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EXECUTIVE SUMMARY

The Federal Communications Commission has professed time and again its interest in prudent, data-driven decision-making. Yet when one reads the Public Notice with respect to Connect America Fund Phase II support, “close” appears to be “good enough.” While “close” may be acceptable when tossing horseshoes and hand grenades (as the saying goes), it is simply unacceptable for critical universal service determinations. Any plan to proceed quickly and in the absence of reliable data when it comes to identifying where unsubsidized competitors operate places consumers at risk of losing access to affordable, high-quality communications services. Indeed, it is perplexing how regulators could place any reliance on the National Broadband Map (the “NBM”) and perhaps other proprietary data sources in the face of comments by the Rural Associations and many others highlighting the challenges of service mapping and the shortcomings of the NBM in particular, including the flaws in underlying data, mismatches between different iterations of state and federal maps, and – perhaps most importantly – the fact that these data show neither the availability of voice service nor the affordability of voice or broadband services.

The statutory mandate of universal service requires more than reliance on a flawed, dated, and incomplete mapping database that is subject to check only through a “challenge” process. In lieu of such inadequate procedures, the Commission should for all purposes look to the only credible and detailed process proposed to date on the record of this proceeding for determination of where an “unsubsidized competitor” might operate. That proposal, as previously submitted by the Rural Associations – and building upon a proposal first made by the cable industry itself – would establish a more robust process to be triggered *at the request of a would-be competitor* that desires to establish through clear factual showings that it indeed offers

consumers a meaningful competitive alternative for voice and broadband services in the area(s) in question.

There should be no room for or tolerance of “short-cuts” in fulfilling the statutory requirement of universal service, and the Commission’s commitment to data-driven decision-making should be reflected in a more informed and thoughtful evidentiary process for identifying potential “unsubsidized competitors” than is suggested by the Public Notice.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

**COMMENTS OF THE
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION,
THE NATIONAL EXCHANGE CARRIER ASSOCIATION, INC., AND
THE WESTERN TELECOMMUNICATIONS ALLIANCE**

The National Telecommunications Cooperative Association (“NTCA”),¹ the National Exchange Carrier Association, Inc. (“NECA”),² and the Western Telecommunications Alliance³ (collectively, the “Rural Associations”) hereby file comments in the above-captioned proceeding to highlight concerns with the cavalier and imprecise means by which purported “unsubsidized competitors” might be identified for purposes of universal service fund (“USF”) support determinations.⁴

¹ NTCA’s membership includes over 800 rate-of-return-regulated local exchange carriers (“RLECs”) that operate in small rural communities and surrounding areas across the country. Most of these operating companies provide voice, video, and broadband Internet services, and each is a “rural telephone company” as defined in the Communications Act of 1934, as amended.

² 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).

³ WTA is a trade association that represents over 250 small rural telecommunications companies operating in the 24 states west of the Mississippi River.

⁴ *Wireline Competition Bureau Seeks Comment on Procedures Relating to Areas Eligible for Funding and Election to Make a Statewide Commitment in Phase II of the Connect America Fund*, Public Notice, DA 12-2075, WC Docket No. 10-90 (rel. Dec. 27, 2012) (“Public Notice”).

I. THE NATIONAL BROADBAND MAP IS RIDDLED WITH ERRORS AND PROVIDES INSUFFICIENT INFORMATION TO JUSTIFY USE AS A PRESUMPTIVE DETERMINANT OF WHERE UNIVERSAL SERVICE FUND OR CONNECT AMERICA FUND SUPPORT SHOULD BE DIRECTED.

The Federal Communications Commission (the “Commission”) has professed time and again its interest in prudent, data-driven decision-making.⁵ It has demonstrated its commitment to such an approach in various contexts, ranging from a very cautious examination of call completion concerns⁶ to its long-running analysis of competitive forces in special access markets.⁷ Yet when one reads the Public Notice with respect to Connect America Fund (“CAF”) Phase II support, “close” appears to be “good enough.” While “close” may be acceptable when tossing horseshoes and hand grenades (as the saying goes), it is simply unacceptable for critical universal service determinations. Any plan to proceed quickly and in the absence of reliable data when it comes to identifying where purportedly unsubsidized competitors operate puts at risk the very concept of universal service and ultimately leaves consumers at risk of losing access to affordable, high-quality communications services based upon inadequate processes that will almost certainly fail to catch “false positives” with respect to the presence of such competitors.⁸

