December 15, 2015

Ex Parte Notice

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *Connect America Fund*, WC Docket No. 10-90

NTCA–The Rural Broadband Association ("NTCA") hereby submits this letter to discuss further the Alternative Connect America Fund Model ("ACAM") for potential use in distributing Connect America Fund ("CAF") support in rate-of-return incumbent local exchange carrier ("RLEC") service areas. Specifically, NTCA herein proposes a path forward by which the Federal Communications Commission ("Commission") can achieve a shared desire to offer RLECs a voluntary option to receive support from the ACAM while also addressing the concerns that still exist relating to the model. In short, and for the reasons discussed below, the Commission can and should adopt in the very near term, as part of a package of reforms with a simple fix for the standalone broadband problem and other measures as previously noted, a voluntary model-based path to support. In particular, the Commission could approve key parameters of that voluntary model path such as election procedures, terms of support, and obligations, while then promptly pursuing several essential steps to refine the model in anticipation of final publication of offers and distribution.

Initial Adoption of a Voluntary Model Support Option

As a preliminary matter, NTCA reiterates its long-standing support for making model-based universal service fund ("USF") support available to those RLECs that choose to take such support on an entirely voluntary basis. NTCA supports doing so as soon as reasonably possible, and with four exceptions noted below, is generally supportive of the draft rules submitted by ITTA-The Voice of Mid-Size Telecommunications Companies and USTelecom to initiate implementation of a model option.[1] More specifically, ITTA's draft model rules, if modified and/or simply clarified in the following four ways, could be paired with a targeted fix for standalone broadband support and other measures to encourage efficient operations and focused distribution,[2] as part of a transformative set of reforms for adoption pursuant to a Commission order in the very near future:

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[1] *Ex Parte* Letter from Genevieve Morelli, President, ITTA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Dec. 4, 2015).

[2] *See Ex Parte* Letters from Michael R. Romano, Senior Vice President, NTCA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Nov. 9 and Nov. 24, 2015).

- In subsections (c) and (h) of draft rule 54.311, the term "fully-funded location" requires clarification to avoid confusion in carrier expectations and to ensure the most efficient use of USF resources made available via model-based support. In particular, each and every location in a census block where the average cost is between the "lower-end" benchmark and any "Extremely High-Cost Threshold" that may be established should be considered a "fully-funded location" to which the defined build-out duties apply.

- Subsection (e) of draft rule 54.311 would provide a default that, if the Commission does not take further action by the end of the ten-year term of support contemplated under the model, model-based support would continue at the same levels for each electing carrier on a year-to-year basis until the Commission takes action. NTCA is supportive of clearly defined default rules for what will happen if the Commission does not take further action on model-based support prior to the end of the ten-year period; such rules are necessary to provide visibility to model-based support recipients in terms of support expectations at the end of the term. This rule, however, must be squared with the realities of universal service budgets. Specifically, it should be made clear that payment of model-based support should continue on a year-to-year basis after the ten-year term of support in the absence of Commission action *only to the extent that there are CAF reserves or other "uncommitted" high-cost funds available to enable such continuation of support* and *that under no circumstances will support be extracted from other (non-model electing) RLECs via "budget controls" or other measures to fund the continuation of the model option for each electing carrier at the same level after ten years.* If CAF reserves or other uncommitted funds are not then available at sufficient levels to provide support at the same level as provided during the preceding ten years for each model elector, then in the absence of Commission action, each model elector should on a year-to-year basis receive a pro-rata share of any additional funds that may then be available; provided, however, in such cases, in no event should a model elector receive less than the level of support received by that carrier prior to model election – unless that RLEC is a carrier that elected the model despite receiving less under the model than existing support, in which case the level of model support received by that RLEC in year 10 shall continue on a year-to-year basis in the absence of further Commission action.

