

wireless broadband services at or above the broadband speed threshold established by the Commission to millions of consumers.

Throughout this proceeding, WISPA has consistently advocated for rules and procedures that would prevent LECs from obtaining and using federal subsidies to compete with unsubsidized providers. In short, WISPA believes it is contrary to the public interest for the Commission to direct federal funds to large companies so they can overbuild areas that are already served by privately funded WISPs, cable operators and others. This only rewards LECs for previously electing to avoid serving those areas without subsidies while punishing those providers that did choose to serve those areas. More than two years ago, WISPA filed for reconsideration of the *USF/ICC Transformation Order*,³ asserting that the voice and broadband components of the definition of “unsubsidized competitor” set out in Section 54.5 of the Commission’s rules should be able to be provided by separate entities.⁴ WISPA vigorously opposed carriers’ waiver requests that sought subsidies at higher per-location levels,⁵ for middle-mile facilities⁶ and for areas served by WISPs.⁷ More recently, WISPA has advocated for CAF

³ *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (“*USF/ICC Transformation Order*”).

⁴ See WISPA Petition for Partial Reconsideration, WC Docket Nos. 10-90, *et al.* (Dec. 29, 2011). WISPA proposed that the term “unsubsidized competition” be replaced with the term “area subject to unsubsidized competition,” which “consists of a census block in which there is at least one facilities-based provider of terrestrial fixed voice and at least one facilities-based provider of terrestrial fixed broadband service that do not receive high-cost support. For purposes of this definition, these voice and broadband services need not be provided by the same entity.” The Commission has not acted on the petition.

⁵ See Opposition of WISPA to Petition for Waiver, WC Docket Nos. 10-90, *et al.* (Oct. 12, 2012) (opposing Alaska Communications Systems waiver request); Opposition of WISPA to FairPoint Communications, Inc. Petition for Waiver of Sections 54.312(b)(2) and (3) of the Commission’s Rules and Conditional election of Incremental CAF Support, WC Docket Nos. 10-90, *et al.* (Oct. 11, 2012) (opposing FairPoint waiver request).

⁶ See Opposition of WISPA to Windstream Election and Petition for Waiver, WC Docket Nos. 10-90, *et al.* (Aug. 24, 2012) (opposing Windstream waiver request).

⁷ See Opposition of WISPA to Petition for Waiver, WC Docket Nos. 10-90, *et al.* (July 12, 2012) (opposing CenturyLink waiver request).

Phase I and Phase II challenge processes and rules that would promote fairness and transparency and appropriately place the burden of proof on carriers seeking subsidies.⁸

NCTA's Application correctly explains that the Bureau should not have required "unsubsidized competitors" seeking to avoid subsidized overbuilding to meet the same performance requirements that carriers would need to meet in order to obtain CAF Phase II subsidies. The Bureau also acted contrary to Commission policy by imposing *de facto* price and service regulations on existing providers. The Commission should grant NCTA's Application and state that, in a given census block, an unsubsidized provider need only meet the broadband speed threshold of 3 Mbps/768 kbps in order to prevent a carrier from obtaining CAF Phase II subsidies.

Discussion

In addition to concurring with the reasons presented in the Application, WISPA emphasizes two grounds for reversing the *CAF Phase II Service Obligations Order*. First, the Bureau exceeded its authority by establishing pricing, latency and usage criteria for existing unsubsidized providers. In so doing, the Bureau re-defined the term "unsubsidized competitor" that the full Commission adopted in the *USF/ICC Transformation Order*. There, the Commission determined that CAF subsidies would not be available in areas served by an "unsubsidized competitor," which it defined as "a facilities-based provider of residential terrestrial fixed voice and broadband service that does not receive high-cost support."⁹ Notably, the Commission did not in this context define "broadband" and, more importantly, did not qualify the term or require the Bureau to modify this definition. To the contrary, the

⁸ See, e.g., Emergency Petition for Reconsideration or, Alternatively, For an Extension of Time, WC Docket Nos. 10-90, *et al.* (Dec. 21, 2012) (seeking reconsideration of rules allowing "limited" challenges); Comments of WISPA, WC Docket No. 10-90 (Jan. 28, 2013) (CAF Phase I challenge rules); Comments of WISPA, WC Docket No. 10-90 (Feb. 19, 2013) (CAF Phase II challenge rules).

⁹ See Section 54.5.

Commission stated that to determine areas eligible for support, “we will also exclude areas where an unsubsidized competitor offers broadband service that meets the broadband performance requirements *described above*.”¹⁰ The Commission “described above” in the *USF/ICC Transformation Order* a single performance criterion for existing providers – broadband speed – and made no mention of any additional requirements. Moreover, the Commission delegated to the Bureau the specific obligations of establishing the extremely high-cost threshold,¹¹ determining the *areas* eligible for support¹² and developing *prospective* performance criteria for carriers *seeking* subsidies. The Commission did not establish performance metrics for CAF Phase II in the *USF/ICC Transformation Order* and did not state that performance criteria for existing “unsubsidized competitors” would be decided at a later date, either by the Commission or by the Bureau. The Commission also did not delegate to the Bureau responsibility for modifying the definition of “unsubsidized competitor,” but only the task of determining the *areas* where the broadband speed threshold was not met and therefore eligible for Phase II support. The Bureau thus is bound by the full Commission’s decision and lacks authority to impose new performance criteria on “unsubsidized competitors.”

Second, assuming *arguendo* the Bureau had the authority to impose additional requirements on existing broadband providers, the Bureau acted contrary to Commission policy by treating all broadband providers the same, whether they are subsidized or not. By requiring unsubsidized providers to offer services at specific pricing, latency and usage levels in order to prevent carriers from receiving CAF Phase II support, the Bureau has essentially created the same standard for those wishing to prevent competing with a subsidized carrier as for those

¹⁰ *USF/ICC Transformation Order* at 17729 (emphasis added). See also Application at 4, n.12.

¹¹ See *USF/ICC Transformation Order* at 17729.

¹² See *id.* (“it would be appropriate to exclude any area served by an unsubsidized competitor and we delegate to the Wireline Competition Bureau the task of implementing the specific requirements of this rule”).

seeking such funding. This would be true even where the unsubsidized provider is providing broadband service at or above the broadband speed threshold of 3 Mbps/768 kbps. WISPA agrees with NCTA that “[f]or 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.”¹³

In sum, in the *CAF Phase II Service Obligations Order*, the Bureau impermissibly exceeded its authority by imposing pricing, latency and usage level requirements on “unsubsidized competitors,” as defined in the *USF/ICC Transformation Order*. The Bureau also acted contrary to Commission policy by applying the same requirements on “unsubsidized competitors” that it established for price cap carriers seeking CAF Phase II subsidies, thereby directing subsidies to areas that are already served. The Commission should reverse the Bureau and declare that unsubsidized providers should be able to avoid being overbuilt with CAF Phase II funds if they offer fixed broadband services at or above the broadband speed threshold of 3 Mbps/768 kbps.

¹³ Application at 6.

Conclusion

For the foregoing reasons, the Commission should grant the Application for Review filed by the National Cable & Telecommunications Association.

Respectfully submitted,

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