

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

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
Alaska Communications Systems)	
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 the request of Alaska Communications System (ACS) 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 and prior NCTA filings,² 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 ACS has failed to demonstrate that the public interest would be served by waiving that requirement, the Petition should be denied.

¹ Petition of Alaska Communications Systems Group, Inc. for Flexibility in the Use of Frozen High-Cost Support, WC Docket No. 10-90 (filed Apr. 9, 2013) (Petition); *see also* Public Notice, *Wireline Competition Bureau Seeks Comment on the Alaska Communication System Petition for Waiver of Certain High-Cost Universal Service Rules*, WC Docket No. 10-90, DA 13-700 (rel. Apr. 11, 2013).

² In all material respects, the Petition mirrors a similar petition filed in February 2013 by FairPoint Communications. NCTA opposed the FairPoint petition and our arguments in the FairPoint matter apply equally to ACS' Petition. *See* Opposition of the National Cable & Telecommunications Association, WC Docket No. 10-90 (filed Mar. 18, 2013); *see also* Letter from Steven F. Morris, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 (filed April 10, 2013); Letter from Steven F. Morris, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 (filed Mar. 19, 2013).

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 a competitively neutral basis using market-based mechanisms.³ 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.⁴ 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;⁵ (2) directing support to areas not already served by companies that were willing to deploy facilities without a subsidy;⁶ and (3) increasing the accountability of support recipients and the program generally.⁷

The frozen support rule from which ACS 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."⁸ The frozen support rule also more efficiently directs funding than did the legacy regime by explicitly requiring that supported

³ *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*).

⁴ *Id.* at 17673, ¶ 22.

⁵ *Id.* at 17672, 73, ¶¶ 17, 20.

⁶ *Id.* at 17672, ¶ 16.

⁷ *Id.* at 17675-76, ¶ 31.

⁸ *Id.* at 17722, ¶ 149.

broadband-capable networks be located in “areas unserved by an unsubsidized competitor.”⁹ 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.

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, ACS 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. ACS 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.”¹⁰ 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 ACS in its Petition,¹¹ 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

⁹ *Id.*

¹⁰ *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*).

¹¹ Petition at 6, 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).

waiver.”¹² Although the waiver standard identified in the *CAF Order* and modified in the *Fifth Order on Reconsideration* appears to be focused on carriers seeking to avoid reductions in support,¹³ presumably the standard in the instant case – where the full amount of support will continue to be provided – is at least as rigorous. Yet the Petition does not even mention this waiver process or make any attempt to demonstrate that it meets the standards set forth in those orders.

Regardless of the specific test the Commission chooses to apply, its review of the Petition should start with the fact that granting the requested waiver unquestionably would lead to less broadband investment in areas that do not have broadband today than if the Commission were to enforce the rule as adopted. The frozen support rule explicitly requires a certain type 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 allocated by ACS to other investments (i.e., not broadband) or other areas (i.e., areas that already are served by unsubsidized competitors). Such an approach is fundamentally inconsistent with the common sense goals that the Commission identified in the *CAF Order*. Indeed, at the same time that ACS and other price cap carriers are seeking relief from the obligation to spend frozen support in areas not served by competitors, their trade association is advocating that the Commission incorporate the exact same obligation into the Rural Health Care program to prevent their networks from being overbuilt by subsidy recipients.¹⁴

¹² *Fifth Order on Reconsideration*, 27 FCC Rcd at 14556-57, ¶ 19.

¹³ *CAF Order*, 26 FCC Rcd at 17839, ¶ 539.

¹⁴ See Petition for Reconsideration and Clarification of the United States Telecom Association, WC Docket No. 02-60 (filed Apr. 1, 2013) at 4 (“There is no defensible rationale for today’s Universal Service Fund to support overbuilders where private capital is already providing broadband connectivity.”).

ACS 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.¹⁵ There are a number of flaws with this line of argument.

First, ACS’s argument that it is required by the legacy rules to spend money on common line costs is inaccurate. ACS 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.¹⁶ Simply put, there is no obligation that it spend the money it receives on common line facilities and no evidence in the Petition that the \$13 million of legacy support it will receive in 2013 that is not affected by the frozen support rule is inadequate to satisfy any federal obligation in areas that already are served by its competitors.¹⁷

Second, while the frozen support rule does require ACS 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 unsubsidized competitors. In contrast with CAF money, which is conditioned on achieving particular results that may depend on the investment of some private capital,¹⁸ the obligation imposed on ACS here is simply to spend roughly \$6 million of the \$19 million it receives from American

¹⁵ Petition at 5.

¹⁶ As USTelecom explained in a recent ex parte letter, no price cap carriers “remain subject to cost-based regulation, and many have not been cost regulated in more than 20 years.” Letter from Walter McCormick, President and CEO, USTelecom, to Chairman Julius Genachowski, et al., WC Docket No. 12-61 at 1-2 (filed May 3, 2013).

¹⁷ Moreover, even if obligations imposed by the state were somehow relevant to the Commission’s analysis, ACS has not demonstrated why \$13 million is insufficient to meet such obligations in the competitive portions of its territory.

¹⁸ 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.

consumers through the universal service high-cost support program in a manner that directly advances the Commission's policy objectives.¹⁹

Given the limited conditions attached to the receipt of frozen legacy support, there is no merit to ACS's suggestion that it will be forced to incur costs that it has no ability to recover.²⁰ The Petition focuses almost exclusively on ACS's ability to recover costs through Subscriber Line Charges and largely ignores the question of whether it would be able to recover the costs through its retail rates. Even if ACS had demonstrated that it had no ability to seek rate increases with respect to local exchange service regulated by the state commission (which it did not), retail rates for long distance service and broadband (as well as any bundled offering including those services) are entirely unregulated by the Commission. Consequently, there is no basis on which the Commission could accept ACS's assertion that it is unable to recover from its customers any costs that exceed the amount of subsidy it receives from the high-cost program, nor is there any basis on which to conclude that consumers in competitive areas will not have access to reasonably priced services.

Finally, the Commission should reject ACS' request for flexibility to move support among its study areas as it sees fit. According to ACS, this flexibility is necessary because there is so much competition in some of its study areas that it "may be unable to spend one-third of its allotted frozen high-cost support on broadband in such unserved locations."²¹ If ACS is receiving millions of dollars in legacy support for a study area that is mostly, or wholly, served by an unsubsidized competitor, the appropriate response from the Commission is to reduce, or eliminate, the support for that location because consumers in that area will have sufficient voice

¹⁹ Petition at 4-5.

²⁰ *Id.* at 7-10.

²¹ *Id.* at 12; *see also id.* at 14 ("ACS is a small company facing vigorous competition in an extremely challenging service area.").

and broadband service without the subsidy. It is then up to the Commission, not ACS, to determine whether that money should be used to reduce the contribution factor or distributed in some other way that advances the Commission's objectives.

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 ACS 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

May 13, 2013