- With respect to the transitional "phase-in" of ACAM support described in subsection (k) of draft rule 54.311 for those RLECs that wish to elect the model despite receiving less support thereunder, NTCA would support this provision contingent upon: (a) the imposition of reasonable but responsible build-out obligations on such RLECs (just as any other model elector would bear) pursuant to section 54.311(c) to ensure that the model is being used by all electing carriers for its identified primary purpose of advancing broadband; and (b) a condition that any and all "budget headroom" freed up as a result of a carrier electing such a transition path (*i.e.*, the support that now becomes available by virtue of a carrier transitioning from a higher level of existing support to a lower level of model-based support) is used to lessen the impacts of budget controls and other reforms on RLECs that do *not* elect model-based support and thereby address concerns about reasonable comparability in rates for consumers served by such RLECs. For example with respect to item (b), if a RLEC were receiving $1,000,000 in existing support and elected instead to receive $750,000 under the model, the $250,000 in support "freed up" under a fixed high-cost budget by virtue of this election should accrue to the benefit of the mechanisms that permitted that RLEC to obtain $1,000,000 in existing support in the first place. Indeed, such a result would be not only helpful, but essential, to address serious concerns highlighted by the recent "price-out" filings that show negative

impacts of "budget controls" on carrier support and consumer rates under a "bifurcated approach" to USF reform.[3]

- Subsection (b) of draft rule 54.311 provides that RLECs electing model-based support will continue to avail themselves of intercarrier compensation and switched access treatment as if they were otherwise rate-of-return-regulated, and that such carriers may also (at their option) remain rate-of-return-regulated or convert to price cap regulation for special access and common line cost recovery. NTCA generally supports this framework, but believes it is essential to clarify in the rules that – if RLECs will be afforded continuing treatment as rate-of-return-regulated operators for purposes of intercarrier compensation and switched access (rather than being compelled to convert to price cap regulation if they do so for special access and common line) – the CAF-ICC budget for all such carriers shall be treated as a single number remaining within a "rate-of-return budget." Put another way, if (just as an example), RLECs receiving $50 Million in CAF-ICC support in 2015 (out of a total of $375 Million in CAF-ICC support for all RLECs) elect to receive model-based USF support, that $50 Million in CAF-ICC would continue to be subject to the same treatment as all other rate-of-return CAF-ICC support and thus remain part of the "rate-of-return budget" in all respects. This would mean that, in future years as the baseline for CAF-ICC cost recovery for all RLECs declines, these "freed-up" sums would defray any negative impacts of any "budget controls" applicable otherwise to calculations of RLEC high-cost support under HCLS, ICLS, and/or any new mechanism.

Even if the draft rules are modified and/or simply clarified in the four ways suggested above and the basic parameters of a model election process are put into place, however, there would still remain a need for further examination of issues to ensure that the ACAM estimates of distribution will comport with the mandates for "specific, predictable, and sufficient" support contained in Section 254(b)(5) of the Communications Act of 1934, as amended. This will be essential both for RLECs to be able to make informed choices about the support options that will be before them, and for the model to be most effective in making use of valuable USF resources and distributing support in accordance with Commission policy goals and statutory mandates. Below, NTCA outlines the technical and "competitive" issues that require resolution between the initial adoption of model election rules and the extension of final offers of support to individual RLECs.

[3] *See, e.g.*, *Ex Parte* Letter from Regina McNeil, National Exchange Carrier Association, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Dec. 2, 2015). *See also Parte* Letter from Regina McNeil, National Exchange Carrier Association, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Nov. 19, 2015); *Parte* Letter from Regina McNeil, National Exchange Carrier Association, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Nov. 13, 2015).

Technical Issues Requiring Resolution

The record already reflects those technical issues most in need of examination prior to final publication of offers and distribution of support via the ACAM.[4] While those points will not be repeated here, it is worth noting in summary fashion herein certain of the issues that remain in question with respect to the ACAM and, which if left uncorrected, would limit the efficacy and even legitimacy of the model.

