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

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

**NTCA–THE RURAL BROADBAND ASSOCIATION,
THE NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.,
THE EASTERN RURAL TELECOM ASSOCIATION, AND
WTA-ADVOCATES FOR RURAL BROADBAND
OPPOSITION TO
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION
APPLICATION FOR REVIEW**

To: Marlene Dortch
Secretary
Federal Communications Commission

I. INTRODUCTION & SUMMARY

Pursuant to section 1.115 of the rules of the Federal Communications Commission (“Commission”), NTCA–The Rural Broadband Association, the National Exchange Carrier Association, Inc., the Eastern Rural Telecom Association, and WTA-Advocates for Rural Broadband (collectively, the “Rural Associations”)¹ hereby submit this Opposition² to the

¹ NTCA–The Rural Broadband Association 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. 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). ERTA is a trade association representing rural community based telecommunications service companies operating in states east of the Mississippi River. WTA is a national trade association that represents more than 250 small rural telecommunications carriers that provide voice, video and data services to some of the most rural and hard-to-serve communities in the country and that are the providers of last resort to those communities.

Application for Review (“AFR”) filed by the National Cable & Telecommunications Association (“Cable”)³ regarding Connect America Fund (“CAF”) Phase II service obligations adopted by the Wireline Competition Bureau (“Bureau”). These service obligations were adopted by the Bureau, pursuant to its delegated authority, to determine which high-cost rural areas in price cap carrier service areas will be eligible for CAF Phase II support.⁴

The Commission should dismiss the Cable AFR. First, the AFR is based in part on the incorrect assertion that the Bureau misused its delegated authority in adopting the *CAF Phase II Service Obligations Order*. As demonstrated below, the AFR fails to provide any support for its assertion that the Commission intended CAF Phase I service obligations to apply to determinations of whether an “unsubsidized competitor” exists, in all instances. In fact, the Bureau was acting in accordance with the Commission’s clear intention to make certain that all rural consumers have access to “reasonably comparable” voice and broadband service, whether that be provided by a carrier receiving CAF Phase I or Phase II support, or an “unsubsidized competitor” providing such “reasonably comparable” service without support.

In addition, the Cable AFR should be dismissed as inconsistent with law and the Commission’s universal service policies. Indeed, the AFR contains no reference to or discussion of the governing statute and principles pertaining to universal service. Moreover, Cable’s

² Wireline Competition Bureau Reminds Parties of Deadlines for Filing Oppositions to and Replies Regarding the National Cable and Telecommunications Association’s Application for Review of the *Connect America Fund Phase II Service Obligations Order*, Public Notice, DA 13-2472, WC Docket No. 10-90 (rel. Dec. 24, 2013) (“*Public Notice*”).

³ NCTA Application for Review, WC Docket No. 10-90 (fil. Dec. 23, 2013).

⁴ *Connect America Fund*, WC Docket No. 10-90, Report and Order, DA 13-2115 (Oct. 31, 2013) (“*CAF Phase II Service Obligations Order*” or “*Order*”).

position would result in the Commission declining to direct high-cost support to areas where market forces are *not* sufficient to create the necessary incentives for the deployment of voice and broadband service that meets minimum standards of universal service set by the Commission simply because Cable (or some other entity) offers *some* level of service there. This would run contrary to the Commission’s previous ruling that price, usage, and latency metrics are also an integral part of determining whether rural consumers have access to “reasonably comparable” services at “reasonably comparable” rates.

Finally, the Cable AFR misreads the *CAF Phase II Service Obligations Order*. The *Order* did not, as Cable argues, impose on unsubsidized competitors the same service obligations as required of CAF Phase II recipients. Rather, the process established by the Commission and implemented by the *CAF Phase II Service Obligations Order* is aimed at confirming whether, *in fact*, an unsubsidized competitor is providing truly “universal” and “reasonably comparable” service to higher-cost-to-serve rural consumers at the same level as that obligated to be provided by a CAF Phase II-eligible entity. That determination is separate and apart from imposing those service obligations on any alternative provider.

