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

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Promoting Rural Broadband in Rate-of-Return Areas	))	

COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association (NCTA) opposes the proposal to provide rural local exchange carriers (LECs) with legacy high-cost support for "broadband only" lines.[1] Broadband support should be provided pursuant to the Connect America Fund (CAF), not under legacy rate of return regulation. As with the CAF program established in price cap areas, support in rate of return areas should be targeted only to those areas where no unsubsidized provider is offering broadband service and it should be made available on a competitively and technologically neutral basis.

INTRODUCTION

The *Notice* issued by the Wireline Competition Bureau (Bureau) seeks comment on two proposals for promoting broadband in areas served by rate of return LECs. First, the Bureau solicits comment on a proposal from NTCA for providing high-cost support to rate of return LECs for lines that serve customers that purchase broadband service, but not voice service.[2] Second, it asks questions about how it might encourage rate of return LECs to voluntarily

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1 Public Notice, *Wireline Competition Bureau Seeks Comment on Options to Provide Rural Broadband in Rate of Return Areas*, WC Docket No. 10-90, DA 13-1112 (rel. May 16, 2013) (*Notice*).

2 *Id*. at 2-4.

operate under Phase II of the CAF rather than continuing to receive high-cost support under the legacy rate of return regime.[3]

As NCTA explains in these comments, the *Notice* misses the mark because it focuses on different ways to provide funding to rate of return LECs, rather than focusing on how best to deploy broadband to people who live in the areas served by those companies. As the Commission already has recognized in the context of the CAF program, the better public policy approach is to identify solutions that make support available to any broadband provider that is able to meet the Commission's service standards and target that support only to those areas where service is not available from an unsubsidized provider. Even if the Commission decides to provide rate of return LECs with support for "broadband only" lines outside of the CAF program, such support should be limited to lines that are located in portions of their service areas where no unsubsidized provider is offering service.

I. THERE IS NO BASIS FOR PROVIDING BROADBAND-ONLY SUPPORT UNDER THE LEGACY RATE OF RETURN REGIME

In the *CAF Order*, the Commission made clear that it was continuing to provide support for the provision of telecommunications services, but that companies receiving such support now would be required to provide broadband services as a condition of receiving that support.[4] In price cap areas, the Commission phased out legacy support and adopted the CAF, which supports the construction and operation of broadband and voice-capable facilities, without regard to whether customers purchase those services, but only in areas where no unsubsidized provider

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3 *Id.* at 5-8.

4 *Connect America Fund,* WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17683, ¶ 60 (2011) (*CAF Order*) ("Section 254 grants the Commission clear authority to support telecommunications services and to condition the receipt of universal service support on the deployment of broadband networks.").

offers those services.[5] In contrast, rate of return carriers continue to receive support under the legacy regime, which generally provides support based on the number of voice lines in service, but without regard to whether an unsubsidized provider also serves the area.[6]

Under NTCA's proposal, rate of return LECs would have the best of both worlds, receiving support without regard to the services purchased by the customer or the presence of unsubsidized providers. There are a number of problems with this proposal. First, as noted by the Bureau, such an approach is almost certain to increase the level of support beyond the $2 billion budgeted for areas served by rate of return LECs.[7] Although the Commission has discretion to make adjustments to the high-cost program, it should be extremely reluctant to increase the size of the program, particularly if, as is the case here, there is no corresponding expansion of broadband deployment.

In addition to the budgetary concerns raised by the proposal to provide rate of return LECs with "broadband only" support, the proposal also is at odds with the Commission's decision to continue treating voice as the supported service for purposes of the universal service high-cost support program.[8] Indeed, the same day that the Bureau released the *Notice*, it also released an order establishing a challenge process for Phase II of the CAF in areas served by price cap LECs.[9] In that order, the Bureau stated that a company must provide both broadband Internet access and traditional voice service to be treated as an "unsubsidized competitor" for

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5 *Id.* at 17726, ¶¶ 160-62 (describing network deployment obligations); *id*. at 17729, ¶ 170 (excluding areas served by unsubsidized providers).

6 The Commission did provide an exception by eliminating support in areas where competitive service is available to 100 percent of the homes in the study area, but it has yet to take any action to implement that provision. *Id.* at 17767-68, ¶ 283.

7 *Notice* at 4 n.18 ("[A]ny change that served to increase [rate of return LECs] ICLS draw would likely result in them receiving in excess of $2 billion annually.").

8 *CAF Order* at 17683, ¶ 60.

9 *Connect America Fund*, WC Docket No. 10-90, Report and Order, DA 13-1113 (rel. May 16, 2013).

purposes of determining whether support is available, even if the broadband service far exceeds the baseline standards established by the Commission.[10] Under this approach, for example, even if a new entrant (e.g., Google Fiber) built a gigabit broadband network in a rural area, and even if voice service was available from multiple wireless and over-the-top providers, the incumbent LEC in that area would continue to be eligible for support unless the broadband entrant offered traditional voice service.

As illustrated by this hypothetical example, the requirement that a support recipient or an unsubsidized competitor provide both voice service and broadband Internet access can lead to inefficient results. But if the Commission is going to change this policy and start to recognize that a significant minority of customers are not interested in purchasing wireline voice service (from the incumbent or competitors),[11] it should not make that change solely for the benefit of rate of return LECs as requested by NTCA.[12] Rather, the Commission also should consider broadband and voice separately for purposes of determining whether an area is served by an

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[10] *Id*. at ¶ 9 ("We conclude that the ability of the consumer to obtain voice service from a third party is not sufficient for that broadband provider to be deemed an unsubsidized competitor . . . .").

