

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No 10-90
)	
Federal-State Joint Board on Universal Service)	WC Docket No. 05-337
)	

**REPLY TO OPPOSITIONS OF
NTCA–THE RURAL BROADBAND ASSOCIATION**

NTCA–The Rural Broadband Association¹ (“NTCA”) hereby submits this Reply to Oppositions of the Dell Telephone Cooperative (“Dell Telephone”) Application for Review (“Application”)² of the Wireline Competition Bureau’s (“Bureau”) dismissal of Dell Telephone’s petition for waiver³ of certain universal service fund distribution rules. At the outset, it is important to note that NTCA submits these “replies” only to offer its support of Dell Telephone, since to NTCA’s knowledge, not one party opposed the Application.

On April 30, 2013, the Bureau released an order dismissing Dell Telephone’s petition for waiver of certain universal service rules adopted in November 2011,⁴ declining to reach the merits of Dell Telephone’s request. The Bureau instead decided that Dell Telephone was

¹ NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers. All of NTCA’s members are full service local exchange carriers and broadband providers, and many of its members provide wireless, cable, satellite, and long distance and other competitive services to their communities. Each member is a “rural telephone company” as defined in the Communications Act of 1934, as amended.

² Application for Review of Dell Telephone Cooperative, WC Docket Nos. 10-90, 05-337 (filed May 30, 2013).

³ Petition for Waiver of Dell Telephone Cooperative, WC Docket No. 10-90 *et al* (filed June 7, 2012).

⁴ *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011), *pets for review pending sub nom. In re: FCC*, 11-161, No. 11-9900 (10th Cir. Filed Dec. 8, 2011) (“USF/ICC Order”).

required to “first avail [itself] of state remedies available” under Texas law.⁵ In issuing the Dell Denial Order order, the Bureau created a new waiver standard, exceeding its delegated authority. The Bureau’s disregard of the established standard for a waiver – one that NTCA actively sought to have clarified in the Fifth Reconsideration Order⁶ – was also arbitrary and capricious and unlawful.

The Federal Communications Commission (“Commission”) created a waiver process after eligible telecommunications carriers (“ETCs”) made it clear that universal service reforms would threaten some companies’ financial viability and would imperil service to rural communities. Specifically, the Commission provided that “[a]ny carrier negatively affected” by the universal service reforms could seek a waiver and show that “the reduction in existing high-cost support would put consumers at risk of losing voice services, with no alternative terrestrial providers available to provide voice telephone service to consumers”⁷ The Commission indicated that the applications would be subject to rigorous review, but did not then, nor in its Fifth Reconsideration Order, in which it clarified how waiver evaluations should tie more closely to the statutory requirements of universal service, indicate that an ETC must first pursue relief under state law before seeking relief from the Commission. In fact, the Bureau has granted waiver petitions (even if just in limited fashion), never before requiring a Petitioner to avail itself of such remedies.

The Commission delegated to the Bureau the authority to approve or deny requests for waiver, but did not impart upon the Bureau the ability to unilaterally establish criteria for disposition of waivers – whether on a case by case basis or as a holistic matter. Only the

⁵ *Connect America Fund; High-Cost Universal Service Support*, WC Docket Nos. 10-90, 05-337, Order, DA 13-965 (Wireline Competition Bureau rel. April 30, 2013) (“Dell Denial Order”).

⁶ *Connect America Fund, et al., Fifth Order on Reconsideration*, WC Docket No 10-90, et al, (rel. Nov. 16, 2012).

⁷ USF/ICC Transformation Order, ¶¶ 539-540.

Commission, pursuant to appropriate administrative procedure, has the authority to modify its rules or otherwise make such policy determinations. While the Bureau's purported attempt "to further fiscal responsibility and accountability" in creating a new waiver standard may be laudable, the law specifically prohibits such behavior.⁸ The Bureau has the authority to consider waiver requests only within the established framework. The Bureau lacks the authority to require an ETC to seek state relief before obtaining applying for federal relief and in doing so, acted contrary to its delegated authority.

Moreover, by requiring Dell Telephone to pursue state relief first, the Bureau discriminated between similarly-situated petitioners in violation of the law. As Dell Telephone pointed out in its Application, the DC Circuit has made it clear that an agency acts arbitrarily and capriciously when it "applies different standards to similarly-situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record."⁹ Dell Telephone should be held to the same standard, no more and no less, as other parties that have sought waiver relief – those being the requirements spelled out in the Commission's rules and clarified in the Commission's orders. The Bureau's application of a different standard to Dell Telephone as compared to similarly situated waiver applicants, was thus arbitrary and capricious and in violation of the law.

It is also striking as a matter of good policy to see the Bureau send Dell off to pursue state remedies for a loss of *federal* high-cost support that has come about as a result of changes after-the-fact in *federal* policy. The federal high-cost Universal Service fund shifts cost recovery

⁸ 47 C.F.R. § 0.291(a)(2) ("The Chief, Wireline Competition Bureau shall not have authority to act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines.")

⁹ Dell Telephone Application, 11-12, citing *Burlington N & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 R.3d 771, 777 (D.C. Cir 2005); *Airmark Corp. v. FAA*, 758 F.2d 685,692 (D.C. Cir 1985).

from individual subscribers in high-cost areas to all subscribers nationwide in furtherance of core universal service principles, including that consumers in all regions of the Nation should have access to telecommunications and information services that are reasonably comparable to those in urban areas and at comparable rates.¹⁰ The Bureau’s shifting of funding responsibility back to the state of Texas thus flies in the face of these well-grounded universal service principles.

No party has opposed Dell Telephone’s Application for Review, and Dell Telephone has provided both a robust case for reversal of the Bureau’s decision and “good cause”¹¹ for the substantive grant of its underlying waiver. Therefore, the Commission should grant Dell Telephone Cooperative’s Application for Review of the Wireline Competition Bureau’s dismissal of its petition for waiver of certain USF rules

Respectfully submitted,



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¹⁰ 47 U.S.C. § 254.

¹¹ 47 C.F.R. § 1.3.