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

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208
	)	
ETC Annual Reports and Certifications	)	WC Docket No. 14-58
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92

APPLICATION FOR REVIEW
of the
NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.;
NTCA-THE RURAL BROADBAND ASSOCIATION;
EASTERN RURAL TELECOM ASSOCIATION;
and
WTA – ADVOCATES FOR RURAL BROADBAND

January 21, 2015

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I. INTRODUCTION AND SUMMARY

Pursuant to section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the Rural Associations listed above[1] seek Commission review of the Wireline Competition Bureau's

[1] 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). NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service local exchange carriers and broadband providers, and many of its members provide wireless, cable, satellite, and long distance and other competitive services to their communities. ERTA is a trade association representing rural community based telecommunications service companies operating in states east of the Mississippi River. WTA is a national trade association that represents more than 280 rural telecommunications carriers providing broadband, voice, and video services. WTA

December 22, 2014 *Order* in the above-captioned proceeding.[2] As discussed below, the *Order* improperly dismissed as "untimely" a petition for reconsideration submitted by the Rural Associations on August 4, 2014.[3] The Rural Associations' *PFR*[4] sought reconsideration of the Commission's *2014 Connect America Order/FNPRM*[5] insofar as that order affirmed methods used by the Bureau to develop the local service rate floor in 2014 and thereafter.[6]

As discussed below, review of the Bureau's *Order* is warranted because the Bureau did not address – indeed, simply ignored – the reasons set forth in the *PFR* explaining why reconsideration was both timely and necessary.

An agency violates the Administrative Procedure Act when it "fails to consider an important aspect of the problem." In dismissing the Rural Associations' PFR, the Bureau failed to consider or address the fact that data used by the Bureau to calculate the local rate floor was made public only a few days before the *2014 Connect America Order/FNPRM* was adopted.

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members serve some of the most rural and hard-to-serve communities in the country and are providers of last resort to those communities.

[2] *Connect America Fund*, WC Docket No. 10-90, *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, *ETC Annual Reports and Certifications*, WC Docket No. 14-58, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Order, DA 14-1882 (rel. Dec. 22, 2014) (*Order*).

[3] *Id.* ¶¶ 1, 5-8.

[4] Petition for Reconsideration of the National Exchange Carrier Association, *et al.*, WC Docket No. 10-90, *et al.*, 2, 7 (filed Aug. 4, 2014) (*PFR).*

[5] *Connect America Fund*, WC Docket No. 10-90, *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, *ETC Annual Reports and Certifications*, WC Docket No. 14-58, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 7051 (2014) (*2014 Connect America Order/FNPRM*). The Order was released on June 10, 2014, and published in the Federal Register on July 9, 2014. (79 Fed. Reg. 39163).

[6] *Id.* ¶¶ 7, 80; 47 C.F.R. § 54.318(b).

Those data clearly demonstrated – for the first time – that the Commission's assumptions regarding the rate floor calculation method were in error. As such, the *2014 Connect America Order/FNPRM* provided parties with their first opportunity to seek reconsideration of the rate floor methodology based on actual data. Now that the information is available, review and reconsideration are both warranted and timely. The Commission should accordingly reverse the Bureau's dismissal of the Rural Associations' *PFR* and address the *PFR* on the merits.

II. BACKGROUND

The Rural Associations' *PFR* provided a detailed review of the Commission's local rate floor rule and associated calculation methods.[7] Briefly, the Commission's 2011 *ICC/USF Order* adopted a rule whereby High-Cost Loop Support (HCLS) and high-cost model support would be reduced in instances where end-user rates for local exchange voice service plus state regulated fees fall below a certain level.[8] The rate floor was to be established based on a national average of urban rates for fixed local voice service.[9] The Commission directed the Wireline Competition Bureau to collect survey data for use in setting a new local service rate floor for 2014, and annually thereafter.[10]

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[7] 47 C.F.R. § 54.313(h)(1); 47 C.F.R. § 54.318.

[8] *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 an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link-Up*, WC Docket No. 03-109, *Universal Service – Mobility Fund*, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011) ¶¶ 234-247 (*ICC/USF Order*). *See also* 47 C.F.R. § 54.318.

[9] *Id.* ¶¶ 237-238.

