

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

In the Matter of)
)
CONNECT AMERICA FUND) **WC Docket No. 10-90**
)

**OPPOSITION OF THE
INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE**

The Independent Telephone & Telecommunications Alliance (“ITTA”) hereby submits its Opposition to the Wireless Internet Service Providers Association’s (“WISPA”) Petition for Partial Reconsideration¹ filed in response to the May 16, 2013 *Report and Order* issued by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding.²

INTRODUCTION AND SUMMARY

As explained below, the Wireline Competition Bureau (“Bureau”) should reject WISPA’s requests to revise its definition of unsubsidized competitor and to elevate the evidentiary standard for challenging CAF Phase II census block eligibility determinations. WISPA asks that the Bureau revise its current definition of unsubsidized competitor to one that “focus[es] on the availability of voice and broadband services in a particular area, not on whether [a] *single company* offers both unsubsidized voice and broadband services in that area.”³ WISPA also asks the Bureau to depart from its previous conclusion and to “elevate the evidentiary standard governing the [CAF Phase II eligibility] challenge

¹ Petition for Partial Reconsideration of the Wireless Internet Service Providers Association, WC Docket No. 10-90 (filed July 3, 2013) (“WISPA Petition for Partial Reconsideration”), at 4.

² *In the Matter of Connect America Fund*, WC Docket No. 10-90, Report and Order, DA 13-1113 (rel. May 16, 2013) (“*Report and Order*”).

³ WISPA Petition for Partial Reconsideration, at 3.

process to “clear and convincing”⁴ from the current standard of “more likely than not.”⁵

The Bureau should retain the current definition of unsubsidized competitor. WISPA’s proposed change would unfairly strip away funding from companies that have made investments in reliance on USF support to the detriment of consumers and universal service policy objectives. In addition, the Bureau should retain the current evidentiary standard for the CAF Phase II challenge process. The Bureau correctly concluded that the “more likely than not” standard is best suited for this process.⁶

I. THE BUREAU SHOULD RETAIN THE CURRENT DEFINITION OF UNSUBSIDIZED COMPETITOR FOR DETERMINING AREAS ELIGIBLE FOR SUPPORT

The current definition of “unsubsidized competitor” best serves the Commission’s policy and legal objectives. WISPA’s original petition for reconsideration of that definition remains pending and the current petition is merely an attempt by WISPA to have another bite at that apple.⁷ As ITTA explained in its comments in response to that petition, adopting WISPA’s proposed definition would be bad policy for a variety of reasons.⁸

ITTA will not repeat at length its reasons for opposing WISPA’s proposed definitional change here. In short, however, revising the definition to the one proposed by WISPA would effectively strip away funding from service providers that have made substantial broadband network investments in high-cost rural areas in reliance on USF funding. Such a revision could put consumers in such high-cost areas at significant risk of not having access to reliable voice and broadband services. Moreover, adoption of WISPA’s proposed revision may constitute the imposition of an unfunded mandate in the

⁴ *Id.* at 4.

⁵ *Report and Order* at ¶ 21.

⁶ *Id.* at n. 48.

⁷ Petition for Partial Reconsideration of the Wireless Internet Service Providers Association, WC Docket Nos. 10-90, *et al.* (filed Dec. 29, 2011), at 5.

⁸ Opposition of the Independent Telephone and Telecommunications Alliance, WC Docket Nos. 10-90, *et al.* (filed Feb. 9, 2012), at 3-4.

form of service obligations on incumbent price cap carriers without adequate support. Such unfunded mandates would raise serious constitutional implications, and ITTA respectfully reminds the Bureau that it is bound by the Takings Clause of the U.S. Constitution.

II. THE BUREAU SHOULD MAINTAIN THE “MORE LIKELY THAN NOT” STANDARD FOR CAF PHASE II ELIGIBILITY CHALLENGES

The “more likely than not” standard best serves the goals of the CAF program. This standard most effectively ensures that consumers in areas deemed to be “served” (and thus ineligible for CAF Phase II support) in fact have access to broadband that meets the Commission’s service standards. At the same time, this standard ensures that the CAF Phase II challenge process is not unnecessarily burdensome, prevents spurious challenges, and maintains administrative efficiency for all parties.

The Commission has previously “recogniz[ed] the benefits of certainty” with respect to the availability of broadband (especially in areas ostensibly served by a fixed wireless provider) when determining if a census block is served or unserved.⁹ As ITTA and others have pointed out numerous times, reliability issues prevent the National Broadband Map (“NBM”) from being suitable as the basis for “prevent[ing] the residents of those census blocks [listed as served] from receiving the benefits of the CAF Phase II program.”¹⁰ In particular, the NBM significantly overstates service availability by

⁹ *In the Matter of Connect America Fund; a National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) (“*Order*” or “*FNPRM*,” as appropriate), at ¶ 104.

