8300 Greensboro Dr.
Suite 1200
McLean, VA 22102

(703) 584-8678
www.fcclaw.com

LNGS | LUKAS, NACE, GUTIERREZ & SACHS, LLP

June 20, 2013

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation - WC Docket Nos. 10-90, 05-337 and WT Docket No. 10-208

Madam Secretary:

On June 18, 2013, Eric Woody and Chris Reno of Union Wireless; Jonathan Foxman and Julia Tanner of MTPCS, LLC d/b/a Cellular One; Frank DiRico and Andrew Newell of N.E. Colorado Cellular, Inc., d/b/a Viaero Wireless; and Slayton Stewart and Thad Southers of Carolina West Wireless, Inc. (collectively, the "Parties"), along with undersigned counsel, met with Louis Peraertz and Rebekah Goodheart in the Office of Acting Chairwoman Mignon Clyburn, Nicholas Degani in the Office of Commissioner Ajit Pai, Amy Bender and Travis Litman of the Wireline Competition Bureau, and with Margaret Wiener, Martha Stancill, Sue McNeil and Eliot Maenner of the Wireless Telecommunications Bureau to discuss issues related to the design and implementation of Mobility Fund Phase II.

The enclosed slides distributed at the meetings formed the basis of the discussion, which revolved around the Commission's three core principles for Phase II funding: (1) preventing loss of existing service in rural areas; (2) expanding services to new and unserved areas; and (3) upgrading as many rural areas as possible to broadband.

The Parties raised several issues regarding the implementation of Mobility Fund Phase II. In particular, Phase II funding should be targeted to areas that lack 4G service. Given the rapid expansion of 4G in urban areas across the country, establishing 4G as the threshold level of service for Phase II is consistent with the Commission's stated goal to provide rural areas with a level of service comparable to what is available in urban areas.

Devoting long-term government funding for "yesterday's 3G technology" is not an efficient use of scarce Universal Service Fund resources. The Parties pointed out that 3G equipment is becoming harder to obtain for their networks. Moreover, rural customers are demanding 4G speeds in order to take full advantage of modern 4G smartphones, which are widely available and dropping in price. The Parties also explained that next generation 911 services ("NG911") will require 4G networks and funding 4G for Phase II will yield substantial public safety benefits as NG911 becomes widely deployed.

The Commission must permit census blocks that received Phase I funding to be eligible for Phase II funding. Phase I funding has been critical to building infrastructure in eligible rural areas. If the Commission decides to make Phase I areas ineligible, some networks constructed with "one time" funding will face substantial challenges, while others may not be upgraded to 4G. Some carriers that were successful in the Phase I auction may have to withdraw Phase I bids if they are not permitted to compete for Phase II funding in these same areas.

The Parties pointed out that Mosaik Solutions mapping data significantly overstates areas of coverage. Recent drive testing by the Parties revealed service areas displayed by Mosaik as being adequately covered were, in fact, lacking sufficient service. As a result, the Commission needs a robust challenge procedure for areas designated as being unavailable for Phase II funding. Specifically, the Parties proposed that if drive testing demonstrates that an area initially designated as unavailable for Phase II does not have adequate coverage, the Commission's default position should be to make that area available for Phase II funding.

The Parties also proposed that the Commission place the burden of proof on incumbent carriers to demonstrate that an area should be blocked off when drive testing and other data show inadequate coverage. As recipients of Phase I funding, the Parties are subject to stringent and clearly stated coverage requirements in the rules. Any carrier seeking to block out an area from competition should be subjected to the same clear standards.

With respect to the term of support for Mobility Fund Phase II, a ten-year term is important to provide carriers with the necessary predictability and consistency of support needed to deploy and operate robust 4G networks. In addition, banks prefer a ten-year term of support, as evidenced by a recent letter to the Commission from CoBank, submitted in Docket 10-90. A ten year term is more closely aligned with the useful life of equipment. The Parties were not supportive of suggestions by FCC staff that if a five-year term is adopted, auction bidders can simply design their five-year bids with a ten-year term in mind. Such an approach would create bidding distortions and disserve rural consumers as a result.

Based on their experiences with obtaining letters of credit ("LOC") in Phase I, the Parties advocated that the Commission not require LOCs in Phase II. The costs of LOCs in Phase I were substantial. Moreover, LOCs are treated as outstanding credit, reducing capital that should be available to construct new networks. In Phase II, the Commission should set clear milestones and rely on its authority to withhold funding, to issue forfeitures, and to revoke ETC designations in extreme circumstances. These are sufficient tools to ensure that Phase II milestones and network construction requirements are being met.