II. STATEMENT OF INTEREST

The Rural Associations recognize that the *CAF Phase II Service Obligations Order* acknowledges that the “metrics” established therein do not “prejudge” similar issues regarding “the service obligations of rate-of-return carriers.”⁵ However, the Cable AFR raises overarching legal and public policy issues regarding universal service in rural areas of the nation served by price cap carriers that may at some point provide a framework for an ensuing discussion of the

⁵ *Id.*, ¶ 2, fn. 3.

service obligations of the Rural Associations' members. Thus, the Rural Associations have a strong interest in the issues raised by the AFR. For the reasons stated herein, the Commission should deny the Cable AFR and make clear that the arguments raised have no merit.

III. THE *CAF PHASE II SERVICE OBLIGATIONS ORDER* WAS ADOPTED CONSISTENT WITH THE COMMISSION'S DELEGATION OF AUTHORITY TO THE WIRELINE COMPETITION BUREAU, AND THE APPLICATION FOR REVIEW SHOULD THEREFORE BE DISMISSED

As an initial matter, the AFR is based, in part, on the incorrect assertion that the Bureau misused its delegation of authority and that the broadband and voice service performance requirements adopted for CAF Phase I recipients were intended by the Commission to be the service obligations that unsubsidized competitors should meet in all instances.⁶ In making this assertion, Cable points to the 2011 *USF/ICC Transformation Order*,⁷ specifically paragraph 170 (corrected by *Erratum* on Feb. 6, 2012 to remove any reference to CAF Phase I).⁸ As Cable notes, paragraph 170 states that “[i]n determining areas eligible for support, we will also exclude

⁶ AFR, fn. 12.

⁷ *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 an 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 – Mobility Fund*, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011) (“*USF/ICC Transformation Order*”).

⁸ *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 an 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 – Mobility Fund*, WT Docket No. 10-208, *Erratum* (rel. Feb. 6, 2012).

areas where an unsubsidized competitor offers broadband service that meets the broadband performance requirements described above.”⁹ Cable provides no citation to any language that would indicate that the Commission intended “described above” to mean *only* the specific provisions of the *Transformation Order* dealing with CAF Phase I. Indeed, a careful reading of the *Transformation Order* makes clear that the Commission intended *all* Americans, in urban and rural areas, to have access to broadband service meeting specific speed, latency, usage, and price standards. Specifically, paragraph 87 states that “[a]ll Americans should have access to broadband that is capable of enabling the kinds of key applications that drive our efforts to achieve universal broadband, including education (*e.g.*, distance/online learning), health care (*e.g.*, remote health monitoring), and person-to-person communications (*e.g.*, VoIP or online video chat with loved ones serving overseas).”¹⁰

Paragraph 103 further defines “unsubsidized competitor” and states that “*all* broadband buildout obligations for fixed broadband are conditioned on not spending the funds to serve customers in areas already served by an ‘unsubsidized competitor.’”¹¹ Paragraph 104 goes on to emphasize the importance of broadband performance characteristics, beyond speed, referencing latency and capacity minimums for all CAF recipients.¹² Finally, Figure 1 of the *USF/ICC Transformation Order* sets out broadband performance characteristics and obligations for CAF Phase I and Phase II, also referencing the latency and usage minimums in addition to speed.

⁹ *Transformation Order*, ¶ 170 (as amended by *Erratum*).

¹⁰ *Id.*, ¶ 87 (internal citations omitted).

¹¹ *Id.*, ¶ 103 (emphasis added).

¹² *Id.*, ¶ 104.

In short, it is clear that the Commission intended the Bureau to make certain that all consumers have access to “reasonably comparable” voice and broadband service, whether it is provided by a carrier receiving CAF Phase I or Phase II support, or an “unsubsidized competitor” providing such “reasonably comparable” service without support. Thus, the Bureau rightly clarified and refined the broadband and voice service requirements for the Second Phase of CAF support when it adopted the *CAF Phase II Service Obligation Order* and, contrary to Cable’s assertion, the *Order* is fully consistent with the Commission’s delegation of authority to the Bureau. Thus, Cable’s AFR should accordingly be dismissed.

