6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket Nos. 10-90, 05-337; FCC 13-16]

Connect America Fund; High-Cost Universal Service Support

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) addresses several issues related to changes made to high-cost universal service support for rate-of-return carriers in the USF/ICC Transformation Order, including granting in part requests to modify the high cost loop support (HCLS) benchmarks.

DATES: Effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

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SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Sixth Order on Reconsideration and Memorandum Opinion and Order in WC Docket Nos. 10-90, 05-337; FCC 13-16, adopted on January 31, 2013 and released on February 27, 2013. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY-A257, 445 12th Street, S.W., Washington, DC 20554. Or at the following Internet address: http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0227/FCC-13-16A1.pdf

I. INTRODUCTION

1. In the USF/ICC Transformation Order, 76 FR 73830, November 29, 2011, the Commission comprehensively reformed universal service and intercarrier compensation, adopting fiscally responsible, incentive-based policies to preserve and advance voice- and broadband-capable networks while requiring accountability from companies receiving support and ensuring fairness for consumers who pay into the universal service fund. Modernizing these systems, the Commission concluded, was critical to meet the universal service challenge of our time: ensuring consumers have access to high-speed

Internet access as well as voice service. As part of this undertaking, the Commission reformed legacy high-cost universal service support mechanisms for rate-of-return carriers. Rate-of-return carriers serve fewer than five percent of U.S. access lines, but operate in many of the country's most difficult areas to serve. Total universal service support for such carriers was approaching $2 billion annually—more than 40 percent of the Commission's $4.5 billion overall budget for the reformed high-cost program. The Commission's reforms for rate-of-return carriers begin the transition toward a more incentive-based form of regulation to encourage efficient operation and to support the widest possible availability of broadband.

2. In this Order, we address several issues related to the changes made to high-cost universal service support for rate-of-return carriers in the USF/ICC Transformation Order. First, we address a number of issues raised in petitions for reconsideration or clarification of the benchmarking rule adopted in the USF/ICC Transformation Order. That rule establishes reasonable limits on capital and operating expenditures eligible for high-cost universal service support for rate-of-return carriers, providing better incentives for carriers to invest prudently and operate efficiently than the prior support mechanism, while providing additional support for carriers below their caps to extend broadband to rural consumers. (Rate-of-return carriers previously faced no limits on their overall spending, and received 100 percent reimbursement of loop costs above a certain level, creating a "race-to-the-top" in spending). We reconsider one aspect of the benchmark rule, but decline to reconsider adoption of the rule in general. We then consider a number of applications for review of the Wireline Competition Bureau's (Bureau's) HCLS Benchmarks Implementation Order, 77 FR 30411, May 23, 2012, which implemented the benchmarking rule for purposes of calculating high-cost loop support (HCLS), and modify certain aspects of the Bureau's order. In addition, we decline requests to reconsider the monthly per-line cap of $250 in total high-cost federal universal service support for all telephone companies, and we reaffirm the extension of the corporate operations expense cap to interstate common line support (ICLS). Finally, we take the opportunity to address requests from certain rate-of-return carriers that the Commission slow our implementation of other aspects of the USF/ICC Transformation Order, emphasizing the importance of continuing with the implementation of reform, but reiterating our commitment to a data-driven process.

3. As we have previously noted, the USF/ICC Transformation Order represents a careful balancing of policy goals, equities, and budgetary constraints. This balance was required in order to advance the fundamental goals of universal service and intercarrier compensation reform within a defined budget, while simultaneously providing sufficient transitions for stakeholders to adapt. We observe that, under Commission rules, if a petition for reconsideration simply repeats arguments that were previously fully considered and rejected in the proceeding, it will not likely warrant reconsideration. This standard informs our analysis below.

II. BENCHMARKING RULE

1. Petitions for Reconsideration

4. We begin by addressing petitions for reconsideration of the benchmarking rule. For the reasons set forth below, we reconsider the Commission's original rule insofar as it requires the Bureau to rerun the benchmark regression annually and direct the Bureau to consider whether running the regression analyses less frequently will better serve the purposes advanced by the benchmarking rule. We deny, however, petitions for reconsideration filed by the National Exchange Carrier Association, Inc. (NECA), Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), and Western Telecommunications Alliance (WTA), (jointly, the Rural Associations) and Accipiter Communications Inc. (Accipiter) to the extent they request that the Commission reconsider its benchmarking rule. We also clarify how support will be redistributed under that rule.

a. Rural Associations' Petition

5. The Rural Associations ask the Commission to reconsider several aspects of its limitations on reimbursable capital and operating expenses. We address certain of these arguments here.