⁵ See, e.g., Alex Pham, “FCC’s Genachowski reinforces call for rules on net neutrality,” *Los Angeles Times*, Oct. 8, 2009 (available at <http://articles.latimes.com/2009/oct/08/business/fi-fcc8>) (calling for a “‘fact-based, data-driven’ open dialogue with industry”); *FCC Chairman Julius Genachowski Announces Formation Of Technology Transitions Policy Task Force*, Press Release, (rel. Dec. 10, 2012) (noting that the Task Force “will conduct a data-driven review and provide recommendations” regarding modernization of policies).

⁶ See, e.g., Letter from Michael R. Romano, Senior Vice President-Policy, NTCA, to Chairman Julius Genachowski, WC Docket No. 10-90, *et al.* (filed Dec. 13, 2012); *Rural Call Completion*, Notice of Proposed Rulemaking, WC Docket No. 13-39 (rel. Feb. 7, 2013).

⁷ See *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593; Order and Further Notice of Proposed Rulemaking (rel. Dec. 18, 2012).

⁸ The Rural Associations acknowledge that the proposal at issue in the instant Public Notice applies only to distribution of CAF Phase II funding to price cap-regulated carriers pursuant to a cost model that

Universal service, being a mandate of federal law,⁹ should not and cannot be placed at risk through reliance on unreliable data sets and methodologies that are still very much in “beta mode.” Thus, as explained in Section II of these comments, rather than adopting the questionable procedures set forth in the Public Notice that presume the National Broadband Map (the “NBM”) and other proprietary data sources correct in the absence of information to the contrary,¹⁰ the Commission should implement something comparable to the more robust and disciplined process that was actually first proposed *by the cable industry itself* in undertaking a data-driven identification of where unsubsidized competitors may operate in a high-cost area.

Indeed, the same conceptual flaws and procedural shortcomings that plague the proposals for identifying areas that are eligible for CAF Phase I support reappear in the CAF Phase II proposals – and, if anything, they are of even greater concern in the context of Phase II because they threaten to affect the ongoing availability of universal service/CAF support for years to come. Specifically, it remains perplexing why the Commission and the Wireline Competition Bureau (the “Bureau”) would continue to place such reliance on the National Broadband Map

is still under development, and that the provisions of the order with respect to unsubsidized competition being implemented through the Public Notice apply on their face and by their plain terms only to areas in which price cap carriers operate. *See Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link-Up*, WC Docket No. 03-109; *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17729 (2011) (“*USF/ICC Order and FNPRM*”), at ¶¶ 170-171. The Rural Associations also observe that a separate and distinct methodology for identifying an unsubsidized competitor in areas served by RLECs remains subject to development through a pending rulemaking proceeding. *See id.* at 17768, ¶ 284, and 18056-59, ¶¶ 1061-1078. Still, for purposes of complying with the statutory universal service mandate and protecting consumers, it is essential from the start that the Commission structures the process of identifying purported unsubsidized competitors properly in every context.

⁹ 47 U.S.C. § 254(b) and (c).

¹⁰ Public Notice, at ¶ 11.

(the “NBM”) and potentially other proprietary data sources despite being on notice and well aware of the challenges associated with mapping voice and broadband serving areas and identifying the precise extent of services offered within such areas.¹¹ As the Bureau’s prior Public Notice seeking comment on “*potentially*” unserved areas for purposes of CAF Phase I acknowledged,¹² the NBM should be used at most as an indicator of where any given provider *might* serve; in the instant Public Notice too, the Bureau seems to acknowledge the need for a “check” on the accuracy of the NBM, proposing a challenge process whereby a would-be CAF recipient could submit evidence that the map contains errors.

The Rural Associations have submitted many rounds of comments explaining in excruciating detail why *any* reliance on the NBM for factual determinations is unjustified and unjustifiable. These reasons include: (1) the mapping tools and data upon which the Commission and Bureau would rely are still very much in “beta mode”;¹³ (2) a series of conceptual and reporting flaws may lead the mapping data to simultaneously overstate broadband coverage in some areas and understate it in others;¹⁴ (3) it is inappropriate and unlawful to use a map that purports to identify solely broadband availability to reduce or

¹¹ See, e.g., *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 12-228, Ninth Broadband Progress Notice of Inquiry (rel. Aug. 21, 2012), at ¶ 31 (citations omitted) (“While we believe SBI Data to be the best available regarding deployment, we recognize that these data may tend to overstate deployment, for example, because some customers within a census block may not be able to achieve the reported speeds.”).

