

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

In the Matter of)
)
Connect America Fund) WC Docket No. 10-90

**APPLICATION FOR REVIEW OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

Pursuant to section 1.115 of the Commission’s rules, the National Cable & Telecommunications Association (NCTA) submits this application for review of the Wireline Competition Bureau’s (Bureau) decision in the *CAF Phase II Service Obligations Order* that model-based Connect America Fund (CAF) Phase II support will be made available to incumbent local exchange carriers (LECs) in any area where an unsubsidized provider does not comply with exactly the same service obligation requirements that would be imposed on the subsidized LEC.¹ The practical consequence of this decision is that areas where cable operators and others have invested significant private capital in broadband deployment erroneously will be treated as if they are unserved. Such an approach would result in inefficient and wasteful spending of CAF support in areas where consumers already have broadband service and it inappropriately regulates the rates, terms, and conditions of services offered by unsubsidized broadband providers. Accordingly, the Commission should reverse the Bureau’s determination

¹ *Connect America Fund*, WC Docket No. 10-90, Report and Order, DA 13-2115, ¶¶ 40-47 (Wireline Comp. Bur., Oct. 31, 2013) (*CAF Phase II Service Obligations Order*). Specifically, we seek review under sections 1.115(b)(2)(i) because the Bureau’s actions in the order are inconsistent with the Commission’s goals of ensuring that universal service support is not used wastefully or inefficiently, and is directed to unserved communities across the nation. 47 C.F.R. §§ 1.115(b)(2)(i); *see also Connect America Fund*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17670, ¶11 (2011) (*CAF Order*).

that non-recipients of model-based CAF Phase II support must meet the same service obligations imposed on incumbent LECs that receive support.

INTRODUCTION

In the 2011 *CAF Order*, the Commission reformed its distribution of universal service high-cost support consistent with several important public policy goals. Among them were bringing broadband to “[u]nserved communities across the nation”; “reducing waste and inefficiency”; “ensuring that public investments are used wisely to deliver intended results”; and “enourag[ing] technologies and services that maximize the value of scarce program resources and the benefits to all consumers.”² To achieve these goals, the Commission found that CAF support would not be used to build broadband “in areas already served by an ‘unsubsidized competitor,’” and that incumbent LECs’ legacy high-cost support would be phased out in areas that are served by unsubsidized competitors.³

As a condition of receiving CAF support, the Commission required funding recipients to offer broadband service with certain performance characteristics. Specifically, to receive CAF Phase I incremental support, incumbent LEC funding recipients must offer broadband at speeds “of at least 4 Mbps downstream and 1 Mbps upstream, with latency sufficiently low to enable the use of real-time applications, including Voice over Internet Protocol, and with usage caps, if any, that are reasonably comparable to comparable offerings in urban areas.”⁴ In 2012, the incumbent LECs accepted \$115 million of CAF Phase I incremental support subject to these obligations,⁵

² *CAF Order*, 26 FCC Rcd at 17670, ¶11.

³ *Id.* at 17701, 17722-23, 17767-68, ¶¶ 103, 149-50, 281-84.

⁴ 47 C.F.R. § 54.312(b)(4); *see also* 47 C.F.R. § 54.312(c)(9).

⁵ *FCC Kicks-Off “Connect America Fund” with Major Announcement: Nearly 400,000 Unserved Americans in Rural Communities in 37 States Will Gain Access to High-Speed Internet Within Three Years*, FCC News Release (July 25, 2012).

and incumbent LECs have requested an additional \$385 million in CAF Phase I incremental support, subject to the same broadband build-out obligations, in 2013.⁶

In March 2013, the Bureau sought comment on implementing the broadband build-out requirements for the next iteration of CAF support, CAF Phase II.⁷ In CAF Phase II, the Bureau is creating a cost model that will be used to determine support amounts available to price cap incumbent LECs that agree to provide voice and broadband to a specified number of locations within a state. If an incumbent LEC declines to accept statewide model-based CAF Phase II support, the support will be distributed through competitive bidding. In addition to seeking comment on the obligations of support recipients, the Bureau also sought comment on whether to require unfunded providers to meet the same or similar requirements to be deemed “unsubsidized competitors,” precluding CAF Phase II support from being awarded to overbuild their service areas.⁸

In the *CAF Phase II Service Obligations Order*, the Bureau adopted specific price, latency, and usage requirements for incumbent LECs to meet if they accept model-based CAF Phase II support through the statewide commitment process. Specifically, incumbent LECs accepting this CAF Phase II support must offer voice and broadband at prices that comply with the comparability benchmarks to be established after the Bureau conducts its urban rate survey, or they must offer service for the same or lower prices in rural areas as in urban areas.⁹ The

⁶ *Up to 600,000 Rural Homes and Businesses in 44 States and Puerto Rico Will Gain Access to Broadband for First Time*, FCC News Release (Aug. 21, 2013).

