

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

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

**COMMENTS
OF
NTCA–THE RURAL BROADBAND ASSOCIATION**

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TABLE OF CONTENTS

EXECUTIVE SUMMARY i

I. INTRODUCTION1

II. ANY EVALUATION OF COMPETITIVE OVERLAP MUST INCLUDE A ROBUST, DATA-DRIVEN CHALLENGE PROCESS, AS WELL AS OTHER PROVISIONS DISCUSSED HEREIN, IN ORDER TO PROTECT RURAL CONSUMERS2

A. FCC Form 477 Indicators Are Insufficient to Ensure that Consumers in Rural Areas Have Access to Reasonably Comparable Voice and Broadband Service. All Past and Recent Experiences Confirm that a Robust Challenge Process is Essential to Confirm the Presence of True Competitive Overlap.....2

B. The Commission Should Start its New Process By Identifying Areas With 99 Percent Overlap.9

C. The Commission Should Structure the Auction, Bidder Application, and Winning Bidder Buildout Rules in a Manner That Protects Rural Consumers10

D. The Commission Should Conduct the Challenge and Auction Process Every Ten Years14

III. THE COMMISSION SHOULD CONSIDER A REASONABLE TRANSITION MECHANISM, WITH AN AFFIRMATIVE SUNSET, TO ENSURE THE SUSTAINABILITY AND PREDICTABILITY OF THE RLEC HIGH-COST PROGRAM BUDGET AS CONSUMERS MIGRATE TO STANDALONE BROADBAND SERVICES.....14

IV. THE COMMISSION SHOULD ADOPT A TRIBAL BROADBAND FACTOR FOR ALL ENTITIES SERVING TRIBAL AREAS21

V. CONCLUSION.....22

EXECUTIVE SUMMARY

The Federal Communications Commission (“Commission”) took monumental steps in a December 2018 *Report and Order* to put the High-Cost Universal Service Fund (“USF”) mechanisms upon which small, rural local exchange carriers (“RLECs”) rely on more solid footing, thereby allowing these operators to focus on the business of building networks and delivering quality voice and broadband services to rural consumers. The *Further Notice* attached to that *Report and Order* presents a few outstanding critical issues for the Commission to tackle, presenting questions that – depending upon how they are addressed – could help to finalize the foundation upon which these USF mechanisms will operate going forward or unfortunately destabilize them in a manner that could undermine some of the landmark steps taken in December 2018.

Competitive Overlap

First, as the Commission considers a replacement for its prior 100 percent competitive overlap mechanism, it is essential to evaluate purported unsubsidized competitive presence via a robust, data-driven challenge process. Rural consumers need and deserve this basic protection from the dangers of “false positive” findings of unsubsidized competitive presence that could leave them without access to reasonably comparable voice and broadband services and rates as called for by statute. A challenge process is particularly important considering that: (1) FCC Form 477 data has time and again proven to be unreliable as a dispositive measure of broadband deployment, including in the two 100 percent competitive overlap reviews conducted to date; and (2) FCC Form 477 data provides no probative value whatsoever in discerning the availability of competitive voice telephony in the areas where broadband is claimed to be offered. Had the Commission declined to utilize a data-driven process and concluded its prior reviews of

ostensibly indicated competitive overlap based only on blind and absolute reliance on Form 477 data, more than two dozen rural study areas would have lost all high-cost support despite the lack of complete competitive coverage. Particularly in light of the notable struggles with the use of Form 477 data in the Mobility Fund proceeding, the Commission should learn from such efforts – and heed the input of several Members of Congress expressing concern over the flaws in Form 477 data – and therefore decline to move forward in evaluating alleged competitive overlap without a data-driven process to help it make the correct finding.

As the Commission moves away from the 100 percent overlap process, moving to a search for study areas 99 percent overlapped is the logical next step. This would likely require an analysis of perhaps 10 rural study areas that could serve as a good sample size to determine what, if any, unsubsidized competition truly exists at that level before additional Commission and provider resources are consumed in a wider range of study areas. This process should also decline to give credit towards that percentage for “almost served” locations, or locations where the provider claims it can provide service within 10 business days. In the absence of such a standard, high-cost support, and the voice and broadband services it enables, could be removed for locations now served by existing providers with the hope that the purported competitor may one day (but not now) deem it economically viable to extend its facilities to those locations.

After the completion of a data-driven challenge process that confirms 99 percent overlap, the Commission should require all interested bidders in any ensuing auction to make detailed, upfront showings of their technical capability for delivering on the promises they would make at auction. If, for example, a service at certain speed thresholds has never been offered on a widespread commercial basis to tens of thousands of customers across rural areas using a certain technology, a prudent and responsible universal service policy would establish beforehand that

the bidder can deliver on that promise in lieu of only checking *after* the auction has been conducted, awards are announced, and support is withdrawn from the existing (actual) provider.

Finally, with respect to the frequency of these processes, the Commission should conduct the challenge process and any ensuing auctions once every ten years. As the Commission noted in adopting ten-year time frames for RLECs accepting model-based high-cost support and for those operators of all kinds accepting Connect America Fund (“CAF”) II auction funds, certainty and predictability are critical to network operators serving rural areas.