[10] *Id.* ¶¶ 239, 246.

Several of the Rural Associations sought reconsideration in 2011 of the Commission's decision to base the rate floor on an average of urban rates, and suggested instead the Commission base its rate floor on statistical analyses, with the actual floor set (for example) on one or more standard deviations below the average.[11] The Rural Associations explained at the time how use of a statistical measure ***such as*** the standard deviation would identify more accurately those carriers whose rates are so-called "artificially low" or beyond reasonable comparability.[12] The Commission declined to adopt these suggestions, however, because of a concern that a rate floor set two standard deviations below the urban average "could" – without specific reference to any data, precisely because no data were yet available – result in a rate floor "so low as to be meaningless."[13]

The Wireline Competition and Wireless Telecommunications Bureaus then began collecting data via survey for calculating the rate floor in 2013, and in early 2014 the Wireline Competition Bureau released a brief Public Notice announcing the 2014 local service rate floor

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[11] *See* Petition for Reconsideration and Clarification of NECA, OPASTCO, and WTA, WC Docket No. 10-90, at 13-14 (filed Dec. 29, 2011) (*2011 Rural Association PFR*).

[12] *Id.* The Rural Associations explained that arithmetic averages can be influenced unduly by the presence of outliers, both above and below the mean. *Id.* n. 32. The Rural Associations also pointed out there is nothing "artificially low" about an end-user rate that is a penny or even a dollar below the national average; that the Commission has previously relied upon standard deviations to establish "reasonably comparable" rates for purposes of determining a rate ceiling; and that overall this approach would be more consistent with the "reasonable comparability" standard set forth in the Act. *Id.* at 14.

[13] *Connect America Fund,* WC Docket No. 10-90, *et al.,* Third Order on Reconsideration, 27 FCC Rcd. 5622 (2012) ¶ 23 (*Third Reconsideration Order*). The Commission also criticized the Rural Associations for not providing any analyses to support reconsideration, *id*, without acknowledging that such analysis would have been impossible without access to the Bureau's subsequently-gathered survey data. Nor did the Commission recognize that the Rural Associations did not actually suggest two standard deviations as ***the*** proposal for reconsideration; but instead only *analogized* to the two-standard deviation approach in suggesting the Commission should adopt some "range of reasonable comparability" around the urban average. *2011 Rural Association PFR* at 14.

would be $20.46 – an amount dramatically higher than the previous rate floor of $14 established in the Commission's 2011 *ICC/USF Order*.[14] This $20.46 rate floor was materially higher even than the Commission's own estimates in the 2011 Order, where it stated "we anticipate the rate floor for the third year [2014] will be set at a figure close to the sum of $15.62 plus state regulated fees.[15] This surprising announcement served only to highlight the significance of the survey to an informed debate about the rate floor and underscored the lack of data available to all parties and the Commission itself when the rate floor policy was first set.

The Bureau did not initially provide any of the data or calculations underlying the 2014 local service rate floor, but in response to concerns expressed by the Rural Associations and NARUC, among others,[16] the Bureau ultimately released the data obtained in its survey to the public.[17] While the Commission subsequently granted, in part, a separate petition filed by ERTA, ITTA, NTCA, NECA, USTelecom, and WTA[18] seeking a delay in implementation of

[14] *Wireline Competition Bureau Announces the Results of Urban Rate Survey for Voice Services; Seeks Comment on Petition for Extension of Time to Comply With New Rate Floor*, Public Notice, DA 14-384 (rel. Mar. 20, 2014) (*Public Notice*). The new rate floor was also materially higher than the Commission's own estimate in 2011. *See ICC/USF Order* ¶ 243 (stating the rate floor would likely be "set at a figure close to the sum of $15.62 plus state regulated fees.")

[15] *ICC/USF Order* ¶ 243.

[16] *See* Reply Comments of NTCA, NECA, ERTA, and WTA, WC Docket No. 10-90, at 5 (filed Mar. 31, 2014). *See also* Reply Comments of ITTA and USTelecom at 6; Montana Telecommunications Association at 6; JSI at 4. In a petition filed April 15, 2014, NARUC explicitly asked the Bureau to release the data from the urban rate survey for public review, and requested the Commission seek comment on the methodology for calculating the rate floor benchmark. Petition of NARUC, WC Docket No. 10-90 (filed Apr. 15, 2014).