6. First, the Rural Associations argue that the Commission's decision to use regression analyses to limit reimbursable capital costs and operating expenses in the USF/ICC Transformation Order was "premature and improper," and that the Commission should instead have stated that it would

"examine a regression analysis approach . . . subject to adequate notice and comment." They claim that the Commission's decision to use regression analyses to develop the benchmarks "leaves no room to argue that other approaches might be used in whole or in part as a substitute to achieve the kinds of constraints sought by the Commission," such as limiting new investment based on depreciation of existing plant, as the Associations previously proposed.

7. Contrary to the Rural Associations' allegations, the Commission provided ample opportunities for parties to comment "on specific methods to be utilized" to limit carriers expenses. In its February 2011 Notice of Proposed Rulemaking, 76 FR 11632, March 2, 2011, the Commission explained that under then-existing rules, rate-of-return carriers with high loop costs could have 100 percent of their marginal loop costs above a certain threshold reimbursed through the federal universal service fund while other carriers that took measures to control expenses could find themselves losing support to carriers that increased costs. Those effects, the Commission explained, meant that the rules did not create appropriate incentives to control costs and invest rationally. The Commission proposed to address these concerns by using regression analyses to estimate appropriate levels of capital and operating expenses, sought comment on this proposal, and adopted its benchmarking rule after considering the comments received, including those filed by the Rural Associations. The Commission found that the approach it adopted is a "reasonable way to place limits on recovery of loop costs" and specifically rejected the Rural Associations' proposed alternative because it "would do little to limit support for capital expenses if past investments for a particular company were high enough to be more than sufficient to provide supported services, and would do nothing to limit support for operating expenses, which are on average more than half of total loop costs." The Associations raise no new arguments to change this conclusion, and therefore we reject their petition to reconsider the adoption of benchmarks or the regression approach generally.

8. Second, the Rural Associations ask the Commission to reconsider its decision to change the caps annually based on a "refreshed" run of the regression analyses, arguing that the Commission should instead leave any caps in place for at least seven years. They argue that if the regressions are

updated each year, carriers could be encouraged to invest less to avoid being affected by the caps because "it appears that a carrier could actually reduce or maintain existing investment and expense levels during a given year but still suffer unexpected reductions in its HCLS . . . if its 'peer group' has changed or if its existing peers have reduced their costs faster."

9. Since filing their petition, the Rural Associations have modified this request for relief. They no longer request that the Commission freeze any regression-based caps for at least seven years. Pending further updating and analysis of the regression methodology, they urge the Commission to "hold the caps constant for a period of several years starting in 2014," and then analyze the regression methodology "to determine whether there are more optimal methods than such a default rule to address concerns with respect to predictability in the longer-term."

10. We note, as an initial matter, that the Bureau chose to use the same regression coefficients in 2013 as those calculated for 2012 during the phase-in of the initial benchmarks (i.e., it "froze" the 2012 coeffecients for 2013). Accordingly, carriers have been able to determine their benchmarks, and estimate their support, throughout the phase-in period. In effect, during the phase-in, the Bureau's approach is consistent with the Rural Associations' request. In addition, as discussed in more detail below, we direct the Bureau to revise the benchmark methodology to generate a single cap for each study area; these updated benchmarks will apply beginning in 2014. The issue before us now, therefore, is how frequently the new benchmarks should be updated beginning 2015.

11. As the Rural Associations recognize, the decision whether and if so, how to freeze the expense benchmarks involves a number of tradeoffs. On the one hand, as the Rural Associations point out, more frequent updates create the possibility of changes in carriers' support levels. If carriers cannot estimate likely future support levels with a reasonable degree of certainty, frequent updates may deter even efficient investment. On the other hand, in practice, annual updates may produce only small changes for all or nearly all carriers. In fact, a comparison of the 2012 benchmarks with 2013 benchmarks, calculated as if the Bureau had not frozen the 2012 coefficients, shows that the ratio of an

individual carrier's costs to its caps in 2012 is strongly predictive of whether the carrier would have been capped in 2013. Moreover, if the benchmarks are updated less frequently, over time they may fail to reflect industry-wide cost trends and cap carrier spending at levels that are either too high or too low. And if the benchmarks are updated infrequently, each update could cause larger and more sudden changes in support levels, at least for a subset of carriers. Updating the benchmarks less frequently also risks treating similarly situated carriers differently based on the timing of their investments. For example, a study area that has higher costs due to investment would not have those investments reflected in its benchmark if its benchmark cap were frozen. A freeze could therefore also distort carriers' investment decisions by encouraging them to time their investments to maximize their benchmarks rather than to invest efficiently. In addition, while there are many potential means to limit the volatility of the benchmarks from year to year, each potential approach would have, necessarily, a different ultimate effect on each study area's benchmarks, and thus its own costs and benefits.

