

**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
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	

ORDER ON RECONSIDERATION

Adopted: April 20, 2017

Released: April 21, 2017

By the Commission: Chairman Pai and Commissioners Clyburn and O’Rielly issuing separate statements.

I. ORDER ON RECONSIDERATION

1. By this Order, we grant the Petition for Reconsideration filed by NTCA–The Rural Broadband Association (NTCA) of the Commission’s *Rate-of-Return Reform Order* with respect to the average per-location, per-project construction limitation on universal service support provided for in the *Rate of Return Reform Order*.¹ We find that amending the rule as described below will encourage carriers to plan cost-effective broadband deployment projects that include higher-cost locations, while maintaining adequate incentives for the efficient use of universal service funds.

2. In the *Rate-of-Return Reform Order*, the Commission adopted a Capital Investment Allowance to limit universal service reimbursement of capital expenses associated with very high-cost locations, with a goal of preserving funds for more efficient projects with deployment to a greater number of lower-cost locations.² As part of the Capital Investment Allowance, the Commission adopted a rule precluding carriers from seeking universal service support for all capital expenses associated with any construction project with average per-location costs above a company-specific “Maximum Average Per-Location Construction Project Limitation.”³

3. NTCA seeks reconsideration of how the construction limitation is applied.⁴ NTCA contends that disallowing all costs associated with a construction project will cause carriers to exclude

¹ See Petition For Reconsideration and/or Clarification of NTCA–The Rural Broadband Association, WC Docket No. 10-90, *et al.*, at 22-23 (filed May 25, 2016) (NTCA Petition for Reconsideration). NTCA seeks, in part, reconsideration of that portion of the *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, 31 FCC Rcd 3087, 3127-31, 3236-39, paras. 105-17 & App. B, § 54.303 (2016) (*Rate-of-Return Reform Order*) that adopts a capital construction limitation to ensure that carriers cannot obtain universal service support for excessive per-location construction investments. We received no oppositions or comments in response to this Petition for Reconsideration.

² *Rate-of-Return Reform Order*, 31 FCC Rcd at 3236-39, paras. 105-17.

³ *Id.* at 3128, para. 108, 3238-39, App. B, § 54.303(f).

⁴ NTCA Petition for Reconsideration, at 22-23. In its petition, NTCA also sought reconsideration and/or clarification of aspects of the *Rate-of-Return Reform Order* other than the new construction project limitation issue. We do not address those issues at this time.

certain locations to reduce the average per-location cost of the project, with the possible consequence of permanently “stranding” some locations without broadband-capable service.⁵ For example, if a carrier subject to a \$10,000 average per-location limitation developed a project costing \$105,000 to serve 10 locations (*i.e.*, with an average cost per-location served of \$10,500), the cost of the entire project would be disallowed. The carrier might instead exclude a handful of the highest cost locations to bring the average per-location cost below the threshold.⁶ Once excluded, however, there may not be a subsequent project that deploys service to those locations as efficiently as the first project and, as a result, the location may never receive broadband-capable service.

4. NTCA therefore requests that the rule disallow, for the purpose of seeking universal service support, only the portion of a project’s expenses that exceed the average per-location threshold.⁷ In the example above, where the \$10,500 average per-location cost of the project exceeds the carrier’s \$10,000 Maximum Average Per Location Construction Project Loop Plant Investment Limitation, the carrier would report \$100,000 (*i.e.*, \$10,000 per location) for universal service support purposes and exclude \$5,000 (*i.e.*, the amount in excess of \$10,000 per location). In that case, a carrier might elect to deploy service to the highest-cost locations without prejudice to its ability to receive universal service support for the project, up to the amount of the average per-location cap.

5. Upon reconsideration, we agree that wholly disallowing costs associated with projects exceeding the construction limitation could have the effect of preventing deployment to some locations that a carrier might otherwise choose to serve. As the Commission noted in adopting the Capital Investment Allowance, “[a]lthough it is the Commission’s goal to ensure broadband deployment throughout all areas, finite universal service resources must be used where they are most needed.”⁸ NTCA’s proposed solution is to retain the average per-location construction limitation as a maximum amount includable for universal service support purposes in connection with a construction project. We find that this solution adequately preserves two critical Commission interests: first, promoting efficient use of universal service funds to maximize the number of high-cost locations with broadband-capable facilities, and second, enabling some locations to be efficiently included within another deployment project (when they might otherwise be denied service altogether). We therefore grant NTCA’s petition with respect to the construction limitation.