IV. THE APPLICATION FOR REVIEW SHOULD BE DISMISSED AS INCONSISTENT WITH LAW AND THE COMMISSION’S UNIVERSAL SERVICE POLICY

Turning to the policies implicated by the AFR, the Rural Associations respectfully suggest that it is important to recall what universal service means, and focus on the beneficiary of the networks providing such universal service – the consumer. Indeed, it is telling that the Cable AFR contains no reference to or discussion of the governing statute and principles pertaining to universal service and little, if any, apparent concern for consumer impacts.

Section 254 of the Communications Act of 1934, as amended (the “Act”), defines “universal service” as “an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services.”¹³ Section 254 then sets forth a number of principles that the Commission must by law look to in preserving and advancing such

¹³ 47 U.S.C. § 254(c)(1).

universal service. Several of these principles are relevant to placing the Cable AFR in the proper context:

- (1) Quality and Rates. Quality services should be available at just, reasonable, and affordable rates.
- (2) Access to advanced services. Access to advanced telecommunications and information services should be provided in all regions of the Nation.
- (3) Access in rural and high cost areas. Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.¹⁴

Thus, putting aside the very question of whether and to what degree explicit Universal Service Fund (or CAF) support is required for the deployment of networks that enable the provision of universal service in a given area, the law by its explicit terms requires that all consumers in all regions must have access to advanced telecommunications services that are reasonably comparable in quality to those available in urban areas and at affordable, reasonably comparable rates. This goal can be achieved through “the operation of the market” in some locations, and will require a flow of explicit support in other areas – but the critical point is that, either way, federal law requires that the consumers in *all* areas must in fact receive the types and levels of service defined by the statute and the Commission as universal service.

The logical outgrowth of the AFR appears to be based on Cable’s belief that the fundamental foundation of the universal service provisions of the Act is applicable to *some* rural consumers and not *all* rural consumers. By trying to avoid application of the Bureau’s metrics

¹⁴ *Id.* at § 254(b)(1) to (3).

adopted in the *CAF Phase II Service Obligations Order* in the context of what entities are or are not considered to be “unsubsidized competitors” for purposes of CAF Phase II model-based universal service disbursements, Cable would relegate certain consumers to a lower level of service. Accordingly, Cable’s request to define universal service downward must be rejected as inconsistent with law.

Moreover, in focusing on the proclaimed significance of its own industry’s presence, Cable ignores the consumer. Regardless of what the customer actually receives, Cable apparently would want federal law to be interpreted to assume that the mere presence of a provider of some level of broadband in a market is sufficient to fulfill universal service. More is needed, however, to enable and fulfill universal service. To determine that explicit universal service support is unnecessary in a high-cost area, there must be an in-depth examination of whether the market is in fact otherwise providing rural consumers in such an area with access to services that are reasonably comparable in price and quality to those available in urban areas.¹⁵ The Bureau thus rightly focused on the meaning of universal service to consumers, and properly held that would-be competitors should be accountable for fulfilling that mission (by meeting the

¹⁵ This discussion highlights the importance of carrier of last resort (“COLR”) obligations, which help to ensure that reasonably comparable service is provided to consumers in *both* the low-cost populated town centers *and* the high-cost, sparsely populated areas that surround town centers. RLECs acting as COLRs have leveraged private investment with high-cost universal service support to provide coverage to consumers *throughout* their study areas. Not only would a “just trust us” approach to verifying whether each consumer receives the benefit of universal service likely leave some consumers behind, it would also undermine the benefits that come from averaging high costs over an entire study area. It is very likely that any entity that does happen to meet the definition of “unsubsidized competitor” in RLEC areas will operate in the most densely populated (lowest-cost) portion of a given study area. As a result, disaggregation and reallocation of costs would result in *increased* need for support in outlying areas, as the benefits of averaging associated with the lower-cost “hole” are eliminated and only the higher stand-alone costs of serving the “donut” are taken into account.

same service obligations as CAF recipients) rather than treating the mere presence of a cable provider as enough, in and of itself.