Standalone Broadband Conversions

To promote the sustainability of the recently increased High-Cost USF program budget during a brief period as more consumers adopt standalone broadband, the Commission should adopt transitional measures that will promote continued consumer-driven adoption of standalone broadband services while minimizing the prospect during such a transition of a return to the unpredictability created by imposition of budget controls. As an example of such a concept, each individual RLEC receiving cost-based high-cost support could have its support calculated based on a maximum annual growth rate in Consumer Broadband-Only Loop (“CBOL”) lines of 10 percent of that RLEC’s prior year voice lines, starting at each carrier’s baseline of such broadband-only connections as of December 31, 2018. Such a limit on annual CBOL conversions would need, however, to affirmatively sunset in 2024 precisely because it is only a transitional mechanism. In addition, such a concept would neither penalize nor take away support from any individual carrier. Rather, because it applies only to CBOL conversions occurring after December 31, 2018, this limited temporary transition would simply provide a means to meter *future* growth in the Connect America Fund Broadband Loop Support (“CAF-

BLS”) mechanism during a period when consumer adoption of standalone broadband services may accelerate, thus minimizing the likelihood of a budget control rearising during this period.

Tribal Broadband Factor

Finally, NTCA urges the Commission to adopt a Tribal Broadband Factor for all cost-based support recipients serving Tribal Lands. Tribal communities across the nation have for far too long lagged behind in terms of access to communications services – first voice and now broadband. The Commission’s universal service policies should not distinguish between RLECs committed to serving Tribal areas versus those carriers that are Tribally-owned or predominantly serving Tribal areas. Across Tribal areas, many of the very same challenges exist, such as lower “take rates” due to lower incomes and other operational considerations. A Tribal Broadband Factor for all cost-based support recipients serving Tribal Lands would help to ensure that voice and broadband service are available and affordable for every one of these communities.

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**COMMENTS
OF
NTCA–THE RURAL BROADBAND ASSOCIATION**

I. INTRODUCTION

NTCA–The Rural Broadband Association¹ hereby submits these comments in response to the Further Notice of Proposed Rulemaking (“*Further Notice*”)² issued by the Commission in December 2018 in the above-captioned proceedings.

These comments address three issues raised in the *Further Notice*. First, NTCA offers herein a detailed proposal for replacement of the 100 percent competitive overlap process eliminated by the December 2018 *Report and Order*. The continuation of a meaningful overlap

¹ NTCA represents nearly 850 rural rate-of-return regulated telecommunications providers (“RLECs”). 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.

² *Connect America Fund*, WC Docket No. 10-90, *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 a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, FCC 18-176 (rel. December 13, 2018) (“*Further Notice*” or “*Report and Order*”).

challenge process is essential to ensure that rural consumers are not harmed by a misplaced reliance on FCC Form 477 data that, while informative, has time and again proven to be unreliable as a dispositive measure of broadband deployment. Second, NTCA supports a temporary transitional measure for sustaining the recently revamped USF budget for recipients of cost-based (or “legacy”) support over the next several years as consumers migrate away from traditional local exchange voice telephony and increasingly toward standalone broadband service options. This concept will promote continued consumer-driven adoption of standalone broadband services while minimizing the prospect during such a transition of a return to the unpredictability created by the imposition of budget controls. Third, NTCA expresses support once again for a Tribal Broadband Factor along the lines of that previously proposed by the National Tribal Telecom Association (“NTTA”) and asks that such a factor apply to the support received by any RLEC committed to serving Tribal areas.

II. ANY EVALUATION OF COMPETITIVE OVERLAP MUST INCLUDE A ROBUST, DATA-DRIVEN CHALLENGE PROCESS, AS WELL AS OTHER PROVISIONS DISCUSSED HEREIN, IN ORDER TO PROTECT RURAL CONSUMERS.

A. FCC Form 477 Indicators Are Insufficient to Ensure that Consumers in Rural Areas Have Access to Reasonably Comparable Voice and Broadband Service. All Past and Recent Experiences Confirm that a Robust Challenge Process is Essential to Confirm the Presence of True Competitive Overlap.

The *Further Notice* seeks comment on how the Commission should distribute cost-based high-cost USF support in RLEC study areas that are overlapped or nearly entirely overlapped by unsubsidized competitors, and further solicits input on how the agency should make that determination.³ NTCA provides below recommendations on how to implement such a process going forward. As discussed in further detail below, however, the limits of data gathered via

³ *Further Notice*, ¶¶ 184-199.

FCC Form 477 – and more specifically the dangers of “false positive” competitive overlap determinations that blind and absolute reliance on such data would produce – necessitate the use of robust challenges as part of any such process in order to protect rural consumers.⁴

While the data captured by Form 477 are informative, they are far from dispositive. Both the accuracy and the level of granularity at which data are reported simply do not provide policymakers with a true “facts on the ground” perspective with respect to either broadband or voice service availability. For example, an individual census block is designated as “served” for broadband purposes if a provider merely *advertises* (but does not actually provide) a given level of service to *any* location in that census block. Similarly, and perhaps even more disturbingly from a policy perspective (and more dubiously from a legal perspective), providers report the availability of voice telephony on Form 477 merely at a *state level*. This provides no value whatsoever in establishing the availability of quality and reliable voice telephony – the actual