12. In light of these considerations, we reconsider the Commission's decision to the extent it requires the Bureau to update the regressions annually. We direct the Bureau, as it updates the benchmarks for 2014, to consider whether these benchmarks should be held constant for multiple years, and, if so, which mechanism would best advance our objectives to preserve and advance the deployment of voice- and broadband-capable networks while providing better incentives for carriers to invest prudently and operate efficiently. In doing so, the Bureau should carefully consider the extent to which annual updates are likely to cause significant year-over-year changes in support levels. We expect the Bureau to adopt an approach that will provide carriers sufficient certainty regarding future years' benchmarks to encourage efficient investment while maintaining the balance struck in the Commission's reforms to encourage efficient spending by HCLS recipients.

13. <u>Finally</u>, the Rural Associations ask the Commission to reconsider its decision regarding the reductions resulting from the HCLS benchmarks and "find instead that the entirety of those reductions will be redistributed to other [rural carriers] – including those impacted by new caps – within the overall

capped HCLS mechanism." They argue that not redistributing reductions to capped carriers results in a "double cap" on HCLS.

14. We decline to reconsider the Commission's decision to redistribute HCLS only to those carriers whose loop costs are not capped by the benchmarks. We find that providing additional support to carriers with the highest costs relative to their peers is contrary to the purposes of the benchmarking rule. Moreover, by providing redistributed support only to carriers that are below their benchmarks, the rule provides an additional incentive for carriers to operate efficiently and keep costs below their caps. In addition, we note that the Rural Associations appear to assume that by allowing carriers capped by the benchmarks to receive redistributed support, they would have the chance to recover "more <u>but still not all</u>" of their high loop costs. To the contrary, the Rural Associations' proposal could permit some carriers limited by the benchmarks to receive more in redistributed support than they would lose through the benchmark reductions.

15. While we disagree with the Rural Associations' proposal to redistribute HCLS to carriers whose support is capped by the benchmarks, we take this opportunity to clarify that there is no "double cap" on HCLS. That is, we clarify that all HCLS reductions will be redistributed, though only to carriers whose loop costs are not limited by the benchmarks. In discussing the proposed methodology for creating benchmarks the Commission estimated that only approximately half of the HCLS reductions experienced by carriers limited by the benchmarks would be redistributed. Other language in <u>the USF/ICC Transformation Order</u> made clear, however, that the Commission was not mandating partial redistribution. Specifically, the Commission said "we will place limits on the HCLS provided to carriers whose costs are significantly higher than other companies that are similarly situated, and support will be redistributed to those carriers whose unseparated loop cost is not limited by operation of the benchmark methodology." We note that under the phase-in adopted by the Bureau, all HCLS reductions were redistributed in 2012. And now we clarify that all reductions will be redistributed in future years as well.

b. Accipiter Petition

16. Accipiter argues that the Commission's decision to adopt cost benchmarks is flawed because such benchmarks cannot distinguish between carriers that "may legitimately be outliers due to particular considerations, including population density, terrain, and operating environment," and carriers that "are outliers due to waste, fraud or abuse, or other inefficiencies." Accipiter claims the failure to make this distinction is "irrational" and reflects a failure to consider the specific challenges facing Accipiter and other carriers.

17. We disagree. The Commission's benchmarking approach is designed precisely to compare each individual carrier's costs to those of similarly situated carriers, accounting for the most significant drivers of cost such as "density, terrain, and operating environment." It is reasonable for the Commission to adopt a general rule to identify carriers with costs that are significantly higher than most of their similarly situated peers instead of relying on more costly and administratively burdensome alternatives such as audits. Carriers that believe that the benchmarks do not adequately address unique circumstances that they face can seek a waiver of the Commission's rules. Accipiter's petition for reconsideration reads more like a petition for waiver, and in fact, Accipiter sought, and the Bureau granted, a temporary waiver of the benchmarking rule and other new rules that would limit its support.

18. In its petition for reconsideration, Accipiter makes a variety of other arguments that relate not to the Commission's rule as adopted, but rather to the benchmarking methodology proposed in the USF/ICC Transformation FNPRM, 76 FR 78384, December 16, 2011. But those complaints are not relevant to our reconsideration of the Commission's benchmarking rule. The Commission delegated to the Bureau the authority to adopt and implement a final methodology, which the Bureau did in its April 2012 HCLS Benchmarks Implementation Order. Several parties, including Accipiter, filed separate applications for review of the Bureau's HCLS Benchmarks Implementation Order. We turn to that order now.

2. Applications for Review

19. We next address a number of arguments raised in the context of applications for review of the Bureau's HCLS Benchmarks Implementation Order, and we modify the Bureau's order in three respects. Specifically, (1) we direct the Bureau to develop a regression methodology that will generate a single total loop cost cap for each study area beginning in 2014; (2) as an interim measure toward a single cost cap, for purposes of calculating HCLS support in 2013, we sum capex and opex caps generated by the Bureau's current methodology; and (3) we modify the phase-in of the benchmarks for 2013. We do not otherwise modify the Bureau's HCLS Benchmarks Implementation Order at this time. In taking these actions, we address certain of the arguments raised in the applications for review, and we defer consideration of the other issues raised in those applications for review.

