



December 17, 2018

***Ex Parte Notice***

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

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

Dear Ms. Dortch:

This letter responds to correspondence filed by the Wireless Internet Service Providers Associations (“WISPA”) in the above-referenced proceeding on December 5, 2018.<sup>1</sup> That letter was itself a response to a prior submission by NTCA–The Rural Broadband Association (“NTCA”) regarding next steps with respect to the Connect America Fund (“CAF”) Phase II auction.<sup>2</sup>

In the first instance, it is worth noting the significant consensus between NTCA and WISPA in the substance of their letters. Both associations concur that only eligible telecommunications carriers (“ETCs”) may receive high-cost universal service fund (“USF”) support pursuant to the Communications Act of 1934, as amended (the “Act”), and that such support must be utilized for supported telecommunications services.<sup>3</sup> NTCA also agrees wholeheartedly with WISPA’s assertion<sup>4</sup> – and has itself long asserted<sup>5</sup> – that the determination of what constitutes a telecommunications service should be technology-neutral, looking to the function provided and the terms and conditions of the offering rather than simply and simplistically citing to the technology (IP or otherwise) by which a service is provided.

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<sup>1</sup> *Ex Parte* Letter from Claude Aiken, President & CEO, WISPA, to Marlene H. Dortch, Secretary, Federal Communications Commission (“Commission”), WC Docket No. 10-90 (filed Dec. 5, 2018) (“WISPA Letter”).

<sup>2</sup> *Ex Parte* Letter from Michael R. Romano, Sr. Vice President, NTCA, to Marlene H. Dortch, Secretary, Federal Communications Commission (“Commission”), WC Docket No. 10-90 (filed Nov. 14, 2018) (“NTCA Letter”).

<sup>3</sup> *See* NTCA Letter at 1; WISPA Letter at 3; *see also* 47 U.S.C. §§ 254(e) and (c)(1).

<sup>4</sup> WISPA Letter at 2.

<sup>5</sup> *See, e.g.*, Petition of NTCA for a Rulemaking to Promote and Sustain the Ongoing TDM-to-IP Evolution (filed Nov. 19, 2012), at 4 (“Regulatory distinctions that turn on what technology might be used to deliver a given service devolve into form over substance.”).

Thus, NTCA believes WISPA merely misunderstands the issues raised in NTCA's prior letter in arguing against the points that NTCA's letter makes. To be clear, NTCA does not dispute that a carrier can use a variety of technologies to deliver a "voice telephony service" that qualifies as a telecommunications service. Indeed, many carriers do this all the time using advanced network access technologies and IP-enabled softswitches. Rather, NTCA's *only* points with respect to the classification of "voice telephony service" in its letter were as follows:

1. The Commission itself has indicated that the supported telecommunications service for purposes of Section 254 of the Act is "voice telephony service,"<sup>6</sup> and a reviewing court has upheld this designation of the supported service.<sup>7</sup>
2. It is insufficient for a provider to declare summarily in a passing line of an ETC designation petition that its voice telephony service is a "telecommunications service" and then have it deemed so. Rather, this Commission or state commissions must engage in a fact-specific analysis to verify that the service offered – *again, regardless of and without respect to underlying technology* – is functionally equivalent to a telecommunications service and is being offered on a common carrier basis in light of the circumstances surrounding the offering (e.g., tariffing and other indicators of nondiscriminatory public offering on a common carriage basis).<sup>8</sup> In other words, regardless of technology, the reviewing agency *must* find that the supported "voice telephony service" is in fact a telecommunications service.
3. In at least one recent instance, a court has determined that interconnected VoIP is *not* a telecommunications service, and the Commission filed a brief in that proceeding advising the court that it has to date affirmatively declined to classify it as such.<sup>9</sup>

All this is then not to argue that the Commission cannot find that interconnected VoIP qualifies as a telecommunications service in the context of any given ETC designation petition. But particularly in light of long-standing and recent regulatory treatment of interconnected VoIP, to determine whether a given "voice telephony service" – interconnected VoIP or otherwise – qualifies as a telecommunications service, NTCA submits that this Commission or a reviewing state commission must engage in the factual analysis necessary to reach that conclusion based again *not* upon the mere underlying technology but rather (as WISPA itself notes) based upon the functionality offered and also the circumstances surrounding that service offering.

