

**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
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109
)	
Universal Service Reform – Mobility Fund)	WT Docket No. 10-208

**EMERGENCY PETITION FOR CLARIFICATION,
OR IN THE ALTERNATIVE, WAIVER OF
NTCA–THE RURAL BROADBAND ASSOCIATION,
THE EASTERN RURAL TELECOM ASSOCIATION,
THE INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE,
THE NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.
THE UNITED STATES TELECOM ASSOCIATION, AND
THE WESTERN TELECOMMUNICATIONS ALLIANCE
WITH RESPECT TO THE REQUIREMENT THAT RLECs
SUBMIT FIVE-YEAR SERVICE QUALITY IMPROVEMENT PLANS**

NTCA–The Rural Broadband Association (“NTCA”), the Eastern Rural Telecom Association (“ERTA”), the Independent Telephone and Telecommunications Alliance (“ITTA”), the National Exchange Carrier Association, Inc. (“NECA”), The United States Telecom Association (“USTelecom”), and the Western Telecommunications Alliance (“WTA”)

(collectively, the “Associations”)¹ hereby submit an Emergency Petition for Clarification, or in the alternative, Waiver, with respect to the requirement that rural rate-of-return-regulated incumbent local exchange carriers (“RLECs”) submit five-year service quality improvement plans (“Five-Year Plans”) pursuant to Section 54.202(a)(1)(ii) and Section 54.313(a)(1) of the rules of the Federal Communications Commission (the “Commission”).²

For the reasons set forth herein, the Commission should clarify that RLECs are not required to file Five-Year Plans without receiving reasonable advance notice of the filing deadline in order to prepare and complete such plans. Given that many of the specific data-gathering activities required to develop Five-Year Plans were not effective in 2012, the need still for approval from the Office of Management and Budget (“OMB”) in connection with this data collection, and the need for RLECs to have time to prepare plans following such approval, the filing deadline should not occur before 2014. Moreover, since those data collections have just been initiated in 2013, and it would be helpful to have as much as a year’s worth of data to report, it is sensible to delay the requirement until at least 2014. The Commission should

¹ NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers. All of NTCA’s members are full service local exchange carriers and broadband providers, and many provide wireless, video, satellite, and/or long distance services as well. ERTA is a trade association representing approximately 68 rural telephone companies operating in states east of the Mississippi River. ITTA represents mid-size communications companies that provide a broad range of high quality wireline and wireless voice, broadband, Internet, and video services to 24 million access lines in 44 states. NECA is responsible for preparation of interstate access tariffs and administration of related revenue pools, and collection of certain high-cost loop data. *See generally*, 47 C.F.R. §§ 69.600 *et seq.*; *MTS and WATS Market Structure*, CC Docket No.78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1983). USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks. WTA is a trade association that represents over 250 small rural telecommunications companies operating in the 24 states west of the Mississippi River.

² 47 C.F.R. §§ 54.202(a)(1)(ii) and 54.313(a)(1).

therefore clarify that the requirement to submit a Five-Year Plan does not and will not apply in 2013, and that such a plan will not be required before July 1, 2014.

Alternatively, if the Commission does not believe that such clarification is warranted or appropriate, it should grant on an emergency basis a blanket waiver of any applicable requirement to submit a Five-Year Plan in 2013, and should waive the deadline for such filings until at least July 1, 2014, (if not later), given other significant reform implementation tasks now underway (such as mapping to establish corrected study area boundaries and conversion of intrastate access rates and structure to interstate rates and structure) and the continuing refinement and application of regression analysis-based caps that, pending further review and development, remain subject to year-over-year changes in untested and unpredictable ways.³ Such relief, in the form of either clarification or waiver, is needed on an emergency basis given the substantial efforts required for RLECs to attempt to comply with a July 1, 2013, deadline.

Section 1.3 of the Commission's rules states that "rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown."⁴ The "good cause shown" standard has been interpreted to grant the Commission discretion to waive

³ See, *Connect America Fund*, WC Docket No. 10-90, *High-Cost Universal Service Support*, WC Docket No. 05-337, Sixth Order on Reconsideration and Memorandum Opinion and Order (rel. Feb. 27, 2013) ("Sixth Reconsideration Order"), at ¶ 16 ("We direct the Bureau . . . to consider whether these benchmarks should be held constant for multiple years, and, if so, which mechanism would best advance our objectives to preserve and advance the deployment of voice- and broadband-capable networks while providing better incentives for carriers to invest prudently and operate efficiently. In doing so, the Bureau should carefully consider the extent to which annual updates are likely to cause significant year-over-year changes in support levels. We expect the Bureau to adopt an approach that will provide carriers sufficient certainty regarding future years' benchmarks to encourage efficient investment while maintaining the balance struck in the Commission's reforms to encourage efficient spending by HCLS recipients.").