[17] *Wireline Competition Bureau Announces Posting of Voice Data From Urban Rate Survey, and Explanatory Notes*, Public Notice, DA 14-520 (rel. Apr. 18, 2014). This was only *five days* before the Commission was scheduled to consider an item on this topic at its April 23, 2014 Open Meeting.

[18] Petition for Extension of Time by ERTA, ITTA, NECA, NTCA, USTELECOM and WTA, WC Docket No. 10-90 (filed Mar. 11, 2014).

support reductions associated with the rate floor,[19] the Commission made clear in its *2014 Connect America Order/FNPRM* it would not reconsider or amend any other aspects of its rate floor policy or calculation methods.[20]

The Rural Associations' *PFR* did *not* seek reconsideration of the Commission's decision to phase-in support reductions associated with the urban rate floor. To the contrary, the *PFR* expressed appreciation for the Commission's efforts to ensure a gradual implementation of support reductions as opposed to immediate flash-cuts in support. It remains important, however, that the Commission reconsider – with the benefit of data that were unavailable in 2011 or even until just before the April 23, 2014 Open Meeting – the specific methodology by which the rate floor was established and will continue to be established going forward.[21]

The Bureau's *2014 Connect America Order* correctly points out the weighted average approach was adopted by the Commission in its 2011 *ICC/USF Order* and reconsideration of this method was previously denied.[22] The facts remain, however, that the Commission did not actually implement the rate floor methodology until it adopted the *2014 Connect America Order/FNPRM*, and that no party had an opportunity to analyze the underlying data, and thus the assumptions underlying the methodology, until the Bureau chose to release that information just

[19] *See FCC Takes Major Strides Toward Further Expansion of Rural Broadband*, News Release (rel. Apr, 23, 2014).

[20] *2014 Connect America Order/FNPRM* ¶¶ 7, 80. The Bureau did, however, subsequently issue an Erratum to the description of the local rate floor phase-in. *See Connect America Fund*, WC Docket No. 10-90, *et al.*, Second Erratum (rel. July 11, 2014).

[21] Section 1.429 of the Commission's rules permits parties to file Petitions for Reconsideration of actions taken in rulemaking proceedings. 47 C.F.R. § 1.429. In cases where a Petition relies on facts or arguments not previously presented to the Commission, the Petition must show that the facts or arguments relied on "were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity." 47 C.F.R. § 1.429(b)(2).

[22] *2014 Connect America Order/FNPRM* ¶ 86.

a few days prior to the Commission's action. Had this information been available to the Commission and interested parties in 2011 or at any other relevant time before the rate floor methodology was implemented, it is entirely possible the Commission would have reached a different conclusion.[23] Indeed, now that actual data on urban rates have been made available, it is apparent that the Commission's earlier rejection of the use of standard deviations in conjunction with the average rate to determine the rate floor was based upon assumptions that proved flatly incorrect. Had the Commission agreed to use a statistical method, such as the standard deviation approach originally proposed *as an example* by the Rural Associations in this proceeding, the resulting rate floor would have been either $12.44 (based on a two-standard deviation standard) or $16.45 (based on a one-standard deviation standard). Neither rate would be so low as to be "meaningless," as the Commission once feared – and the one-standard deviation method would have in fact been much closer to the Commission's 2011 "$15.62 plus state regulated fees" estimate than the $20.46 that ultimately resulted from the survey.

The Bureau's *Order* does not address any of these points. Indeed, the Bureau's *Order* pointedly ignores arguments in the *PFR* explaining why reconsideration of the rate floor methodology is now timely. This failure to consider "an important aspect of the problem" warrants reversal of the Bureau's Order. The Commission should instead reconsider the

[23] For example, the Rural Associations' *PFR* reiterated that no one outside the Bureau knew or could have known the specific methodology to be used until mid-April 2014. No one could have anticipated that the Bureau would cull 73 percent of surveyed census tracts from its statistically valid sample (362 out of 497 census tracts were dropped) nor that some unregulated rates would be treated differently from others. *See PFR* at 7, n. 25, citing *2014 Connect America Order/FNPRM*, Statement of Commissioner Ajit Pai (approving in part and dissenting in part) at 206, n.31. Nor could anyone have anticipated that charges for measured or messaged service (services typically cheaper than unlimited local service) would be excluded entirely, and it still remains unclear how non-recurring charges were handled. Had the data been available, however, interested parties could have analyzed not only tariffed rates, but also how many subscribers actually pay those rates, which could have produced a much more meaningful average. *Id.*

methodology used to calculate the rate floor and direct the Bureau to recalculate the floor using a methodology that incorporates a reasonable range of rates, as suggested by the Rural Associations.

