carriers who serve disparate study areas or service territories that are within a state but separated by geographic areas are better served by a statewide

approach, especially when a regional or national approach may mean the adoption of relevant standards at a higher price level.

A statewide approach better reflects the consumers' ability to purchase services based on each state's unique economic and income distribution realities. Although the Pa. PUC does not have any fundamental objection to the preliminary adoption of a standard metric of \$60 per month for retail broadband access services, the Pa. PUC questions whether the FCC should adopt a corresponding standard for voice services at the \$37 per month level which is at variance from the \$30 per month figure for basic residential voice service that has already been used in the *USF/ICC Transformation Order*.¹⁹ The Pa. PUC also suggests that these pricing level standards be subject to periodic re-examination and adjustment.²⁰

Latency for an eligible CAF II recipient should be set at the standard needed to prevent quality of service issues and promote basic and advanced streaming video, especially for educational and business purposes. This is essential for economic development, particularly for business customers and interested residential consumers.

The *Minimum Usage Allowance* for an eligible CAF II recipient should be set at least at 100 GB per month, given the professed goal of the *USF/ICC Transformation Order* regarding the provision of voice and retail broadband access services in order to promote education, business, and consumer services in rural areas. If 100 GB is the minimum needed for online education as the FCC Notice claims, it follows that 100 GB must be the minimum usage given the benefits to economic development coming from online education. That will be especially critical to distant high cost or rural areas where

¹⁹ *USF/ICC Transformation Order*, ¶¶ 852 & 913-916, *slip op.* at 296 & 328-331, 26 FCC Rcd 17959 & 17991-17994.

²⁰ See generally Comments by State Members of the Federal State Joint Board on Universal Service, WC Docket No. 10-90 *et al.*, NPRM, May 2, 2011, at 52-53.

physical facilities for that purpose are far apart and the citizens' cost to get there increases as energy costs increase over time.

Speed For Eligible CAF II Recipients. Although the FCC can proceed with the adoption of its *USF/ICC Transformation Order* standard of 4 / 1 Mbps, the Pa. PUC notes the comments of the California Public Utilities Commission (CPUC) that suggest the adoption of a higher 6 / 1.5 Mbps standard that is associated with video streaming because California recently appears to have adopted that as a state standard. If the Commission were to adopt a higher speed standard for an eligible CAF II recipient, it may also have to make an upward adjustment to the adopted 100 GB per month minimum usage allowance for retail broadband access services. The Commission should also provide CAF support for carriers needing to upgrade their existing networks to comply with any new FCC technical standards.

Conclusion

The Pa. PUC suggests that the FCC should explicitly state that its adoption of the contemplated technical standards regarding the evaluation of price cap ILEC eligibility for CAF II support or carrier eligibility for any federal support does not connote the adoption of guidelines of how the relevant retail broadband and voice access services should be regulated. Carriers should have access to federal support to finance any upgrade of their networks needed to meet new federal technical standards. No carrier should lose support unless there is a proceeding in which states have automatic standing to participate, and that the unsubsidized competitor is willing and able to serve all customers in geographic areas where support is being withdrawn from regulated ILECs with COLR obligations. Such explicit conditions on the adopted technical standards will serve to avoid potential legal conflicts with applicable independent state laws.

The Pa. PUC thanks the FCC for an opportunity to file Reply Comments.

Respectfully Submitted On Behalf Of,

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