⁴ 47 C.F.R. § 1.3.

application of its rules in situations where strict compliance would not be in the public interest.⁵

Generally, waiver of the Commission's rules is granted when both (i) special circumstances warrant a deviation from the general rule and (ii) such deviation will serve the public interest.⁶

Special circumstances and the public interest support the grant of a blanket waiver to all RLECs of the requirement to file a Five-Year Plan in 2013. First, as the Commission's recent Sixth Reconsideration Order highlights,⁷ work remains to be done before RLECs can obtain a more predictable picture with respect to what investments in broadband networks will be recoverable over a series of years under the Quantile Regression Analysis ("QRA") caps on high-cost support adopted by the Wireline Competition Bureau (the "Bureau"). The Associations have previously indicated their desire to work with the Commission and the Bureau to examine these concerns with respect to predictability and to seek to improve the operation of the caps (subject to pursuing other legal rights and remedies with respect to their very application in the first instance).⁸ Until such time as such work is complete and there is reasonable predictability in planning from year-to-year, it would certainly reflect "more effective implementation of overall

⁵ *Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

⁶ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

⁷ Sixth Reconsideration Order, at ¶ 16.

⁸ For example, NTCA and WTA recently submitted a document to this effect, entitled "Continuing Technical and Mechanical Concerns Relating to Implementation of Regression Analysis Cap-Based Models." This paper was submitted in an effort to isolate and address flaws that remain in the model, generally, despite the recently released Sixth Reconsideration Order and, specifically, to seek improvements with respect to the transparency, accuracy, predictability, and methodological integrity of any QRA model that will apply. *Ex Parte* Letter from Michael R. Romano, Sr. Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, WC Docket No. 10-90, *et al.* (filed Mar. 7, 2013) ("Technical Concerns *Ex Parte*").

policy on an individual basis”⁹ to refrain from compelling RLECs to file Five-Year Plans. Any Five-Year Plan required prior to such work being completed cannot itself be deemed stable, and thus will be of limited value to the Commission. Second, the preparation of Five-Year Plans would appear to require significant coordination with comprehensive mapping activities that are just now being understood and have yet to be implemented.¹⁰ Deferral of the Five-Year Plan effort until the broader mapping efforts are complete would ensure a more robust and well-developed work product.

Given that work on any Five-Year Plan due by July 1, 2013 would need to start in short order, and given the administrative and cost burdens associated with filing such a plan, the Associations submit this Petition on an emergency basis and respectfully seek the relief requested herein as soon as possible.

I. THE COMMISSION SHOULD CLARIFY THAT THE FIVE-YEAR PLAN REQUIREMENT FOR RLECS DOES NOT APPLY IN 2013 BECAUSE OF THE LEAD TIME NEEDED TO PREPARE PLANS FOLLOWING STILL-PENDING OMB APPROVAL.

FCC Form 481 – the vehicle proposed by the Bureau for collecting information pursuant to Sections 54.202(a)(1)(ii) and 54.313(a)(1), as well as many other reporting requirements – has

⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

¹⁰ See, *Wireline Competition Bureau Announces Procedures and Deadlines for Submissions of Study Area Boundaries*, WC Docket No. 10-90, WC Docket No. 05-337, Public Notice, DA 13-456 (rel. Mar. 18, 2013). Pursuant to this public notice, study area boundary maps are not likely to be corrected very far ahead of a potential July 1, 2013 deadline for the submission of Five-Year Plans. And, as discussed further in Section II, *infra*, necessary efforts to correct flawed study area boundary data introduce even more uncertainty in the near term.

yet to be granted approval by the OMB¹¹ for compliance with the Paperwork Reduction Act.¹²

With comments regarding Form 481 not due to the Commission until April 26, 2013, RLECs are likely to have rather short notice of the effectiveness of the final version and format of the Form in question. Moreover, certain related aspects of service quality and coverage reporting requirements – such as those set forth in Sections 54.313(a)(2) through (a)(7), to the extent those provisions will apply to broadband, and Sections 54.313(f) and (g)¹³ – likewise remain subject to necessary approvals that appear to be sought in the same notice as approval for Form 481. Importantly, it is the understanding of the Associations that the Commission does not plan to apply these service quality and coverage reporting requirements to broadband until July 1, 2014.¹⁴ In light of the fact that many of the relevant service quality and coverage reporting requirements with respect to broadband deployment are not due for another year, and given that the very form by which all of this information and the Five-Year Plan would be submitted is just now being considered for approval, it is unclear whether the Five-Year Plan can in fact be

¹¹ Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested, 78 Fed. Reg. 12750 (Feb. 25, 2013).

¹² The Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520). Moreover, many of the data collection requirements themselves contained within the Form 481 have not yet been approved by the OMB.