II. PROCEDURAL MATTERS

6. *Paperwork Reduction Act.* This document does not contain new or modified information collection requirements 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).

7. *Final Regulatory Flexibility Certification.* The Regulatory Flexibility Act of 1980 as amended (RFA)⁹ requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that “the rule will not have a significant economic impact on a substantial number of small entities.”¹⁰ The RFA generally defines “small entity” as having the same meaning as the

⁵ *Id.*

⁶ See Letter from Michael R. Romano, Senior Vice-President—Industry Affairs and Business Development, NTCA—The Rural Broadband Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 (filed Feb. 3, 2017), at 2-3.

⁷ NTCA Petition for Reconsideration, at 22-23.

⁸ *Rate-of-Return Reform Order*, 31 FCC Rcd at 3129, para. 110.

⁹ See § 5 U.S.C. S 601 *et. seq.*

¹⁰ 5 U.S.C. § 605(b).

terms “small business,” “small organization,” and “small governmental jurisdiction.”¹¹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹² 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).¹³

8. In this Order on Reconsideration, we amend the construction project limitation within the Capital Investment Allowance to permit carriers to report, for universal service purposes, capital expenses per location up to the established per-location per project limit, rather than disallowing all capital expenses associated with construction projects in excess of the limit. This project-specific limitation provides a reasonable upper limit on the amount of per-location capital expenses associated with a carrier’s new construction project that we expect will rarely be exceeded. Moreover, to the extent that this rule change has a significant economic impact on any small carriers, the rule change will provide such carriers additional flexibility to undertake new construction projects that exceed the limit without risk of losing all universal service support associated with the project. Because we anticipate that this rule will not affect a substantial number of carriers, we do not anticipate that it will affect a substantial number of small entities. Therefore, we certify that the requirements of this Order on Reconsideration will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the Order on Reconsideration including a copy of this final certification to the Chief Counsel for Advocacy of the Small Business Administration. *See* 5 U.S.C. § 605(b).

9. *Congressional Review Act.* The Commission will send a copy of this Order on Reconsideration to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

III. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1 through 4, 214(e)(6), and 254 of the Communications Act of 1934, 47 U.S.C. §§ 151-154, 214(e)(6), 254, and pursuant section 1.429 of the Commission’s rules, 47 CFR § 1.429, the Petition for Reconsideration filed by NTCA on January 3, 2017 IS GRANTED to the extent indicated above and this Order on Reconsideration IS ADOPTED, effective thirty (30) days after publication of the text or summary thereof in the Federal Register.

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

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

¹¹ 5 U.S.C. § 601(6).

¹² 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

¹³ Small Business Act, § 15 U.S.C. § 632.

13. IT IS FURTHER ORDERED that pursuant to section 1.427 of the Commission's rules, 47 CFR § 1.427, this Order SHALL BE EFFECTIVE 30 days after publication of the text or summary thereof in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary
Federal Communications Commission

APPENDIX A

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 54 as follows:

PART 54—UNIVERSAL SERVICE

1. Amend §54.303 by revising paragraph (f) introductory text to read as follows:

§54.303 Eligible Capital Investment and Operating Expenses

* * * * *

(f) *Construction Allowance Adjustment.* Notwithstanding any other provisions of this section, a rate-of-return carrier must exclude from the data it submits for the purposes of obtaining high-cost support under subpart K or subpart M of this part the amount of Loop Plant Investment associated with a new construction project that exceeds the Maximum Average Per Location Construction Project Limitation for that project as determined by the Administrator according to the following formula:

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**STATEMENT OF
CHAIRMAN AJIT PAI**

Re: *Connect America Fund; ETC Annual Reports and Certifications; Developing a Unified Intercarrier Compensation Regime*, WC Docket Nos. 10-90, 14-98, CC Docket No. 01-92

April is Stress Awareness Month. It is also Pets Are Wonderful Month. And National Occupational Therapy Month, National Garden Month, National Older Americans Month, National Better Hearing and Speech Month, National Multiple Birth Awareness Month, and STD Awareness Month.

It's also National Food Month. Or more specifically, it's National Pecan Month, National Soy Foods Month, National Soft Pretzel Month, and Fresh Florida Tomato Month!

