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

In the Matter of	)
	)
Connect America Fund	) WC Docket No. 10-90
	)
ETC Annual Reports and Certifications	) WC Docket No. 14-58
	)
Developing a Unified Intercarrier Compensation Regime	) CC Docket No. 01-92
	)

PETITION FOR RECONSIDERATION

WTA – ADVOCATES FOR RURAL BROADBAND

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Summary

WTA – Advocates for Rural Broadband ("WTA") petitions for reconsideration of portions of the Commission's March 30, 2016 Order regarding high-cost universal service support for rate-of-return carriers.

WTA seeks reconsideration and revision of the Order's determinations in paragraphs 125 and 136 that "qualifying unsubsidized competitors" do not need to offer and provide the same broadband speeds and services as the rural local exchange carriers ("RLECs") whose support they seek to reduce or eliminate. It proposes instead that the Commission prevent loss or degradation of service to rural consumers by qualifying entities as "unsubsidized competitors" only if they provide the same broadband speeds as the existing RLEC (thereby preventing displacement of fiber-to-the premises and other higher speed services by inferior services) and the same services (thereby preventing loss of Lifeline and other critical services).

WTA requests reconsideration of the Order's lack of clarity and guidance regarding the treatment of exchange sales, transfers of control and mergers that take place after the separate Alternative Connect America Cost Model ("ACAM") and Rate of Return ("RoR") Paths are implemented. In particular, WTA requests that study area and exchange transactions continue to be encouraged, and that study areas under new ownership remain on the Path elected at the time of implementation (even if that results in commonly owned study areas in the same state being on different paths).

WTA ask the Commission to reconsider the Order's failure to establish a streamlined procedure for revising build-out obligations if (as is very likely) fiber optic cable and contract construction services become much more expensive or unavailable during the massive nation-

wide and industry-wide broadband construction programs the Commission has mandated. The Commission can accomplish this by establishing streamlined procedures for the revision of its build-out requirements (e.g., if cost increases exceed thirty percent (30.0%)) and for the extension of its build-out deadlines (especially if materials or services become unavailable for substantial periods beyond the control of RLECs).

Finally, WTA notes that the benchmarks and budgetary controls established by the Order for broadband-only service are virtually certain to lead to retail broadband rates in many RLEC service areas that exceed the Commission's reasonably comparable broadband rate ceilings for 10/1 services. It requests recognition that RLEC organizations have to recover their costs to remain in business and proposes suspension or other relief from the consequences of exceeding reasonably comparable retail broadband rate ceilings unless and until increased CAF BLS support can be provided.

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PETITION FOR RECONSIDERATION

WTA - Advocates for Rural Broadband ("WTA"), pursuant to Section 1.429 of the Commission's Rules, hereby petitions for reconsideration of various portions of the Report and Order, Order and Order on Reconsideration[1] ("Order") in this proceeding. This petition is filed in accordance with the public notice provided in 81 *Fed. Reg.* 24282 (April 25, 2016).

I. WTA – Advocates for Rural Broadband

WTA is a national trade association representing more than 300 rural telecommunications providers ("RLECs") offering voice, broadband and video-related services in rural America. WTA members are generally small local exchange carriers that serve some of the most remote, sparsely populated and expensive-to-reach areas in the country and that are providers of last resort to those service areas. The typical WTA member has 10-to-20 full-time employees, and serves fewer than 3,500 access lines in the aggregate, and fewer than 500 access lines per exchange.

[1] *In the Matter of Connect America Fund et al.*, Report and Order, Order and Order on Reconsideration, Further Notice of Proposed Rulemaking, WC Docket Nos. 10-90 and 14-58 and CC Docket No. 01-92, FCC 16-33, released March 30, 2016.

WTA was an active participant in the proceedings that led to the *Order*. As its name indicates, WTA and its members are advocates for the deployment and adoption of high quality and affordable broadband networks and services throughout Rural America in a manner that provides broadband services and rates that are reasonably comparable to those available in urban areas. WTA examines and evaluates this and other rulemakings in terms of their implementation of the core statutory principles of Section 254(b) of the Communications Act, and their effectiveness in promoting and achieving increased deployment and adoption of the broadband networks, speeds and services needed by rural Americans.

WTA hopes that the *Order* will achieve at least some of the stability and predictability that WTA members and other RLECs have long sought with respect to the high-cost support mechanisms that are essential for rural broadband deployment and adoption. However, in addition to its continuing concerns with the sufficiency of the various existing, revised and new mechanisms, WTA requests reconsideration and revision of the following portions of the *Order*: (1) its determinations in paragraphs 125 and 136 that "qualifying unsubsidized competitors" do not need to offer and provide the same broadband speeds and services as the RLECs whose support they seek to reduce or eliminate; (2) its lack of clarity and guidance regarding the treatment of exchange sales, transfers of control and mergers that take place after the separate regulatory and support paths established therein are implemented; (3) its failure to establish a streamlined procedure for revising build-out obligations if (as is very likely) fiber optic cable and contract construction services become much more expensive or unavailable during the massive nation-wide and industry-wide broadband construction programs the Commission has been mandating; and (4) its establishment of benchmarks and budgetary controls for broadband-only

service that are virtually certain to lead to retail broadband rates in many RLEC service areas that exceed the Commission's reasonably comparable broadband rate ceilings for 10/1 services.