III. DISCUSSION

A. The Rural Associations' *PFR* was proper and should be considered substantively by the Commission.

The Commission should grant this Application for Review because the Bureau improperly dismissed the Rural Association's *PFR*. Section 1.115 of the Commission's rules provides that an application for review warrants consideration by the Commission if the Bureau action "conflicts with statute, regulation, case precedent," or constitutes "prejudicial procedural error." The Bureau's *Order* dismissing the Rural Associations' *PFR* as "untimely" must be reversed because it entirely ignores the reasons given in the *PFR* as to why reconsideration was in fact timely. As such, the *Order* is inconsistent with law, *i.e.*, it is arbitrary and capricious under section 706(2)(A) of the Administrative Procedure Act.

Further, in dismissing the Rural Associations' *PFR* without considering the merits of the arguments, the Bureau's action constitutes prejudicial procedural error in that the *Order*, if not reversed, essentially prevents petitioners from challenging implementation of Commission policy based on evidence that was not available when the Bureau believed that a timely challenge was due.[24] The Bureau's dismissal should accordingly be reversed so the Commission can evaluate

[24] The *Order* concludes that the *PFR sought* untimely review of the *ICC/USF Order*. *Order* ¶¶ 5, 8. In the *2014 Connect America Order/FNPRM*, the Commission dismissed as untimely a petition for reconsideration of the rate floor methodology filed by the National Association of Regulatory Utility Commissioners ("NARUC") of the *Rate Floor Order* (28 FCC Rcd. 4242 (2013), even though the data upon which the petition was based was not available at the time the petition was filed. *See 2014 Connect America Order/FNPRM* ¶ 82.

and resolve the Rural Associations' substantive arguments in light of the actual data used to implement the Commission's policies.[25]

B. Failure to address the *PFR* substantively would violate the Administrative Procedure Act.

The Rural Associations' *PFR* asked the Commission to reconsider the *2014 Connect America Order/FNPRM's* affirmation of methods used to develop the rate floor in light of the specific data used by the Bureau to implement Commission policy. The data, which relied on a limited sample of urban rate data, led to a result that was over 30 percent higher than the urban rate floor the Commission expected when it established the policy in the *ICC/USF Order* in 2011.[26] The Commission itself only adopted the rate floor policy after reviewing specific data available to it at that time.[27] These data are critical to an evaluation of the policy itself because the rate floor has the effect of cutting off universal service support, which the statute requires to be "sufficient."[28] Therefore, the actual rate floor is an important aspect of the establishment of the policy.[29]

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[25] Because the *PFR* was in fact timely, the Commission must address it. 47 C.F.R. § 1.429.

[26] The *PFR* explained that rates between $12.44 (the two-standard deviation standard) and $16.45 (the one-standard deviation standard) are commonly available in large cities, including Washington, D.C. and large areas of Washington State and Oregon, among other places. *PFR* at 9. In addition, the *PFR* explained that holding the rate floor to the urban average also ignores cost-of-living considerations and differences in income levels, as well as differences in the value of service that can be realized given massive disparities in the number of other persons and businesses situated within urban and rural local calling areas. *Id.* at n. 28.

[27] *ICC/USF Order* ¶ 236, n. 380.

[28] 47 U.S.C. § 254(b)(5).

[29] It is no answer that the Commission agreed to a lengthier transition to implement the urban rate floor in the *2014 Connect America Order/FNPRM* because the establishment of a transition does not address the reasonableness of the rate floor implemented at the end of the transition period.

