

**STATEMENT OF  
COMMISSIONER AJIT PAI  
CONCURRING IN PART AND DISSENTING IN PART**

Re: *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.

Too many rural Americans have waited too long for high-speed Internet access. The FCC promised broadband throughout rural America five years ago when it started reforming the Universal Service Fund<sup>1</sup>—a promise that echoed our duty to “make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”<sup>2</sup>

Progress since then has been halting, especially for those residing in areas served by the nation’s rural telephone companies. That’s because of a quirk of regulatory history: Our rules governing small, rural carriers provide universal service support only to networks that supply telephone service, not stand-alone broadband service.

That regulatory system has put some carriers to a Hobson’s choice. On one hand, they can offer stand-alone broadband—which urban consumers have and rural consumers want—and lose universal service support. On the other, they can deny consumers the option of an Internet-only service, and risk them dropping service altogether (which they increasingly are). The net result is that rural carriers hold back investment because they are unsure if they can deploy the next-generation services that consumers are demanding.

That’s why three years ago, I called on the FCC to support stand-alone broadband service and establish a Connect America Fund for rate-of-return carriers.<sup>3</sup> That’s why two years ago, I was glad that my colleagues agreed with me to “propose a stand-alone broadband funding mechanism for rate-of-return carriers serving the highest-cost reaches of our country” in the *Seventh Recon Order*.<sup>4</sup> And that’s why in June last year, I put my own plan on the table, calling for “targeted changes to existing universal service rules” coupled with “a path so that rate-of-return carriers that want to participate in the Connect America Fund can do so.”<sup>5</sup> My plan was simple enough that the rules fit on a single page and could have been adopted last summer.

I wasn’t alone in thinking a simple fix was the best one. A bipartisan supermajority of 61 U.S. Senators, led by John Thune, Amy Klobuchar, and Deb Fischer, wrote in May 2015 that “no new models or sweeping changes are needed to adopt and implement a targeted update to fix the [stand-alone

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<sup>1</sup> *Connect America Fund et al.*, 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, 26 FCC Rcd 17663, 17667, para. 1 (2011) (*Universal Service Transformation Order*) (“Today the Commission comprehensively reforms and modernizes the universal service and intercarrier compensation systems to ensure that robust, affordable voice and broadband service, both fixed and mobile, are available to Americans throughout the nation.”).

<sup>2</sup> Communications Act § 1.

<sup>3</sup> Remarks of Commissioner Ajit Pai before the NTCA 2013 Legislative and Policy Conference at 2 (2013), available at <http://go.usa.gov/cAMXJ>.

<sup>4</sup> *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 7051, 7137, para. 269 (2014) (*Seventh Recon Order*); *id.* at 7251 (Statement of Commissioner Ajit Pai, Approving in Part and Dissenting in Part).

<sup>5</sup> Statement of FCC Commissioner Ajit Pai Announcing His Plan to Support Broadband Deployment in Rural America at 1–2 (2015), available at <http://go.usa.gov/cAM5Y>.

broadband] issue . . . instead a simple plan that isolates and solves this specific issue is all that is needed right now.”<sup>6</sup> Similarly, Congressman Kevin Cramer and 114 other members of the U.S. House of Representatives warned that “previous USF reform stumbles have hindered rural broadband investment” and urged instead “an immediate, targeted solution.”<sup>7</sup> And my colleague Commissioner Jessica Rosenworcel warned that “when you add the piece parts of our reform together—and they are manifold—what we have is extremely complex,” which “can deny carriers . . . the certainty they need to confidently invest in their network infrastructure.” Instead, she hoped “we can craft rules in a way that ultimately reduces complexity and uncertainty.”<sup>8</sup>

So it is with some trepidation that I met the circulation of this 237-page *Order*. Yes, it changes our accounting rules to support stand-alone broadband. Yes, it opens a path for rate-of-return carriers to volunteer for the Connect America Fund’s alternative cost model (the A-CAM). And yes, it does these things without a “new mechanism that replaces the old HCLS and ICLS mechanisms”—without, that is, the bifurcated approach that many rural carriers feared and that FCC leadership proposed last fall.<sup>9</sup> To the extent it accomplishes these tasks, I concur in part.