WTA's proposed solutions include: (a) preventing loss or degradation of service to rural consumers by qualifying entities as "unsubsidized competitors" only if they provide the same broadband speeds and services as the RLECs whose high-cost support they are seeking to reduce or eliminate; (b) clarifying, that after implementation of the Alternative Connect America Model ("ACAM") and Rate of Return ("RoR") Paths, study area and exchange transactions will continue to be encouraged, and that study areas under new ownership will remain on the path elected at the time of implementation (even if that results in commonly owned study areas in the same state being on different paths); (c) making its ACAM and RoR build-out obligations more flexible by establishing streamlined procedures for their revision (if cost changes exceed a specified percentage) or extension (if materials or services become unavailable for a substantial period); and (d) in the absence of the increased and sufficient high-cost support that would enable RLECs and their affiliates to comply with retail broadband rate ceilings, the recognition that RLEC organizations have to recover their costs to remain in business and the grant of relief from the consequences of exceeding reasonably comparable retail broadband rate ceilings.

II. The Commission Should Reconsider and Strengthen Its Requirements for Qualification as "Unsubsidized Competitors" to Ensure That Customers in Affected "Competitive" Areas Do Not Suffer Loss or Degradation of Service.

WTA seeks reconsideration of the *Order's* holdings that an entity may qualify as an "unsubsidized competitor": (a) merely by offering a "threshold" broadband speed of 10/1 Mbps rather than matching the actual maximum broadband speed provided by the incumbent RLEC in the census blocks where the RLEC's Connect America Fund Broadband Loop Support ("CAF BLS") is being eliminated (*Order*, par. 125); and (b) by not being required to provide the same

services and comply with the same service obligations as the displaced RLEC (*Order*, par. 136). These holdings must be reversed, for they threaten to critically reduce and impair the service and service quality available to the rural households and businesses located in affected census blocks.

In Section 254(b) of the Communications Act, Congress adopted specific consumer-oriented principles to govern all universal service regulations and mechanisms implemented by the Commission. These basic statutory principles are: (1) the availability of quality services at just, reasonable and affordable rates [Section 254(b)(1)]; (2) access to advanced telecommunications and information services in all regions of the nation [Section 254(b)(2)]; and (3) access by consumers in all regions of the nation to telecommunications and information services that are reasonably comparable in service and price to those available in urban areas [Section 2154(b)(3)]. Whereas Section 254(b)(7) authorizes the Commission and the Joint Board to adopt such other principles as they determine to be necessary, appropriate and consistent with the Act, it does not confer any authority upon the two entities (or upon the Commission acting unilaterally) to supersede, downgrade or dilute the explicit core statutory principles.

A. A "Qualifying Unsubsidized Competitor" Must Offer and Provide the Same Broadband Speeds as the Incumbent RLEC Whose Support It Seeks to Cut

In paragraph 125, the *Order* finds that "using a 10/1 Mbps threshold at the present time for identification of competitors is consistent with the Commission's section 254 goal of ensuring that universal service funding is used in the most efficient and effective manner to provide customers in rural and high-cost areas with voice and broadband service."[2] However, the *Order* does not define "efficient" or "effective," assess their relative importance, or explain how they interrelate with each other and with the express Section 254(b) principles.

[2] *Order* at par. 125.

Whereas "efficiency" can be a significant consideration, the paramount goal of Section 254 is that high-cost support mechanisms must be "effective" in providing rural consumers with both basic and advanced services that are of high quality, affordably priced, and reasonably comparable to those available in urban areas. Without the underlying provision of effective consumer access to the requisite networks and services, "efficiency" has little meaning. In fact, to the extent that "efficiency" is limited to mean only reduced amounts of high-cost support, the most "efficient" mechanism could absurdly be argued to be one that provides no high-cost support at all and that allows rural networks and services to disintegrate and disappear.

"Efficiency" becomes a practicable goal only if it measures the relative amounts of high-cost support that are used to provide access to an equivalent or reasonably comparable menu of services by the same customers. If the provided services are not the same, and particularly if they differ substantially in scope and quality, there is no assurance that a reduced amount of high-cost support for the inferior service constitutes an increase in "efficiency."