[11] *See, e.g.*, Blumberg and Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January – June 2012*, Center for Disease Control, National Center for Health Statistics (rel. Dec. 20, 2012), at http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201212.PDF (estimating that over 35 percent of American homes have only wireless phones).

[12] At the same time that NTCA has advocated "broadband only" support for its members, it also has advocated a test for entities to be treated as unsubsidized competitors that not only would require the provision of both broadband and voice service, but also would require that they comply with a number of other obligations that the Commission does not currently impose on companies receiving support. *See* Comments of NTCA, et al, WC Docket No. 10-90 (filed March 28, 2013) at 2 n.3. As NCTA has explained previously, proposals like this are plainly intended to perpetuate support levels in competitive areas even when it is clear they are wasteful and inefficient. *See* Reply Comments of the National Cable & Telecommunications Association, WC Docket No. 10-90 (filed Feb. 17, 2012) at 11 ("Like so much of the Rural Associations' advocacy, the net result of their proposals is that the Commission would be providing incumbents with substantially more support than is necessary.").

unsubsidized competitor, as requested in the pending reconsideration petition filed by the Wireless Internet Service Providers Association in 2011.[13]

At a minimum, the Commission should limit support for "broadband only" lines to areas where no unsubsidized competitor offers broadband and voice services. As the Commission found in the *CAF Order*, providing support in areas that other providers are willing to serve without a subsidy is wasteful and inefficient.[14] As NCTA has documented previously, some rate of return LECs are receiving tens of millions of dollars annually to serve areas that are almost completely served by competitors.[15] If, notwithstanding the concerns identified above, "broadband only" support is to be provided, that support should be provided only for lines that are located in areas not served by an unsubsidized provider.[16]

II. THE COMMISSION SHOULD CONSIDER MANDATING THAT RATE OF RETURN LECS PARTICIPATE IN CAF

The second portion of the Bureau's *Notice* solicits comment on ways to encourage rate of return LECs to voluntarily participate in CAF rather than continuing to receive support under the legacy rate of return regime.[17] As a general matter, NCTA strongly supports the concept of moving incumbent LECs away from rate of return regulation. In a competitive market, a regime

13 *See* Petition for Partial Reconsideration of the Wireless Internet Service Providers Association, WC Docket No. 10-90 (filed Dec. 29, 2011) at 5 ("[T]o identify areas in need of CAF support, the Commission should look to the market conditions of the area to determine whether it is unserved, not to whether any particular single company in a market offers both unsubsidized voice and broadband services.").

14 *CAF Order* at 17767, ¶ 281 ("Providing universal service support in areas of the country where another voice and broadband provider is offering high-quality service without government assistance is an inefficient use of limited universal service funds.").

15 *See, e.g.,* Opposition of the National Cable & Telecommunications Association to Petitions for Stay, WC Docket Nos. 10-90 and 05-337 (filed June 1, 2012) at 2-3 (demonstrating that EATEL received between $25 and $30 million per year in support to serve an area where 97 percent of locations were able to receive broadband from a cable operator and nearly all locations can receive broadband from a wireless provider).

16 As in the CAF program, the Commission could implement this approach by requiring support recipients to certify that this funding is only being requested for areas that, to the best of the company's knowledge, are unserved by an unsubsidized provider.

17 *Notice* at 5-8.

that provides one competitor with guaranteed recovery of its expenses and a return on its investment unfairly skews the marketplace. It is long past time to move toward a regime that more closely resembles the one the Commission established in price cap territories, which provides support only to those areas where there is no business case for investment and only through the use of a competitive bidding mechanism that should distribute support more efficiently.

While NCTA supports the objective of moving rate of return LECs to a price cap/CAF regulatory regime, attempting to do so on a voluntary basis may have limited success. One significant challenge in this regard is that LECs that operate in competitive markets will be unlikely to voluntarily switch to CAF because CAF only provides support in areas where there is no unsubsidized provider. A LEC that has been receiving millions of dollars in subsidies in an area that is well served by an unsubsidized provider is unlikely to voluntarily give up access to the legacy regime. Rather, as the Commission recognized in the *CAF Order*, it will need to take mandatory steps to reassess the level of support provided to such study areas.[18] Mandating that rate of return LECs operating in competitive study areas participate in CAF would be one way to achieve that objective, while ensuring that sufficient support continues to be provided in areas where no provider can make a business case for broadband deployment.

Rate of return LECs also have strong incentives to stay with the legacy rate of return regime as long as the Commission continues to provide those carriers with a rate of return that exceeds their actual costs. As comprehensively documented in a recent report by the Bureau staff, the current 11.25 percent rate of return is at least three percentage points higher than

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[18] Specifically, the Commission found that support should be eliminated in areas where competitors offer service in 100 percent of the study area and it sought comment on proposals for reducing support in areas where the competitive overlap is significant, but less than 100 percent. *CAF Order* at 17767-68, ¶¶ 281-284. NCTA encourages the Commission to move forward expeditiously on these important issues.

warranted and has been for some time.[19] Establishing a more realistic rate of return for use in the legacy regime would be an important first step in encouraging LECs to transition to price cap regulation and the CAF program.

CONCLUSION

The *Notice* proceeds from the flawed premise that the only way to promote broadband in rural areas is to provide additional funding to rate of return LECs. As explained in these comments, the Commission could achieve better results by making support available to all qualifying broadband providers and by targeting that support only to areas where no unsubsidized provider is offering broadband service. Even if the Commission does provide rate of return LECs with support for "broadband only" lines as requested by NTCA, such funding should be limited to those areas not served by competitive providers.

Respectfully submitted,

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[19] PRESCRIBING THE AUTHORIZED RATE OF RETURN, Wireline Competition Bureau Staff Report, WC Docket No. 10-90 (rel. May 16, 2013).