¹² See *Wireline Competition Bureau Updates the List of Potentially Unserved Census Blocks in Price Cap Areas and Extends the Deadline for Comment on the List*, Public Notice, DA 12-2001, WC Docket No. 10-90 (rel. Dec. 10, 2012).

¹³ See, e.g., Rural Associations’ Comments, WC Docket No. 10-90 (filed Jan. 9, 2013), at 2-3.

¹⁴ *Id.* at 3-4.

eliminate USF support when the only service that the USF actually supports by law is voice;¹⁵ (4) it is inappropriate and unlawful to use data that merely capture broadband availability to make determinations regarding USF when the stated purpose of universal service, as reformed by the Commission, is to ensure that both voice and broadband services are “reasonably comparable” in price and quality.¹⁶ The Rural Associations have also provided evidence that the Bureau’s databases continue to mislabel census blocks as being within RLEC or price cap-served study areas, only further exacerbating concerns about the accuracy of any results that rely upon such data.¹⁷

The Rural Associations have not been alone in identifying the many problems resident within the NBM and its limited utility in the context of USF/CAF determinations. The United States Telecom Association (“USTelecom”), for example, noted in the context of CAF Phase I the logical and practical incongruity associated with using a map that purports to capture broadband speeds of 3 Mbps downstream/768 kbps upstream in determining where 4/1 Mbps broadband service is available.¹⁸ The same logic (or lack thereof) applies with equal force to a

¹⁵ *Id.* at 4; *see also* *Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link-Up*, WC Docket No. 03-109; *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17701 (2011), at ¶ 103 (defining an “unsubsidized competitor” as “a facilities-based provider of residential terrestrial fixed voice and broadband service that does not receive high-cost support”) (emphasis added).

¹⁶ Rural Associations’ Comments, at 4-5.

¹⁷ *Id.* at 5 (finding that over 9,000 census blocks were mislabeled as being in one type of study area compared to another).

¹⁸ USTelecom Comments, WC Docket No. 10-90 (filed Jan. 9, 2013), at 3-5.

comparable proposal in the context of CAF Phase II support.¹⁹ Indeed, USTelecom’s preliminary analysis indicated that perhaps more than one million unserved housing units are “lost” as a result of such a rough cut.²⁰ USTelecom similarly highlighted the potential for significant inaccuracy in the data underlying the National Broadband Map (and overstatement of coverage as a result) arising out of self-reporting by providers.²¹

Problems within the NBM have been flagged by others as well. Comcast, for example, has indicated that its coverage in over 100,000 census blocks is misstated.²² Meanwhile, comments filed recently by Time Warner Cable in the context of CAF Phase I support reinforce that anything less than a robust and disciplined process will be subject to gamesmanship and/or subjective conclusions in defining what constitutes a “served” area. Specifically, Time Warner Cable indicated that its own list of “served” census blocks includes areas “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”²³ A process can hardly be considered “data-driven” when an entire rural census block – which can be quite large geographically – could be deemed ineligible for USF or CAF support simply because a would-be competitor unilaterally asserts (without validation, evidentiary presentation, or certification) that it previously provided 3 Mbps/768 kbps

¹⁹ *Contra* Public Notice at ¶¶ 9-10, 12.

²⁰ USTelecom Comments, WC Docket No. 10-90 (filed Jan. 9, 2013), at 2.

²¹ *Id.* at 6-8. Indeed, given the Commission’s pronouncements that accountability is an essential component of its reforms and regulatory processes, it is jarring to see a proposal to accept as a presumptive matter the unverified self-reported (and self-interested) assertions of individual providers in identifying service coverage.

²² Letter from Mary McManus, Comcast, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Jan. 24, 2013), at 2.

²³ Time Warner Cable Comments, WC Docket No. 10-90 (filed Jan. 9, 2013), at 2.

fixed broadband to a single customer there, with no mention of the rates at which service was available or whether voice was offered as well.