A prime example is the likely impact upon customers of defining Wireless Internet Service Providers ("WISPs") as "qualifying unsubsidized competitors" with respect to RLECs that have constructed fiber-to-the-premises ("FTTP") facilities in particular groups of census blocks. Even if some WISPs certify that they can offer 10/1 Mbps service to 85 percent of the locations in specified census blocks, they may not actually be able to provide this level of service during a significant number of time periods, particularly during severe weather, when foliage is heavy, and/or during periods of peak or heightened usage. More important, as demanded broadband speeds continue to increase rapidly through temporary 4/1 Mbps, 10/1 Mbps and 25/3 Mbps way stations to higher and higher levels approaching Gigabit-level services, WISPs will not be well-positioned to upgrade and reconfigure their existing networks frequently to keep up

with growing customer bandwidth needs or with new services and applications. They may not have the technical and financial resources to make these continuing improvements; and, as unsubsidized competitors, will not be subject to federal or state regulatory requirements to do so.

In stark contrast, RLECs with FTTP facilities have scalable networks already in place that can be upgraded readily and rapidly during the foreseeable future to provide broadband services and speeds in the Gigabit range via relatively minor changes in electronics. However, as the *Order* has recognized, these RLECs still need high-cost support to operate, maintain and pay the construction loans for the high-speed broadband networks they have deployed.[3] Hence, if an RLEC FTTP network is deprived of CAF BLS in various census blocks due to the presence of a WISP unsubsidized competitor, its ability to operate and maintain its network, and to repay its outstanding loans, will be reduced or impaired. And even if it receives disaggregated support for other portions of its study area, the RLEC will not be able to use such support in the "competitive" area.

If a provider of marginal services that cannot compete with fiber-based networks over time with respect to bandwidth, quality and reliability is able to deprive a FTTP or other fiber-based carrier of CAF BLS support in substantial portions of its study area, the real losers will be the households and businesses located in the affected census blocks. Those customers will no longer have the option to upgrade their service to virtually unlimited bandwidths as they need or want them. Rather, the affected RLEC losing CAF BLS may have difficulty repaying its construction loans, or otherwise freeing up funds for service upgrades in the "competitive" area. In some cases, the RLEC may lose so much CAF BLS that it will have to cut back on maintenance and operations in the affected area, such that customers located therein will actually suffer service and service quality declines. This will be true even if disaggregation minimizes

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[3] Order, at par. 56.

the net amount of CAF BLS lost by an RLEC, for the CAF BLS received for other portions of the study area may not be used in the "competitive" area.

It is hard to see how or why the households and businesses in the "competitive" area would agree to make this "trade." They get nothing new from a marginal WISP that is unlikely to be able to keep up with their increasing broadband service needs, and that has no obligation to continue serving them or to upgrade its network in the future. Rather, they will lose much of the benefit of readily scalable broadband speed upgrades, and quite possibly suffer degradation or loss of their existing high-speed broadband service if the CAF BLS losses are substantial.

These results run wholly contrary to the predominant service and service quality goals of Section 254. Whereas some WISP services may be available at lower rates than FTTP services (in significant part, because they are not subject to the same regulatory requirements and costs), they do not offer comparable quality, speeds or advanced features, and are also not reasonably comparable to the higher and higher speed broadband services available in urban areas.

WTA has previously proposed a straightforward approach that will avoid impairment or loss of service to customers in "competitive" census blocks. Specifically, an entity may qualify as an "unsubsidized competitor" and eliminate the CAF BLS of an incumbent RLEC in particular census blocks only if the entity can provide the *same broadband speeds* as the RLEC is currently providing therein. This approach will effectively address and advance the service quality, affordability and reasonable comparability principles of Section 254(b), and directly protect rural household and business customers from impairment or loss of service. It is also equitable to both RLECs and potential competitors. If a cable television company or WISP can provide the same broadband speed as an RLEC that presently receives high-cost support – whether that RLEC is currently providing 4/1, 10/1, 25/3 or Gigabit service – the RLEC's CAF

BLS would be eliminated in the affected census blocks. This approach will be "effective" in assuring that customers can keep the same level of service in the "competitive" area whether it is provided by the RLEC or the competitor. It will also be "effective" in providing both RLECs and competitors with incentives to increase the broadband speeds that they offer and provide. Finally, it will be "efficient" in that the CAF BLS support determinations will be made on the basis of the same broadband speed offerings.

B. A "Qualifying Unsubsidized Competitor" Must Offer and Provide the Same Broadband Services and Obligations as the Incumbent RLEC Whose Support It Seeks to Cut

In paragraph 136, the *Order* declined to impose various requirements suggested by WTA upon entities seeking status as "qualifying unsubsidized competitors." The foremost of such requirements were obligations: (a) to offer Lifeline services to low-income customers; (b) to cooperate with other service providers regarding interconnection and other Section 251 obligations and negotiations; (c) to show long-term stability by owning or leasing the facilities necessary to serve the alleged "competitive" census blocks; and (d) to comply with state voice service and service quality standards. In addition, WTA proposed that WISPs seeking status as "qualifying unsubsidized competitors" be prohibited from charging prospective customers a fee or charge for location visits or other preparatory work to determine whether the WISP can actually provide the customer location with acceptable signal quality and broadband speed - a fee that neither this Commission nor any discernible state commission would allow RLECs to assess.