But the changes the *Order* makes to our Universal Service Fund are anything but simple. Take the stand-alone broadband mechanism. To calculate the support provided by that mechanism, a carrier must (1) determine the historical costs of providing broadband-only loops (defined “on a per-line basis, as the costs that are currently recoverable for a voice-only or voice/broadband line in ICLS”)<sup>10</sup>, (2) apply the new limits on operating expenses,<sup>11</sup> (3) apply the old limits on corporate operations expenses,<sup>12</sup> (4) apply the new limits on capital expenses,<sup>13</sup> and (5) subtract an imputed charge of up to \$42 per broadband-only loop to determine the initial support amount.<sup>14</sup> A carrier then must (6) disaggregate support for non-competitive areas using one of four separate methods,<sup>15</sup> (7) add back a portion of the disaggregated support for competitive areas during a transition period,<sup>16</sup> (8) subtract a per-line budget reduction,<sup>17</sup> (9) apply a pro rata budget reduction,<sup>18</sup> (10) apply the monthly per-line limit on universal service support, if applicable,<sup>19</sup> and (11) subtract the difference between that carrier’s old Interstate Common Line Revenue Requirement and what would have been its Interstate Common Line Support (ICLS) after

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<sup>6</sup> Letter from John Thune, U.S. Senator, et al., to the Honorable Thomas Wheeler, Chairman, FCC, at 1 (May 12, 2015).

<sup>7</sup> Letter from Kevin Cramer, Member of Congress, et al., to the Honorable Thomas Wheeler, Chairman, FCC, at 1 (May 12, 2015).

<sup>8</sup> *Seventh Recon Order*, 29 FCC Rcd at 7250 (Statement of Commissioner Jessica Rosenworcel).

<sup>9</sup> Remarks of FCC Chairman Tom Wheeler as Prepared for Delivery, NTCA Fall Conference, Boston, Massachusetts at 5 (2015), available at <http://go.usa.gov/cAM5B>.

<sup>10</sup> *Order* at para. 88; new rule 54.901(a).

<sup>11</sup> *Order* at para. 98; new rule 54.901(b).

<sup>12</sup> New rule 54.901(c).

<sup>13</sup> *Order* at para. 111; new rule 54.901(b).

<sup>14</sup> *Order* at para. 92; new rule 54.901(a)(2).

<sup>15</sup> *Order* at para. 138; new rule 54.319(e).

<sup>16</sup> *Order* at para. 145; new rule 54.319(f)–(g).

<sup>17</sup> *Order* at para. 153; new rule 54.901(f)(2).

<sup>18</sup> *Order* at para. 153; new rule 54.901(f)(3).

<sup>19</sup> Rule 54.302(a).

applying these reforms.<sup>20</sup> Those 11 steps are hardly straightforward calculations—and hardly something a rural telephone company can do without hiring yet another accounting consultant.

Believe it or not, the complexity only increases as you go further down the rabbit hole. Consider the new limits on operating and capital expenses in steps two and four. For operating expenses, the *Order* invents double log regression analysis (DLRA) benchmarks that compare similarly situated rate-of-return carriers based on their size and density—or more precisely the natural log of each carrier’s operating expenses per housing unit to the natural log of the housing units in a carrier’s area, the natural log of the density of that area, and the square of the natural log of the density of that area.<sup>21</sup> For capital expenses, the *Order* creates a limit on Annual Allowable Loop Plant Investment (AALPI) equal to 15% of a carrier’s inflation-adjusted accumulated depreciation plus 5% of a carrier’s inflation-adjusted total loop investment, adjusted to account for at least eight different factors.<sup>22</sup> To calculate the results of these new expense limits is no easy task. To foresee their impact on carrier operations and the deployment of broadband—the mind boggles.

The *Order* promises that the new limits will give carriers “sufficient incentive to be prudent and efficient in their expenditures.”<sup>23</sup> But if past is prologue, I wouldn’t count on it. Compare the DLRA benchmarks and the AALPI limit to the FCC’s last attempt to limit operating and capital expenses so that carriers would “operate more efficiently and make prudent expenditures”<sup>24</sup>: the quantile regression analysis (QRA) benchmarks. Like the DLRA benchmarks, the QRA benchmarks relied on a regression analysis to compare similarly situated companies. Like the AALPI limit, the QRA benchmarks relied on a large number of factors to try and accommodate differences between carriers. And like both, the QRA benchmarks were not designed to save the Fund a dollar. We know the QRA benchmarks chilled the investment climate and impeded the deployment of broadband to rural Americans.<sup>25</sup> I can only hope the sequel has a different ending.

The truth is I don’t know whether this *Order* will help or hinder broadband deployment in rural America. No one does. That’s in part because FCC leadership has deliberately left the public in the dark.

For example, the Commission did not propose adopting new operating expense limits on rate-of-return carriers in its *Seventh Recon Order* (the predicate for most of the rules adopted herein<sup>26</sup>), and never even sought comment on the DLRA benchmarks adopted in this *Order*. The genesis of the proposal appears to be an ex parte filing that “responded to concerns expressed by the Bureau [about] proposing

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<sup>20</sup> *Order* at para. 155; new rule 54.901(e)(1) & (3).

