



December 18, 2013

Ex Parte

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

Re: *Connect America Fund, WC Docket No. 10-90*

Dear Ms. Dortch:

As various questions continue to be debated in connection with the development of a Connect America Fund (CAF) Phase II universal service support model, NTCA–The Rural Broadband Association (NTCA) hereby submits for the record these comments regarding the identification of so-called “unsubsidized competition” in that model in response to recent filings. Although the model does not apply to the distribution of universal service fund (USF) support to rural rate-of-return-regulated local exchange carriers (RLECs) such as those within NTCA’s membership, as noted in prior NTCA filings, certain of the issues being debated in connection with the development of that model are of concern to NTCA. In particular, to the extent that any RLECs should ever desire in the future to avail themselves voluntarily of model-based support, resolution of these issues consistent with good public policy, the interests of rural consumers, and statutory mandates governing universal service will be essential to pursuing such a path.¹

Specifically, these comments address issues relating to an *ex parte* submission of the American Cable Association (ACA) and the National Cable & Telecommunications Association (NCTA) filed November 25, 2013,² which addresses the manner in which the Commission would determine the presence of purported competitors who could affect the eligibility of an area for

¹ See, e.g., *Connect America Fund, High-Cost Universal Service Support: Ex Parte* Letter from Michael R. Romano, Sr. Vice President-Policy, NTCA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90, *et al.*, at 9 (filed Sept. 12, 2013); *Connect America Fund, High-Cost Universal Service Support: Reply Comments of NTCA, et al.*, WC Docket No. 10-90, at 10, 11 (filed July 15, 2013), at 10-11; *Connect America Fund, High-Cost Universal Service Support: Comments of NTCA, et al.*, WC Docket Nos. 10-90 and 05-337, at 11-27 (filed June 17, 2013).

² *Connect America Fund: Ex Parte filing on the CAF Phase II Program of American Cable Association and National Cable and Telecommunications Association*, WC Docket No. 10-90 (filed Nov. 25, 2013) (ACA/NCTA).

which an incumbent price cap carrier might receive Connect America Fund (CAF) Phase II high-cost support. The ACA/ NCTA filing articulates several recommendations regarding (1) eligible telecommunications carrier (ETC) designations, and (2) the process for determining where purported unsubsidized competitors are providing service.

First, ACA/NCTA note that would-be CAF Phase II recipients may be compelled to obtain ETC status even before they could confirm whether the incumbent price cap carrier will elect to avail itself of Phase II funding. ACA/NCTA aver that could introduce the possibility that a firm may obtain ETC status but subsequently discover that it would be unable to bid for high-cost support for the area in which it was interested serving. Therefore, ACA/NCTA propose, “the Commission should institute and administer an alternative process that facilitates participation by competitive providers in the auction while maintaining the Commission’s rigorous requirements for recipients of support and retaining state authority to designate entities as ETCs.”³

NTCA recognizes the potential that some firms may seek and obtain ETC designation only to discover subsequently that their first, or lower, choice of areas to serve are unavailable to them. NTCA also appreciates ACA/NCTA’s specific mention of “the Commission’s rigorous requirements for recipients of support.”⁴ However, a prerequisite to bidding must be an affirmative finding that participants are wholly suited to provide service in accordance with the standards articulated by the Commission for Phase II participants. Therefore, NTCA opposes any relaxation of eligibility standards for auction participants, and urges the Commission to retain the requirements that *all* bidders (and, indeed, *any* recipients of USF or CAF support) be ETCs as certified by the jurisdictional body charged with reviewing their applications. Indeed, NTCA finds it curious, if not concerning, that ACA/NCTA would suggest their members should prepare for participation in the CAF Phase II process *without* taking reasonable steps in advance to seek designation as an ETC for the areas that they would hope to serve. Moreover, while ACA/NCTA assert that seeking ETC designation is somehow “unduly onerous,” this statement is lacking in any justification or support. To the contrary, in the experience of NTCA’s members, “onerous” obligations attach not as a result of merely seeking and becoming an ETC, but rather with actually serving as a carrier of last resort and/or becoming a CAF recipient with associated performance obligations.

Beyond questionable assertions as to the “onerous” nature of the ETC designation process, postponement of that type of a review or, worse, abdication of any ETC designation requirements, would simply introduce more administrative uncertainty into the process. If the ACA/NCTA position prevails, entire auction processes could conclude before any definitive determination is made as to whether the winner is actually legally able to provide the service

³ ACA/NCTA at 2.