The *Order* rejected these proposed requirements, apparently because "many … seem intended to subject the competitor to the same regulatory requirements as the incumbent."[4] Another way of looking at this is that WTA was focusing upon the predominate customer service goals of Section 254, and requesting that alleged "competitors" be required to provide consumers

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[4] *Id.*

with equivalent services, and comply with the same federal and state service requirements, as the RLECs they seek to displace. The *Order's* assumption that "the net result of these proposals would be to ensure that no entity would ever qualify as an unsubsidized competitor"[5] is wholly contrary to fact and experience. More than 1,100 small RLECs and their competitive local exchange carrier ("CLEC") affiliates have complied with the proposed requirements for decades without going out of business or leaving the industry.

In its recent *Lifeline Order*,[6] the Commission acted to make its "Lifeline program a key driver of the solution to our Nation's broadband affordability challenge."[7] Recognizing that "broadband has evolved into the essential communications medium of the digital economy,"[8] the Commission determined that it is "imperative for everyone to have access to sufficient service"[9] that is needed for completing homework, searching and applying for jobs, and interacting with healthcare providers. In addition, the Commission found that Lifeline service helps to narrow the digital divide, and to give low-income consumers access to services that are reasonably comparable to those which are available to a majority of Americans.[10]

Given the critical role and importance of the Lifeline program, it is bewildering why the *Order* rejected proposals to require "qualifying unsubsidized competitors" to offer Lifeline services to low-income customers. If an unsubsidized competitor succeeds not only in eliminating an RLEC's CAF BLS in various census blocks but also in causing the RLEC to reduce or terminate its service therein, who is going to provide Lifeline services to the low-income customers residing in the affected census blocks? Few RLECs have ever realized even a

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[5] *Id.*

[6] *In the Matter of Lifeline and Link Up Reform and Modernization et al.*, Third Report and Order, Further Report and Order, and Order on Reconsideration, WC Docket Nos. 11-42, 09-197 and 10-90, FCC 16-38, released April 27, 2016 ("*Lifeline Order*")

[7] *Lifeline Order*, at par. 3.

[8] *Id.* at par. 12.

[9] *Id.*, at par. 22.

[10] *Id*.

miniscule profit from providing Lifeline service, and most have spent more in the past on administering the program than they have received in Lifeline support dollars. However, as eligible telecommunications carriers ("ETCs"), all RLECs are required by Section 54.405(a) of the Rules to offer Lifeline services to eligible low-income customers, and by Section 54.405(b) to reasonably publicize the availability of those services. If cable operators, WISPs and others are going to seek "qualifying unsubsidized competitor" status in order to weaken, displace, or replace RLECs, such entities must be required to offer and advertise Lifeline services so that low-income consumers in the affected census blocks retain access to the services which they presently obtain from RLECs.

Prospective "qualifying unsubsidized competitors" also need to be subject to and comply with the negotiation and interconnection requirements of Section 251 of the Act. Again, this is primarily a consumer protection issue – if customers in the affected census blocks are to be able to continue calling their neighbors without substantial changes in service quality or cost, the "qualifying unsubsidized competitors" and other service providers must employ the Section 251 mechanisms to establish appropriate interconnection and traffic exchange arrangements.

The proposed facility ownership and lease requirements were meant to protect *bona fide* service providers and the public from amateur and "fly-by-night" operations. Cable operators, substantial WISPs and CLECs can readily meet this criterion; a kid who thinks it is "cool" to start and run a WISP service out of his parent's garage for a couple weeks or months may not do so. Local consumers will be very poorly served if an established RLEC is forced to reduce or terminate services because of its loss of CAF BLS support in a group of census blocks for a potential seven-year period due to the temporary presence of an alleged "unsubsidized

competitor," especially if that "competitor" then leaves the market or goes out of business within the initial portion of the seven-year period.

State commissions retain the jurisdiction to regulate intrastate voice services, as well as to adopt and enforce consumer protection measures for voice and broadband services. All service providers are obligated to comply with these state obligations. As part of its long-established partnership and cooperation with the states, the Commission should require "qualifying unsubsidized competitors" to demonstrate that they comply with applicable state requirements, particularly state voice service and service quality standards.

The Commission's mission to protect consumers and promote the public interest requires that it discourage the practice of some WISPs to charge prospective customers a fee to go to their homes and determine whether the WISP's service is actually available there. Even if such fees are credited to consumers that can be served and that take the WISP's service, consumers who do not take the WISP service are forced to pay even if the WISP cannot serve them. This is in stark contrast to RLECs, who have federal and state obligations to serve new customers upon reasonable request, and who would not be permitted by this Commission or their state commissions to charge prospective customers for determining whether and how they could actually be served.

Also, by requiring a potential "unsubsidized competitor" to in fact provide substantially similar services as the RLEC whose high-cost support the "competitor" is challenging, the Commission can and should reduce the opportunities and temptations for a competitor to game the system. For example, substantial qualifying standards that are monitored and enforced can prevent an unscrupulous "competitor" from offering a higher speed, lower rate or additional service temporarily for a few weeks or months to deprive the local RLEC of CAF BLS support,

and then reverting back to its former offerings to the detriment of customers in the affected census blocks.

