

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

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337

**REPLY COMMENTS OF THE RURAL INDEPENDENT COMPETITIVE ALLIANCE  
ON THE FURTHER NOTICE OF PROPOSED RULEMAKING**

The Rural Independent Competitive Alliance (“RICA”) files its reply comments with respect to the March 31, 2014 comments of other parties regarding rules for implementation of Rural Broadband Experiments.<sup>1</sup> RICA’s Reply Comments will focus on a limited set of issues where there is substantial disagreement in the filed comments.

**I ALL UNALLOCATED FUNDS SHOULD BE AVAILABLE FOR EXPERIMENTS**

Many parties agree with RICA that all unallocated funds should be available for “experiments” rather than only \$50-100 million. These parties point in particular to the large number of Expressions of Interest (“EOI”) and the large number of potential broadband subscribers.<sup>2</sup> Other parties support the FNPRM suggestion.<sup>3</sup> Because costs of providing

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<sup>1</sup> Report and Order and Further Notice of Proposed Rulemaking, WC Doc. No. 10-90, FCC 14-5, released January 14, 2014, 79 Fed. Reg. 11327, Feb. 28, 2014. (“Order” or “FNPRM”).

<sup>2</sup> Alaska Rural Coalition at 5; BARC Electric Coop at 2, CCA at 3; Vermont Telecommunications Authority at 7.

<sup>3</sup> Fiber to the Home Council at 3; ITTA at 2; US Telecom at 4.

service with various technologies and potential revenues are comparatively well understood<sup>4</sup> and the objective of the CAF is to reach unserved areas as rapidly as possible, an arbitrary limit on a percentage of the available funds before the Commission has even seen concrete proposals would not serve the public interest.

## **II THE CAF MODEL FOR PRICE CAP AREAS SHOULD ESTABLISH NEITHER THE BUDGET NOR THE AMOUNT OF SUPPORT AVAILABLE FOR EXPERIMENTS IN PRICE CAP AREAS**

Several parties commented that the model the Commission will use to allocate support to Price Cap carriers in their service areas is not valid for the areas of Rate of Return carriers.<sup>5</sup> These comments are consistent with RICA's broader point that the as yet unfinished model is unlikely to predict accurately the cost of building and operating "robust, scalable" broadband networks *by small entities* in many high cost rural areas, including areas served by Price Cap carriers.<sup>6</sup> Quite apart from the lack of validation of the model even for its intended use, the intended use is by very large carriers on a state-wide basis.<sup>7</sup> Because the model is to be used to determine support on a statewide basis involving a large number of exchanges, or census tracts, the over and under cost predictions for individual census blocks or exchanges in the state may average out sufficiently that a Price Cap carrier will be able to make a rational business decision whether or not to accept CAF Phase II support. But smaller entities who wish to propose experiments that compete with the Price Cap carriers in less than state-wide areas are much more likely to be at substantial risk of model inaccuracy. Further, because the model is intended to

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<sup>4</sup> Alaska Rural Coalition at 6; RICA at 4;

<sup>5</sup> Alaska Rural Coalition at 9; JSI at 7; NTCA et al. at 15.

<sup>6</sup> RICA comments at 3. Emphasis added.

<sup>7</sup> *Transformation Order* at para. 166 ("Second, using the cost model, the Commission will offer each price cap LEC annual support for a period of five years in exchange for a commitment to offer voice across its service territory within a state and broadband service to supported locations within that service territory, subject to robust public interest obligations and accountability standards.")

provide support for only five years, higher cost areas requiring continuing support will not be feasible to serve. Even if all the unallocated funds are made available, the funds would be insufficient for a competitor to make a state-wide bid that could also take advantage of the averaging of the model errors. It follows that the model will not accurately predict the costs of a competitive carrier serving a portion of a Price Cap study area.

For much the same reason the model is not suitable for Rate of Return carrier areas because smaller areas require significantly greater accuracy than is needed for state-wide operation. This observation applies even though the underlying costs of construction and operation of a particular portion of a Price Cap study area and a comparable area of a Rate of Return carrier may be similar.

### **III COST EFFECTIVENESS SHOULD NOT BE THE PRIMARY CRITERION**

RICA argued that cost effectiveness should not be the primary criterion for evaluating experiment proposals because nothing would be learned about serving more high cost areas and a perverse incentive to design to the lowest “first cost” would prevent achievement of the stated objectives of robustness and scalability.<sup>8</sup> Several parties agreed, including The Navajo Nation Telecommunications Regulatory Commission (“NNTRC”) which stated:

Quantitatively evaluating experiments based on “cost effectiveness” sounds much like the reverse auctions the FCC has held in Auctions 901 and 902. Such reverse auctions will always be won by the entity proposing to serve the next least expensive unserved area. Using “cost effectiveness” as a significant scoring factor will mean, yet again, that the last few percentage of population who are without broadband will continue to remain unserved, possibly forever. If the Commission truly seeks to satisfy the “core value” of “universal service,” it must begin now, with these IP Experiments, to incentivize carriers to find ways to bring broadband service to the *most rural*, and *least served*.<sup>9</sup>

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<sup>8</sup> RICA Comments at 8. The rural ILEC associations pointed out that funding should be for networks that can be expected to be sustainable. NTCA, NECA & ERTA Comments at 11.

