

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

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

**COMMENTS OF
NTCA–THE RURAL BROADBAND ASSOCIATION,
THE NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.
THE EASTERN RURAL TELECOM ASSOCIATION, AND
THE WESTERN TELECOMMUNICATIONS ALLIANCE**

NTCA–The Rural Broadband Association (“NTCA”), the National Exchange Carrier Association, Inc. (“NECA”), the Eastern Rural Telecom Association (“ERTA”), and the Western Telecommunications Alliance (“WTA”) (collectively, the “Rural Associations”)¹ hereby submit comments in response to the Public Notice released by the Wireline Competition Bureau (the “Bureau”)² seeking input with respect to service obligations and identification of unsubsidized competitors for purposes of Connect America Fund (“CAF”) Phase II support.

Although the proposals in the Public Notice appear to inch toward a more robust process for purposes of confirming the extent to which certain kinds of unsubsidized competitors operate

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. 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 approximately 68 rural telephone companies operating in states east of the Mississippi River. WTA is a trade association that represents over 250 small rural telecommunications companies operating in the 24 states west of the Mississippi River.

² *Wireline Competition Bureau Seeks Further Comment on Issues Regarding Service Obligations for Connect America Phase II and Determining Who Is An Unsubsidized Competitor*, Public Notice, DA 13-284, WC Docket No. 10-90 (released Feb. 26, 2013) (“Public Notice”).

in a given area (as compared to prior proposals), the Rural Associations remain concerned that such determinations will fail to capture accurately and entirely the extent to which a competitor offers a meaningful alternative in such areas, thus undermining the statutory mandate of universal service. For the reasons set forth herein, and consistent with the statutory mandate to preserve and advance universal service, the Bureau should take further steps to implement an evidentiary-based process that takes more true account of the very issues discussed in its most recent Public Notice – such as the availability of both broadband *and* voice service, the prices for such services, and the quality of service in each instance.

I. THE PUBLIC NOTICE REFLECTS MOVEMENT TOWARD A ROBUST AND DATA-DRIVEN PROCESS FOR IDENTIFYING THE PRESENCE OF PURPORTED “UNSUBSIDIZED COMPETITORS,” BUT IT STILL PROVIDES AN INEXPLICABLE AND UNJUSTIFIABLE “FREE PASS” FOR CERTAIN SECTORS.

As the Rural Associations have noted for some time, the Commission should not, and cannot by law, depart from its professed commitment to “data-driven” policies when it comes to any process for identifying purported unsubsidized competitors.³ Specifically, nothing less than

³ Specifically, the Rural Associations have proposed that a would-be competitor would need to file, with a state commission, a petition that shows through clear and convincing evidence that, at a minimum: (1) it is a state-certified carrier or eligible telecommunications carrier; (2) it can satisfy any public interest obligations required of a Universal Service Fund (USF) recipient; (3) it can deliver, as of the filing of the petition, both voice telephony service and broadband speeds of at least 4 Mbps downstream/1 Mbps upstream and with latency and usage limits that meet the Commission’s broadband performance requirements for 100 percent of *both* the residential *and* business locations in the purportedly competitive area through the use of its own facilities in whole or in substantial part and in a manner comparable (fixed or mobile) to the relevant USF recipient; (4) it offers each of those broadband and voice services on a stand-alone basis on a month-to-month basis (*i.e.*, without contractual commitments) at rates that are reasonably comparable, as defined by the Commission, to those offered by the USF recipient; (5) it will comply with all of the same reporting, service monitoring, and other “accountability” requirements (including any net neutrality and other regulatory requirements) as the USF recipient for the area in question; and (6) it neither receives high-cost support of any kind *nor* cross-subsidizes its operations in the specific, affected study area with revenues from other areas of operation or sources. Comments of NTCA, NECA, and WTA, WC Docket No. 10-90 (filed

a meaningful and evidence-based process must be applied at each turn – without short-cuts – if the Commission is to fulfill its statutory universal service responsibilities to rural consumers.