20. Single Total Cost Cap. Consistent with the Commission's direction, the Bureau's HCLS Benchmarks Implementation Order generated limits on reimbursable capital expenses and operating expenses for purposes of determining HCLS; compared companies' costs to those of similarly situated companies; and used statistical techniques to determine which companies shall be deemed similarly situated. Consistent with the Commission's delegation of authority, the Bureau also considered and tested additional variables and made further improvements to the methodology based on the comments from two peer reviewers and interested parties, and its own analysis. The most significant change in the methodology that the Bureau made was using two regressions to generate only two caps for each company – a capex limit and an opex limit – rather than generating eleven caps as originally proposed in Appendix H of the USF/ICC Transformation FNPRM.

21. We agree with the Bureau's decision to use fewer regressions than proposed in the USF/ICC Transformation FNPRM. The Bureau explained that doing so "enables carriers to account for the needs of individual networks and recognizes the fact that carriers may have higher costs in one category that may be offset by lower costs in others." The Bureau adopted two regressions even though "[u]sing a greater number of regressions makes it possible to identify outliers at a granular level."

Although one peer reviewer and some commenters recommended using a single regression to limit total cost, the Bureau decided that approach "would provide fewer safeguards against overspending." Because "[c]apital and operating expenditures reflect fundamentally different measures of business performance," the Bureau reasoned that "[u]sing two regressions instead of one provides carriers flexibility to manage their operations, while still enabling the Commission to identify more instances where carriers spend markedly more in either category than their similarly-situated peers."

22. We agree with commenters that the Bureau's methodology was an improvement over the proposed methodology that used eleven regressions, and we recognize that there are trade-offs in choosing the number of regressions. On balance, we conclude that going forward, it would be better to use one regression to generate a single cap on total loop costs for each study area. A single cap will provide carriers with greater flexibility to account for the specific needs of their locales and networks. This approach recognizes that carriers often consider the trade-offs between capital costs and operating expenses when making investment decisions. For example, in its Application for Review, Central Texas argues that it "balanced the costs of using aerial cables against the costs of burying cable and determined that it costs less overall to bury cable, rather than constantly maintain and replace aerial cable in the windy, tough, varmint-ridden Texas terrain. By keeping its cable maintenance costs low, Central Texas receives no credit from the regression model for doing so even though it has much lower operational expenditures."

23. The record before the Bureau when it adopted two regressions instead of eleven regressions also contained support for using a single regression. For example, as noted above, one of the peer reviewers of the benchmark methodology, Paroma Sanyal, stated that "individual cost capping [i.e. capping individual types of costs rather than total costs] ignores any complementar[it]y or substitutability between the various cost components," which may discourage overall cost-minimization and fails to recognize that carriers face different trade-offs between types of expenses. Sanyal suggested that "[a] more flexible approach may be to estimate the 90th percentile over the total cost," which "would be more in line with theoretical cost-minimization approaches where . . . expenditure caps can enhance efficiency

under a rate-of-return regulation." Similarly, Roger Koenker, one of the economists who developed quantile regression analysis, opined that his "primary criticism of the proposed FCC methodology [in Appendix H] lies in the way that cost estimates for individual cost components are aggregated. . . . A preferable, and simpler, approach would be to develop one conditional quantile model for aggregate costs." Koenker concluded that the proposed aggregation of cost categories "yields cost limits that may be unduly stringent in some cases, and unduly lenient in others."

24. For these reasons, we are persuaded that using a single total loop cost benchmark would be preferable to using separate capex and opex caps. Accordingly, we direct the Bureau to develop a regression methodology that will generate a single cap for each study area. We note that the Bureau also will be incorporating into its analysis revised study area boundaries, which will be obtained through an upcoming data collection. We direct the Bureau to analyze the impact of various approaches prior to adopting its new methodology, which we anticipate will be implemented for distribution of HCLS beginning in 2014.

25. Summing Capex and Opex Caps for 2013. We recognize that the Bureau needs time to develop and seek comment on a new methodology, and therefore, absent some interim measure, carriers would continue to operate under two separate caps until 2014. We therefore conclude it is appropriate to combine or "sum" the existing caps as an interim measure. As a result, for purposes of providing HCLS, starting the first full month after the effective date of this Order and for the rest of 2013, we will account for the trade-offs carriers make between capital expenditures and operating expenses by summing the capex and opex caps as an interim measure. That is, we will add each study area's capex and opex benchmarks together to establish a new limit on total unseparated loop costs for purposes of determining HCLS. In the short term, summing the capex and opex benchmarks together will provide an administratively feasible means to recognize the trade-offs between capital and operating expenses that carriers have made over time, while the Bureau works to develop a new single-equation regression. We note that external parties and one peer reviewer have expressed concern about summing benchmarks based on quantiles. As a matter of statistics, the sum of the quantiles is not the quantile of the sums, which

is to say that summing two 90th percentile benchmark caps does not produce the same result as would setting a cap based on the 90th percentile of total costs. Although summing is imperfect as an estimate of the 90th percentile of overall costs, we find that as an interim measure it provides a reasonable way to recognize that there are tradeoffs between capital and operating expenditures. For example, to the extent a carrier's costs are over the capex benchmark but under the opex benchmark because it has made large investments to lower its operating costs and overall costs, summing the benchmarks will provide additional allowances for these expenditures.