In declaring the *CAF Phase II Service Obligations Order* to be “inconsistent” with the basic premise of the CAF, the AFR states that the *Order*, “enables price cap incumbent LECs to receive statewide model-based CAF Phase II support in areas where market forces have been sufficient to promote broadband deployment.”¹⁶ It further asserts that, “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*.”¹⁷

Taking these statements together, Cable would apparently have the Commission decline to direct high-cost support to areas where market forces are *not* sufficient to create the necessary incentives for the deployment of voice and broadband service that meets minimum standards of universal service set by the Commission simply because Cable (or some other entity) offers *some* level of service there (at rates or levels of service quality that may be anyone’s guess). Indeed, the AFR asks the Commission to decline to provide CAF Phase II support in areas where an unfunded provider offers broadband meeting *only* the specified speed threshold.¹⁸ This would run contrary to the Commission’s previous ruling¹⁹ that price, usage, and latency metrics are also

¹⁶ AFR, pp. 4-5.

¹⁷ *Id.*, p. 5 (emphasis added).

¹⁸ *Id.*, p. 7.

¹⁹ *See, USF/ICC Transformation Order*, ¶ 87. (“In developing these performance requirements, we seek to ensure that the performance of broadband available in rural and high cost areas is “reasonably comparable” to that available in urban areas. All Americans should have access to broadband that is capable of enabling the kinds of key applications that drive our efforts to achieve universal broadband, including education (*e.g.*, distance/online learning), health care (*e.g.*, remote health monitoring), and person-to-person communications (*e.g.*, VoIP or

an integral part of determining whether rural consumers have access to “reasonably comparable” services at “reasonably comparable” rates.

The Cable AFR also suggests an unsupportable reading of the *CAF Phase II Service Obligations Order*. While Cable asserts that the *Order*, “imposed the same requirements on parties that do not ‘voluntarily accept universal service support,’”²⁰ *the Order* in fact does no such thing.

Rather, the process established by the Commission and implemented by the *CAF Phase II Service Obligations Order* is aimed at confirming whether, *in fact*, some alternative broadband provider is providing truly “universal” and “reasonably comparable” service to higher-cost-to-serve rural consumers at the same level as that obligated to be provided by a CAF Phase II-eligible entity. Only by this determination can there be any rational basis to determine that such alternative broadband provider is, *in fact*, an “unsubsidized competitor” operating in a given area. That determination is separate and apart from imposing those service obligations on that alternative broadband provider.

Put another way, the provisions of the *CAF Phase II Service Obligations Order* cited by Cable (¶¶ 40-47) are part and parcel of a method by which an unsubsidized competitor can, in the words of the Bureau, “exclude an area from Phase II support.”²¹ If an alternative broadband

online video chat with loved ones serving overseas)). (citing 47 U.S.C. § 254(b)(3), “Consumers in all regions of the Nation . . . should have access to . . . advanced telecommunications and information services[] that are reasonably comparable to those services provided in urban areas . . .”).”

²⁰ AFR, p. 6.