⁷ *Wireline Competition Bureau Seeks Further Comment on Issues Regarding Service Obligations for Connect America Phase II and Determining Who Is an Unsubsidized Competitor*, WC Docket No. 10-90, Public Notice, 28 FCC Rcd 1517, 1520-25, ¶¶ 13-26 (Wireline Comp. Bur. 2013).

⁸ *Id.* at 1520-21, ¶¶ 13, 17-19.

⁹ *CAF Phase II Service Obligations Order*, DA 13-2115, ¶¶ 7-13.

Bureau also required incumbent LECs to offer broadband with a round trip latency of 100 milliseconds or less, and to offer at least a 100 gigabyte minimum broadband usage allowance.¹⁰

In addition to adopting these requirements for incumbent LEC funding recipients, the Bureau “conclude[d] that unsubsidized competitors should meet the same standards we require of Phase II price cap carrier recipients.”¹¹ Where an unsubsidized provider does not meet these standards, CAF Phase II support will be made available to the incumbent LEC. The practical consequence of this decision is that areas where cable operators and others have invested significant private capital in broadband deployment erroneously will be treated as if they are unserved. The Bureau should have exercised its delegated authority to avoid such a result.¹² Its failure to do so is inconsistent with Commission policy and should be reversed.

I. PROVIDING STATEWIDE MODEL-BASED CAF PHASE II SUPPORT IN AREAS WHERE UNSUBSIDIZED PROVIDERS HAVE DEPLOYED FACILITIES WILL LEAD TO WASTEFUL AND INEFFICIENT USE OF UNIVERSAL SERVICE FUNDS

The essential purpose of the CAF is to support the deployment of broadband in areas where market forces have been inadequate to promote such deployment. The Bureau’s decision is inconsistent with that basic premise in that it enables price cap incumbent LECs to receive

¹⁰ *Id.* at ¶¶ 16, 22.

¹¹ *Id.* at ¶ 40.

¹² In adopting the same statewide CAF Phase II broadband service requirements for unfunded and funded providers, the Bureau noted that it was acting “[c]onsistent with the Commission’s direction in the [CAF Order]”. *CAF Phase II Service Obligations Order*, DA 13-2115 at ¶ 40. The Bureau, however, misapplies the Commission’s delegation. The Bureau asserts that the Commission “directed that Phase II support should not go to any ‘areas where an unsubsidized competitor offers broadband service that meets the broadband performance requirements’ of Phase II.” *Id.* at ¶ 39. However, the Commission actually said, “In determining the areas eligible for support, we will also exclude areas where an unsubsidized competitor offers broadband service that meets the broadband performance requirements *described above*”. *CAF Order*, 26 FCC Rcd at 17729, ¶ 170 (emphasis added). The Commission was not directing the Bureau to impose the strict incumbent LEC CAF Phase II requirements that it was to adopt at a future date, but to instead use the broadband requirements set out in the *CAF Order* that apply to CAF Phase I. These requirements are codified in section 54.312 of the Commission’s rules, and reflect the most stringent level of service obligations that unsubsidized providers should have to meet.

statewide model-based CAF Phase II support in areas where market forces have been sufficient to promote broadband deployment.

As NCTA explained to the Bureau, in some cases providers that have invested private capital to serve high-cost areas may be able to meet most, but not all, of the service obligations due to the economic constraints of providing service in such areas.¹³ Had the Commission adopted competitive bidding as the sole method for distributing CAF support, the provider would have an opportunity to bid for the additional amount of support needed to remedy the shortcoming in its service offering, e.g., increasing the data usage allowance, or reducing prices. But under the current regime, which provides exclusive statewide model-based support to incumbent LECs, the result would be that universal service support would allow the incumbent LEC to overbuild an unsubsidized provider that offers broadband at or above the specified speed threshold. Treating an area where private capital has been invested in broadband deployment as if it were an unserved area, and then offering a subsidy to another provider on an exclusive basis, is inconsistent with the Commission's requirement that universal service support be used efficiently, and that "CAF will only provide support in those areas where a federal subsidy is necessary to ensure the build-out and operation of broadband networks."¹⁴

II. THE BUREAU IS INAPPROPRIATELY REGULATING THE RATES, TERMS, AND CONDITIONS FOR BROADBAND PROVIDED BY UNSUBSIDIZED PROVIDERS

In establishing broadband requirements for purposes of CAF, the Commission directed the Bureau to account for the fact that the Commission does not set regulated rates for broadband

¹³ Comments of the National Cable & Telecommunications Association, WC Docket No. 10-90, at 2 (Mar. 28, 2013).

¹⁴ *CAF Order*, 26 FCC Rcd at 17673, ¶ 24.