26. Phase-In. We also slightly modify the phase-in of the HCLS benchmarks adopted by the Bureau. Applications for review of the HCLS Benchmarks Implementation Order ask us to either set it aside or delay the implementation of the HCLS benchmarks until the Commission addresses various concerns. Although we deny requests to delay the implementation, we modify the phase-in to limit the amount by which any one carrier's support may be reduced in 2013. In 2012, HCLS was reduced by twenty-five percent of the difference between the support calculated using the study area's reported cost per loop and the support as limited by the benchmarks, unless that reduction would exceed ten percent of the study area's support as otherwise would be calculated based on NECA cost data. The Bureau's phase-in for 2013, as adopted in HCLS Benchmarks Implementation Order, will reduce support by fifty percent of the difference between the support calculated using the study area's reported cost per loop and the support as limited by the benchmarks in effect for 2013, but remove the limit on the total impact on individual carriers. We maintain the Bureau's fifty percent phase-in for 2013. However, starting the first full month after the effective date of this Order and for the rest of 2013, we will limit the amount of the reduction to no more than fifteen percent of the study area's support as otherwise would be calculated based on NECA cost data, absent implementation of the benchmark rule. We conclude that this strikes a reasonable balance between continuing the phase-in of the benchmark rule, while giving those carriers most heavily impacted additional time to adjust, particularly as the Bureau updates the benchmarks for 2014.

27. Other Issues. In this section we address a number of other issues raised in the applications for review; we defer consideration of the remaining issues to a future order.

28. Predictability. Several parties argue that the Bureau's benchmark methodology results in support amounts that are unpredictable in violation of section 254(b)(5) of the Communications Act of 1934, as amended (the Act). Central Texas, for example, claims that the dynamic, annually changing nature of the regression caps does not allow carriers to predict future HCLS based on current and near-future expenditures. And Accipiter argues that the results are so unpredictable that the Bureau's methodology "effectively prohibits companies from making reasonable and rational investment decisions." We disagree.

29. As the United States Court of Appeals for the Fifth Circuit explained in Alenco, the Commission can satisfy the statute by adopting predictable rules that govern distribution of subsidies; its rules need not provide precisely predictable funding amounts. Yet what these parties seek is precisely the predictable funding amounts the statute does not require. In any event, as noted above, the Bureau provided that same regression coefficients would be used in 2013 as those calculated for 2012 in order to ensure that carriers would be able to calculate their benchmark caps for the phase-in period well in advance. Accordingly, at least with respect 2012 and 2013, the carriers were, in fact, provided with the certainty they request. And, as discussed above, for 2014 and beyond, we direct the Bureau to revise its methodology to set a single total cost benchmark for each study area and to consider how frequently that regression should be updated. We do so with the expectation that the Bureau will adopt an approach that will provide carriers sufficient certainty regarding future years' benchmarks to encourage efficient investment while maintaining the balance struck in the Commission's reforms to encourage efficient spending by HCLS recipients. For these reasons, we reject the claim that the Bureau's order violates the Act because it provides insufficient predictability.

30. Similarly-Situated Companies. We also disagree with the Rural Associations' claim that the "Bureau's methodology does not rely on statistical analysis of 'similarly situated' companies, as the

Commission's USF/ICC Transformation Order directed. In fact, the actual formulas do not establish any comparator groups." They argue that the benchmark "formulas impose limitations on companies without regard to whether their per-unit costs are excessive or relatively high compared to 'peers.'" On the contrary, we find that the Bureau's regression analysis was consistent with Commission's direction. We note that the Rural Associations never explain how they would propose to define "similarly situated" companies. We conclude that the Bureau took a reasonable approach, taking into account all the significant variables in determining the caps, in effect comparing each company to all other companies to the degree to which the companies are similar in regard to the variables found to be significant (i.e., the degree to which they are similarly situated).

31. Trigger. We also reject the argument made by several parties in their applications for review that "a regression model should be used only to trigger a harder look to determine whether a carrier's costs were truly 'inefficient.'" The Commission did not provide the Bureau with the discretion to use the regression methodology in that manner. Moreover, as explained above in the context of the petitions for reconsideration, we conclude that it was reasonable for the Commission to adopt a general rule to identify carriers with costs that are significantly higher than their peers instead of relying on more costly and burdensome approaches like audits, as would be required if the regression methodology were used merely as a trigger.