Since everyone else is making this stuff up, we decided April would be Infrastructure Month at the FCC. If we are going to close the digital divide in this country and see ubiquitous 5G, then companies must be able to build next-generation networks. These networks will be the foundation for bringing economic opportunity and job creation to every corner of the United States.

The Order before us makes the first simple but needed change to the stand-alone broadband rules the FCC adopted just last year. Our current rules say that high cost carriers will lose all universal support for capital expenses on a construction project if the average costs per location exceeds a company-specific threshold. And so a carrier may have to exclude certain high-cost homes from a project entirely in order to avoid losing all funding for the project, even if including those homes would be more efficient in the long-run. Today we amend this rule to only disallow expenses above the threshold—encouraging efficient builds without increasing the cost to taxpayers.

This change will help ensure that a quirk in our rules doesn't stand between carriers willing to deploy broadband in areas that cost more to serve and consumers in those areas who want and need Internet access. This is just the latest example of how we intend to promote broadband deployment to help close the digital divide.

Thank you to Ted Burmeister, Lisa Hone, Doug Klein, Rick Mallen, Alex Minard, Kris Monteith, Ryan Palmer, and Suzanne Yelen for helping us kick off Infrastructure Month.

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Connect America Fund; ETC Annual Reports and Certifications; Developing a Unified Intercarrier Compensation Regime*, WC Docket Nos. 10-90, 14-98, CC Docket No. 01-92

Just over a year ago, the Commission took substantial steps to modernize the rate-of-return program. In doing so, we placed the high-cost fund on solid economic footing for the next decade. As part of the *Rate-of-Return Reform Order*, we welcomed ongoing input and partnership from carriers and their associations as we implemented said reforms. Today's action is a direct result of the feedback we received.

The *Order* we adopt this morning addresses an unintended consequence of those much needed reforms. When we instituted the capital investment allowance in the *Rate-of-Return Reform Order* in 2016, the goal was a noble one: to promote the efficient use of universal service funds. While this continues to be important, I never envisioned the mechanisms we put in place would harshly penalize carriers for going just one dollar over their capital investment allowance.

By amending the capital investment allowance rule to permit carriers to recoup capital expenses up to the per-location limit today, we modify a requirement that had the potential to chill broadband infrastructure investment. Carriers were inadvertently placed in the difficult position of having to exclude certain locations for broadband deployment in order to reduce the average per-location cost of all projects if they exceeded the per-location allowable cost threshold. This disallowance of all, not simply the excess of reimbursements, had the potential of leaving adjacent locations "permanently stranded" without broadband-capable service.

Today's *Order* continues not only to promote our goals under the *Rate-of-Return Reform Order*, it provides carriers with the flexibility they need to undertake broadband deployment projects in high-cost areas, enabling them to build out broadband to a greater number of locations. This represents another step forward in our efforts to advance deployment of affordable broadband services in all areas of the United States and close the broadband deployment gap, consistent with Congressional expectations. In that same vein, I hope and expect that we will also act soon to pause the imminent voice rate floor hike, coupled with action to rein in waste, fraud, and abuse in the high-cost program.

My thanks go to the staff of the Wireline Competition Bureau for their hard work on this very important item.

**STATEMENT OF
COMMISSIONER MICHAEL P. O'RIELLY**

Re: *Connect America Fund; ETC Annual Reports and Certifications; Developing a Unified Intercarrier Compensation Regime*, WC Docket Nos. 10-90, 14-98, CC Docket No. 01-92

I support this decision to make clear that rate-of-return carriers may undertake additional investments to deploy broadband in a cost-effective manner without fear that they will be precluded from recovering *all* of their capital expenses through USF. I, for one, never intended the rule to operate as a “kill switch” and would have preferred to clear up the apparent confusion as soon as we became aware of the issue almost a year ago. In the same vein, I hope that the Commission will promptly respond to other pending requests for clarification or guidance in this area. Certainly, we should address what some have referred to as a “punch list” in very quick order.

Going forward, I expect that we will see fewer requests to clarify or reconsider Commission meeting items as the public now has the opportunity to review the actual text under consideration. They can help spot potential issues before the Commission votes on the items. This will save time and resources both for Commission staff and outside parties. I think it is fair to say that the pilot project has been a success and we can now make it standard operating procedure, including extending it to circulation items as well.