<sup>9</sup> NNTRC Comments at 7. *See also*, CA PUC at 5; JSI at 12; Vermont Telecommunications Authority at 4.

Parties supporting cost effectiveness as the primary criterion do not address these concerns.<sup>10</sup> Nor do they explain how a logical, valid comparison of costs can be made between proposals for different performance characteristics much less between areas with different inherent costs to serve and demographics. US Telecom, for example, favors cost effectiveness as the sole criterion because the selection process would be faster.<sup>11</sup>

#### **IV THE FCC DOES NOT HAVE AUTHORITY TO DIVEST STATE COMMISSIONS OF JURISDICTION TO DESIGNATE ETCs**

The FNPRM asked whether state commission failure to act on an ETC designation application in 60 days should create a presumption that the state lacks jurisdiction apparently then defaulting to FCC jurisdiction under Section 214(e)(6). RICA opposed this proposal as without legal basis and likely to result in litigation leading to delay, expense and uncertainty.<sup>12</sup> The Massachusetts Department of Telecommunications and Cable likewise pointed out that “... , unlike other, unrelated statutory provisions, nothing in Section 214(e) specifies or implies that states must act within a specified time period on ETC-related petitions.”<sup>13</sup> Other comments supported preemption, although without substantive analysis of the Commission’s authority.<sup>14</sup> WISPA, for example, says: “...the Commission should exercise jurisdiction specifically to designate ETCs for the program in order to create a single, streamlined process for the

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<sup>10</sup> See, e.g., ACA at 5; CCA at 7; NCTA at 8. ITTA at 5, however, does recognize that cost effectiveness should not be compared between high and low cost areas.

<sup>11</sup> US Telecom at 4. See also, NCTA at 8.

<sup>12</sup> RICA Comments at 10.

<sup>13</sup> MADTC at 3-4.

<sup>14</sup> TCA at 4 (“Where the selected participant is either already a designated ETC within the State (and is looking to extend its designation to cover the geographic location within its application) or is an affiliated subsidiary of an existing ETC...”); UTC at 9; Fiber to the Home Council claims incorrectly that ETC designation is not required as a matter of law. FTHC at 11.

distribution of program funding” but cites no source of FCC power to displace state authority prescribed in the Act.<sup>15</sup>

NCTA claims “the requirement to obtain designation as an Eligible Telecommunications Carrier has the potential to operate as a barrier to competitive entry in rural areas”<sup>16</sup> but fails to explain how Congress in the 1996 Act could have assigned to state commissions the sole authority to designate carriers as ETCs, but also contemplated that state legislative grant of jurisdiction to such Commission could be found by the FCC to violate Section 253(a).<sup>17</sup>

## V CONCLUSION

RICA welcomes even the very modest opportunity proposed in the FNPRM for rural CLECs to demonstrate that with proper support they are able to construct and operate broadband capable networks in the rural high cost areas long neglected by the large Price Cap ILECs. Because the Expressions of Interest appear to propose projects requiring considerably more support than the full amount of unallocated support funds available, the Commission will necessarily have to utilize rational, objective criteria in deciding which proposals will be funded. In order for entities to justify the expense of preparing adequate proposals, these criteria must be fair, clearly explained and issued promptly with respect to the time frame for funding CAF Phase II projects.

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<sup>15</sup> WISPA at 9

<sup>16</sup> NCTA at 6.

<sup>17</sup> Section 214(e) contains no hint that the FCC is granted any authority to oust a state commission from the *in personam* jurisdiction over carriers granted by its legislature or the jurisdiction granted by Section 214(e)(2). The Act was amended in 2007 by adding Section 214(e)(6) when Congress became aware that some telephone companies such as tribally owned or cooperatively organized were not subject to state commission jurisdiction and would lose the USF support they were then receiving if they were not designated as ETCs. Pub. L. 105-125.

The amount of support provided in the areas of Price Cap ILECs should not be determined by the CAF II model, because the model will not accurately predict the costs of providing service by competitive entities that will necessarily be limited to less than state-wide proposals by the limited amount of funding proposed. While cost effectiveness is a valid comparison tool, it must not be given priority because the result would likely be funding of the least, rather than most, robust and scalable networks. Finally, the Commission is without legal authority to presume that state commissions lack jurisdiction to act on ETC designation requests either under a “shot clock” or in general. Preemption is not to be presumed; rather Congress could not have granted such authority to state commissions and simultaneously granted the Commission *sub silentio* authority to override it.

Respectfully submitted

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