As one example, the ACAM produces significant increases and decreases in support as compared to prior results that, in certain cases, are difficult to comprehend when considered in the context of "facts on the ground." For example, in some cases, model results show significant increases in support for RLECs that have already deployed broadband at 10/1 or higher speeds to large portions of their study areas. At the same time, in other instances, carriers in the opposite situation and most in need of support to deploy additional broadband-capable facilities necessary to provide such speeds would experience support *reductions*. The latter could result in significant negative implications for perhaps tens of thousands of rural consumers that lack access to 10/1 or better broadband service, contrary to both Section 254 and the Commission's own stated goals for this proceeding.[5] Moreover, RLECs that may otherwise seek to avail themselves of the option of receiving ACAM based support cannot make sense of such variations and thus may be forced to decline the option.[6]

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[4] *See, e.g.*, *Ex Parte* Letter from Michael R. Romano, Senior Vice President, NTCA, *et al*., to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Jun. 24, 2015) (*Rural Associations' June 24th Letter*); *Ex Parte* Letter from Larry Thompson, Vantage Point, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Jul. 13, 2015) (*VPS July 13 letter*) (reporting the result of in-depth case studies showing wide variations in costs – both upward and downward – between actual fiber-to-the-home construction projects and model results); *Ex Parte* Letter from Vincent H. Wiemer, Alexicon, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Jun. 18, 2015); *Ex Parte* Letter from Gerard J. Duffy, WTA, et al., to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90, at 1 (filed Jul. 15, 2015).

[5] *Connect America Fund, et al.*, WC Docket No. 10-90, et al., Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, (rel. Jun. 10, 2014), at ¶ 269 (stating intent to create a support mechanism that, among other things, "distribute[s] support equitably and efficiently, so that all rate-of-return carriers have the opportunity to extend broadband service where it is cost-effective to do so").

[6] It is also important to observe that measures of 10/1 service based upon Form 477 data could yield illogical and even troubling results. Specifically, Form 477 data capture the speeds that are *offered* by a given carrier, rather than the actual *capability* of the network in that census block. Thus, it is possible that a carrier could have fiber-to-the-premise or similarly capable technology deployed in a given census block, and yet not be today reporting speeds of 10/1 as offered. In those cases, the "model" in relying upon Form 477 data would show that carrier as requiring model-based support to deploy a network capable of 10/1, even as the carrier *already has a network capable of speeds far in excess of that.* In those instances, the model would misdirect funds for new construction, leaving less funding under a fixed high-cost USF budget available for other areas where new construction may be much needed.

Moreover, as the Rural Associations have also previously discussed,[7] cost deviations between model predictions and either engineered or actual construction costs also undermine the utility of the ACAM. The Rural Associations further noted that these deviations were not specific to any state, region of the country, project size.[8] Additionally, the ACAM overestimates costs for a large percentage of higher cost wire centers and underestimates costs for a large percentage of lower cost wire centers.[9] This asymmetry in cost deviations means that the model's inaccuracies are not likely to "even out" or "average out" even for carriers with large numbers of wire centers.[10] This, and the fact that such deviations exist for RLECs all across the nation, underscores the importance of an attempt to get the costs "right" in finalizing offers of model support. That is, these issues likely stem from inaccurate data as to the cost drivers that exist for RLECs and are not merely the result alone of distributional "dials" that have been developed for various policy reasons (*i.e.*, budgets, benchmarks).[11]

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[7] Rural Associations' June 24th Letter, at 2.

[8] *Id*. at 4.

[9] VPS July 13 letter (discussing the results of an analysis of engineering data from 144 wire-center fiber-to-the-premises projects).

[10] Nowhere was this fact more evident than in a filing made by CenturyLink, requesting "flexibility" in meeting deployment obligations as a recipient of model based support. To justify the request, CenturyLink noted that:

> The Connect America Cost Model ("CAM") is a useful tool for determining, in the aggregate, where supported networks should be built so as to maximize deployment within a reasonable budget. ***But no model is perfect, and least of all at a disaggregated detail level— even if the CAM is very accurate overall, it is certain to be inaccurate frequently at the level of an individual household location, or even census block***.