Finally, the Parties expressed their concern that some unserved rural areas have been particularly difficult to cover because the Parties have encountered tower siting and co-location issues on lands controlled by the federal government. The Parties asked that the Commission initiate an inter-agency dialogue between the FCC and other relevant agencies (*e.g.*, the U.S. Department of Interior's National Park Service and the U.S. Department of Agriculture's U.S.

Forest Service) in order to facilitate tower construction and equipment co-locations on areas controlled by the federal government.

Respectfully submitted,

David A. LaFuria
Marc A. Paul

Counsel to Union Wireless, MTPCS, LLC,
N.E. Colorado Cellular, Inc., and Carolina West Wireless, Inc.

Enclosure

cc: Louis Peraertz
Rebekah Goodheart
Nicholas Degani
Margaret Wiener
Martha Stancill
Sue McNeil
Eliot Maenner
Amy Bender
Travis Litman

Mobility Fund Phase II Rulemaking

FCC Ex Parte Meetings

June 18, 2013

WC Docket No. 10-90 and 05-337
WT Docket No. 10-208

8300 Greensboro Drive
Suite 1200
McLean, VA 22102
www.fcclaw.com
(703) 584-8666

Promoting the FCC's Three Core Goals in Phase II

1. Prevent Loss of Existing Service in Rural Areas

- To prevent carriers from decommissioning facilities, existing ETCs must be able to fund operating expenses going forward.

- Keeping the last two years of phase down in effect for all census blocks not won at Phase II auction enables carriers to transition more smoothly without the "flash cut" that the FCC talked about avoiding in the broadband plan.

- Helps to solve the issue that small carriers have previously noted – that the area won at auction is often much smaller than the total rural area being served by the carrier, a mix of eligible/ineligible areas.

8300 Greensboro Drive
Suite 1200
McLean, VA 22102
www.fcclaw.com
(703) 584-8666

Promoting the FCC's Three Core Goals in Phase II

2. Expand Services to New and Unserved Areas

- Service availability on carrier coverage maps submitted to Mosaik significantly overstates coverage. Many areas have downlink but not uplink capability.
- Mosaik data should be made available to carriers for purposes of the challenge process, and the associated data and maps should be updated to reflect changes resulting from corrections.
- Excluding areas served by VZW, ATT, and Sprint based on propagation model incorrectly presumes high-quality service available in many rural areas without a subsidy.

8300 Greensboro Drive
Suite 1200
McLean, VA 22102
www.fcclaw.com
(703) 584-8666

Promoting the FCC's Three Core Goals in Phase II

2. Expand Services to New and Unserved Areas

- Categorically declare that any area that was funded in Phase I is eligible for Phase II support.

- In disputed areas, place the burden on carriers to demonstrate that an area should be blocked off from Phase II auction - provide clear standards and a high burden of proof.

- For example, carriers should be required to demonstrate "unsubsidized coverage" using the FCC's post-auction drive testing requirements.

8300 Greensboro Drive
Suite 1200
McLean, VA 22102
www.fcclaw.com
(703) 584-8666

Promoting the FCC's Three Core Goals in Phase II

3. Upgrade As Many Rural Areas to Broadband As Possible

- Expanding the map in Phase II is imperative to advancing broadband.
- Eligible areas should be those that do not have 4/1 mobile broadband coverage.
- Lowering standards to 3G is absolutely the wrong direction.

8300 Greensboro Drive
Suite 1200
McLean, VA 22102
www.fcclaw.com
(703) 584-8666

<u>Promoting the FCC's Three Core Goals in Phase II</u>

3. Upgrade As Many Rural Areas to Broadband As Possible

- Why would government fund yesterday's technology – 3G – for five or more years?
- Will it be FCC policy that a rural area gets funding for 3G from 2015-2020, with no other carrier eligible for support to provide 4G?
- Any census block that was funded in Phase I should be made eligible for Phase II to ensure 4G service.

8300 Greensboro Drive
Suite 1200
McLean, VA 22102
www.fcclaw.com
(703) 584-8666

Other Issues for Consideration

1. Funding for Five Years Instead of Ten

- Five year funding period is much less than the useful life of the plant.
- Financing build outs with five year loan terms will be difficult.
- Auction process allows carriers to increase bid amounts, to cover opex beyond five years, at the risk of losing at auction.
  - This is not an optimal approach.
  - Can create distortions.

8300 Greensboro Drive
Suite 1200
McLean, VA 22102
www.fcclaw.com
(703) 584-8666

Other Issues for Consideration

1. Funding for Five Years Instead of Ten

- Rules and bid structures should encourage bids that match the time that exclusive funding will be available.
- Some argue that a five-year funding term would correlate with the rapid evolution of wireless technology.
  - In fact, areas in the most need of Phase II support generally respond to changes in technology slower than urban areas.
  - Rural areas, therefore, would be better served by a 10-year term of support.