The Bureau’s most recent Public Notice moves closer to the mark than prior proposals in developing such an evidentiary process with respect to the question of unsubsidized competition. The Public Notice suggests, for example, that a fixed wireless provider would be required to demonstrate its qualifications as an “unsubsidized competitor” by making “an *affirmative showing* that it meets the necessary speed, latency, capacity, and price criteria.”⁴ The Public Notice also appears to recognize, for the first time, that the principles of universal service require a more detailed analysis than the mere identification of the availability of a certain speed threshold of broadband based upon a self-reported, unverified national mapping project.⁵ For example, the most recent Public Notice finally proposes to take careful account of critical service

Feb. 19, 2013), pp. 9-11. *See also*, Comments of NTCA, OPASTCO, NECA, and WTA (the Rural Associations), WC Docket No. 10-90 (filed Jan. 9, 2013); Reply Comments of the Rural Associations, WC Docket No. 10-90 (filed Jan. 24, 2013); Comments of the Rural Associations, WC Docket No. 10-90, *et al.* (filed Jan. 18, 2012), pp. 75-94.

⁴ Public Notice, ¶ 11 (emphasis added).

⁵ It is also worth noting that additional data sources available to the Commission, for the purposes of determining rural consumers’ access to broadband, will not assist the Commission in efforts to identify the presence of true unsubsidized competition throughout a supported carrier’s service area. Again, this reinforces the notion that a more robust and evidence-based process that requires an affirmative showing on the part of purported unsubsidized competitors is required. A recent report from the Bureau’s Industry Analysis and Technology Division, based on data collected via FCC Form 477, is instructive. At one point, the report states that “we emphasize that a provider who reports residential fixed-location connections of a particular speed in a particular census tract may not necessarily offer service at that speed everywhere in the census tract.” Internet Access Services: Status as of December 31, 2011 (released February 2013) p. 8 (referencing Figure 5(a) entitled “Percentages of Households Located in Census Tracts Where Providers Report Residential Fixed-Location Connections of Various Speeds as of December 31, 2011”).

characteristics – such as prices, service quality, and usage thresholds⁶ – in assessing whether universal service can be fulfilled in a particular area without the need for support for any one carrier.

These are welcome developments, to be sure, and they show a thoughtful evolution in how to balance competing policy dynamics. Unfortunately, the proposals in the Public Notice still stop inexplicably and unjustifiably short in implementing such processes across the board. Specifically, while the Public Notice applies a more robust and “data-driven” process to the determination of whether a *fixed wireless* provider is indeed qualified as an “unsubsidized competitor,” it still appears to retreat to a more superficial “just check the map” approach with respect to other fixed would-be competitors. As a result, the onus of a robust and evidence-based affirmative showing is not also placed on cable providers (who, presumably, would possess the most accurate information as to their service offerings and availability), as was actually first proposed by the cable industry itself.⁷ On the contrary, as the Public Notice makes clear, alleged

⁶ Public Notice, ¶¶ 13-26.

⁷ In recent comments on the question of “unsubsidized competition,” the cable industry tries to distance itself from its prior suggestion to use a more thoughtful, evidentiary-driven process for establishing unsubsidized competition. Specifically, the National Cable & Telecommunications Association (NCTA) asserts that its prior proposal should be disregarded because it was made “before the Commission fundamentally changed the high-cost program, including adopting the requirement that universal service high-cost support not be used in areas served by an unsubsidized competitor.” Reply Comments of NCTA, WC Docket No. 10-90 (filed March 4, 2013), fn. 11. As an initial matter, it is oddly circular to argue that a more thoughtful process that the cable industry itself first proposed to identify unsubsidized competitors should now be considered dated and inapplicable simply because the Commission has since decided that it in fact wants to identify unsubsidized competitors. Put another way, the cable industry is effectively arguing that the Commission should now ignore the precise details of the cable industry’s proposals because the basic concept that the industry advanced was adopted. Moreover, and more importantly, NCTA fails to respond to the fundamental concerns raised by the Rural Associations; that is, a “just check the map” approach does not provide any chance to evaluate precisely the kinds of things – such as affordability and service quality of both voice and broadband – now teed up as considerations in the instant Public Notice.

unsubsidized cable provider competitors would be able to rely upon uncertified, unilateral assertions of competitive presence through the more generic broadband mapping process.⁸ The onus would be on incumbents to challenge their assertions through evidentiary submissions that attempt to disprove claims of availability and/or highlight ways in which the services offered by such would-be competitors are not in fact reasonably comparable with respect to service type (*e.g.*, voice vs. broadband), service quality (*e.g.*, speed, latency, capacity, or other limits), or price (*i.e.*, does the competitor also offer services at “reasonably comparable” rates to those available in urban areas?). Indeed, the Bureau seems itself to acknowledge later in the Public Notice that looking solely at broadband availability would be insufficient to fulfill the goals of ensuring that reasonably comparable voice and broadband services are available at reasonably comparable rates across the nation.⁹ There is no good reason, as part of a well-considered