⁴ For comparable reasons as those described herein, NTCA believes the Commission should re-evaluate its decision to forgo altogether *any* challenge process as part of its extension of a new model offer to legacy carriers (the Alternative Connect America Cost Model (“ACAM”)-II offer). To the extent that the Commission is eager to encourage RLECs to migrate to model-based support, denial of a robust challenge process – or *any* challenge process at all – seems counter-intuitive at best, as ultimately a meaningful challenge process could *help* to establish where support is needed and enable greater migrations to model-based support. Indeed, NTCA is aware that a number of carriers currently receiving cost-based support have viewed alleged competitive coverage as indicated on Form 477 data (data as of December 2017) in the process of preparing to evaluate forthcoming ACAM II offers. Some of these carriers have been surprised, and even dismayed, to find claims of competitive presence in census blocks that are false or mistaken in light of facts on the ground. Yet these “false positives” will leave the census blocks at issue unfunded and could force legacy carriers to decline the ACAM II offer. Of course, one might argue that since the model is “optional,” a carrier displeased with its model offer can choose to continue to receive cost-based support. But this may yield no better result given that the Commission is now considering eliminating a meaningful challenge process in the context of cost-based support as well, thereby potentially leaving *no* real option for a carrier to seek reasonable remedy for the flaws of overstated and overinflated coverage. At bottom, as many in Congress have already noted in related contexts (*see* fn. 12, *infra*), a meaningful challenge process that is driven by data, as compared to falling back upon marketing claims and supposition, is essential in the context of *every kind* of USF support in order to further the Commission’s public policy objectives and fulfill the statutory mandate of universal service.

supported service⁵ – within the actual area claimed to be overlapped.⁶ If blind and absolute reliance on Form 477 data becomes the rule, thousands of rural consumers could be left without access to reliable voice services, a result that would run directly counter to the Commission’s focus on improving the quality of consumers’ access to public safety services⁷ and in direct contravention of a statutory universal service mandate that is ultimately linked to the availability of voice telephony.⁸ Indeed, nothing could be more important than access to voice service in a time of emergency or natural disaster, and in rural areas where mobile wireless service can be spotty and unreliable, the Commission should take great pains to ensure that no consumer lacks access to the choice of a reliable voice connection to contact public safety services.

⁵ Both the 2011 USF/ICC Transformation Order and a reviewing court confirmed that the supported telecommunications service for purposes of Section 254 of the Act is “voice telephony service.” See *Connect America Fund*, et al., WC Docket No. 10-90, et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011), ¶¶ 62-65 and 77-81; *In Re: FCC 11-161*, 753 F.3d 1015, 1048-49 (10th Cir. 2014).

⁶ *Modernizing the FCC Form 477 Data Program*, WC Docket No. 11-10, Further Notice of Proposed Rulemaking, FCC 17-103 (rel. Aug. 4, 2017), ¶ 3 (“Currently, providers of fixed (wired or fixed wireless) voice service (including both local exchange service and interconnected VoIP) and fixed broadband service report on their subscriptions by submitting their total connections in each census tract in which they provide service. In addition, the providers of fixed voice service answer certain questions about their state-level total subscriptions. Providers of mobile voice and broadband report their total subscribers for each state in which they provide service to customers.”) (Internal citations omitted).

⁷ *Ensuring Continuity of 911 Communications*, PS Docket No. 14-174, FCC 15-98, Report and Order (rel. Aug. 7, 2015) (“Report and Order”) (adopting back-up power requirements for non-line powered voice services in order to ensure consumers have access to 911 services in the event of a power outage); *Improving 911 Reliability*, PS Docket Nos. 13-75, *Reliability and Continuity of Communications Networks, Including Broadband Technologies*, PS Docket No. 11-60, Report and Order, FCC 13-158 (rel. Dec. 12, 2013) (adopting rules to improve the reliability and resiliency of 911 communications networks nationwide); *Implementing Kari’s Law and Section 506 of RAY BAUM’S Act*, PS Docket No. 18-261, *Inquiry Concerning 911 Access, Routing, and Location in Enterprise Communications Systems*, PS Docket No. 17-239, Notice of Proposed Rulemaking, FCC 18-132 (rel. Sep. 26, 2018) (seeking comment on proposed rules implementing Kari’s Law Act of 2017 and Section 506 of the RAY BAUM’S Act provisions designed to improve timely access to 911 services in enterprise and multiple dwelling unit settings).

⁸ See fn. 5, *supra*.

The limits of Form 477 data have been seen time and again already in multiple Commission proceedings affecting USF support for fixed and mobile services. For example, in the two 100 percent competitive overlap reviews conducted to date for cost-based RLEC support, *a total of only one*⁹ study area was found to be in fact so overlapped despite initial indications that 15¹⁰ and 13¹¹ rural study areas, respectively, were fully served by unsubsidized competitors. Had the Commission declined such a data-driven process and conducted and concluded the proceedings based instead upon blind and absolute reliance upon Form 477 data, more than two dozen study areas would have lost all high-cost support despite the lack of actual competitive coverage. Or, in the context of the present proposal in the *Further Notice*, the Commission would have conducted more than two dozen unnecessary auctions – auctions that would have inefficiently wasted valuable provider and Commission resources alike – under mistaken pretenses (at best). While the *Report and Order* asserts that the 100 percent overlap process was flawed because of the lack of incentives for unsubsidized competitors to participate, what is beyond dispute is that *the process was in fact tainted* because of the unreliability of Form 477 to start and was only *saved* from erroneous conclusions by a process that improved upon the data available via that form. NTCA asks only that the Commission include a similar sanity check here, and decline a striking and legally questionable departure from evidence-based policymaking.

⁹ *Report and Order*, ¶ 137.

¹⁰ *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)

¹¹ *Wireline Competition Bureau Publishes and Requests Comment on Rate-Of-Return Study Areas Potentially 100 Percent Overlapped by Unsubsidized Competitors*, WC Docket No. 10-90, Public Notice, DA 17-760 (rel. Aug. 11, 2017).

