

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
Universal Service Reform – Mobility Fund)	WT Docket No. 10-208
)	
ETC Annual Reports and Certifications)	WC Docket No. 14-58
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
Developing an Unified Inter-carrier Compensation Regime)	CC Docket No. 01-92
)	

REPLY COMMENTS OF THE RURAL INDEPENDENT COMPETITIVE ALLIANCE

The Rural Independent Competitive Alliance (“RICA”) files its reply comments in response to the comments of other parties with respect to the Further Notice of Proposed Rulemaking (“FNPRM”) in the above referenced proceedings, released June 10, 2014, FCC 14-54. RICA is a national association of rural competitive local exchange carriers (“CLECs”) affiliated with incumbent local exchange carriers (“ILECs”).

In its initial comments RICA urged the Commission to adopt rules benefiting rural consumers of voice and broadband services by facilitating the ability of CLECs to offer competitive broadband services in rural Price Cap territories where Universal Service support is necessary to provide reasonably comparable service at reasonably comparable rates.

I There is general support for increasing the minimum broadband speed to 10/1 Mbps, but substantial issues are disputed as to the consequences of that change.

Many parties' comments were consistent with RICA's view that 10/1 Mbps service is necessary for broadband provided in rural areas to be considered "reasonably comparable" to urban service.¹ The Price Cap carriers and their association, however, see such an increase as a reason for the Commission to significantly alter the structure adopted in the *Transformation Order* and thereby further restrict the already minimal opportunities for competitive entry.² The factual statements in these comments are often consistent with points RICA has been making for many years. The policy conclusions the Price Cap carriers reach from those facts, however, are diametrically opposed to the concept of promotion of local competition inherent in the 1996 Act, and even inconsistent with the Commission's severe restriction of competitive opportunity in high cost rural areas in the *Transformation Order*.

A. The Price Cap Carriers' Right of First Refusal Should Not Be Extended Beyond the Five Year Term

The *Transformation Order*, adapting an earlier proposal and that of an ILEC group led by AT&T, concept that the Commission then adopted the Right of First Refusal in all but name.³ The Commission's rationale for the elimination of support for competitors in areas requiring USF support was that with their existing POTS networks as a base, the Price Cap carriers could more rapidly extend broadband service to the rural areas they had previously ignored. The Commission and the 10th Circuit brushed aside RICA's objection that this "predictive judgment"

¹ Washington Independent Telecommunications Association, et al. at 5. ("if funded"); Concerned Rural ILECs at 3; US Telecom at 2 (with 10 year support); AT&T at 44.

² AT&T at 44. "Meeting a 10 Mbps downstream requirement is therefore likely to cause price cap carriers to redesign their networks in a more significant way, which not only adds to these carriers' costs, it also adds time. AT&T also does not believe it could meet the current CAF II state-level commitment build-out milestones if it has to offer broadband service at 10 Mbps downstream/1 Mbps upstream." CenturyLink at 20 (can't build to 10/1 in five years).

³ *Transformation Order* at para. 165.

was without any factual foundation because those networks would not support even the Commission's initial broadband performance requirements.⁴ The Commission successfully defended its "balancing" before the 10th Circuit by arguing, *inter alia*, that it was due particular deference because the monopoly on access to support would last no more than five years at most.⁵

Now the Price Cap carriers' comments say they are all in favor of more than doubling the broadband speed requirement, but to be able to deliver 10/1 their monopoly on support must be extended to 10 years because they will have to do a lot of construction.⁶ The necessary implications of these statements are that whatever basis the Commission may have had for its prior conclusion that the existing Price Cap's POTS networks could be upgraded to broadband at 4/1, that conclusion has no relevance to the building a 10/1 network, and there is, accordingly, no basis to provide the Price Cap carriers with an even more extensive period during which they exclusively have access to universal service support.⁷

RICA recognizes and agrees with the Commission's more recent conclusion that support to winning competitive bidders should be for 10 years,⁸ but non-ILEC competitive bidders and

⁴ *Transformation Order* at para. 175; *aff'd subnom In Re FCC 11-161*, 753 F.3d 1015 (10th Circuit 2014). The DC Circuit, however, recently reminded the Commission that deference to an agency's predictive judgment requires "some logic and evidence, not sheer speculation." *Sorenson Communications, Inc. v. FCC*, ___ F.3d ___ (D.C. Circuit 2014).

⁵ *In Re FCC 11-161*, 753 F.3d at 1083 ("We conclude that the FCC reasonably exercised its discretion in adopting this USF funding framework for price-cap areas, *particularly since the framework applies only during the interim period....*") (emphasis added).

⁶ USTelecom at 4.

⁷ The Commission and the 10th Circuit ignored RICA's argument that the Price Cap carriers' rural networks could not be simply upgraded to meet the existing 4/1 standard, but would require substantial rebuilding. The Price Cap carriers now agree, at least as to the 10/1 standard. AT&T at 41, n. 111 ("...changing the speed of the required service from 4 Mbps downstream...has significant consequences in terms of how CAF II providers must design and construct their networks.").

⁸ Report and Order at para. 35. Ten years support is better than five years, but any fixed term of support is inconsistent with the reality that not only does the investment have a

the Price Cap carriers electing a statewide commitment are not in any material way similarly situated. The Price Cap carriers proposed and won a Right of First Refusal which grants them sole access to USF support despite the clear intent of the 1996 Act that USF support was not to be used to protect incumbent monopolies. Inherent in that extraordinary gift is its time limited nature and the carriers' free choice whether to accept it or not. Now they want to have not only their term limited monopoly, but a doubling of that term. The Price Cap carriers must recognize that the support monopoly comes with tradeoffs, and make their choices accordingly.

