



EX PARTE

May 9, 2013

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *In the Matter of Connect America Fund High-Cost Universal Service Support-Model Design and Data Inputs for Phase II of the Connect America Fund*, WC Docket Nos. 10-90 and 05-337

Dear Ms. Dortch:

The National Association of State Utility Consumer Advocates (“NASUCA”) files these additional comments regarding the above matter.¹

Background

On April 22, 2013, the Wireline Competition Bureau (“Bureau”) of the Federal Communications Commission (“FCC” or “Commission”) released a Report and Order adopting the Phase II Cost Model for the Connect America Fund (“CAF”).² Specifically,

¹ NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

² In the Matter of Connect America Fund High-Cost Universal Service Support-Model Design and Data Inputs for Phase II of the Connect America Fund, WC Docket Nos. 10-90 and 05-337, Report and Order, released April 22, 2013, DA 13-807 (“April 2013 Order”).

the Order adopts the “platform” that will be used to estimate the average monthly cost of operating and maintaining a broadband-capable network. The Bureau will release another Order that adopts specific input values for the model.³

NASUCA submits this letter to urge the FCC to lift the proprietary designation of the *results* that CostQuest’s Connect America Cost Model (“CACM”) yields. Such disclosure would permit open analysis of and discussion about the levels of support that the CACM estimates. Consumers ultimately bear the cost of the broadband subsidies that will be disbursed based on the CACM, and consumers are the ultimate beneficiaries of the expanded broadband deployment that the CAF funds are intended to spur. Presently, however, the CACM is not sufficiently open and transparent. The CACM results are considered proprietary, a designation with which NASUCA strongly disagrees. Some of NASUCA’s members and some of NASUCA’s consultants have signed the requisite proprietary agreements so that they can analyze the model and its results. This arrangement, whereby public policy debate and discourse is limited to a subset of potentially interested parties, unduly constrains national and public debate. As this letter demonstrates in detail, the current “closed” and non-transparent status of the CACM is inconsistent with FCC precedent and contradicts the strategic goals that the FCC recently articulated to Congress with its budget request for fiscal year 2014.

The CACM, as described in the FCC’s *USF/ICC Transformation Order* and subsequent notices

On November 18, 2011, the Federal Communications Commission (“FCC”) released the *USF/ICC Transformation Order*,⁴ and, among other things, adopted a methodology for

³ April 2013 Order, at para. 10.

providing Connect America Fund (“CAF”) support in areas served by price cap carriers that will be based on a forward-looking cost model to (1) estimate the costs of deploying broadband-capable networks in high-cost areas and (2) identify the areas where support will be available.⁵ The FCC will rely on the cost model to offer each price cap incumbent local exchange carrier (“ILEC”) annual support for a period of five years in exchange for a commitment to offer voice service across its service territory within a state and broadband service to supported locations within that service territory.⁶ The FCC intends to use the forward-looking cost model to identify extremely high-cost and remote areas (in both price cap and rate-of-return territories) that should receive support from the Remote Areas Fund.⁷

On December 15, 2011, the FCC sought the submission of cost models by February 1, 2012.⁸ The FCC reiterated that its “goal is to adopt a specific model to be used for estimating support amounts in price cap areas by the end of 2012 in order to provide support beginning January 1, 2013.”⁹ The FCC also stated that the “final model and inputs will be developed through an open, deliberative process, and there will be

⁴*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) (*USF/ICC Transformation Order and FNPRM*).

⁵*See id.* at para. 166.

⁶*See id.* The FCC also sought comment on whether and how to adjust eligible telecommunications carrier (“ETC”) voice service obligations in areas where an ETC is no longer receiving federal support. *See id.*, Section XVII.F. For all territories for which price cap ILECs decline to make the service commitment, the FCC will award ongoing support through a competitive bidding mechanism.

⁷ *See id.* at paras. 167, 1229.

⁸ FCC Public Notice DA 11-2026, “Request for Connect America Fund Cost Models,” WC Docket Nos. 10-90, 05-337, rel. December 15, 2011 (“December 2011 Notice”).

⁹ *Id.*, at para. 2, citing *USF/ICC Transformation Order*, at para. 192.

opportunity for further public input before a final model is adopted and support levels are established.”¹⁰ In its December Notice, the FCC stated, among other things:

Public Access to Submitted Models. In the *USF/ICC Transformation Order and FNPRM*, the Commission reaffirmed criteria that any forward-looking cost model used to determine federal high-cost support must meet, stating that the “model and all underlying data, formulae, computations, and software associated with the model must be available to all interested parties for review and comment. All underlying data should be verifiable, engineering assumptions reasonable, and outputs plausible.” *Models and input values submitted in this proceeding may be subject to reasonable restrictions to protect commercially sensitive information and proprietary data, but the models and data must be available for public scrutiny and potential modification.* A copy of all models’ underlying source code must be available to Commission staff and interested parties, who must also have meaningful access to the relevant data, and the ability to change input values, run sensitivity tests, and analyze the results of various model runs. Access to models may not be restricted by use of a paywall (i.e., access to the model cannot be conditioned on paying a fee). In addition, any need to procure additional data or intellectual property to make use of or modifications to models will be taken into account in evaluating submissions.¹¹

In NASUCA’s view, contrary to the FCC’s expressed intention, the CACM is *unreasonably* restricted.