Concerns about the accuracy of Form 477 data are of course hardly limited to the context of fixed services. Indeed, it is striking that now, of all times, in the midst of an uproar surrounding the accuracy of data in the mobile services context, the Commission would even consider the prospect of *eliminating* a challenge process and moving more aggressively forward with blind and absolute reliance on Form 477 information as-filed. In recent months, Members of Congress have repeatedly expressed serious concerns with Commission decisions based on unreliable coverage data in the context of the Mobility Fund as well as other proceedings, with the now Chairman of the House Energy and Commerce Committee noting that “the reality on the ground does not match the FCC’s data.”¹² As Chairman Pai correctly stated in response to these congressional inquiries, “[w]e need to understand where broadband is available and where it is not in order to target our efforts and limited funding to areas that are most in need.”¹³ NTCA and its member companies could not agree more, as such devotion to the “facts on ground” is critical to preventing “false positives” that can remove support from rural areas where needed and leave consumers (or, worse still, put consumers back) on the wrong side of the digital divide. In the Mobility Fund context, the Commission wisely took a step back from blind and absolute reliance on Form 477 data and initiated a more robust challenge process to resolve the

¹² Letter from Congressman Frank Pallone, Jr. and Congressman Mike Doyle, to Ajit Pai, Chairman, Federal Communications Commission (May 8, 2018), p. 2. *See also* Letter from Senator Amy Klobuchar and Senator Shelley Moore Capito to Ajit Pai, Chairman, Federal Communications Commission (September 13, 2018); Letter from Senator Joe Manchin, III and Senator Roger F. Wicker to Ajit Pai, Chairman, Federal Communications Commission (April 12, 2017); Letter from Senator James Inhofe, Senator James Lankford, Congressman Frank D. Lucas, Congressman Tom Cole, Congressman Steve Russell, Congressman Markwayne Mullin to Ajit Pai, Chairman, Federal Communications Commission (September 7, 2018).

¹³ Letter from Ajit Pai, Chairman, Federal Communications Commission, to Senator Amy Klobuchar and Senator Shelley Moore Capito (November 27, 2018).

discrepancies in broadband availability data.¹⁴ NTCA asks merely that the same sort of attention to accuracy and fact-finding is utilized here, and it would only be reasonable for the Commission to rely upon a robust, data-driven challenge process here to validate advertising claims of coverage before eliminating support and launching new auction procedures.

With all this as background, NTCA therefore disputes the notion that challenge processes do not work or that racing straight to auction based upon advertising reports and potential voice offerings somewhere else hundreds of miles away in the same state is somehow a more efficient use of resources. In fact, when viewing it from the proper perspective – that is, properly viewing it as a thorough process for seeking out the existence of *true* competitive overlap by providers capable of serving a rural area without high-cost support, as opposed to simply an ends-oriented means of eliminating support – a competitive overlap process is *essential*. Such processes are needed to weed out false positives that would leave rural consumers high and dry, while also finding true competitive overlap where it exists and then reducing or eliminating support accordingly thereafter.

Finally, the statutory principles underpinning all of this cannot be ignored as competitive overlap questions are considered. From a statutory perspective, a challenge process provides the only means to ensure that consumers living in areas deemed competitively overlapped in fact have access to “reasonably comparable” standalone voice and broadband services (as called for by Section 254 of the Communications Act), as well as to determine if the latter service meets minimum latency standards already determined by the Commission to be necessary for access to

¹⁴ *Connect America Fund*, WC Docket No. 10-90, *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, Order on Reconsideration and Second Report and Order, FCC 17-102 (rel. Aug. 4, 2017) (reconsidering the Commission’s previous decision to use Form 477 data as the basis for determining deployment of qualified 4G LTE for the map of areas presumptively eligible for MF-II support and initiating a one-time data collection of 4G LTE coverage maps).

latency-sensitive applications.¹⁵ FCC Form 477 fails entirely to capture the data necessary for the Commission to comport with its congressional directive in these regards, and a challenge process is therefore a “must” to establish that those parameters are met. Universal service is about more than basic availability of service. To the contrary, the Commission has a statutory directive to ensure that service once available is reasonably comparable in terms of price and quality to that available to urban consumers. Thus, a reduction in (or an elimination of) existing providers’ high-cost support due to the presence of purported unsubsidized competitors that turn out to be utterly incapable of offering reasonably comparable services at reasonably comparable rates would be a patent dereliction of the Commission’s statutory duty as set forth by the Congress. Only a robust challenge process can prevent this result and fulfill the Commission’s mandate.

This reasoning and these legal arguments apply with equal force regardless of the percentage of overlap sought to be assessed. *Any* review of purported competitive presence necessarily requires a challenge process to establish if it exists. In fact, a challenge process is perhaps *even more* essential when one moves from 100 percent study area overlap to lesser percentages, because the fractions of overlap will compel the Commission to look at coverage on a sub-study area or even sub-census block review before concluding the percentage of overlap has been achieved before moving to an auction. Thus, the mere fact that the percentage is being reduced does not eliminate the need for a meaningful challenge process – if anything, such a change only exacerbates the need for one.

¹⁵ *Connect America Fund*, WC Docket No. 10-90, *ETC Annual Reports and Certifications*, WC Docket No. 14-58, Report and Order and Order on Reconsideration, FCC 17-12 (rel. Mar. 2, 2017), ¶ 34.