The Commission itself set the stage for the instant problem because the critical data needed to evaluate its policy were not available at the time the policy was adopted. The data behind the rate floor of $20.46 announced by the Bureau was not made available until five days before the adoption of the *2014 Connect America Order/FNPRM*. Because that Order effectively upheld the new rate floor, it is the first decision which can be challenged based on the released data.[30] As such, that data represented newly available information, which made the Rural Associations' *PFR* timely pursuant to section 1.429(b) of the Commission's rules. Thus, the Rural Associations had valid reasons for submitting the *PFR* following issuance of the *2014 Connect America Order/FNPRM*; indeed, they could not have submitted it any sooner in the absence of the released data. The Bureau's Order entirely ignores this point. As such, it erroneously applied Commission rules and should be reversed.

The Administrative Procedure Act requires the Commission to consider all important aspects of issues before it.

> Under the arbitrary-and-capricious standard, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)* (internal quotation marks omitted). "Normally, an agency rule would be arbitrary or capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[31]

[30] We note the Bureau could have made this data available before its implementation decision but did not do so until a much later date, months after the new urban rate floor was announced by the Bureau.

[31] *Sorenson Commun's, Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014).

The Bureau *Order* refused to address the timeliness arguments present in the *PFR*, and thus failed to address "an important aspect of the problem" as required by the APA.[32]

C. The Bureau cannot engage in a "shell game" to preclude substantive review of the Rural Associations' *PFR*.

By failing to permit the Rural Associations to timely challenge a policy based on actual data the Bureau is engaged in a classic "shell game:" it avoids evaluating arguments based on actual data by not obtaining or revealing that data until after the theoretical decision is reached. This situation is made worse because the agency rejected the Rural Associations' original proposal to revise the rate floor methodology, in part on grounds the Rural Associations failed to provide sufficient analysis to support their concerns.[33] Once data became available several years later showing that, in fact, the Rural Associations' position was correct, the Bureau dismissed the Rural Associations' *PFR* as untimely. This is a classic example of a "shell game" designed to permit the Commission to evade review of erroneous, premature policy decisions. It was enabled by the Commission's own procedures in establishing a policy based on then-available evidence,[34] and then implementing the decision based on a data set revealed only at a much later date, which increased the rate floor by over 30 percent.

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[32] Failure to consider a petition as timely based on the release of actual data is similar to avoiding the requirement that an agency permit review of an "as applied" challenge to a rule, which is specifically required by the courts. *See, e.g., AT&T v. FCC*, 978 F.2d 727, 734 (D.C. Circ. 1992) (court required FCC to address as applied challenge in a complaint case, rather than relying solely of a rulemaking action). Because the rate floor rule was implemented by the Bureau, based on later-revealed data, the implementation decision is in the nature of an adjudication which should be independently reviewable in addition to the theoretical adoption of a policy in a rulemaking policy.

[33] *Third Reconsideration Order* ¶ 23.

[34] *ICC/USF Order* ¶ 246.

The Bureau should not be permitted to use its delegated authority to undermine the Commission's responsibility to review important policy matters in this manner.[35] The Commission should instead review the Rural Associations' *PFR* of the *2014 Connect America Order/FNPRM* insofar as it affirmed the methodology used to determine the $20.46 rate floor. Because the rate floor is over 30 percent higher than the Commission's original expectations, i.e., that it would initially be set at $15.62 plus state-regulated fees, the original policy is questionable in light of actual data, which was not available at the time the policy was established. Reconsideration is also critical to FCC compliance with section 254(b)(5)'s mandate that universal service be "sufficient."

IV. CONCLUSION

In dismissing the Rural Associations' *PFR* as "untimely," the Bureau's Order utterly fails to address the fact that reasons presented in the *PFR* as to why reconsideration of the *2014 Connect America Order/FNPRM* was both timely and warranted. The Bureau *Order* should thus

[35] The D.C. Circuit has previously criticized the Commission for attempting to preclude judicial review of its implementation of a de-tariffing policy. *AT&T* at 731-32 (Court overturned Commission refusal to issue a decision based on a complaint brought under Section 208 of the Act, but instead deferred decision to a rulemaking action that remained unresolved for over two years).

be reversed by granting the instant Application for Review of the Bureau *Order*. The Commission itself should address the merits of the Rural Associations' *PFR*.

Respectfully submitted,

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