¹³ Section 54.313(f)(1)(i) requires reporting on the provision of broadband at 4 Mbps downstream/1 Mbps upstream upon reasonable request; Section 54.313(f)(1)(ii) requires reporting of community anchor institutions to which the RLEC began providing broadband in the previous year; Section 54.313(f)(2) requires financial reporting by RLECs; and Section 54.313(g) requires RLEC certification for areas with no terrestrial backhaul.

¹⁴ *Ex Parte* Letter from Michael R. Romano, Sr. Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, WC Docket No. 10-90, *et al.* (filed Feb. 25, 2013).

required for submission by July 1, 2013. The Commission should therefore simply clarify that the Five-Year Plan will not be required until July 1, 2014.

Moreover, Five-Year Plan filings will consist of more than the mere submission of planning documents already in existence. To prepare a Five-Year Plan, a company necessarily needs to gather information on the current state of its deployment and other matters captured by various provisions of Section 54.313. In addition, given that the Five-Year Plan arises out of a federal regulatory requirement, no carrier will simply “throw into the regulatory hopper” some pre-existing internal planning document to the degree that one exists. RLECs are more likely to approach such a filing requirement much as public companies approach filings with the Securities and Exchange Commission (“SEC”).¹⁵ For example, any prudent publicly-traded company only provides periodic, carefully crafted forecasts that have been vetted thoroughly by executive management, lawyers, accountants, and auditors through a time-consuming and expensive process. And, as the Commission is undoubtedly aware, publicly reporting companies are sure to include with each such report a litany of risk factors, caveats, and warnings to inform the reader that any projections provided therein, despite being carefully crafted, reviewed, and vetted at substantial expense and effort, should not and cannot be relied upon. It is almost certain that RLECs will feel obligated to take a similar tack with respect to Five-Year Plans – thus incurring substantial expense and burden to prepare reports that contain necessary and justified disclaimers and caveats warning about risk factors. Moreover, many RLECs are thinly staffed and would likely need to hire outside experts and consultants at great expense to complete this extensive data gathering.

¹⁵

Id.

The Commission should take note of these data collection and reporting burdens (and the ultimate utility of obtaining such “hedged” reports) as part of the upcoming comments being sought on Form 481, and should clarify in the interim that because such consideration will occur in that comment process, the Five-Year Plan will not be required as part of any Form 481 filing until July 1, 2014, at the earliest.

II. IF CLARIFICATION CANNOT BE PROVIDED, THE COMMISSION SHOULD GRANT A BLANKET WAIVER OF THE REQUIREMENT THAT RLECs FILE A FIVE-YEAR PLAN BECAUSE OF THE CURRENT UNPREDICTABILITY OF THE QRA CAPS.

If the Commission will not clarify that RLECs need not submit Five-Year Plans until July 1, 2014, at the soonest, the Commission should, in the alternative, grant a waiver of the requirement to submit such plans until at least July 1, 2014. Sections 54.202(a)(1)(ii) and 54.313(a)(1) of the Commission’s rules require that RLEC high-cost support recipients file comprehensive Five-Year Plans, specifying network investment plans and use of universal service fund support at a granular level to be forecasted over a period of several years. Compliance with this rule is complicated by the continued application of a QRA model that provides RLECs with little ability to predict what the limits on cost recovery will be in just one year, let alone over the following four years. The Commission’s recent reconsideration of its decision to require annual updates of the QRA caps, and its specific charge to the Bureau to “adopt an approach that will provide carriers sufficient certainty regarding future years’ benchmarks”¹⁶ recognizes that more work remains to be done to instill a greater sense of

¹⁶ Sixth Reconsideration Order, at ¶ 16. As Commissioner Rosenworcel has recognized, this step will contribute to “a more ‘predictable’ and ‘sufficient’ system—one that provides carriers with more confidence to invest in broadband infrastructure.” *Id.*, Statement of Commissioner Jessica Rosenworcel. Prior to completing this step, however, those concerns with respect to certainty that

certainty within the QRA model. The current unpredictability, pending such review and potential changes, makes it unlikely that plans submitted, particularly with respect to later years, will be reliable and thus of meaningful utility to policymakers. RLECs should not be held accountable for developing and implementing investment plans when cost recovery and high-cost support fluctuates from quarter to quarter and, as of right now, remain subject to caps that are not known until a month before the next year (or, if recent experience is any indication, several weeks or months into the then-current year). The Commission should, therefore, grant a blanket waiver of Sections 54.202(a)(1)(ii) and 54.313(a)(1) pending review and resolution of concerns with respect to the predictability of the QRA caps.

Beyond concerns with respect to the predictability of the QRA caps and the underlying model, the QRA system in current form contains errors that are likely to have a material impact on individual RLECs' respective support amounts.¹⁷ For example, the Commission has acknowledged, and is now in the process of addressing, the need for corrected study area boundary data; the record also contains evidence of a number of other flaws in the QRA models that require careful attention and resolution.¹⁸ As a further complication, corrections that are made to address errors in study area boundaries and other flaws in the QRA model will

prompted the Commission to take this step on reconsideration remain outstanding, and they hinder effective planning on even a year-over-year basis.