In sum, unless the Commission reconsiders its position on qualifying requirements for "unsubsidized competitors," rural consumers are in real jeopardy of losing services which they enjoy today as well as becoming less able to obtain higher speed and state-of-the-art broadband services in the future.

C. The *Order's* "Unsubsidized Competitor" Provisions Are Not Consistent with Section 214(e) of the Communications Act

In addition to the foregoing reasons for reconsideration of the *Order's* "qualifying unsubsidized competitor" determinations, WTA notes also that they do not comport with the statutory ETC service area requirements of Section 214(e) of the Communications Act.

Section 214(e)(1) established that "[a] common carrier designated as an eligible telecommunications carrier . . . shall be eligible to receive universal service support in accordance with section 254, and shall, throughout the service area for which the designation is received – (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) . . ." The legislative history of the 1996 Telecommunications Act explains the intent of this provision: "Upon designation, a carrier is eligible for any specific support provided under new section 254 for the provision of universal service in the area for which that carrier is designated."[11] A fair reading of this provision is that an RLEC that has been designated as an ETC should receive high-cost support for the supported voice and broadband services that it provides within the service area for which it received its ETC designation.

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[11] *Conference Report*, Report 104-458, 104th Congress 2d Session (January 31, 1996), at p. 141.

More important, Section 214(e)(5) defines this "service area" as "a geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms." It goes on to provide:

> In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.

The legislative history of the 1996 Act explains the intent of this provision as: "New Section 214(e)(5) provides the definition of 'service area,' which in general is determined by a State commission."

Hence, Section 214(e) makes it clear that the states have the primary jurisdiction to determine the areas in which RLECs and other ETCs provide supported services and receive high-cost support. The Commission can work to modify these areas, but must do so jointly with the appropriate state commissions, and after considering Federal-State Joint Board recommendations. Section 214(e) does not give the Commission any authority to determine unilaterally that designated ETCs should no longer receive support from certain mechanisms within portions of their state-defined "service areas" where they have long been receiving such support.

III. The Commission Should Clarify and Expand Its Rules Regarding the Treatment of Transactions After the ACAM and RoR Paths Are Implemented

WTA seeks reconsideration or clarification of two matters relating to exchange sales, transfers of corporate control, and mergers that take place after completion and implementation of the elections by RLECs of the ACAM Path and the RoR Path. These are: (a) the scope and interpretation of new Section 54.902(c) of the Rules; and (b) the *Order's* general lack of

guidance regarding the treatment and impact of exchange sales, transfers of control and mergers during the term of the two Paths.

Section 54.902(c) of the Rules states that "[i]n the event that an entity other than a rate of return carrier acquires exchanges from a rate-of-return carrier, absent further action from the Commission, the carrier will receive model-based support and be subject to public interest obligations as specified in §54.310." WTA finds the scope and effect of this rule to be unclear and uncertain, and requests that it be either clarified, or reconsidered and revised.

Given the reference to the Section 54.310 provisions regarding CAF Phase II obligations, the provision might be read as requiring price cap carriers that acquire exchanges from RoR carriers to receive model-based support and be subject to CAF Phase II public interest obligations. Whereas price cap carrier acquisition of RoR exchanges is not a frequent occurrence, it is possible.

However, Section 54.902(c)'s use of the term "entity other than a rate of return carrier" [particularly in contrast to the express use of "price cap carrier" in the immediately preceding Section 54.902(b)] creates substantial uncertainty regarding its scope. In addition to a price cap carrier, an "entity other than a rate of return carrier" might be, *inter alia*, a competitive local exchange carrier ("CLEC"), an interexchange carrier, an entity engaged in a non-telecommunications business, an investment group, a minority shareholder of a RoR carrier, or a general manager or other employee of a RoR carrier. If any of these other entities acquires "exchanges" from a RoR carrier, will such "exchanges" be required to receive model-based support and be subject to CAF Phase II obligations unless the Commission grants a waiver or takes other further action? That does not appear to be the *Order's* intent, but the term "entity other than a rate of return carrier" can be read expansively, or interpreted so in the future.

The use of the term "exchanges" also raises questions and uncertainties regarding the scope of Section 54.902(c). Does the subsection address only asset transactions where one or more exchanges are acquired, but not the entire incumbent local exchange carrier ("ILEC") or the entire study area. Or, is the term "exchanges" intended to be read expansively to encompass the acquisition of all of the exchanges of an ILEC or study area, the acquisition of all or a controlling portion of the voting interests and equity of an ILEC or its holding company, and/or the negotiation and completion of a merger of two or more ILECs or ILEC organizations?

Because of the foregoing ambiguities, Section 54.902(c) should be reconsidered and revised to specify expressly the nature and extent of the transactions that it covers.