Finally, even if the NBM and comparable data in proprietary databases were accurate in all respects – and it should be abundantly clear at this point that they are a far cry indeed from that – it would be patently arbitrary, capricious, and unreasonable to utilize such data as a presumptive resource for USF/CAF determinations given the limited nature of what data the NBM purports to capture and reflect. First, the map does not show the availability of voice services – the only service that the USF actually supports.²⁴ Thus, should USF support be reduced or eliminated because of an indication of broadband coverage on that map, this could lead to voice service rates becoming unaffordable or incomparable to rates in urban areas, or possibly even to a discontinuance of voice service altogether in the highest cost areas. Second, the NBM does not show prices for broadband service. This introduces the risk that USF support that can help to keep rates for broadband affordable and reasonably comparable in a high-cost area – a stated goal of the Commission in its reforms²⁵ – will be eliminated or reduced in error simply because two providers are shown to offer broadband in a given census block. In short, even if the data within the NBM were pristine, accurate, and up-to-the-minute, such data would provide little, if any, indication of whether USF or CAF support is still needed to meet the objectives of universal service.

The NBM (and comparable proprietary databases) therefore should not and cannot reasonably be deemed the presumptive determinant of where broadband service exists in the

²⁴ *USF/ICC Order and FNPRM*, 26 FCC Rcd at 17693 (2011), at ¶ 79 (“Today, all ETCs, whether designated by a state commission or this Commission, are required to offer the supported service – voice telephony service – throughout their designated service area.”) (emphasis added).

²⁵ *See id.* at 17695, ¶ 86 (“ETCs must make this broadband service available at rates that are reasonably comparable to offerings of comparable broadband services in urban areas.”).

absence of proof to the contrary. Put another way, USF/CAF recipients should not be put in the position of “proving a negative” with respect to the absence of self-reported competition as shown on the NBM. The extent of service offerings on the NBM is often unclear, the accuracy of the information underlying any indication of potential service requires more careful validation, and even where accurate, the scope of the data contained within the NBM is of limited probative value in ultimately determining whether USF/CAF support is unnecessary in a given area. Using either comments filed in an abbreviated cycle to “correct” the NBM for CAF Phase I purposes, or an abbreviated challenge process for purposes of CAF Phase II, will not remedy these concerns; such procedures will be woefully insufficient to ferret out false or imprecise indications (or omissions) of meaningful competitive presence and the need or (lack thereof) for CAF or USF support in a given geographic area. Instead, as discussed in the section that follows, a more surgical, robust, and disciplined process – one more consistent with that initially proposed by the cable industry itself in first suggesting this concept – is required by law and good policy.

II. BOTH A MEANINGFUL COMMITMENT TO DATA-DRIVEN DECISION-MAKING AND THE STATUTORY MANDATE OF UNIVERSAL SERVICE REQUIRE A MORE ROBUST AND DISCIPLINED PROCESS FOR IDENTIFYING THE PRESENCE OF PURPORTED “UNSUBSIDIZED COMPETITORS” THAN THE PRESUMPTIONS AND SHORT-CUTS OUTLINED IN THE PUBLIC NOTICE.

For the reasons described in the preceding section, the statutory mandate of universal service requires more than reliance on a flawed, dated, and incomplete mapping database that is subject to check only through a “challenge” process. Indeed, in first putting forward this concept, even the cable industry itself suggested that a more robust process should be triggered

at the request of a would-be competitor.²⁶ Beyond the obvious complications associated with trying to “prove a negative” with respect to the absence of effective competition, the process suggested in the Public Notice puts would-be “challengers” in the impossible position of having to obtain access to sensitive information – such as latency and other service characteristics – in an accelerated timeframe (e.g., 45 days) that alleged competitors might or might not make publicly available.²⁷

Thus, in lieu of procedures such as those identified in the Public Notice,²⁸ the Commission and the Bureau should for all purposes look to the only credible and detailed process proposed to date on the record of this proceeding for determination of where an “unsubsidized competitor” might operate. As outlined in the prior filings of the Rural Associations and in lieu of putting the burden of proof on the USF or CAF recipient to “disprove” the NBM as suggested in the Public Notice, this process would (as the cable industry itself first suggested) put the burden on the would-be “unsubsidized competitor” to make the necessary showings. Specifically, the competitor would need to aver and show through clear and convincing evidence (and accompanying certification/verification) in a petition to a state commission (with a copy to the applicable consumer advocate’s office) that, at a minimum:

²⁶ See Petition for Rulemaking by National Cable & Telecommunications Association, RM-11584 (filed November 5, 2009), at 5 (“Under NCTA’s proposal, the Commission would establish a two-step process by which any party may request that the Commission reassess the level of support distributed to providers to a particular study area. In the first step, *the burden would be on the petitioner* to demonstrate that the area meets one of two competition-based triggers.”) (emphasis added).