²¹ *CAF Phase II Service Obligations Order*, ¶ 40. Specifically, paragraph 40 of the *CAF Phase II Service Obligations Order* states that “[t]o exclude an area from Phase II support, an

provider seeks to “exclude” the price cap-regulated carrier from receiving such CAF Phase II support, that alternative broadband provider can undertake whatever network and service provisioning it needs to meet that objective. That decision, however, is a voluntary decision by the alternative broadband provider and, if not made, demonstrates that no market forces exist that should preclude CAF Phase II support for the area under review. Thus, the *CAF Phase II Service Obligations Order*’s metrics do not impose obligations on an alternative broadband provider to provide service meeting the standards. At the same time, however, such requirements do ensure that the service metrics determined to be required for universal service can be achieved in all areas to the benefit of all rural consumers.²²

Likewise, in no way does the *Order* inappropriately regulate the broadband rates, terms, and conditions of unsupported carriers.²³ Rather, the Bureau explained that it was providing “guidance to parties that voluntarily accept universal service support as to how their compliance with the Commission’s service obligations will be evaluated.”²⁴ This language cannot reasonably be read to support Cable’s claim that the Bureau is regulating the rates, terms, and

unsubsidized competitor must be offering broadband and voice service that would meet the Commission’s requirements for price cap carriers receiving model-based support.”

²² The *CAF Phase II Service Obligations Order* specifically states that “a potential unsubsidized provider need only make a showing regarding the metrics discussed in this Order in two circumstances: first, if it challenges an area initially designated as unserved, claiming that the area should instead be treated as served; or second, if it is responding to a challenger’s claim that one of the census blocks shown as served by the provider is in fact unserved.” *Id.*, ¶ 40. In fact, as even the AFR admits (AFR, p. 6), the *Order*, specifically declines to require “unsubsidized competitors to comply with the reporting requirements of a funding recipient,” including requiring such a carrier to make a “certification” that it meets these metrics. *Id.*

²³ AFR, pp. 5-7.

²⁴ *CAF Phase II Service Obligations Order*, ¶ 6, fn. 13 (emphasis added).

conditions of alternative broadband providers and requiring the offering of services that meet the same standards (price, speed, usage, and latency) as CAF Phase II recipients. As explained above, any alternative broadband provider that seeks “unsubsidized competitor” status does so voluntarily in order to limit CAF Phase II disbursements in a given area. Indeed, the Bureau’s guidance simply reinforces the compliance requirements for CAF Phase II recipients in areas where *only* the incumbent price cap carrier is willing to voluntarily provide service meeting minimum standards, for both the high-cost and the low-cost portions of the area in question, and no unsubsidized provider offers service meeting those standards.

V. CONCLUSION

Contrary to Cable’s efforts to suggest otherwise, the *CAF Phase II Service Obligations Order* is no more than an affirmation that “reasonable comparability” is the standard for delivery of services to rural consumers, whether delivered by a supported carrier of last resort or by operation of the market alone. As the Rural Associations have noted for some time,²⁵ the Commission should not, and cannot by law, adopt anything less than a “data-driven,” meaningful, and evidence-based process when it comes to identifying purported unsubsidized competitors. The risk of “false positives” – that is, incorrect judgments as to whether consumers in a given area would be denied the benefits of universal service – is too great to allow for anything less than such a robust process. To be clear, the Rural Associations remain concerned as to whether the Bureau has in fact created a process that can accurately confirm the extent to which a purported unsubsidized competitor operates in a given area, providing truly “reasonably

²⁵ Comments of NTCA, NECA, ERTA, and WTA, WC Docket No. 10-90 (fil. Mar. 28, 2013); Reply comments of Comments of NTCA–the Rural Broadband Association, NECA, ERTA, and WTA, WC Docket No. 10-90 (fil. Apr. 12, 2013).

comparable” voice and broadband service. Certainly, the approach that the Cable AFR advocates would irreparably damage the flow of high-cost support to those locations where market forces have failed to enable the deployment and delivery of services that are reasonably comparable to those available in urban areas. The Commission should instead, at each turn, without short-cuts, fulfill its statutory universal service responsibilities to rural consumers. Doing so requires at the very least dismissal of Cable’s AFR.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Brian J. Ford certify that on this, the 7th day of January, 2014, copies of the foregoing NTCA, NECA, ERTA, and WTA (Rural Associations') Opposition to the National Cable & Telecommunications Association Application for Review were served by first class mail, postage prepaid, to the following parties to the proceeding:

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