Moreover, in reviewing Section 54.902 and other portions of the *Order*, WTA notes that the *Order* is silent regarding the regulatory treatment of exchange sales, transfers of control and mergers during the terms of the ACAM Path and the RoR Path. If, in Year 3, an RLEC that opted onto the Model Path has an opportunity to acquire an RLEC study area in the same state that remained on the RoR Path, how will the Commission treat the transaction? Will the buyer be able to bring the acquired study area into the Model Path; and, if so, how will the Model Path and RoR Path budgets be revised, and how will the acquired study area's CAF-ACAM support and build-out obligations be calculated? Similarly, if in Year 4, an RLEC that had remained on the RoR Path (or been forced to do so because it had been more than 90 percent built out to 10/1) acquires an RLEC study area in the same state on the ACAM Path, will the acquired study area have to move to the RoR Path, or can the buyer move to the ACAM Path (particularly if the aggregate 10/1 build-out percentage of the existing and acquired study areas is now less than 90 percent)? In either instance, how will the ACAM Path and RoR Path budgets be revised to take

into account the transaction-related movements of study areas between the paths and to retain predictability regarding funding levels?

Exchange sales, transfers of control and mergers have a significant positive impact upon the quality, affordability and reasonable comparability of service in rural areas. They allow financially stronger and more broadband-oriented companies to acquire study areas or exchanges that are having a more difficult time raising the funds needed for substantial upgrades, or whose elderly owners and managers do not wish to undertake substantial broadband upgrades and incur the associated construction debts before they retire. Some transactions are able to reduce administrative, maintenance and operating costs, and generate increased economies of scale, so as to allow the combined operations to devote more existing resources to service improvements and expansions.

However, for transactions to be negotiated and take place, the parties must know the regulatory ground rules and be able to accurately predict significant revenue and cost impacts. Particularly now when the Commission is setting the RLEC industry on new ACAM and RoR Paths for an extended period, it needs to establish specific and predictable rules for the high-cost support impacts of transactions during this time.

WTA proposes that the Commission reconsider the absence of such guidance in the *Order*, and adopt clear rules stating that sales of entire study areas, transfers of control and mergers will not change the ACAM Path and RoR Path status of the study areas changing ownership. ACAM Path study areas would retain the same support amounts and build-out obligations throughout the remainder of the term of the existing ACAM Path, even if they were acquired by an entity having one or more RoR Path study areas in the same state. RoR Path study areas would remain on rate-of-return regulation even if acquired by an entity having

ACAM Path exchanges in the same state. This approach would be simple and predictable, and would avoid disruptions to the budgets of the approximately 1,100 RLECs on the existing Paths. Maintaining subsequently acquired properties on both Paths in the same state would not give rise to allocation problems any more complicated that those currently present when an entity with study areas in two different states elects a different Path in each state.

Sales of some but not all exchanges within a study area would not fit readily within the proposed rule. However, such transactions currently require waivers of the Part 36 study area definition, and are likely to continue to do so in the future. Exchange transactions involving study area waivers could continue to be reviewed and conditioned upon state commission approval, minimal high-cost support impacts and public interest benefits. However, WTA notes that, for such transactions to be encouraged, the study area waivers would need to be processed expeditiously and any conditions attached to them would need to be straightforward and predictable.

IV. The *Order's* Build-Out Obligations Do Not Consider Virtually Certain Price Increases and Delays Regarding Fiber Optic Cable and Construction Contractors

The *Order* adopts build-out obligations for ACAM Path participants in Section 54.308(a)(1) of the Rules that are based upon a prospective $200 per month per location funding cap (*i.e.*, support up to an $252.50 average cost) for "fully funded" locations.[12] This amount could be reduced if the initial expressions of interest in the ACAM Path cause initial model-based support to exceed the additional $150 million or $200 million to be allocated to the ACAM Path annually.[13] Based upon the ultimate funding cap, ACAM Path participants will receive a specific amount of high-cost support each year for ten years, and be required to build-out 25/3 or

[12] *Order,* par. 52.
[13] *Order*, par. 62-63.

10/1 service to a specific number of additional "fully funded" locations during the ten-year period, including interim milestones for years 4 through 10. 47 C.F.R. §§54.308(a)(1), 54.311(d) and 54.54.316(b)(2).

The *Order* also adopts a five-year build-out obligation for RoR Path carriers. 47 C.F.R. §54.308(a)(2). The required number of additional locations to be served is determined by dividing a specified amount of five-year forecasted CAF BLS support by one of two estimates for cost per location. The first of these is based on the weighted average cost per loop for carriers of similar density (potentially increased by 150 percent); the second is based on the ACAM-based average cost per location for the RLEC's study area.

The key elements of both the ACAM Path and the RoR Path build-out obligations are that they are based upon recent or current per location costs, and that they set a fixed number of new locations to be served during the next ten or five years, respectively.