32. Finally, while we have, in this Order, addressed a number of significant issues raised in the applications for review, we recognize that a number of issues remain pending. We otherwise defer consideration of issues not addressed herein.

III. LIMITS ON TOTAL PER-LINE HIGH-COST SUPPORT

33. We deny both petitions for reconsideration. In the USF/ICC Transformation Order, the Commission concluded that a $250 cap would be reasonable after finding that "support drawn from limited public funds in excess of $250 per-line monthly . . . should not be provided without further justification." The Commission also noted that "virtually all (99 percent) of incumbent LEC study areas

currently receiving [universal service] support are under the $250 per-line monthly limit." Even so, to provide affected carriers a measured transition, the Commission delayed the implementation of the $250 cap for six months to "provide an opportunity for companies to make operational changes, engage in discussions with their current lenders, and bring any unique circumstances to the Commission's attention through the waiver process." Moreover, after the six-month delay, the Commission phased-in the $250 cap "to ease the potential impact of this transition." As a result, effective July 1, 2012, carriers subject to the $250 cap received support of no more than $250 per-line plus two-thirds the difference between their uncapped per-line amount and $250, and effective July 1, 2013, carriers will receive no more than $250 per-line plus one-third the difference between their uncapped per-line amount and $250 through June 30, 2014.

34. Petitioners have not presented any new evidence or arguments that persuade us to reconsider adoption of the $250 per-line per month cap. And, we disagree with the Rural Associations' claims that the Commission failed to adequately explain the basis for adopting the $250 cap. The Commission provided a thorough, reasoned analysis of the basis for adopting the $250 cap. By phasing-in the $250 cap, the Commission also provided carriers time to adjust, while promoting the Commission's goal of fiscal responsibility. Moreover, the USF/ICC Transformation Order acknowledged that if there are unique circumstances, carriers should utilize the waiver process. We recently modified and clarified the Commission's guidance for the waiver process in our Fifth Order on Reconsideration, 78 FR 3837, January 17, 2013.

35. We note that, in 2011, there were 26 incumbent study areas that received $250 per month or more in per-line support. Of those 26 study areas, the Commission has received nine waiver petitions arguing that waiver of the cap is necessary for the company to continue to serve its community; one of those petitions subsequently was withdrawn. That the carriers serving the remaining study areas have not filed for waivers suggests that the measured transition adopted by the Commission provides an appropriate amount of time for affected companies to adjust their operations without disrupting service to consumers.

36. We deny the requests of Accipiter and the Rural Associations that the Commission apply the $250 cap "on a prospective basis only." The Commission decided, after fully considering the record, that the immediate adoption of the $250 cap would advance its goal of imposing responsible fiscal limits on universal service support. Accipiter claims that applying the cap "to previously-incurred expenses is in no way consistent with the Congressional directive that support be 'predictable,' and would punish carriers for reasonable investment decisions that cannot be reversed to account for the Commission's new rules." The Commission fully considered and rejected such arguments in the USF/ICC Transformation Order, explaining that section 254 of the Act "does not create any entitlement or expectation that ETCs will receive any particular level of support or even any support at all." In fact, "there is no statutory provision or Commission rule that provides companies with a vested right to continued receipt of support at current levels, and [the Commission is] not aware of any other, independent source of law that gives particular companies an entitlement to ongoing USF support." In addition, the Commission upheld the principle that universal service mechanisms be predictable by adopting a measured transition to the implementation of the $250 cap for all carriers that made clear how much support carriers could expect to receive as the cap was phased in. As discussed above, rather than "punish" carriers for previously incurred expenses, the Commission made efforts to "ease the potential impact" of the transition on all carriers by delaying the implementation of the cap for six months, phasing in the cap over a period of three years, and providing a waiver process for those carriers that face unique circumstances.

IV. ICLS CORPORATE OPERATIONS EXPENSE CAP

37. Accipiter and the Rural Associations provide no new evidence and introduce no new arguments that persuade us to reverse or otherwise modify this approach, and therefore we deny these petitions for reconsideration. Accipiter claims that any immediate extension of the corporate operations expense cap to ICLS will have "devastating financial implications" on carriers that are in the process of growing their operations to serve rural areas. Accipiter notes that "[c]orporate operations expenses must be incurred before a carrier can add its first line," while acknowledging that "per-line corporate operations costs are quickly averaged down as new subscribers are added." But the Commission has already made

accommodations for carriers with limited subscribership. The Commission retained the rule that permits carriers with 6,000 or fewer working loops to recover a minimum amount per working loop if they would receive less than that minimum under the application of the ICLS corporate operations expense cap formula (i.e., \$42.337 - (.00328 x number of total working loops)). Specifically, such carriers can recover monthly for each working loop: \$63,000 divided by their total number of working loops. Moreover, if carriers believe that due to their unique characteristics, they need to recover more corporate operations expenses through ICLS than allowed for under the cap, they remain free to petition for a waiver of the cap pursuant to the Commission's waiver process.