B. The Commission Should Start its New Process By Identifying Areas With 99 Percent Overlap.

As it moves away from a standard of complete overlap, the Commission should start by identifying those study areas with 99 percent competitive overlap in terms of fixed terrestrial voice telephony and broadband at 25/3 Mbps or greater. Moving to a 99 percent competitive overlap is the logical next step in this process – likely calling for an analysis of no more than 10 study areas¹⁶ – and would serve as a good sample size to determine what, if any, unsubsidized competition can be discerned and truly exists at that level before additional Commission and provider resources are consumed in a wider range of study areas and census blocks.

As noted above, however, regardless of what percentages are set, under no circumstances should the Commission move forward with an auction prior to the completion of a challenge process. With a “confirmed competitive” rate of 4 percent (27 of 28 rural study areas preliminarily found to be competitively overlapped based on 477 data tuned out not to be so¹⁷), the 100 percent competitive overlap proceedings demonstrated that reliance on Form 477 data, *alone*, is risky at best.

In addition, the Commission should adopt an “actually served” standard for its determination of whether 99 percent overlap exists. More specifically, carriers purporting to serve 99 percent of a rural study area should not get credit towards that percentage for “almost served” locations, or locations where the provider claims it can provide service within 10 business days. In the absence of such a standard, high-cost support, and the broadband service it enables, could be removed for locations now served by existing providers with the hope that the

¹⁶ The *Report and Order* estimates that eight study areas are 100 percent overlapped and seven additional study areas are 95 percent overlapped. *Report and Order*, ¶ 144.

¹⁷ See, fns. 10 & 11, *supra*.

competitor may one day (but not now) deem it economically viable to extend their facilities to those locations. With no guarantee that any provider actually will step forward and fill the void, thousands of rural consumers could be left high and dry as support for the carrier already *actually* serving them dissipates on the theory that someone else *could* show up someday (or within 10 business days of someday).

Finally, the Commission should consider an assessment of broadband subscription data here as well. While Form 477 does not require carriers to identify broadband subscriptions by census block, that data is made available via that form to the Commission on a census tract basis. NTCA proposes that the Commission remove from consideration census blocks in tracts where a purported unsubsidized competitor reports no actual subscribers. A lack of actual subscribers across the entirety of a census tract is a strong indication that the purported unsubsidized competitor lacks the ability to actually provide high-quality service in a rural study area. This approach would narrow the field, so to speak, and reduce the number of study areas to which the full-blown challenge process discussed above would apply.

C. The Commission Should Structure the Auction, Bidder Application, and Winning Bidder Buildout Rules in a Manner That Protects Rural Consumers.

After the completion of a data-driven challenge process – one that confirms the presence of an unsubsidized competitor actually delivering reasonably comparable voice and broadband services to 99 percent of the study area at issue – the Commission should require all interested bidders in any ensuing auction to make detailed, upfront showings of their technical capability for delivering on the promises they would make at auction. In particular, if, for example, a service at certain speed thresholds has never been offered on a widespread commercial basis to tens of thousands of customers across rural areas using a certain technology, a prudent and

responsible universal service policy would establish beforehand that the bidder can actually deliver on that promise in lieu of only checking *after* the auction has been conducted and awards of support had been announced. Indeed, this is especially important given that – unlike other recent auctions that focused exclusively on unserved areas – these may be areas where customers are *already served* by an incumbent with high-speed broadband and voice services. In this case, a false positive of competitive presence *or* a loss of support at auction could quite easily result in customers going from served to unserved, a result the Commission clearly does not intend and would of course want to take prudent steps to avoid. A careful vetting of the technical capabilities that underlie promises before funding is awarded will therefore allow the Commission to avoid committing to providers that may not be able to deliver and eliminating support for carriers that have already shown they can do so. Put another way, it would be the ultimate failure of universal service policy for an overlap process and ensuing auction to result in customers *losing* services to which they already had access.

NTCA therefore proposes that technical specifications should be submitted by potential bidders for review by the Commission, and that such information should also be available for review by interested parties and stakeholders pursuant to a protective order. The latter step would augment the Commission’s own analysis, and could be accomplished in relatively short order through a brief window for review and comment, all while appropriately and necessarily protecting proprietary network information from the public domain pursuant to the agency’s well-established protective order procedures. Through such a process, third-party engineers and other technical resources could provide a useful “second set of eyes” as to any issues that might preclude or complicate service delivery as contemplated by the bids made.

After the completion of the challenge process and this initial vetting, the Commission should then auction off *the entire rural study area* as subject to a commitment to serve thereafter. For one, the entire study area and the rural consumers that reside there need to be served – and as noted above, the incumbent provider may be forced to exit all or part of the market at such time as support is revoked or reduced. Moreover, if a competitor asserts that it can and already does serve 99 percent of the study area in question without a subsidy, that fact should be reflected in the bid to be put forward by the competitor to serve the entire study area. Focusing the auction and ensuing buildout obligations only on individual census block groups, on the other hand, threatens economic efficiencies gained through providing voice and broadband services throughout the entirety of a service area and puts at risk the services already being supplied by the incumbent rural carrier to “the 99 percent.” It should therefore be made unmistakably clear that winning bidders will be required to serve 100 percent of the affected study area upon prevailing. In addition, the existing incumbent should be relieved of its Eligible Telecommunications Carrier status and attendant obligations once the winning bidder has completed its buildout and support to the incumbent completes its wind-down.