The critical problem with the existing ACAM and RoR build-out obligations is that the underlying build-out costs for most or all RLECs are virtually certain to increase substantially. Without even taking into account the possibility or probability of inflation in the overall national or international economy, the workings of the Commission's various universal service and E-Rate initiatives render it virtually certain that the prices of fiber optic cable and the costs of the construction contractors, crews and equipment necessary to deploy fiber and associated facilities will increase rapidly during the next five and ten years. With CAF Phase II build-out obligations being implemented for the price cap carriers that elected statewide model-based support, with new E-Rate networks being built in certain regions, with both the ACAM Path and RoR Path mechanisms and build-out obligations to commence implementation during 2017, and with the CAF Phase II reverse auctions and build-out obligations to come during the near future, there is

going to be a massive increase in demand for fiber optic cable as hundreds of carriers throughout the nation are going to be planning and deploying broadband upgrades and extensions at the same time. An even more critical fact is that there is going to be an extraordinary demand for the construction contractors, crews and equipment necessary to deploy the fiber and other facilities necessary for the required broadband build-outs.

The massive increase in demand for fiber optic cable is going to drive up fiber prices, and is also likely to result in much longer lead times between order and delivery, as well as (a) inevitable delays in production and distribution and (b) declines in fiber quality. The Commission needs to consider the experiences of the Rural Utilities Service ("RUS") Broadband Initiatives Program ("BIP") and the National Telecommunications and Information Administration ("NTIA") Broadband Technology Opportunities Program ("BTOP") that were part of the American Recovery and Reinvestment Act of 2009 ("ARRA"). Whereas tsunami damage to a Japanese fiber plant complicated matters, the much smaller BIP and BTOP programs encountered a significant spike in demand for fiber optic cable, with ensuing escalating price hikes for fiber optic cable, delivery periods approaching two years, and increased incidence of defects and substandard quality. The much larger build-out program required by the *Order* and associated price cap and E-Rate programs will increase fiber demand -- and impact prices, delivery periods and product quality -- to a far greater degree than the ARRA programs. Lead times for fiber delivery appear to be about six months at present, and can be expected to grow past the two year delays experienced under BIP and BTOP.

Cost and availability problems are likely to arise also with respect to the construction contractors, crews and equipment needed to deploy the required broadband facilities. There are only a limited number of construction contractors capable of deploying broadband facilities, and

limited quantities of trained crews and suitable equipment. In normal times, an RLEC putting out a construction project for bid can expect about 8-to-12 responses from regional contractors. With price cap carriers, regional E-Rate networks, most RLECs, and future CAF Phase II auction winners all needing to deploy broadband within the coming 5-to-10-year period, there will be a major temporary increase in the demand for contractors, crews and equipment. Existing contractors will not have sufficient trained crews and equipment to do all the projects that will be needed to address the build-out obligations. Supply and demand will mean that these construction companies will increase their prices greatly, turn down some projects, and schedule others for several years in the future. During recent years, WTA members have found that, when one or two carriers in their state are doing substantial fiber deployments, contractor bids for additional jobs are likely to be substantially higher than the amounts of their bids for similar projects in prior years and that fewer contractors are likely to bid on individual projects.

Whereas fiber manufacturing plants can run close to 24 hours a day, construction crews cannot work around the clock and are limited further by heavy rains, electric storms, snow, frozen ground and other weather and climate conditions that slow or preclude outdoor construction. As the Commission is aware, substantial portions of the country have effective construction seasons of six months or less. These difficulties will result in delays that will exacerbate the problems of completing ongoing broadband projects on schedule and of freeing up crews and equipment to begin the next project.

Some may argue that RoR Path carriers have 5 years, and ACAM Path carriers 10 years, to complete the build-out requirements mandated by the *Order*. However, the required preparations for such construction will squeeze the actual broadband construction and deployment work into a much shorter period. First, it will take substantial time for RLECs to

apply for and obtain the RUS and/or private loans necessary to finance the required construction.[14] Second, it is not clear that RUS will have enough money to fund all the loan applications filed with it, and may have to deny some applications and force the affected RLECs to begin the loan application process anew with private lenders. Third, some broadband deployment projects will require extensive environmental assessments and approvals that can take months or years to obtain before they can get loan approvals and finalize equipment and construction contracts. Fourth, obtaining rights-of-way and easements from governmental and private entities can and will be time-consuming.

WTA is very concerned that all of the build-out requirements imposed by the Commission across the industry and the nation during the next five-to-ten years are going to result in massive cost increases that will render the current build-out requirements unattainable at the current support levels, and that the various likely shortages and delays will render timely compliance with build-out deadlines impossible.

WTA proposes that the Commission address this extremely likely situation by adopting a rule that allows RoR Path carriers to request and obtain via a streamlined process a reduction of their applicable build-out requirements if they can show that their cost per location has increased by thirty percent (30.0%) or more above the cost per location used to compute their initial build-out requirement.[15] In addition, the Commission should adopt a streamlined waiver process that would permit RoR Path and ACAM Path carriers to extend their deadlines for meeting interim and/or ultimate build-out requirements if they can show that they had made *bona fide* attempts to

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[14] The processing of RUS loans from application to grant currently takes about 18 months. Although RUS is trying to reduce that time period, its efforts may be counteracted by substantial increases in the number of loan applications and a shortage of appropriated dollars to fund all of the loan applications it receives.