¹⁷ See, *supra*, fn. 8 (stating that “the correction of geographic boundary data is likely to produce significant swings in coefficients. This confirms that the model may be subject to wide swings based on correction of only a single study area boundary, and that predictability or certainty will be unobtainable until, at a minimum, this process is complete and coefficients are reset.”).

¹⁸ See, e.g., Technical Concerns *Ex Parte; Ex Parte* Letter from Vincent H. Wiemer, Alexicon Telecommunications Consulting, to Marlene H. Dortch, Secretary, WC Docket No. 10-90, *et al.* (filed Feb. 21, 2013) (attaching Vincent H. Wiemer & Michael J. Balhoff, CFA, White Paper: Lessons from Rebuilding the FCC’s Quantile Regression Analysis at 28 (Feb. 2013)).

themselves significantly alter the QRA caps, if not thought through in advance and implemented carefully.¹⁹ In short, with a giant “reset” button set to be pressed with respect to the QRA model and resulting caps as of January 1, 2014 (or later, if some corrections take more time to resolve) and because of the impact and subsequent need to redevelop projections, it makes little sense to compel carriers to develop Five-Year Plans in the face of such potentially significant and currently unknown (and unknowable) changes. As an alternative, the Commission should at most require RLECs to file a “Six-Month Plan” that could provide a baseline of anticipated service quality improvement efforts for the period from July 1, 2013 to December 31, 2013 (*i.e.*, for the period preceding the significant changes likely to arise in the QRA caps as a result of mapping changes and other data corrections that should be made during that period), and then revisit once the corrections are adequately tested and implemented within the QRA model when a Five-Year Plan might be appropriate.

III. CONCLUSION

For the foregoing reasons, the Commission should provide prompt clarification that RLEC recipients of high-cost Universal Service Fund support are not required to submit the five-year service quality improvement plan filings required by Sections 54.202(a)(1)(ii) and 54.313(a)(1) of its rules until July 1, 2014, at the earliest. Alternatively, the Commission should find good cause exists to grant on an emergency basis a blanket waiver to all RLECs of the requirement to submit Five-Year Plans until July 1, 2014, or later if the special circumstances justifying such a waiver are not resolved by that time.

¹⁹ See, *Ex Parte* Letter from Michael R. Romano, Sr. Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, WC Docket No. 10-90, *et al.* (filed Jul. 12, 2012) (showing “the significant ‘ripple effects’ on support payments across 113 different study areas arising out of just the correction of a single variable for two other study areas for boundary data”).

Respectfully submitted,

**NTCA-THE RURAL BROADBAND
ASSOCIATION**

By: /s/ Michael R. Romano

Michael R. Romano

Jill Canfield

Brian J. Ford

4121 Wilson Boulevard, Suite 1000

Arlington, VA 22203

mromano@ntca.org

(703) 351-2000

**EASTERN RURAL TELECOM
ASSOCIATION**

By: /s/ Jerry Weikle

Jerry Weikle

Regulatory Consultant

5910 Clyde Rhyne Drive

Sanford, NC 27330

weikle@erta.org

(919) 708-7404

**INDEPENDENT TELEPHONE AND
TELECOMMUNICATIONS ALLIANCE**

By: /s/ Genevieve Morelli

Genevieve Morelli, President

Micah M. Caldwell, Vice President –

Regulatory Affairs

1101 Vermont Ave., NW, Suite 501

Washington, D.C. 20005

gmorelli@itta.us

mcaldwell@itta.us

(202) 898-1519

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**NATIONAL EXCHANGE CARRIER
ASSOCIATION, INC.**

By: /s/ Richard A. Askoff

Richard A. Askoff

80 South Jefferson Road

Whippany, NJ 07981

raskoff@neca.org

(973) 884-8000

**UNITED STATES TELECOM
ASSOCIATION**

By: /s/ David Cohen

David Cohen

607 14th Street, NW, Suite 400

Washington, D.C. 20005

dcohen@ustelecom.org

(202) 326-7300

**WESTERN TELECOMMUNICATIONS
ALLIANCE**

By: /s/ Derrick Owens

Derrick Owens

Vice President of Government Affairs

317 Massachusetts Avenue N.E., Ste. 300C

Washington, DC 20002

derrick@w-t-a.org

(202) 548-0202

By: /s/ Gerard J. Duffy

Gerard J. Duffy

Regulatory Counsel for WTA

Blooston, Mordkofsky, Dickens, Duffy &

Prendergast, LLP

2120 L Street NW, Suite 300

Washington, DC 20037

gjd@bloostonlaw.com

(202) 659-0830