Moreover, with respect to support for the incumbent provider, upon completion of an auction wherein the existing incumbent does not prevail, the Commission should adopt a ten-year “wind-down” mechanism for elimination of that provider’s support. As the winning bidder completes its buildout requirement and ramps up buildout incrementally over what will presumably be a ten-year period (assuming periods comparable to other recent auctions), the incumbent provider may choose to discontinue investment and delivery of services in all or part of the study area – perhaps not immediately, but over time. As a result, coverage gaps could emerge ultimately, leaving again hundreds or thousands of rural consumers who previously had

voice and/or broadband service without until “the new provider of last resort shows up.” A wind-down mechanism tracking to the ramp-up of the auction winner’s buildout duties (reflecting the relative shares of the USF budget for the area as services ramp down in the case of the incumbent and up for the winning bidder) would transition incumbent providers’ support down over a period of ten years, limiting the prospect for coverage gaps.

Finally, the Commission should adopt the service tiers as proposed in the *Further Notice*, but with further adjusting of the weighting factors for the 100 Mbps and Gigabit service tiers. The Commission should, at every opportunity, seek to obtain the best return for consumers and ratepayers over the life of investments made leveraging universal service funds. Aiming for the best possible service can do just that, and any bidding procedures adopted here should actively encourage the deployment of “future-proof” broadband facilities that can stand the test of time and meet an evolving level of universal service.¹⁸ Bids should therefore be weighted in a manner (specifically, 70 for 25/3 “baseline” service, 35 for 100 Mbps “above baselines” service and 0 for the Gigabit tier) that recognizes the greater value of higher-quality levels of broadband that are “reasonably comparable” to those available in urban areas and that will deliver a return on “the investment of USF resources” for years to come.

¹⁸ It is also important that the Commission take a long-term view here – by encouraging the deployment of networks that can stand the test of time – given the fact that a number of states have backed away from carrier of last resort provisions. Without these protections in place, some rural consumers could, over time, lose access to quality, reasonably comparable service as technology changes and consumers needs for bandwidth grows. As consumer demand for bandwidth grows, carriers not driven by carrier of last resort obligations to upgrade the connections available to non-economic, rural areas may fail to do so, and facilities made possible now by universal service dollars will be of little use over time. On the other hand, a policy that directs universal service funds to be utilized to deploy facilities that can keep up with bandwidth demands can ensure that broadband connections made available to rural consumers now will remain reasonably comparable in terms of speed and latency over time.

D. The Commission Should Conduct the Challenge and Auction Process Every Ten Years.

Finally, the Commission should conduct the challenge and auction process every ten years. As the Commission noted in adopting ten-year time frames for RLECs accepting A-CAM-based high-cost support and for those operators of all kinds accepting CAF II auction funds, certainty and predictability are critical to network operators serving rural areas and building out to and upgrading connections in sparsely populated areas.¹⁹ There is no reason the same fundamental principle should not apply in the case of cost-based or “legacy” support. More specifically, RLECs working hard to improve and extend service in their difficult-to-serve rural communities (especially those subject to buildout mandates) should not be forced to constantly divert resources to fending off other carriers’ claims of service coverage or to worry about “the rug being pulled out” from prior investments in a way that other USF recipients do not. Just as with the A-CAM and CAF II auction mechanisms, a ten-year cycle will avoid the possibility of constant disruption while also providing the Commission with a periodic review of unsubsidized competitive presence as broadband deployments evolve. There is no reason to deny parity among the Commission’s high-cost USF mechanisms in this regard.

III. THE COMMISSION SHOULD CONSIDER A REASONABLE TRANSITION MECHANISM, WITH AN AFFIRMATIVE SUNSET, TO ENSURE THE SUSTAINABILITY AND PREDICTABILITY OF THE RLEC HIGH-COST PROGRAM BUDGET AS CONSUMERS MIGRATE TO STANDALONE BROADBAND SERVICES.

The *Further Notice* seeks comment on how the Commission might address concerns that a rapid increase in adoption of CBOLs could result in the exhaustion of newly increased budget

¹⁹ See *Connect America Fund*, et al., WC Docket No. 10-90, et al., Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 16-33 (rel. Mar. 30, 2016) (“*2016 Rate-of-Return Reform Order*”), ¶ 22; *Connect America Fund* et al., WC Docket No. 10-90 et al., Report and Order et al., FCC 14-54 (rel. Jun. 10, 2014), ¶ 35.

resources and reintroduce the unpredictability of budget controls.²⁰ NTCA herein offers a proposal intended to responsibly limit potential budget increases associated with CBOL growth for a brief transition period and thereby provide carriers with the predictability critical to making long-term network investments, even while continuing to promote consumer adoption of standalone broadband services.

As an initial matter, the Commission is correct to “think ahead” as to the sustainability of the increased budget resources it has just provided and to identify ways of minimizing the likelihood of a reintroduced budget control if at all possible. In the wake of the *2016 Rate-of-Return Reform Order*, RLECs receiving cost-based support were plunged into a period of significant uncertainty due to the Budget Control Mechanism (“BCM”) that escalated rapidly and wildly, producing a 12.3 percent average reduction in support for the period of June 2017-June 2018 and 15.5 percent the next year. (Indeed, it might be said that the only predictability was that the budget control would increase, although the exact figure upon which it might land was still clearly a guessing game where every carrier lost.) As NTCA noted in comments last year, “it was not surprising that NTCA’s 2017 survey found that 64 percent of respondents planned to reduce future network investments over the next 12 months.”²¹ Ultimately, rural consumers paid the price of such uncertainty and harmful budget cuts in terms of delayed or unaffordable access to high-quality broadband connections.

Fortunately, the Commission recognized the damage that such uncertainty could produce and took watershed steps last year to put the USF programs on more steady footing moving forward. First, the Commission adopted an order last spring to plug the holes in support

²⁰ *Further Notice*, ¶¶ 200-204.