[15] WTA is aware that new Section 54.308(a)(2)(iii) of the Rules exempts some RLECs from the RoR build-out obligations if deployment "in any census block" would result in total study area support exceeding the $250 per line per month cap; or if deployment would exceed the $10,000 per location per project capital investment allowance. However, these exemptions do not address many of the build-out problems that will be caused by skyrocketing prices or unavailable equipment or contractors.

obtain the requisite pre-construction approvals, fiber optic cable and/or contractor arrangements, and had been unsuccessful in doing so for reasons significantly outside their control.

V. The *Order's* Benchmark and Budgetary Controls Render It Unlikely That Retail Broadband Rates Can Comply With Reasonable Comparability Ceilings

Recipients of high-cost support that are subject to broadband performance obligations are required to offer broadband service at rates that are at or below the relevant reasonable comparability benchmark. For 2016, the Wireline Competition Bureau has provided the following listing of reasonably comparable rate benchmarks for 10/1 service at the specified usage allowances: (a) 100 gigabits: $69.14; (b) 150 gigabits: $71.17; (c) 250 gigabits: $73.72; and (d) unlimited usage: $75.20.[16] ETCs will be required to certify that at least one of their broadband service plans meets these benchmarks in the annual FCC Form 481 due July 1, 2016 (provided Paperwork Reduction Act approval is obtained in a timely manner).

WTA does not oppose *per se* the $42 benchmark of new Rule Section 54.901 or the budget control mechanism of new Rule Section 54.901(f). However, it notes that these provisions relating to wholesale broadband transmission, together with the other transmission and retail costs that need to be recovered, make it virtually impossible for many RLEC affiliates to provide retail 10/1 broadband Internet access service at or below the foregoing rate benchmarks.

WTA understands that the new $42 benchmark is intended to recover that amount of costs from customers and reduce the amount of CAF BLS support necessary for wholesale broadband-only transmission service. It further understands that the budget control mechanism has been adopted to keep total RLEC high-cost support within a $2.0 billion annual budget, and

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[16] *Public Notice* (Wireline Competition Bureau Announces Results of 2016 Urban Rate Survey for Fixed Voice and Broadband Services, Posting of Survey Data and Explanatory Notes, and Required Minimum Usage Allowance for ETCs Subject to Broadband Public Interest Obligations), DA 16-362, released April 5, 2016.

to reduce CAF BLS as necessary to do so. The $42 benchmark and budget control mechanism are interrelated in that a lower benchmark could increase the size of the CAF BLS reduction calculated by the budget control mechanism, while a higher benchmark could decrease it. Both the $42 benchmark and the budget control mechanism constitute the portion of costs allocated to wholesale broadband transmission service that may not be recovered from CAF BLS but must be recovered from customers.

The important point here is that the $42 benchmark and the budget control mechanism relate entirely to wholesale broadband transmission. In addition to these wholesale costs, retail broadband service rates must recover: (a) the National Exchange Carrier Association ("NECA") tariff rates for DSL Voice-Data and DSL Data Only rate elements (ranging from approximately $18 to $38 per month); (b) federal universal service charges (currently 17.9% for the Second Quarter of 2016); (c) middle mile and access service connection point costs (estimated roughly at $6.50 to $7.50 per customer per month); and (d) retail costs such as sales, marketing and help desk operations. The $42 benchmark, NECA tariff rates, universal service contributions, and middle mile costs alone add up to over $80 – that is, more than any of the listed $69.14-to-$75.20 reasonably comparable retail rate benchmarks -- without even considering retail costs and potential budget control support reductions.

Unless and until it can provide more high-cost support to enable further reduction of wholesale broadband transmission rates (or reduction of the $42 benchmark, or elimination of the budget control mechanism), the Commission should postpone or suspend the FCC Form 481 broadband rate certification, and announce that it will not penalize entities that cannot meet its retail broadband rate benchmarks or ceilings. Without increased CAF BLS or other high-cost

support, the retail broadband rate benchmarks cannot be reasonably achieved by many RLECs and their affiliates, and should not be enforced against them.

VI. Conclusion

In sum, WTA requests reconsideration and revision of the *Order*: (1) to prevent loss or degradation of service to rural consumers by requiring those seeking to qualify as "unsubsidized competitors" to provide the same broadband speeds and services as the RLECs whose support they seek to reduce or eliminate; (2) to clarify the treatment of exchange sales, transfers of control and mergers that take place after the separate ACAM and RoR Paths are implemented; (3) to establish streamlined procedures for reducing and extending build-out obligations if (as is very likely) fiber optic cable and contract construction services become much more expensive or unavailable during the massive nation-wide and industry-wide broadband construction programs the Commission has mandated; and (4) to suspend or otherwise relax enforcement of retail broadband rate ceilings that cannot be met under current CAF BLS benchmarks and budgetary controls without increased and sufficient high-cost support.

Respectfully submitted,
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