Significance of broadband cost model for consumers

Price cap ILECs are given the right of first refusal for these \$1.8 billion in broadband funds, and if they do not step forward for the funds, the funds will be allocated using an auction process. The broadband cost model affects consumers in two major ways: (1) consumers pay for universal service fund (“USF”) support through the USF contribution charge on their telephone bills and so have an interest in having the funds used prudently; and (2) consumers who lack access to broadband could benefit from the program if it causes carriers to deploy broadband sooner than they otherwise would. Of course

¹⁰ December 2011 Notice, at para. 3.

¹¹ *Id.*, at para. 4, cites omitted, emphasis added.

because of network externalities, the entire universe of consumers benefits from accelerated broadband deployment and adoption. In its April 2013 Report and Order, the FCC estimates that “eighty-five percent of the approximately 6.3 million locations in the nation that lack access today to terrestrial fixed broadband at or above the Commission’s broadband speed benchmark live in areas served by price cap carriers.”¹²

In response to the FCC’s Notice last year, soliciting comment on the details of models intended to estimate the cost of extending broadband to unserved areas,¹³ NASUCA as an organization, and NASUCA members the Maine Office of the Public Advocate and the New Jersey Division of Rate Counsel (“Rate Counsel”) and The Utility Reform Network (“TURN”) submitted comments on July 9, 2012 and NASUCA submitted an *ex parte* on July 27, 2012. Among other things, the Notice asked “parties to identify outstanding questions relating to the verifiability of the underlying data, the reasonableness of engineering or economic assumptions, the reasonableness of model design decisions and choices of data sources additional to those identified here, and the plausibility of outputs.”¹⁴ Most recently, as is discussed above, on April 22, 2013, the Bureau released a Report and Order adopting the Phase II CAF Cost Model. The Bureau will release another Order that adopts specific input values for the model.¹⁵

It is not in the public interest to constrain unduly public discussion of the CACM.

¹² April 2013 *Report and Order*, at para. 1. In its November 2011 USF/ICC order, at para. 21, the FCC estimated that “[m]ore than 83 percent of the approximately 18 million Americans that lack access to residential fixed broadband at or above the Commission’s broadband speed benchmark live in areas served by price cap carriers—Bell Operating Companies and other large and mid-sized carriers.” The lower number in the recent Order is presumably attributable to the FCC’s reference to *locations* as opposed to *Americans*, as well as to further refinements to the FCC’s estimate.

¹³ FCC, *Wireline Competition Bureau Seeks Comment on Model Design And Data Inputs for Phase II of The Connect America Fund*, WC Docket Nos. 10-90, 05-337, DA 12-911, Rel. June 8, 2012 (“Notice”).

¹⁴ Notice, at para. 108.

¹⁵ April 2013 Order, at para. 10.

Not only is the CACM proprietary, but also all reports that the CACM generates are presently being treated as proprietary. However, it is not in the public interest to unduly constrain public discussion of the CACM. Indeed, NASUCA cannot fathom why the *reports* that are generated by the model, that is the *results* of the model should be considered proprietary. As it now stands, users must sign proprietary agreement. The Second Supplemental Protective Order states:

We adhere, to the extent practical, to the standard terms used in other Commission protective orders, making modifications as appropriate to reflect that the material being made available is access to and the output of proprietary software. As we did last fall, we adopt a License Agreement to afford appropriate protections to the proprietary cost model. We also adopt a Non-Disclosure Agreement to facilitate access to the source code that underlies the cost model.¹⁶

The FCC provides no explanation as to why output should be deemed proprietary. The Second Supplemental Protective Order also states that “CostQuest is making different types of access available” (para. 6) one of which is “Reports Only Access”:

Reports Only Access is similar to the access that CostQuest made available in September 2011 in this proceeding pursuant to the Supplemental Protective Order. Under Reports Only Access, CostQuest shall provide a Reviewing Party a login and a password that will enable access to CQBAT results over the Internet, using Internet Explorer version 8 or version 9. Specifically, CostQuest will provide (i) access to CQBAT, (ii) the output of CQBAT, and (iii) supporting inputs. CostQuest shall grant sufficient access to enable the Reviewing Party to be able to generate reports based on available model runs. These runs include all those filed in this proceeding in addition to those runs made public by parties with Full Access who choose to do so. CostQuest shall grant the Reviewing Party the capability to test the sensitivities of various parameters, including, at a minimum: Total Max Funding, Target Benchmark, Alternative Technology Cost Cutoff, FCC Portion, Monthly Support Funding Cap, Mark with Provider, and Cable Unserved. CostQuest shall also grant the Reviewing Party the capability to generate reports at the following levels of geography: Census Designated Place, Census Block Group, Census

¹⁶ In the Matter of the Connect America Fund, WC Docket No. 10-90, Second Supplemental Protective Order, rel. February 10, 2012, at para. 2.