²¹ Comments of NTCA, WC Docket No. 10-90, et al. (fil. May 25, 2018), p. 25.

resulting from the July 2017 to June 2018 BCM.²² The Commission then took an even more important step in December 2018 to place the High-Cost program on a solid foundation, with a budget that “will provide the means and the *certainty* necessary to spur investments to meet demand and help achieve our universal service goals.”²³ But it is important now to finish the work of shoring up the foundation of the High-Cost program through a transition period during which consumers are likely to continue to seek a move to standalone broadband services.

There can be no doubt that the transition to standalone broadband will place increased pressure on federal support mechanisms as more network costs are effectively transferred into the interstate jurisdiction, both those costs associated with new investments and even just the costs associated with prior investments that are reclassified as interstate when a consumer ceases to buy intrastate voice service on the same line. It is obviously complex to discern precisely to what degree this may heighten the risk of a budget control (and ensuing support reductions) potentially arising anew because of factors ranging from the overall pace of industry CBOL conversions to varying paces of carrier-specific standalone broadband and the individual cost characteristics of those carriers making such conversions. What is unmistakably clear, however, is that care must be taken to ensure the sustainability of the budget that the Commission has thankfully supplemented during a transition period when customers are increasingly expected to migrate to standalone broadband and prior to the Commission’s planned re-evaluation of the budget in 2024. The Commission should seek to avoid a new “race to the top” whereby rapid

²² *Connect America Fund*, et al., WC Docket No. 10-90, et al., Report and Order, Third Order on Reconsideration, and Notice of Proposed Rulemaking, FCC 18-29 (rel. Mar. 23, 2018) (“*2018 Rate-of-Return Reform Order and NPRM*”), ¶¶ 73-82.

²³ *Report and Order*, ¶ 80 (emphasis added).

CBOL conversions end up creating the risk of significant budget controls that fall predominantly upon other carriers not converting lines at as rapid a pace.

To address such concerns surgically and balance the desire to promote adoption of standalone broadband with ensuring a reasonable and stable budget control during this consumer-driven transition, the Commission should consider steps such as those suggested in the *Further Notice* proposal to limit support for CBOL conversions above a certain threshold. Such measures would help provide carriers (as well as the Commission) certainty: but, such measures would be needed only until such time as the five-year budget review contemplated by the *Report and Order* is completed.²⁴ For example, the Commission could limit the increase in CBOL conversions for which a carrier may receive support to 10 percent of that carrier’s prior voice lines in a prior year, with any such limit expiring through an absolute sunset in 2024.

To be clear, such a limit would *not* limit the *actual* amount of customers that could convert to standalone broadband in a given year; this would of course be driven solely by customer demand. Indeed, under a limit such as that suggested above, every RLEC’s customer base could, in theory, be nearly 50 percent up to 100 percent converted to standalone broadband by the 2024 sunset date without any effect on that carrier’s support, evidencing the migrations that could still occur even with such limits in place. Nor would this proposed limit *discourage* CBOL conversions, because, as described below, carriers would continue to receive support for such connections in excess of the annual limit “as if” they were voice lines. Put another way, such a limit would *only limit the increased support* a carrier could receive from such conversions over the next several years, and thereby minimize the likelihood (or at least the magnitude) of a

²⁴ *Id.*, ¶ 97. Any such measure adopted by the Commission may also require re-evaluation sooner to the extent that acceptance of ACAM II offers materially alter current assumptions with respect to the cost-based (or “legacy”) budget.

budget control being foisted on *other* RLECs as a result of such conversions during that transitional period.

More specifically, pursuant to this concept, each individual RLEC receiving cost-based high-cost support would have its support calculated based on a maximum annual growth rate in CBOL lines of 10 percent of that RLEC's prior year voice lines, starting at each carrier's baseline of such broadband-only connections as of December 31, 2018. For those CBOL connections up to and equal to the annual limit, the RLEC would receive CAF-BLS support for CBOLs just as it does for all other CBOL connections previously in place. But *only* for those CBOL connections in excess of the limit – in other words, in the event of significant conversions of voice lines to standalone broadband – the RLEC would receive support in that year “as if” those CBOL connections continued to include voice. (Any residual interstate costs not recovered through USF support or the CBOL benchmark would then be recovered through interstate special access rates.)

In this regard, such a limit would look and operate quite similarly to the “one-page plan” put forward by then Commissioner and now Chairman Pai in 2015,²⁵ but only with respect to those CBOL connections in excess of the annual limit and only until 2024 when this limit would sunset.²⁶ All migrations thereafter would then receive “CBOL CAF-BLS” (unless the Commission were to decide affirmatively at that point to renew and/or adjust the limit).

²⁵ Statement of FCC Commissioner Ajit Pai Announcing His Plan to Support Broadband Deployment in Rural America (Jun. 29, 2015), available at: <https://www.fcc.gov/document/commissioner-pai-announces-rural-broadband-plan>.

²⁶ To be clear, it will be important to ensure an affirmative sunset of any such limit as of 2024 in order to take stock anew of the need for any such limit as part of the anticipated budget review; as noted above, it would also seem prudent to consider following ACAM II elections whether there are changed circumstances with respect to the need for or structure of any such limit.