²⁷ Public Notice, at ¶¶12-14, 17.

²⁸ See *id.* at ¶ 22 (“We seek comment on all these proposals and on any alternatives. If commenters believe different procedures would better serve the Commission’s goal of targeting support to areas without unsubsidized competitors, they should provide a detailed description of their preferred alternative.”)

1. it is a state-certified carrier or eligible telecommunications carrier (to ensure adequate opportunity for regulatory and consumer advocate oversight);
2. it can satisfy any public interest obligations required of a USF recipient (to ensure continuing service quality);
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. A fixed service can be either fixed wired or fixed terrestrial wireless. A fixed terrestrial wireless service should be defined as one that does not support roaming and requires a fixed ground station transmitting to a fixed transceiver located at the customer's premises;
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 (to ensure affordability of rates for consumers);
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 (to ensure a continuing ability for the Commission to monitor service quality *and* to ensure that the state and the Commission are aware to the extent that the competitor at some subsequent point no longer serves the entire market in the manner presented in the initial petition); 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.²⁹ Any competitor seeking to establish that it provides unsubsidized competition must be required to present evidence – in the form of *pro forma* financial statements for its operations in that area – demonstrating that the area is indeed "economic" of its own accord and can support a *stand-alone* business

²⁹ See, ADTRAN Inc. Comments, WC Docket No. 10-90, *et al.* (filed Jan. 18, 2012), at n. 19 (noting that "subsidy" may be achieved in any number of ways, including stimulus program funding or free spectrum, and that "[e]ntry by such competitors, even if not subsidized by high-cost support, does not mean that subsidies are not needed to support broadband deployment in these areas").

plan (*i.e.*, that operations in the area are not being cross subsidized by revenues/profits from the competitive provider’s other service areas or lines of business).³⁰

Once such a petition has been filed, the USF recipient whose support would be affected by the purported presence of unsubsidized competition should *then* be given the opportunity to rebut or otherwise address the competitor’s showing. This opportunity must include the ability to access and review, at the most granular level possible, the data filed by a competitor to ensure meaningful scrutiny and testing – as compared to trying to develop from scratch information needed to rebut unverified self-reports that constitute the NBM. Copies of all such filings should also be given to this Commission so that the state regulators, consumer advocates, interested industry stakeholders, and this Commission all have a complete record by which to judge whether support for a carrier of last resort should be modified and the consequences of that decision on consumers in the affected area.

It is essential as a matter of “data-driven” public policy – and the statutory mandate of universal service requires – that a more robust and carefully designed process based upon objective and complete data be employed in assessing the purported presence of “unsubsidized competition.” It is also essential in the end that this process identify not only the mere availability of broadband services in part of a given area, but that it identify accurately as well the extent to which voice services are available and also the rates and quality of *both* voice *and*

³⁰ Absent such a showing, as noted above and in numerous prior filings, the Commission runs the substantial risk of failing to identify accurately those areas that are in fact “uneconomic” to serve, thereby reducing or eliminating support where it is needed based upon the actual characteristics of those areas such as density or addressable market. The Commission should also consider the extent to which the competitor is “invested” and actually provides service in the area – that is, the extent to which it has deployed its own facilities (as compared to relying upon the facilities of the incumbent) and the length of time that it has operated in the area. A provider that has just arrived recently (*i.e.*, within the past two or three years) in a market, that advertises services with few if any subscribing customers, and/or that serves only a densely populated census block in a high-cost area might appear to be competing, but might also be said to be engaged in “cream-skimming” that exacerbates pricing pressure and the need for USF support in outlying areas.

broadband services *throughout* that area. There should be no room for or tolerance of “short-cuts” in fulfilling the statutory requirement of universal service, and the Commission’s commitment to data-driven decision-making should be reflected in a more informed and thoughtful evidentiary process for identifying potential “unsubsidized competitors.”

Respectfully submitted,

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February 19, 2013