<sup>21</sup> *Order* at para. 99; new rule 54.303(a).

<sup>22</sup> *Order* at paras. 110–14; new rule 54.303(b)–(m) (adjustments include a broadband-deployment adjustment, a construction-allowance adjustment, a loop-cap-adjustment factor, a construction-limitation factor, an excess-loop-plant-investment carry forward, a no-wireline-facilities adjustment, a grant-funds adjustment, a loan-funds-disbursed adjustment, a contracted-construction-project adjustment, and a minimum-annual-allowed-loop-plant-investment adjustment).

<sup>23</sup> *Order* at para. 6.

<sup>24</sup> *Universal Service Transformation Order*, 26 FCC Rcd at 17742, para. 210.

<sup>25</sup> Letter from John Charles Padalino, Acting Administrator, Rural Utility Service, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, at 1–2 (Feb. 15, 2013).

<sup>26</sup> Although the *Seventh Recon Order* gave clear notice of some proposals, *see, e.g.*, 29 FCC Rcd at 7137, para. 269 (proposal to support stand-alone broadband); 7139–45, paras. 276–99 (proposal to allow a voluntary transition to model-based support), others are at best an outgrowth, logical or not, *see, e.g.*, *Order* at para. 160 (pinning the adoption of broadband deployment obligations on the FCC’s expressed desire to “renew a dialogue regarding the best way to encourage continued investment in broadband networks throughout rural America,” 29 FCC Rcd at 7134, para. 258).

potential limits on operating expenses.”<sup>27</sup> The Administrative Procedure Act, however, contains no exception to its notice-and-comment requirements for rules proposed by outside parties at the behest of agency staff in a nonpublic meeting.<sup>28</sup>

Another example: I’ve heard from rural advocates that it’s hard to understand what these reforms mean for rural broadband deployment without seeing the details. As the head of NTCA—The Rural Broadband Association said last month, “With any change of this magnitude . . . there is always a concern that it not be too complex and of course that it not disrupt the ability to serve customers. It will be absolutely essential to see the written words on the page and review the specific terms of the order to understand the actual effectiveness of the reforms and how all the moving parts will affect the ability of smaller providers to keep delivering on our national promise of universal service.”<sup>29</sup> Small, rural carriers from across the land have echoed those sentiments. And so do the American people, who rightfully think it bizarre that the federal government enacts major plans before letting them see what’s in it.

That’s why I asked the Chairman’s Office to release the text of this reform plan to the public in February. I am grateful to Commissioner O’Rielly (who played a leading role in creating the plan) for his support. But unfortunately, FCC leadership denied that request.

We should level with rural Americans before springing our “help” upon them. When the agency previously ignored their concerns, we ended up reconsidering our decisions in the *Universal Service Transformation Order* seven separate times. I fear we are making that same mistake again. Given this lack of transparency—given the limited feedback the public has been able to provide my office on the likely effect of these reforms—I cannot support their adoption.

And I must dissent on one more point. Just two months ago, four commissioners agreed that “advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion” because “one in ten Americans lacks access to 25 Mbps/3 Mbps broadband.”<sup>30</sup> Indeed, we found that 34 million Americans lacked access to 25 Mbps broadband, with a “stark contrast in service between urban and rural America.”<sup>31</sup> Having concluded as much, the statute requires us to “take immediate action to accelerate deployment of such capability.”<sup>32</sup>

And yet, the Commission ignores that congressional directive here and declines the invitation to take immediate action to accelerate deployment of 25 Mbps broadband. Rather, carriers must deploy only 10 Mbps broadband using their new stand-alone broadband support.<sup>33</sup> The 10 Mbps standard determines

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<sup>27</sup> Letter from Gerard J. Duffy, WTA Regulatory Counsel, et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, at 2 (May 29, 2015).

<sup>28</sup> See, e.g., 5 U.S.C. § 553(b); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (An agency “must *itself* provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment.” (emphasis in original)); see also *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) (explaining that a proposal “not published in the Federal Register” expressing the views of a party but “not the Commission” does not satisfy the APA’s requirements). Nor can I find an exception to the Paperwork Reduction Act or the Small Business Paperwork Relief Act that lets the agency direct small, rural carriers to submit additional paperwork to USAC, see *Order* at note 204, without first proposing a rule and going through the appropriate information collection review process. See, e.g., 44 U.S.C. § 3506(c)(2), (4).

<sup>29</sup> NTCA, NTCA Responds to Chairman Wheeler’s USF Reform Blog (Feb. 19, 2016), available at <https://www.ntca.org/2016-press-releases/ntca-responds-to-chairman-wheeler-usf-reform-blog.html>.