⁴ *Id.*

and, consequently, obtain the funding it seeks. The Commission's interest in expeditious deployment of broadband is best served by ensuring that those engaging processes to obtain Federally-administered support are certified at the outset as eligible to obtain that support and provide service in accordance with the standards and obligations that attach to it.

After seeking to relax the standards by which a firm could seek to bid for CAF Phase II support, ACA/NCTA turn to their continuing mission to relax the standards by which one identifies an "unsubsidized competitor" for purposes of disqualifying an area from such support in the first instance. NTCA will not repeat yet again its many concerns with the cable industry's ongoing efforts to "move the goalposts" in establishing where a truly unsubsidized competitor offers a meaningful alternative in terms of reasonably comparable voice and broadband services.⁵ But, the Commission should not countenance demands to relax any further the standards for such determinations as they now exist under the Phase II Obligations Order.⁶

For example, ACA/NCTA propose that an unsubsidized competitor can be a provider that "can turn-up service in a commercially reasonable amount of time."⁷ They explain, "This definition of availability reflects standard industry practice of building near a location and then installing the drop when service is requested." NTCA opposes this modified definition, and submits that the ability to "turn-up" service cannot be conflated with any practice of actually providing reasonably comparable service at reasonably comparable rates, which is what universal service requires. A purportedly unsubsidized competitor should not be allowed to disqualify an area otherwise in need of USF or CAF support merely because the competitor purports (without verification of what it can actually do or the rates at which it might offer service) to be able to provide service sometime in the future. Instead, the Commission's "unsubsidized competition" construct presupposes the presence of a competitor *actually providing service* such that that external supplemental support should not be necessary to encourage the provision of service in that specific area. NTCA is not alone in this view – in a recent *ex parte* filing, Windstream notes

the Commission has made clear that a challenger must demonstrate the census block "*is in fact served*" (emphasis added). The fact that a census block may be "serviceable" by the challenger from an engineering perspective does not mean that the block "is in fact served" or the challenger offers service there or show

⁵ See, i.e., *Connect America Fund: Comments of NTCA–The Rural Broadband Association, et al*, WC Docket No. 10-90, DA 13-284 (filed Mar. 28, 2013).

⁶ *Connect America Fund: Report and Order*, WC Docket No. 10-90, DA 13-2115 (WCB, rel. Oct. 31, 2013) (*Phase II Obligations Order*).

⁷ *Id.*

whether a potential customer would be required to pay a substantial fee to gain service, or even would be able to obtain service at all.⁸

To be sure, NTCA has established in many instances on the record that the establishment of so-called unsubsidized competitors must include a thorough analysis to determine whether, in fact, those providers are (a) providing service of reasonably comparable capability; (b) subject to similar regulatory obligations, including carrier of last resort; and (c) not simply focusing on high-margin, relatively low-cost-to-serve locations while ignoring more remote, higher-cost areas. But, at the very least, the fact that a competitor is *not* providing service in a particular region – unless and until someone else might get CAF support there – would tend to illustrate that absent external supplemental support, no reasonable economic model for providing service to that location is present. Therefore, it cannot be adjudged that even theoretically (and certainly not actually) an unsubsidized competitor exists. Moreover, just because a competitor might be willing to serve *a location* in a census block at some point in the future should not give rise to disqualification of that census block from support for all of those other customers who both today and tomorrow see no prospect for service other than from a carrier of last resort or CAF/USF recipient. For these reasons, the Commission should likewise reject ACA/NCTA’s recommendation to treat untested assurances of ability to serve a customer location in a given area (without consideration of rates or service quality) as evidence of “unsubsidized competition” throughout that area.

The Commission should be greatly concerned regarding continued “backsliding” and “watering down” in the identification of “unsubsidized competition.” Universal service policy as captured in Federal law mandates reasonably comparable services at reasonably comparable rates, and reliance on self-asserted competitor claims of potential ability to serve without analysis of actual performance (and how or whether that result would be achieved consistent with universal service policy) runs afoul of such law. That approach raises serious question of whether the entire “unsubsidized competition” construct is legally defensible in the long-run as its scope broadens without sufficient safeguards or reasonable definitions.

Respectfully submitted,

/s/ Joshua Seidemann
Joshua Seidemann
Director of Policy

⁸ *Connect America Fund: Ex Parte of Windstream Corporation*, Docket No. 10-90, at 2 (filed Dec. 9, 2013).