Comments of CenturyLink, WC Docket No. 10-90 (filed Aug. 8, 2014) , at 5 (emphasis added). This filing demonstrates that even for a carrier of CenturyLink's size that can "average out" errors in the model over a statewide service area or even a nationwide footprint, the inaccuracies in the model dictate additional flexibility to meet broadband deployment obligations "in a cost-efficient way." While such flexibility could prove quite valuable to that carrier or carriers of similar size, individual RLECs' small service areas and small number of eligible locations relative to price cap carriers will limit the benefits of such flexibility or averaging of errors. Thus, it is even more imperative that a thorough review of and remedy for the technical issues identified with the ACAM be completed to enable RLECs that choose model-based support to meet any build-out obligations in a cost-efficient way.

[11] A somewhat related concern arises in the model's treatment of networks previously constructed using grant funding – in those cases, existing USF programs do *not* support the capital investments associated with those networks because their costs were already "covered" by the grant. But the model would appear not to be capable of making such distinctions, leading to the potential use of USF dollars to support capital expenditures already fully paid for via prior grant funding.

Competitive Issues Requiring Resolution

Beyond resolving these technical and data-centric issues in the ACAM, the Commission needs to establish and then pursue a process by which it will address the purported presence of unsubsidized competition in census blocks in RLEC service areas under the ACAM. Here again, Form 477 data cannot be seen as a reliable and conclusive (or even presumptive) data point for the validation of competitive presence. The limits of Form 477 data were confirmed in the recent effort to identify RLEC study areas that are 100 percent served by an unsubsidized competitor.[12] As NTCA noted,[13] comments filed in response to the Public Notice demonstrated that reliance on Form 477 deployment data, which formed the foundation of determinations of 100 percent competitive overlap identified in the Public Notice, would be all but certain to lead to the mistaken identification of unsubsidized competition. Indeed, what was particularly instructive in that proceeding were comments filed by purported unsubsidized competitors – carriers identified by the Public Notice as having the ability to serve all locations in a census block – which made clear that such was not the case.[14]

For these reasons, there is a clear need to move beyond Form 477 as a determinative factor in terms of the identification of unsubsidized competition by the ACAM and include a robust but efficient challenge process to ensure that "false positives" do not harm rural consumers while also ensuring that such a process does not needlessly delay the Commission's distribution of support amounts to individual carriers. This challenge process can and should take place concurrently with addressing the technical issues with the ACAM discussed above. The challenge process outlined herein is a critical part of ensuring that the ACAM equitably distributes support, and thus the Commission should not give it short shrift and attempt to proceed with such a process in a truncated fashion that does not fully examine the true nature of purported competitive presence. While it can and should proceed in an efficient manner to ensure that model adopters are able to begin receiving support as soon as possible, it should also be a thorough and complete process that examines the necessary documentary evidence and thus should proceed in conjunction with the technical corrections to the model and be completed prior to the distribution of support.

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12 *Wireline Competition Bureau Publishes Preliminary Determination of Rate-Of-Return Study Areas 100 Percent Overlapped By Unsubsidized Competitors*, WC Docket No, 10-90, Public Notice, DA 15-868 (rel. Jul. 29, 2015) ("Public Notice").

13 Reply Comments of NTCA, WC Docket No. 10-90 (filed Sep. 28, 2015).

14 *See*, Comments of RCN Telecom Services (Lehigh) LLC, WC Docket No. 10-90 (filed Aug. 26, 2015), at 1 (stating that "the Bureau's determination appears to be incorrect to the extent that the Bureau relies only on the RCN deployment file [Form 477] and assumes that RCN served blocks constitute a 100% overlap with Ironton."); Comments of Comcast Corporation, WC Docket No. 10-90 (filed Aug. 28, 2015), at 1 (stating that while Form 477 data show its deployment to the census blocks at issue, it does not offer service to each individual location within those census blocks.).