⁸ The perils of relying solely upon unverified assertions of broadband coverage, such as on the National Broadband Map, can perhaps best be seen in a submission earlier this year from Time Warner Cable regarding what census blocks should be considered “served” for purposes of CAF I. In those comments, Time Warner Cable’s list of census blocks that it claimed to serve included blocks “where [Time Warner Cable] has at least one active billing customer (or at least one former customer, if local personnel confirm that service could be reinitiated within 7 to 10 days) . . . and where a node potentially touches the census block” Comments of Time Warner Cable, WC Docket No. 10-90 (filed Jan. 9, 2013), p. 2. If this is the kind of information that providers will present directly to the Commission itself in asserting what is “served,” one can only imagine the integrity and quality of the information contained within the National Broadband Map. For one, the mere presence of a competitor in a census block does not necessarily translate to broadband service availability to the most remote and expensive to serve rural consumers in that census block. Moreover, the National Broadband Map does not show whether broadband services are offered at reasonably comparable rates and whether the competitor also offers stand-alone voice service at reasonably comparable rates. An “unsubsidized competitor” should therefore be required to make such an affirmative showing in the manner discussed above. *See, supra*, fn. 3.

⁹ *See*, Public Notice, ¶¶ 16-18. *See also, Id.*, ¶ 16 (“In the absence of data from a rate survey, should we establish an interim reasonable comparability benchmark that a competitive provider would need to meet in order to be deemed an unsubsidized competitor?”); *Id.*, fn. 29 (“Under such a proposal, a competitive provider would need to establish that it offered a voice telephony service at a rate no greater than \$37, and a broadband service that provided at least 4

evidentiary process, to compel a universal service recipient to rebut the claims of any would-be competitor, given that the would-be competitor – whether fixed wireline or fixed wireless – purporting to offer such services is in the best position to know its rates, terms, conditions, and service characteristics.

The Commission justifies requiring meaningful evidence from only a subset of would-be competitors based, in part, on “the wide variance in service offerings from fixed wireless providers.”¹⁰ Yet, a comparable analysis, through an affirmative evidentiary showing on the part of a purported unsubsidized competitor, should apply to cable providers as well. That is, given the “wide variance” in the showing of the presence of unsubsidized competitors via the National Broadband Map and the actual presence of such competitive providers,¹¹ the Commission should adopt a much more rigorous process.

Moreover, the Public Notice states that “while we would assume that a cable provider that meets the speed threshold also would meet the price, capacity, and latency requirements discussed below, this is a rebuttable presumption.”¹² There is no basis for affording such a presumption to any would-be competitor. Indeed, the Bureau has cited no evidence whatsoever for affording such a presumption, and it would be the antithesis of “data-driven” decision-making to give any one sector writ large such a “free pass.” Moreover, such a rebuttable

Mbps downstream/1 Mbps upstream (or specified proxy) at a rate no higher than \$60, in order to be deemed an unsubsidized competitor that would preclude funding for a particular census block.”).

¹⁰ *Id.*, ¶ 11.

¹¹ Comments of USTelecom, WC Docket No. 10-90 (filed Jan. 9, 2013), pp. 6-8; Comments of CenturyLink, WC Docket No. 10-90 (filed Jan. 9, 2013), pp. 5-7.

¹² Public Notice, fn. 19.

presumption would put CAF recipients in the unenviable position of rebutting such self-reported assertions without access to sensitive information that alleged competitors do not and undoubtedly will not share.¹³ Finally, and most significantly, giving one subset of would-be competitors such a “free pass” would not permit the Commission to adequately judge the potential for “false positives” – that is, whether consumers in areas who are being denied the benefit of universal support because of alleged unsubsidized competition will in fact have sustained access to reasonably comparable voice and broadband services at reasonably comparable rates. As a statutory principle, “reasonable comparability” should not be contingent upon guesswork, conjecture, “check-the-box” use of incomplete and at least partially inaccurate databases, and/or limited access to certain service characteristics that any given sector of the industry almost certainly holds proprietary.