¹⁰ *See, e.g.*, Reply Comments of the Independent Telephone & Telecommunications Alliance, WC Docket No. 10-90, (filed Mar. 4, 2013), at 4-5; Comments of the National Telecommunications Cooperative Association, the National Exchange Carrier Association and the Western Telecommunications Alliance, WC Docket No. 10-90 (filed Fed. 19, 2013), at 4-8; Comments of the United States Telecom Association and the Independent Telephone and Telecommunications Alliance, WC Docket No. 10-90 (filed Jan. 28, 2013), at 15-16.

wireless Internet service providers (“WISPs”) and others.¹¹ The Bureau acknowledged such concerns in the *Report and Order*.¹²

Recognizing “the difficulty in proving a negative”¹³ in situations where the accuracy of the NBM is being questioned, the Bureau correctly concluded that the “more likely than not” adjudicatory standard is appropriate. There are only so many types of evidence available to a price cap carrier to rebut a showing on the NBM that a given census block is being served and therefore is ineligible for CAF Phase II funding. The Bureau envisioned several examples of such evidence: “a signed certification that an employee of the company attempted to obtain service in a particular block but was unable to do so,” a lack of coverage demonstrated in a provider’s advertising materials, or a signed certification from an officer of a price cap carrier (under penalty of perjury) that it has not ported a telephone number within the last year to the would-be unsubsidized competitor.¹⁴ Although these types of evidence are probative, they are not determinative.¹⁵ While proving a negative may be difficult for a price cap carrier, proving a positive—that is, the existence of service within a given census block—should be relatively easy for a would-be unsubsidized competitor.

WISPA's concerns over unfounded challenges¹⁶ are themselves unfounded. Challenges to a census block eligibility determination must be made with specific evidence.¹⁷ Moreover, in the *Report and Order*, the Bureau reminded parties that “[i]n signing a filing, an attorney is certifying that ‘...to the best of his knowledge, information, and belief there is good ground to support it; and that it is not

¹¹ See CenturyLink Petition for Waiver, WC Docket Nos. 10-90, *et al.* (filed June 26, 2012), at 5-11.

¹² *Report and Order* at 5-6.

¹³ *Id.* at ¶ 15.

¹⁴ *Id.*

¹⁵ *Id.* at n. 35.

¹⁶ WISPA Petition for Partial Reconsideration at 5.

¹⁷ *Report and Order* at ¶ 15.

interposed for delay” and that “rules regarding frivolous proceedings extend to non-attorneys.”¹⁸

In the unlikely event of an erroneous challenge to a census block determination, a would-be unsubsidized competitor can quickly and easily rebut the challenge with information it likely collects as a regular part of doing business. In such cases, the provider may submit, for example, “certifications relating to the number of customers and/or revenues received from customers, or customer lists.”¹⁹ Given this asymmetry, where it is difficult for one party to prove a negative, but very easy for another party to rebut a negative, an un-rebutted (or inadequately rebutted) challenge should be sufficient for the Bureau to allow CAF Phase II support to flow to a given census block.

WISPA has self-servingly focused on keeping the number of challenges low, while failing to acknowledge the paramount goal of ensuring CAF Phase II support flows to where it is needed. Rather than assuage the illusory fear of unfounded challenges, the Bureau should focus on addressing the very real problem of potential coverage overstatement on the NBM.

Moreover, the “more likely than not” standard is consistent with the approach the Commission took with respect to the CAF Phase I challenge process.²⁰ The Commission anticipated the possibility that challenges in CAF Phases I and II would “occur close to one another in time.”²¹ Given this likelihood, it would be far more administratively efficient for all parties for the same standard to apply in both processes. The same issues (e.g., the shortcomings inherent in the NBM) apply both in CAF Phase II and in CAF Phase I. Given that the “more likely than not” standard was rightfully deemed appropriate by the Commission for CAF Phase I, the same standard should apply to the CAF Phase II challenge process.

¹⁸ *Id.* at n. 45.

¹⁹ *Id.* at ¶ 17.

²⁰ *In the Matter of Connect America Fund*, WC Docket 10-90, Report and Order (rel. May 22, 2013), ¶ 33; 47 C.F.R. § 54.312(c)(7).

²¹ *Id.* at n. 69.

CONCLUSION

For the reasons stated above, ITTA respectfully requests that the Bureau reject WISPA's Petition for Partial Reconsideration.

Respectfully submitted,

By: /s/ Genevieve Morelli

Genevieve Morelli
Micah M. Caldwell
ITTA
1101 Vermont Ave., NW, Suite 501
Washington, D.C. 20005
(202) 898-1520
gmorelli@itta.us
mcaldwell@itta.us

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