38. The Rural Associations request that the Commission delay the implementation of the ICLS corporate operations expense cap "until no sooner than January 1, 2013." They argue that the Commission should not implement the corporate operations expense cap before carriers "have adequate opportunity to adjust their operations for compliance" with the new operating expense caps that the Commission proposed to develop through regression analysis in the FNPRM. The Rural Associations have not provided any evidence, however, demonstrating why extending the HCLS corporate operations expense limit to ICLS was inappropriate or why it would be necessary to delay a critical reform that advances the Commission's goals of improving fiscal discipline and accountability.

39. We also deny Accipiter's claim that the Commission violated 47 U.S.C. 254(b)(5) by applying the ICLS corporate operations expense cap to support for 2012, which is determined with reference to 2010 expenses. The company argues that it "reasonably and rationally made decisions about 2010 investments and expenses based on the rules that were in place in 2010." But as we discussed above and addressed repeatedly in the USF/ICC Transformation Order, section 254 does not entitle carriers to recover USF support simply because they expected to receive that support. Accipiter does not cite any additional legal authority that persuades us otherwise.

40. Finally, we are not persuaded by Accipiter's argument that a "one size fits all rule,"—i.e., using a nationwide formula to cap ICLS—is "inappropriate and inflexible" due to the variability in

corporate operations expenses between different regions in the country. Accipiter has not provided any evidence to explain why a nationwide formula is unreasonable. Indeed, the Commission has used a nationwide formula to limit the recovery of corporate operations expenses for HCLS ever since it adopted that corporate operations expense cap in 1997. Accipiter has failed to explain how ICLS differs from HCLS in such a way that it would be unreasonable for the Commission to extend the HCLS nationwide formula to ICLS.

V. IMPLEMENTATION OF FURTHER REFORMS FOR RATE-OF-RETURN CARRIERS

41. Finally, we take this opportunity to address some general arguments made by a number of rate-of-return carrier associations that the Commission should undertake "a careful data-driven process that takes measure of . . . reforms just now being implemented," including those reforms described above, "in lieu of racing forward with additional changes." Although we disagree with these carriers insofar as they suggest we stop our implementation of the Commission's USF/ICC Transformation Order, we agree that a careful data-driven process is consistent with – and indeed critical to – that implementation. We emphasize our continued commitment to such a process, and we direct the Bureau, as it implements the modifications described above and proceeds with other reforms adopted in the USF/ICC Transformation Order, to continue taking all appropriate steps to seek input from affected stakeholders, and gather relevant data on the effect of reforms as they proceed. As an additional measure, we direct the Bureau to report to the Commission, within two years of release of the USF/ICC Transformation Order, i.e., November 18, 2013, on the progress of implementation, and on the impact of reforms based on relevant, available data at that time.

VI. PROCEDURAL MATTERS

A. Paperwork Reduction Act

42. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25

employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

B. Final Regulatory Flexibility Act Certification

43. The Regulatory Flexibility Act ("RFA") requires that agencies prepare a regulatory flexibility analysis for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not have a significant economic impact on a substantial number of small entities." The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

44. This document modifies and clarifies the benchmarking rule adopted by the Commission in USF/ICC Transformation Order, and modifies the Wireline Competition Bureau's implementation of that rule. These modifications and clarifications do not create any burdens, benefits, or requirements that were not addressed by the Final Regulatory Flexibility Analysis attached to USF/ICC Transformation Order. The Commission will send a copy of the Order including a copy of this final certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. 801(a)(1)(A). In addition, the Order and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register. See 5 U.S.C. 605(b).

C. Congressional Review Act

45. The Commission will send a copy of this Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

D. Effective Date

46. We conclude that good cause exists to make this Order effective immediately upon publication in the Federal Register, pursuant to section 553(d)(3) of the Administrative Procedure Act. Agencies determining whether there is good cause to make a rule revision take effect less than 30 days after Federal Register publication must balance the necessity for immediate implementation against principles of fundamental fairness that require that all affected persons be afforded a reasonable time to prepare for the effective date of a new rule. As we note above, summing the capex and opex benchmarks together is an important interim step to recognize the trade-offs that carriers have made in investment, and will therefore mitigate or eliminate the effect of the existing benchmarks cap mechanism on carriers that are capped under one or the other benchmark but not both. It will also reduce the amount of support redistributed to uncapped carriers by a corresponding amount. Because many more carriers receive redistributed support than are capped under the existing mechanism, the effect of summing the caps on any carrier receiving redistributed support will generally be much less significant than the effect on those carriers that are currently capped. Moreover, we note that high cost loop support is generally subject to true-ups over time. Carriers, accordingly, generally have no certain expectation of the precise amount of support they will receive. We conclude under these circumstances that the public interest is best served by immediate implementation of our new interim rule, and that, on balance carriers that will experience a minor reduction in redistributed support do not require additional time to prepare for implementation of a rule change that affects them only modestly.