Rather than adopt a questionable and less-than-robust showing (based on the presumption that the National Broadband Map and other proprietary data sources are both complete and correct), the Commission should adopt a more reliable and generally applicable evidentiary process, one that does not enable a subset of would-be competitors to make unilateral assertions without the necessary validation and evidentiary showings. Instead, the Commission should require *all* providers – whether fixed wireline or fixed wireless – to make the same meaningful affirmative evidentiary showing that they meet the necessary speed, latency, capacity, and price criteria. In prior comments, the Rural Associations have outlined a thorough, yet reasonable

¹³ The Time Warner Cable filing cited in footnote 8, *supra*, is instructive. If this is the kind of self-made determination that undergirds the National Broadband Map and other assertions of broadband service coverage – and there is no reason to believe this is not the case – it is patently unreasonable to place the onus of disproving such claims on any party other than the one making such claims in the first instance.

approach¹⁴ that will enable the Commission to meet its universal service mandate through a robust evidentiary process. Such an approach will help to ensure that rural consumers are not placed at risk of losing access to reasonably comparable voice and broadband service at affordable rates.

II. THE SPEED THRESHOLD FOR DETERMINING THE PRESENCE OF PURPORTED UNSUBSIDIZED COMPETITION MUST NOT RELEGATE RURAL CONSUMERS TO SUBSTANDARD BROADBAND SERVICE.

The Public Notice also seeks comment on the speed threshold from the National Broadband Map that should be utilized as a proxy for 4 Mbps/1 Mbps broadband service as part of identifying census blocks served by competitive providers.¹⁵ The use of 3 Mbps/768 kbps as a proxy for 4/1 Mbps service should be summarily rejected. As the Public Notice seems to recognize, and comments in the context of CAF Phase I also noted,¹⁶ the use of this speed proxy risks excluding certain areas from high-cost support even though consumers in those areas may currently lack access to 4/1 Mbps service today. Such a result could doom rural consumers to substandard broadband service, directly contrary to the Commission's statutory mandate to ensure that rural consumers have access to reasonably comparable advanced services.

The Public Notice proposes instead 6 Mbps/1.5 Mbps as a proxy. This proposal will, of course, help to ensure that consumers in rural areas are not left behind those living in other areas of the nation that may already have access to 4/1 Mbps broadband service, as would be the case with a lower speed standard. In addition, the 6/1.5 Mbps standard has the added benefit of being

¹⁴ See, *supra*, fn. 3.

¹⁵ Public Notice, ¶ 9.

¹⁶ Comments of USTelecom, WC Docket No. 10-90 (filed Jan. 9, 2013), pp. 2-5; Comments of CenturyLink, WC Docket No. 10-90 (filed Jan. 9, 2013), pp. 9-10.

more in line with the broadband speeds that many consumers are already demanding all across the nation.¹⁷ Indeed, it should be noted that even this level of service may rapidly fall behind what is becoming increasingly available to a large number of urban consumers. Locking consumers into 3 Mbps/768 kbps in near-perpetuity is no way to ensure “reasonably comparable” broadband service – especially when it requires long-term network investments that have perhaps an even greater period to provide complete return on investment to enable higher-speed services in the first instance.

The Bureau’s questions regarding the appropriate speed proxies, given once again the shortcomings of the National Broadband Map, also highlight the need for universal service determinations to rest upon an evolving foundation and updated information. Universal service in a broadband era is doomed to fail if the Commission does not undertake a frequent assessment of “reasonable comparability” and – given the nature of long-term network investments – plan reasonably in advance for anticipated changes in broadband speeds. There is already some indication that the national average broadband speeds demanded and used by consumers are exceeding 4/1 Mbps.¹⁸ In light of the time it takes to plan for and implement network investments, the Commission and consumers would be far better-served to think ahead and anticipate what demands, and thus what “reasonable comparability,” will be two or four years from now. This proactive approach to planning for “reasonable comparability,” including at

¹⁷ The Commission is correct in its concern about carriers potentially using Phase II funds to overbuild in areas that already have access to 4/1Mbps service. Similar to a USTelecom suggestion in the context of CAF Phase I, the Commission could require CAF Phase II recipients to certify that support will not be used to deliver broadband service to any area that is already served by 4/1 Mbps broadband service. Comments of USTelecom, WC Docket No. 10-90 (filed Jan. 9, 2013), p. 5.

¹⁸ See, Joan Engebretson, Akamai Sees Big Jump in U.S. Internet Connections Above 10 Mbps, telecompetitor, (Jan. 23, 2013), <http://www.telecompetitor.com/akamai-sees-big-jump-in-u-s-internet-connections-above-10-mbps/>.

least an annual re-evaluation of what speeds and other service characteristics are likely to be in two or four years, will be essential to building a sustainable and more efficient universal service system/CAF that fulfills the statutory mandate faithfully.

Respectfully submitted,

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