Moreover, to be clear, such a limit on annual CBOL conversions for purposes of CAF-BLS support would not penalize or take away support from any individual carrier. Rather, because it applies only to CBOL conversions occurring after December 31, 2018, it would simply provide a means to meter *future* growth in the CAF-BLS mechanism so that the likelihood of budget control rearising is minimized and the overall RLEC High-Cost program budget is shared equitably by all eligible carriers going forward. Again, any individual carrier limited by the proposed conversion limit would still receive the combination of CAF-BLS/high-cost loop support (“HCLS”) it would otherwise receive for voice or voice/broadband lines for CBOL lines above the 10 percent annual conversion limit, thereby ensuring no harm to affected carriers. In short, this approach only “limits the upside” of CBOL conversions through 2024 but does not reduce support for any affected RLEC. At bottom, this approach would help to ensure the sustainability of the recent budget reforms thankfully adopted by the Commission, ensure greater equity going forward in terms of how the revised (but still fixed) budgets will be shared among cost-based RLECs, and promote continued predictability in the wake of such reforms through an initial transition period ending 2024.

By contrast, the *Further Notice* proposal to immediately withdraw HCLS for carriers’ lines that convert to broadband only²⁷ is unnecessary. Such an approach would upset expectations for carriers that have made investment decisions based on anticipated HCLS revenues, and simply “move peas around the plate” in a way that may harm consumers in the most rural, highest-cost areas the worst. As an additional complication, RLECs would seemingly be forced to differentiate between “new” CBOL lines and conversion of “old voice lines” to broadband-only lines for purposes of this exercise, and then be compelled to “true-up” which

²⁷ *Further Notice*, ¶ 202.

lines were and were not eligible for HCLS. The “savings” would not be worth the significant complications, particularly when a simpler, more straightforward, and more equitable approach is available as suggested above.

The *Further Notice* proposal to modify the Commission’s CAF intercarrier compensation (“CAF-ICC”) rules suffers from the same infirmities. For one, a modification requiring carriers to impute some portion of their broadband-only revenues is unnecessarily complicated. It would also undermine one of the main virtues of the CAF-ICC mechanism, which is the regulatory certainty it provides. For these reasons, such an approach is less promising or useful than the sort of transitional limit described above.

The *Further Notice* also indicated that the proposal to modify the CAF-ICC rules may be useful in dealing with possible incentives for “gaming” of CBOL conversions. Given the operation of these systems under a fixed and shared budget, RLECs and the associations that represent them share the Commission’s interest to deter gaming and to sanction it when it arises. The better approach for addressing the possibility for such gaming of the system, however, is to periodically review data submitted by RLECs receiving CAF-BLS support, and then to fashion potential fines or forfeitures if and when any such “gaming” is verified. For example, evidence that a carrier has converted significant portions of its customer base nearly simultaneously from local exchange service to Voice over Internet Protocol service (“VoIP”) – without customer consent and/or deployment of equipment within the customer premises that enables the delivery of a new IP-enabled service – could represent strong evidence of gaming. By contrast, an overwhelming response by consumers in the wake of a marketing campaign touting the availability of a broadband-only connection and over-the-top VoIP service, on the other hand, would indicate nothing more a good-faith effort to fulfill consumer demands, and such

consumer-driven migrations should be neither deterred nor discouraged. The Commission, the industry, and consumers are all therefore better served through audits and enforcement of existing rules in this regard (and tailored responses to any violations found) than by modifying existing cost recovery mechanisms in ways that may have unintended consequences for standalone broadband conversions.

IV. THE COMMISSION SHOULD ADOPT A TRIBAL BROADBAND FACTOR FOR ALL ENTITIES SERVING TRIBAL AREAS

The *Further Notice* seeks comment on adding a Tribal Broadband Factor to the cost-based RLEC high-cost support mechanism. As an initial matter, NTCA notes its appreciation for the Commission’s inclusion of such a factor in the ACAM II offer, as it recognizes the “unique challenges of deploying high-speed broadband to rural Tribal communities.”²⁸ This action by the Commission is likely to be of great benefit to many Tribal communities currently on the wrong side of the digital divide.

Going forward, NTCA urges the Commission to take its commitment to Tribal communities a step further, and adopt a similar mechanism for all cost-based support recipients serving Tribal Lands. It almost need not be said here that Tribal communities all across the nation have for far too long lagged behind in terms of access to communications service, first voice and now broadband. The Commission’s universal service policies should not distinguish between Tribal areas in ACAM vs cost-based areas, and should rather seek to ensure that broadband is available and affordable for every one of these left-behind communities.

²⁸ *Report and Order*, ¶ 55.

In a similar fashion, the Commission should not distinguish between RLECs committed to serving Tribal areas versus those carriers that are Tribally-owned or predominantly serving Tribal areas. Across Tribal areas, the very same challenges exist: lower “take rates” due to lower incomes and a more residential versus business customers as well as the fact that the areas at issue here are in sparsely populated rural areas and served by carriers that must overcome the challenges that these parts of the country pose for any provider. Because these challenges exist for RLECs of all kinds in serving such areas, a Tribal Broadband Factor designed to overcome these challenges and connect Tribal consumers should apply with equal force and weight to any RLEC committed to serving these consumers.

V. CONCLUSION

For all of the reasons discussed herein, the Commission should:

- adopt NTCA’s detailed proposal for replacement of the Commission’s 100 percent competitive overlap process eliminated by the December 2018 *Report and Order*;
- consider transitional measures for sustaining the USF budget for recipients of cost-based support over the next several years as consumers migrate away from traditional local exchange voice telephony services and toward standalone broadband services; and
- adopt a Tribal Broadband Factor along the lines of that previously proposed by the NTTA and apply that factor to the support received by any RLEC committed to serving Tribal areas.

Respectfully submitted,



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