47. In addition, we modified the phase-in of the HCLS benchmarks to limit the amount of reduction of support to no more than fifteen percent of the study area's support absent implementation of the benchmark rule to give carriers that are heavily impacted by the benchmarks more time to adjust. We find that implementing the modification to the phase-in as expeditiously as possible furthers the Commission's objective of ensuring that carriers experience a more gradual implementation of the benchmarks overall which obviates the necessity of providing carriers additional 30 day notice before implementation.

VII. ORDERING CLAUSES

48. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 2, 4(i), 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, and 403 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, 47 U.S.C. 151, 152, 154(i), 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, 403, 1302, and §§ 1.1 and 1.429 of the Commission's rules, 47 CFR 1.1, 1.429, that this Sixth Order on Reconsideration IS ADOPTED, effective upon publication of the text or summary thereof in the Federal Register.

49. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 405 of the Communications Act of 1934, as amended, 47 U.S.C. 405 and §§ 0.291 and 1.429 of the Commission's rules, 47 CFR 0.291 and 1.429, that the Petition for Reconsideration filed by the National Exchange Carrier Association, Inc., Organization for the Promotion and Advancement of Small Telecommunications Companies, and Western Telecommunications Alliance on December 29, 2011 IS GRANTED IN PART to the extent described herein, and IS DENIED IN PART to the extent described herein.

50. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 405 of the Communications Act of 1934, as amended, 47 U.S.C. 405 and §§ 0.291 and 1.429 of the Commission's rules, 47 CFR 0.291 and 1.429, that the Petition for Reconsideration filed by Accipiter Communications Inc. on December 29, 2011 IS DENIED IN PART to the extent described herein.

51. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. 155(c) and §§ 0.291 and 1.115 of the Commission's rules, 47 CFR 0.291 and 1.115, that the Application for Review filed by Central Texas Telephone Cooperative, Inc. on May 25, 2012 IS GRANTED IN PART to the extent described herein, and IS DENIED IN PART to the extent described herein.

52. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. 155(c) and §§ 0.291 and 1.115 of the Commission's rules, 47 CFR 0.291 and 1.115, that the Application for Review filed by the National Exchange Carrier Association, Inc., National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, and Western Telecommunications Alliance on May 25, 2012 IS DENIED IN PART to the extent described herein.

53. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. 155(c) and §§ 0.291 and 1.115 of the Commission's rules, 47 CFR 0.291 and 1.115, that the Application for Review filed by East Ascension Telephone Company, LLC on May 25, 2012 IS DENIED IN PART to the extent described herein.

54. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. 155(c) and §§ 0.291 and 1.115 of the Commission's rules, 47 CFR 0.291 and 1.115, that the Application for Review filed by Silver Star Telephone Company, Inc. on May 25, 2012 IS GRANTED IN PART to the extent described herein, and IS DENIED IN PART to the extent described herein.

55. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. 155(c) and §§ 0.291 and 1.115 of the Commission's rules, 47 CFR 0.291 and 1.115, that the Supplement to Application for Review filed by Silver Star Telephone Company, Inc. on June 22, 2012 IS GRANTED IN PART to the extent described herein, and IS DENIED IN PART to the extent described herein.

56. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. 155(c) and §§ 0.291 and 1.115 of the Commission's rules, 47 CFR 0.291 and 1.115, that the Application for Review filed by Blue Valley Telephone Telecommunications, Inc. on June 22, 2012 IS GRANTED IN PART to the extent described herein, and IS DENIED IN PART to the extent described herein.

57. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. 155(c) and §§ 0.291 and 1.115 of the Commission's rules, 47 CFR 0.291 and 1.115, that the Application for Review filed by Blooston Rural Broadband Carriers on May 25, 2012 IS GRANTED IN PART to the extent described herein, and IS DENIED IN PART to the extent described herein.

58. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. 155(c) and §§ 0.291 and 1.115 of the Commission's rules, 47 CFR 0.291 and 1.115, that the Application for Review filed by Accipiter Communications Inc. on May 25, 2012 IS GRANTED IN PART to the extent described herein, and IS DENIED IN PART to the extent described herein.

59. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 155(c) of the Communications Act of 1934, as amended, 47 U.S.C. 155(c) and §§ 0.291 and 1.115 of the Commission's rules, 47 CFR 0.291 and 1.115, that the Application for Review filed by United States Telecom Association on June 22, 2012 IS GRANTED IN PART to the extent described herein, and IS DENIED IN PART to the extent described herein.

60. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

61. IT IS FURTHER ORDERED, that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary.

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