Tract, service area, Company, County, OCN-Operating Company, and SAC-Study Area Code. No Reviewing Party shall be charged any fee by CostQuest for access in this manner to the above-described materials.¹⁷

Most recently, in its Third Supplemental Protective Order, the FCC stated:

The model will be made available to the public subject to a licensing agreement and a non-disclosure agreement (respectively Appendices B and C attached hereto). To ensure that the proprietary features of the cost model are afforded adequate protection in any submissions made to the Commission and to ensure that the public has the opportunity for robust participation, the Bureau, on its own motion, adopts this Third Supplemental Protective Order. We find that the procedures we adopt in this Order, along with the acknowledgement of confidentiality, the licensing agreement and non-disclosure agreement, provide the public with appropriate access to the model while protecting competitively sensitive information from improper disclosure.¹⁸

In its third supplemental protective order, regarding the Connect America Cost Model (“CACM”), the FCC appears to grant proprietary designation to CACM outputs:

“Licensed Materials” means, and includes any derivative works of: (i) the CACM and CACM documentation, (ii) *the output of the CACM which includes only screen shots, CACM Reports, CACM Solution Sets, CACM derived data provided by CostQuest to USAC, and downloads available directly from the CACM website (“CACM Output”)*, (iii) proprietary CACM inputs, data and databases, (iv) a system evaluator version of the CACM along with any sample CACM databases, which may be used to test the operation of the CACM (“System Evaluator package”), (v) network topologies provided as inputs to CACM, (vi) a digital rights management protected PDF file or files containing the processing source code for the network topology application and CACM, as appropriate, and (vii) related drawings, designs, object code, applications, analytic tools, data provided by CostQuest that is not otherwise publicly available and that CostQuest has kept strictly confidential, defined processes and approaches, and concepts, created or generated by CostQuest at any time before, during, and under this protective order.¹⁹

¹⁷ *Id.*, at para. 6.

¹⁸ In the Matter of the Connect America Fund, WC Docket No. 10-90, Third Supplemental Protective Order, rel. December 11, 2012, at para. 2 (cites omitted).

¹⁹ *Id.*, at para. 4 (emphasis added).

NASUCA urges the Commission to lift the veil from the reports and to classify all results as public. At a minimum, results at study area level should be public. NASUCA is not requesting that the code for the model be made public.

In the past, the FCC has appropriately acknowledged the importance of a cost model and its output being available to the public.

In prior efforts to develop costs for use by the Universal Service Fund, the FCC has placed an emphasis on the model and the output of the model being available to the public. For example, when adopting the forward-looking cost model platform used to develop the forward-looking cost of providing services to be supported by the USF high-cost support mechanism for non-rural carriers the FCC emphasized the importance of a public model. Specifically, in its Order adopting the model, the FCC placed value on the public nature of the model:

We also find that HAI's switching module more fully satisfies the requirement that data, computations, and assumptions be available for review and comment. HAI's modules use a spreadsheet program that reveals all computations and formulas, allows the user to vary input costs, and provides a simple, user-adjustable allocation factor. BCPM also uses a spreadsheet program that reveals its computations and formulas, but its default costs and allocation factors are based on results from the proprietary SCIS and SCM models, and the defaults used to generate the results that BCPM uses in its modules have not been placed on the record in this proceeding. To minimize concerns regarding BCPM's use of proprietary data, the Commission could, in the inputs stage of the proceeding, substitute other inputs in place of the SCIS and SCM results for the cost amounts and allocation factors. Because the SCIS and SCM generate such detailed results, however, the process of trying to determine input values to replace the SCIS and SCM results would inject a significant degree of complexity into the inputs phase of this proceeding. We conclude that this additional complexity in the inputs phase is not justified by potential gains in accuracy. As noted above, we find that HAI's modules compute and allocate switching and interoffice costs with a degree of accuracy that is

sufficient for the computation of federal universal service costs and in a manner that more readily provides for public review.²⁰

The FCC stated further:

In this Order, we select a platform for the federal mechanism to estimate non-rural carriers' forward-looking cost to provide the supported services. To generate the most accurate estimates possible, we have selected the best components from the three models on the record. The model components selected are all generally available to the parties, and a software interface to merge the selected components is also available on the Commission's World Wide Web site. Thus, the federal platform is available for use by states, other interested policymakers, and the public. Pursuant to the plan established in the Further Notice of Proposed Rulemaking, we will continue to evaluate model input values with the intention of selecting inputs for the federal platform at a later date. Once input values have been selected, the federal platform will be used to generate cost estimates.²¹

Furthermore, the FCC provided any updated versions of the model and a list of the modifications on its website and available to the public.²² On June 16, 1999, the FCC released the results (and posted them on its website) of its forward-looking cost model platform used to develop the forward-looking cost of providing services to be supported by the USF high-cost support mechanism for non-rural carriers.²³ In so doing, it stated: "By publicly releasing model results, we seek to facilitate the ability of interested parties to review and comment on the proposed input values and assist the Commission in the

²⁰ *Federal-State Joint Board on Universal Service; Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, CC Docket Nos. 96-45, 97-160, Fifth Report and Order, 13 FCC Rcd 21323 (1998) (*HCPM Platform Order*), at para. 78. The FCC declined to adopt any of the models proposed, but instead, took the best components of the three models: HAI Model ("HAI"), Benchmark Cost Proxy Model ("BCPM"), and Hybrid Cost Proxy Model ("HCPM").

²¹ *Id.*, at para. 92.

²² Federal Communications Commission Public Notice, "Common Carrier Bureau to Post on the Internet Modifications to the Forward-Looking Economic Cost Model for Universal Service Support," CC Docket Nos. 96-45, 97-160, DA 98-2533, December 15, 1998.

²³ Federal Communications Commission Public Notice, "Common Carrier Bureau Released Preliminary Results Using Proposed Input Values in the Forward-Looking Cost Model for Universal Service," CC docket Nos. 96-45, 97-160, DA 99-1165, June 16, 1999.

selection of final input values.”²⁴ Specifically, the FCC released the following results:

(1) a zipped file containing Excel spreadsheets for each non-rural study area showing the results of the model run in the wire center mode; (2) a similar zipped file showing the results of the model run in the density zone mode; (3) a zipped file containing work files of intermediate outputs of the model; (4) an Excel file with spreadsheets for calculating the nationwide average monthly cost per line and estimating support amounts, based on the average cost in each study area; and (5) a similar Excel file based on the average cost in each wire center. The four zipped files contain detailed information regarding the investments, unit costs, expense calculations, and derivation of capital costs, as calculated by the model. The two Excel files that calculate the nationwide average monthly cost per line can be used to estimate federal support amounts based upon certain assumptions made by the user.²⁵

Previously, on June 2, 1999 it had made the model available on its website as well as proposed input values.²⁶ In sharp contrast, the FCC, in this proceeding, has departed from its precedent and is hampering public, open, and transparent discussion of the CACM results.

An open, transparent, and public CACM would be entirely consistent with the FCC’s strategic goals.

An open, transparent, and public CACM is entirely consistent with the strategic goals that the FCC set forth last month in its proposed budget to Congress for fiscal year 2014.²⁷

The budget request noted that the funds will be used to support eight strategic goals, three of which we include verbatim below because they bear on (1) access to and adoption of broadband; (2) protecting and empowering consumers; and (3) operational excellence,

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ The FCC submitted its proposed budget for fiscal year 2014 of approximately \$359 million to Congress on April 10, 2013.

including “a commitment to transparent and responsive processes.”

Strategic Goal 1: Connect America

Maximize Americans’ access to – and the adoption of—affordable fixed and mobile broadband where they live, work, and travel.

Strategic Goal 3: Protect and Empower Consumers

Empower consumers by ensuring that they have the tools and information they need to make informed choices; protect consumers from harm in the communications market.

Strategic Goal 8: Operational Excellence

Make the FCC a model for excellence in government by effectively managing the Commission’s human, information, and financial resources; by making decisions based on sound data and analyses; and by maintaining a commitment to transparent and responsive processes that encourage public involvement and best serve the public interest.²⁸

Conclusion

The FCC should open up the CACM to promote transparency, consumer involvement in discussions about the disbursement of public monies (the cost of which consumers will pay through the federal universal service charge fee), and an open debate. Consumers are both the financial backers for the broadband subsidies, which will be targeted based on the FCC’s CACM, and are the intended beneficiaries of the more widespread broadband deployment that the FCC seeks to achieve. NASUCA and Rate Counsel appreciate the need to protect competitively sensitive computer code but are baffled by the FCC’s decision thus far to close off the model’s results from the public eye. NASUCA and Rate Counsel urge the FCC to revisit this decision in order to promote open discussion about, analysis of, and debate regarding the CACM.

²⁸ Federal Communications Commission, *Fiscal Year 2014 Budget Estimates Submitted to Congress April 2013*, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-320096A1.doc.

Sincerely,

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