<sup>30</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 15-191, 2016 Broadband Progress Report, 31 FCC Rcd 699, 701, para. 4 (2016) (*2016 Broadband Progress Report*).

<sup>31</sup> *Id.* at 750, paras. 120–21.

<sup>32</sup> Telecommunication Act of 1996, § 706(b).

<sup>33</sup> New rule 54.308(a)(2) (“Rate-of-return recipients of Connect America Fund Broadband Loop Support (CAF BLS) shall be required to offer broadband service at actual speeds of at least 10 Mbps downstream . . .”).

the amount of stand-alone broadband funding a carrier receives,<sup>34</sup> the amount it must invest in new facilities,<sup>35</sup> the estimated cost of those facilities,<sup>36</sup> and whether a carrier must invest in new facilities at all.<sup>37</sup> It determines whether a carrier may participate in the model-based support,<sup>38</sup> whether a carrier may receive model-based support in a particular area,<sup>39</sup> and all of a carrier's interim buildout milestones.<sup>40</sup> And it determines whether an unsubsidized competitor reduces a carrier's stand-alone broadband support or model-based support.<sup>41</sup>

To be fair, the 10 Mbps standard is not the only one used. The *Order* does promise that in lower-cost areas (*i.e.*, those “fully funded” by the model) where the rate-of-return carrier elects model-based support, a group of rural consumers (no more than 75%) will receive 25 Mbps broadband—by 2026.<sup>42</sup> In other words, a decade from now a subset of a subset of a subset of rural consumers will get access to the broadband speeds that 96% of urban Americans can purchase today. That's unacceptable.

I implored my colleagues to change course. A few months ago, a majority of the Commission happily lectured us that “broadband” means 25 Mbps connectivity. If that's now the standard, don't we have a duty to support 25 Mbps broadband in rural America? If 25 Mbps broadband is “table stakes” for the 21<sup>st</sup> century,<sup>43</sup> shouldn't we give rural Americans a seat at the table? If we “have a moral and statutory obligation to do better” when “nearly 34 million Americans [can't] get high-speed fixed broadband even if they want[] it,”<sup>44</sup> don't we have a moral and statutory obligation to in fact *do better*?

But my request for equal digital opportunity was specifically rejected. FCC leadership made clear that the agency would not vote to give rural Americans a fair shake by giving them the same speeds their urban counterparts often enjoy. For all the talk of hypothetical fast lanes, the FCC consigns rural America to the actual slow lane.

For these reasons, I concur in part and dissent in part.

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<sup>34</sup> *Order* at para. 92 (calculating the stand-alone broadband benchmark based on the estimated costs and revenues of 10 Mbps broadband); *id.* at para. 109 (adjusting AALPI limit based on relative broadband availability).

<sup>35</sup> New rule 54.308(a)(2)(i) (defining the amount of support required for buildout based on a carrier's deployment of 10 Mbps broadband).

<sup>36</sup> New rule 54.308(a)(2)(ii) (defining the estimated cost per location of new facilities based on the estimated cost of deploying 10 Mbps broadband).

<sup>37</sup> New rule 54.308(a)(2)(i) (declining to require any support be used to buildout new facilities for carriers with 80% of more deployment of 10 Mbps broadband).

<sup>38</sup> *Order* at para. 66 (“[W]e will not make the offer of model-based support to any carrier that has deployed 10/1 broadband to 90 percent or more of its eligible locations in a state . . .”).

<sup>39</sup> *Order* at para. 56 (“We . . . direct the Bureau to exclude from the support calculations those census blocks whether the incumbent . . . is offering voice and broadband service that meets the Commission's minimum standards . . .”).

<sup>40</sup> *Order* at para. 32 (“As shown in the chart below, we require carriers receiving model-based support to offer to at least 10/1 Mbps broadband service to 40 percent of the requisite number of high-cost locations in a state by the end of the fourth year, an additional 10 percent in subsequent years, with 100 percent by the end of the 10-year term. We do not set interim milestones for the deployment of broadband speeds of 25/3 Mbps . . .”).

<sup>41</sup> *Order* at paras. 59, 124.

<sup>42</sup> New rule 54.311(d).

<sup>43</sup> *See, e.g.*, Prepared Remarks of FCC Chairman Tom Wheeler at 1776 Headquarters, Washington, DC, “The Facts and Future of Broadband Competition” at 3 (Sept. 4, 2014).

<sup>44</sup> *2016 Broadband Progress Report*, 31 FCC Rcd at 774 (Statement of Chairman Tom Wheeler).