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<sup>6</sup> *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17685-87 and 17693-94 (2011), at ¶¶ 62-65 and 77-81.

<sup>7</sup> *In Re: FCC 11-161*, 753 F.3d 1015, 1048-49 (10th Cir. 2014). This is not to say that any given consumer must in fact procure voice telephony for support to be provided; to the contrary, as the Commission has made clear "[s]o long as a provider offers some service on a common carrier basis, it may be eligible for universal service support as an ETC under sections 214(e) and 254(e), even if it offers other services – including 'information services' like broadband Internet access – on a noncommon carrier basis." *Id.*, at 1095.

<sup>8</sup> *See, e.g., Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143, *et al.*, Report and Order 32 FCC Rcd 3459, 3567-3589 (2017), at ¶¶ 267-285 (discussing indicators of common carriage pursuant to fact-specific determinations with respect to the offering under consideration).

<sup>9</sup> *Charter Advanced Services v. Lange*, No. 17-2290 (8th Cir. 2018); *see also* Brief for the FCC as *Amicus Curiae*, p. 18 (noting that "the FCC has not classified VoIP as a telecommunications service").

WISPA turns its attention next to the second part of the NTCA Letter, challenging NTCA's reasonable request that technical information with respect to winning bids in the Connect America Fund ("CAF") Phase II auction be subject to stakeholder review pursuant to protective order.<sup>10</sup> In a striking attempt to limit transparency – transparency that would apply, it should be noted, to NTCA members and WISPA members alike, as well as any other prevailing auction bidder – WISPA contends that NTCA's request is an untimely petition for reconsideration because the Commission already decided that such technical information should be treated as confidential and withheld from "routine public inspection."<sup>11</sup>

WISPA's procedural arguments at once overstate and misstate, however, the scope of NTCA's request. NTCA does not dispute, nor has it sought to challenge, the confidential designation of technical information submitted by prevailing bidders in the auction. Moreover, NTCA is not seeking, nor has it ever sought, to subject such technical information to "routine public inspection." Instead, NTCA specifically, expressly, and purposefully cited the protective order process as a means of *sustaining* the confidentiality of the information in question and *avoiding* the prospect of routine public inspection. Thus, NTCA is seeking reconsideration in neither substance nor process of any prior Commission decision, but is asking merely for a review procedure that is typical in Commission proceedings for the handling of confidential information and thus fits squarely within the Commission's existing framework.

Finally, WISPA contends flatly that the review of technical information contemplated by NTCA is unnecessary.<sup>12</sup> This subjective contention falls short in light of the public interest at stake. Hundreds of millions of dollars in universal service support have been awarded to providers pledging to deliver services on a widespread basis in vast rural coverage areas at speeds rarely (if never before) commercially realized via specific technologies. Certainly, the Commission should take care to enable thorough vetting of such proposals prior to distributing funds, and NTCA's proposal facilitates just that by permitting relatively rapid review of applications by interested parties that can aid the Commission's efforts. Nonetheless, NTCA's proposal does not apply only to those applications that look to deliver speeds and services never realized in the commercial marketplace; instead, NTCA recommended applying such a process to *all* applications equally in the interest of equity and technological neutrality. It is unclear why WISPA would be so resistant to such an even-handed proposal and reasonable review of its members' (and all winning bidders') technical filings. NTCA therefore renews its request for a relatively streamlined process whereby interested parties can assist the Commission in completing technical review of prevailing bids in the CAF Phase II auction.

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<sup>10</sup> WISPA Letter at 3-4; *see also* NTCA Letter at 3.

<sup>11</sup> WISPA Letter at 4 (citing *Connect America Fund Phase II Auction Scheduled for July 24, 2018 Notice and Filing Requirements and Other Procedures for Auction 903*, Public Notice, WC Docket No 10-90, 33 FCC Rcd 1428 (2018)).

<sup>12</sup> WISPA Letter at 4.

Marlene H. Dortch  
December 17, 2018  
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Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the rules of the Commission, a copy of this letter is being filed via ECFS.

Sincerely,

/s/ Michael R. Romano

Michael R. Romano  
Senior Vice President –  
Industry Affairs & Business Development

cc: Preston Wise  
Kris Monteith  
Chelsea Fallon  
Alexander Minard  
Katie King  
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