Internet access services.¹⁵ The Bureau asserts that it followed this directive and that its development of pricing and usage standards for statewide model-based CAF Phase II support “in no way constitutes price or usage regulation of broadband services,” but rather is “merely intended to provide guidance to parties that voluntarily accept universal service support as to how their compliance with the Commission’s service obligations will be evaluated.”¹⁶

Contrary to its argument, however, the Bureau did not limit the broadband price and usage requirements to funding recipients, but imposed the same requirements on parties that do not “voluntarily accept universal service support,” but that are merely trying to avoid government-funded overbuilding. While the Bureau correctly refrained from imposing reporting requirements on providers that do not receive CAF Phase II support,¹⁷ it did not apply this same logic to the voice and broadband service obligations. Although unsubsidized providers are not receiving CAF support, and are not eligible to receive either CAF Phase I or model-based statewide CAF Phase II support, which are offered exclusively to incumbent LECs, the Bureau has required these unsubsidized providers to offer their services at specific price, latency, and usage levels. For all practical purposes, the threat that incumbent LECs will be permitted to receive model-based CAF Phase II support to subsidize their service offerings in the unfunded providers’ service areas is tantamount to directly imposing these requirements on unsubsidized providers.

The Commission should reverse the Bureau’s decision to impose on unfunded providers the same “rigorous broadband service requirements” that the Commission intended for

¹⁵ *Id.* at 17708, ¶113.

¹⁶ *CAF Phase II Service Obligations Order*, DA 13-2115 at ¶ 6 n.13.

¹⁷ *Id.* at ¶ 39 n.96.

incumbent LEC funding recipients.¹⁸ Instead, unfunded providers should be able to avoid being overbuilt with statewide model-based CAF Phase II support if they offer broadband at the specified speed threshold.¹⁹

III. UNSUBSIDIZED PROVIDERS SHOULD NOT HAVE TO MEET FUNDED INCUMBENT LEC BROADBAND OBLIGATIONS IN THIS STAGE OF CAF PHASE II

The Bureau acknowledges that different requirements can be adopted for recipients of various types of universal service high-cost support.²⁰ This same flexibility should be afforded to non-recipients of funding as well. Because a non-incumbent LEC has no ability to compete for statewide model-based CAF Phase II support, the Commission should make clear that unfunded providers need only provide broadband service that meets the speed requirements to avoid being overbuilt by an incumbent LEC with such support.

In defending the incumbent LEC-exclusive statewide commitment against arguments that it violated the principle of competitive neutrality, the Commission stated, “As an initial matter, we note that our USF reforms generally advance the principle of competitive neutrality by limiting support to only those areas of the nation that lack unsubsidized providers. Thus, providers that offer service without subsidy will no longer face competitors whose service in the same area is subsidized by federal universal service funding.”²¹ The Bureau’s decision here is

¹⁸ *CAF Order*, 26 FCC Rcd at 17674, ¶ 24.

¹⁹ As the Bureau previously determined, for purposes of model-based CAF Phase II support, “any terrestrial, fixed provider shown on the National Broadband Map as offering broadband with speeds of 3 Mbps/768 kbps will be presumed to provide broadband service meeting the speed requirement of 4 Mbps/1 Mbps.” *Connect America Fund*, WC Docket No. 10-90, Report and Order, 28 FCC Rcd 7211, 7213, ¶ 6 (Wireline Comp. Bur. 2013).

²⁰ *CAF Phase II Service Obligations Order*, DA 13-2115 at ¶ 2 n.3 (“We emphasize that the metrics we adopt in this Order apply only to price cap carriers making a state-level commitment for Phase II and do not prejudge how service obligations may be applied in other aspects of Connect America, such as the requirements for recipients in areas where the price cap carrier declines to make a state-level commitment, Phase II of the Mobility Fund or the Tribal Mobility Fund, the Remote Areas Fund, or the service obligations of rate-of-return carriers.”).

²¹ *CAF Order*, 26 FCC Rcd at 17731, ¶ 177.

completely at odds with that statement because it allows incumbent LECs to receive exclusive statewide support in areas where unsubsidized providers already offer service.

The Commission should reverse the Bureau's decision to impose on unfunded providers the same price, speed and latency requirements that funded incumbent LECs must meet. It may be more appropriate to require mirrored broadband service provisions in the competitive bidding CAF process, where unsubsidized providers at least will have the opportunity to receive any CAF support necessary to offer the requisite level of service in high-cost areas, rather than seeing that support directed exclusively to their competitors for the purposes of overbuilding existing networks.

CONCLUSION

For the reasons explained in this application for review, the Commission should reverse the Bureau's decision to provide statewide model-based CAF Phase II support to incumbent LECs in any area where an unsubsidized competitor does not meet all of the same broadband service requirements that apply to incumbent LEC CAF Phase II support recipients. For purposes of this stage of the CAF, in which incumbent LECs have an exclusive right to support, unsubsidized providers should not be overbuilt with statewide model-based CAF Phase II support in areas where they have invested significant private capital to deploy broadband facilities that meet the Commission's broadband speed requirements.

Respectfully submitted,

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December 23, 2013

CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, certify that on this 23rd day of December, 2013, true and correct copies of the foregoing Application for Review of the National Cable & Telecommunications Association were served by first class mail, postage prepaid, to the following parties to the proceeding:

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