In terms of the challenge process itself, the Commission should begin by publishing a list of census blocks in which an unaffiliated,[15] unsubsidized competitor(s) is shown as being able to serve consumers based upon 477 availability data. The identified competitor(s) should then be directed to file the information that can bridge the gap between what is shown on Form 477 and what is necessary to make a final determination of competitive presence. More specifically, this should include data necessary to demonstrate that:

> (a) 100 percent of the customer locations in each relevant census block(s) can subscribe to fixed terrestrial facilities-based voice (that provides access to 911 and is CALEA compliant) and broadband services at then-current speed definitions, including prior or current provision of voice and broadband to any location in the relevant census block(s) as well as the ability to have service up and running within 7 to 10 business days of service request to any and all locations in the relevant census block(s);
>
> (b) the competitor owns (or leases from an entity other than the incumbent) of all facilities needed to serve each customer location in the relevant census block(s);
>
> (c) the competitor does not use of cross-subsidies of any kind to provide services in the relevant census block(s);
>
> (d) the competitor will charge rates for voice and broadband that are "reasonably comparable" to those rates offered by either the would-be competitor in urban areas or the RLEC in the relevant census block(s);
>
> (e) the competitor is capable of complying with the same speed and latency performance requirements applicable to all CAF recipients (as measured using reasonable Busy Hour Offered Load metrics); and
>
> (f) the competitor will utilize usage allowances comparable to those then currently applicable to a CAF recipient (e.g., minimum 100 GB).[16]

Once such information has been filed with the Commission, RLECs serving the relevant census blocks should be given 60 days to rebut the competitor's claim(s).

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[15] The Commission should first make this determination – that the provider shown as serving in a census block on a Form 477 is not a RLEC or RLEC affiliate. *See Ex Parte* Letter from Michael R. Romano, Senior Vice President, NTCA, *et al.*, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Oct. 29, 2015) at 2 (discussing "instances in which the A-CAM incorrectly classifies an RLEC's or an RLEC affiliate's voice and/or broadband services as services that are being provided by an unsubsidized competitor, even if these services are in fact used and provided in furtherance of the RLEC's eligible telecommunications carrier obligations.").

[16] Each item must be certified to by a company officer and should include supporting documentary evidence. The challenge process proposed herein is the same as to that proposed by NTCA, ITTA-The Voice of Mid-Size Communications Companies, the United States Telecom Association, and WTA – Advocates for Rural Broadband in July 2015. *See Ex Parte* Letter from Michael R. Romano, Senior Vice President, NTCA, *et al*., to Marlene H. Dortch, Secretary, Commission WC Docket No. 10-90 (filed Jul. 16, 2015).

Conclusion

The issues noted above require examination and resolution – they are essential to "finalize" the model and to make final offers of support available to those RLECs that wish to consider a voluntary election of model support. Other issues too will require some time to resolve prior to model support beginning to flow – for example, even for those model electors that remain "rate-of-return" for purposes of special access and common line costs, tariff changes will need to be implemented to reflect the interaction of model support and rates applicable to those costs. These tariff changes likely would need to be reflected in a special set of filings occurring at some point in the future. This simply means that there should be at least some additional time in parallel to examine and resolve the issues noted herein before final offers of model support are made and distribution of such support commences.

This is not to say, however, that the Commission could not – as part of a package responding to the call of Congress for a fix to standalone broadband specifically – adopt the concept of a model-based support option in relatively short order and define key parameters of that option at the same time. For example, based upon the draft rules that have been filed as modified consistent with the recommendations herein, the Commission could in an order that finally addresses the standalone broadband concern also: (1) announce that it will make a model option available to RLECs on a voluntary basis and that it aims to commence distribution of such support as soon as possible; and (2) define key parameters of the model option such as the term of support, the build-out obligations that will attach to model support, and the process it will follow to verify the presence of unsubsidized competitors. It can then use the ensuing months to complete the work (such as competitive challenges and review of inputs) that also very much needs to be done to develop final offers of support via a more accurate and transparent model.

NTCA looks forward to working with the Commission on the issues raised herein to ensure that policymakers and stakeholders can have confidence that distribution of support as determined by the ACAM comports more closely with the "facts on the ground" and results in an equitable distribution of high-cost USF support. Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS.

/s/ Michael R. Romano
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Senior Vice President – Policy

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