8300 Greensboro Drive
Suite 1200
McLean, VA 22102
www.fcclaw.com
(703) 584-8666

Other Issues for Consideration

2. Letter of Credit

- Letter of credit (LoC) is burdensome for small carriers.
- LoCs are difficult for small carriers to obtain, because, for example, they don't have ongoing business relationships with banks that are approved for LoC purposes.
- Ties up limited credit facilities that can no longer be used for investment.

8300 Greensboro Drive
Suite 1200
McLean, VA 22102
www.fcclaw.com
(703) 584-8666

Other Issues for Consideration

2. Letter of Credit

- Constrains investment and economic development in rural areas.

- In a performance default, the threat of loss of ETC status, eligibility to participate in future auctions, and even FCC license, ensures performance.

- Costs of LoC and related opinion letters have been extraordinary in Phase I.

8300 Greensboro Drive
Suite 1200
McLean, VA 22102
www.fcclaw.com
(703) 584-8666

Other Issues for Consideration

3. Demonstration of Coverage

- Road miles are preferable.

  – Using road miles is the best proxy for areas where consumers are likely to use their mobile devices.

  – Easier to drive test.

  – Carriers already have protocols in place to test and measure.

8300 Greensboro Drive
Suite 1200
McLean, VA 22102
www.fcclaw.com
(703) 584-8666

Other Issues for Consideration

3. Demonstration of Coverage

- Using population coverage is not preferable.

  – Determining population coverage within census tracts/blocks is difficult.

  – Developing a testing protocol to measure coverage at residences is difficult.

  – Physically reaching some residences to measure is difficult.

8300 Greensboro Drive
Suite 1200
McLean, VA 22102
www.fcclaw.com
(703) 584-8666

Other Issues for Consideration

4. Inter-Agency Assistance

- Some unserved areas have been difficult to cover due to locations on areas controlled by federal government, such as Forest Service or Park Service.

- Inter-agency dialogue is needed to streamline access will enable carriers to bid with more confidence that an area can be built out within the applicable time frame.

8300 Greensboro Drive
Suite 1200
McLean, VA 22102
www.fcclaw.com
(703) 584-8666

Other Issues for Consideration

5. Public Commitment Rule

- Drop the rule that says if you make a public commitment to build, then an area is ineligible.
  - Business plans change.
  - Executive statements should not form the basis for eligibility.
  - Defining what is a commitment and where it applies exactly can be very difficult to enforce.

8300 Greensboro Drive
Suite 1200
McLean, VA 22102
www.fcclaw.com
(703) 584-8666

Other Issues for Consideration

6. A Cost Model Should Be Used Instead of an Auction

- Reverse auctions have numerous disadvantages.
  - Reduce incentives to enhance service quality.
  - Hamper carriers' access to private investment.
  - Provide incentives for anti-competitive conduct.
  - Harm consumers in rural areas by failing to deliver support to areas with the greatest need for assistance.

8300 Greensboro Drive
Suite 1200
McLean, VA 22102
www.fcclaw.com
(703) 584-8666

Other Issues for Consideration

6. A Cost Model Should Be Used Instead of an Auction

- Use of a cost model is a better approach.
  - FCC itself has concluded that forward-looking costs best approximate costs an efficient carrier would incur.
  - Promotes fiscal responsibility.
  - Creates market certainty and incentives for investment.
  - A cost model can be adjusted – either upward or downward -- to address changing circumstances.
  - Competitively and technologically neutral.

Other Issues for Consideration

7. Right of First Refusal in Price Cap Areas Must Be Reversed

- Permitting ILECs to use 4G to build out rural areas, based on the cost of building a wireline network, is a misguided policy.
  - Amounts to an identical support rule, without competition.
  - Will give ILECs a potentially large windfall.
- No valid public policy reason ever articulated to allow large price cap carriers to have five year monopoly on support with identical support in effect.

8300 Greensboro Drive
Suite 1200
McLean, VA 22102
www.fcclaw.com
(703) 584-8666

Other Issues for Consideration

7. Right of First Refusal in Price Cap Areas Must Be Reversed

- RoFR fails virtually all of the core principles articulated in Section 254.
- Accelerate broadband deployment by reversing RoFR and allowing wireless to bid in price cap areas immediately.

8300 Greensboro Drive
Suite 1200
McLean, VA 22102
www.fcclaw.com
(703) 584-8666