- B. Price Cap Carriers' Pleas To be Allowed to Cherry Pick their service areas to avoid the higher cost areas should be rejected: they want the benefit of the model's overstatement of costs while avoiding its understatement.

RICA opposed the Commission's suggestion that Price Cap carriers' study area commitment be weakened to require only service to 95% of their locations on the grounds that the result would be cherry-picking of the most profitable parts of the area while condemning the highest cost areas to continued non-comparable service.⁹ Not satisfied with the 5% location exemption that the Commission bestowed on them, the Price Cap carriers now want to be able to double to 10% the number of their customers selected for denial of service.¹⁰ In justification, AT&T observes:

...there may be pockets of CAF II-eligible locations where providing broadband at a downstream speed of 10 Mbps may not be economically viable, even with CAF II support.¹¹

significantly longer useful life, but because of continuous changes in demand and technology, capital investment is never a one-time event. The prior USF system based on the cost of providing service thus was much more appropriate in ensuring service to the public.

⁹ RICA at 3.

¹⁰ ATT at 45

¹¹ Id.

This AT&T statement is factually consistent with the point in RICA's comments that "no model can predict the costs of smaller discrete areas with the degree of accuracy required to establish 'sufficient' support..."¹² AT&T, however, wants the best of both worlds: i.e. it wants to be able to receive model based support where the actual costs are close to or below the average predicted by the model, but be relieved of the obligation to provide universal service to at least some of the locations where actual costs exceed the model's prediction.¹³

RICA remains of the view that the Commission should not enhance the generous bargain it offered the Price Cap carriers in the *Transformation Order*: the receipt of model based support for five years in exchange for a state-wide commitment to serve. There the Commission concluded the state-level commitment was preferable to the right of first refusal it had previously proposed or approaches of the ABC Plan because both would have "allowed price cap carriers to pick and choose on a granular basis the areas where they receive model-based support within a state." Allowing price cap carriers to exclude 5 or 10% of the state creates the same cherry picking opportunities the Commission previously rejected, even if to a lesser degree.¹⁴

C. The Comments illustrate why the support provided under the CAF Model cannot be the reserve price for competitive bidding.

The AT&T comment quoted above also supports RICA's argument that the level of model support cannot become the reserve price for competitive bidding in areas where the Price Cap carrier declined the state-wide commitment. Assuming, as the Commission appears to,¹⁵ the decision to make a state-wide commitment is driven wholly or largely by the carrier's own

¹² RICA at 2. *See also*, CenturyLink at 14: "...all models are wrong, but some are useful."

¹³ Avoiding providing service to 5 or 10% of subscribers can be expected to result in avoiding a much higher percentage of the costs. In rural areas it is not uncommon for 20% of the subscribers to account for 80% of the costs.

¹⁴ *Transformation Order*, para. 173.

¹⁵ *Id.*.

computation of whether the total support provided will make provision of service sufficiently profitable, where the commitment is declined there is a strong implication that the carrier considers the support insufficient. If support is insufficient to support an entire state-wide area and the model admittedly both over and underestimates costs in particular areas, the support level established by the model must, *ipso facto*, be insufficient in the higher cost areas. It is thus inescapable that if the Price Cap carrier cannot find it feasible to utilize the support to provide service on a state-wide basis, then it will not be feasible for competitive bidders to provide universal service in the individual higher cost areas if they can bid to receive no more than the model support.

D. Many parties agree with RICA that the mere filing of an experiment proposal is not sufficient to remove the area from potential competitive bidding.

RICA's Comments made the point the mere filing of an experiment proposal is not a reliable basis for the Commission to assume that the proposed support area will actually receive service meeting the applicable performance standards, or any service at all.¹⁶ Thus Price Cap carriers must take the risk that their state-wide commitment will include areas for which experiment proposals were filed, but not completed. Several parties agree at least with the point that the mere act of filing should not be sufficient.¹⁷

II Conclusion

In the *Transformation Order* the Commission concluded, so the 10th Circuit believed, that the lower percentage of broadband deployment in price cap carriers' areas was the result of inadequate universal service support rather than carrier mismanagement or inattention.

Accordingly the Connect America Fund was designed to provide support only for price cap

¹⁶ RICA at 4-5

¹⁷ ITTA at 21, USTelecom at 29, AT&T at 50-51.

carriers, rejecting the intent and specific provisions of the 1996 Act designed to ensure that universal service support mechanisms required by Sections 214(e) and 254 would be competitively neutral. Neutrality was thus sacrificed to a five year monopoly of support eligibility to advance the believed greater good of rapid deployment that would result from adequate funding. The monopoly support was justified as an interim measure that carried with it the substantial obligation to commit to offer broadband to the entire states where it was received.

Now, in the Commission's FNPRM and the comments of the price cap carriers are seen strong indications that the monopoly on support will end not end anytime soon and that the least desirable portions of the price cap study areas will not soon be offered modern broadband services. Specifically, the price cap carriers welcome the proposed increased in minimum broadband speed as a justification for both substantial extensions of their monopoly support period and substantial reductions from the 100% state-wide commitment adopted in the *Transformation Order*. In their justifications for greater relief from paying the price for their monopoly on support than the FNPRM offered them, the price cap carriers necessarily provide factual support for the point that RICA has been making for several years: that model-based support cannot be sufficient in some high cost areas even if reasonably accurate on average over large areas. Model level support as the "reserve price" for competitive bidding will therefore produce a very high failure rate.

The Commission can still test its “predictive judgment” that a support monopoly will bring rapid deployment to rural areas, but if it weakens the obligations of the price cap carriers and extends the time of their monopoly, that will not be the plan the Court endorsed.

Respectfully submitted

Rural Independent Competitive Alliance
By/ David Cosson
Its Attorney

5151 Wisconsin Ave., N.W.
Suite 313
Washington, D.C. 20016
202 333 5275