



January 12, 2018

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *In re Connect America Fund*, WC Docket 10-90; *In re Universal Service Reform – Mobility Fund*, WT Docket No. 10-208

Dear Ms. Dortch:

In the October 18, 2017 Public Notice outlining the challenge process procedures (*Challenge Process PN*) for the Mobility Fund Phase II Auction (MF-II Auction), the Rural Broadband Auction Task Force, the Wireline Competition Bureau, and the Wireless Telecommunications Bureau (collectively the Bureaus) proposed detailed parameters and procedures for a robust and efficient challenge process to resolve disputes about the eligibility of areas that may receive MF-II support.¹ In this letter, CTIA urges the Bureaus to adopt the procedures proposed in the *Challenge Process PN* and expeditiously move forward to auction federal universal service funds to support the deployment of 4G-LTE mobile wireless broadband to unserved rural and other high-cost areas.

The Commission's MF-II challenge process began with a new, one-time collection of qualified 4G-LTE coverage data, defined by download speeds of 5 Mbps at the cell edge with 80 percent probability and a 30 percent cell loading factor, which will be used to establish a map of areas presumptively eligible to receive MF-II support.² Interested parties (challengers) have an opportunity to verify through testing the presumptively ineligible areas the Commission establishes using this new data.

¹ *Comment Sought on Mobility Fund Phase II Challenge Process Procedures and Technical Implementation*, Public Notice, 32 FCC Rcd 7596 (2017) (*Challenge Process PN*); see also *In re Connect America Fund*, Order on Reconsideration and Second Report and Order, 32 FCC Rcd 6282 (2017) (*Challenge Process Report and Order*).

² See, e.g., *Challenge Process PN* 32 FCC Rcd at 7597 ¶ 2.



To ensure that challenges are based on conditions that accurately reflect the consumer experience, the Commission's *Challenge Process Report and Order* requires prospective challengers to "purchase an appropriate service plan from each unsubsidized service provider in the challenged area."³ Because "some providers . . . reduce the speed of data on their networks for network management purposes (e.g., in the case of large data usage by particular users),"⁴ a challenger could influence the Commission's challenge process by submitting speed test data generated on a service plan where the challenger had intentionally exceeded a data cap in order to convert a presumptively ineligible area into an eligible area, despite the fact that 5 Mbps service is actually available.

To address this category of false positive challenges, the Bureaus "propose[d] to allow a [responding carrier] to submit data that identify a particular device that a challenger used to conduct its speed tests as having been subjected to reduced speeds, along with the precise date and time the speed reductions were in effect on the challenger's device" (the "data management proposal").⁵ Thus, the Bureau would have information from both the challenger and responding carrier to determine whether a challenger has sufficiently demonstrated through speed testing that an area should be included in the list of areas eligible for limited MF-II support. The Commission should adopt this proposal.

The Commission authorized the one-time data collection to improve the accuracy of presumptive eligibility determinations and reduce the costs and burdens associated with a lengthy challenge process.⁶ The Bureaus' data management proposal is consistent with the Commission's goals of improving the accuracy of eligibility determinations to ensure that only unserved areas receive funding while also minimizing the costs of the challenge process for participating parties and the Bureaus.

In a recent *ex parte*, however, the Rural Wireless Association (RWA) suggests that the data management proposal would "undermine the challenge process," and

³ *Challenge Process Report and Order*, 32 FCC Rcd at 6308 ¶ 50.

⁴ *Challenge Process PN*, 32 FCC Rcd at 7602 ¶ 14.

⁵ *Id.*

⁶ *Challenge Process Report and Order*, 32 FCC Rcd at 6287 ¶ 10.



proposes instead that the Bureaus should require that carriers disable data management practices for any challenger after receiving notice that the challenger will be testing service availability using a particular device during the challenge period, and others have made similar arguments.⁷ Instead, CTIA urges the Commission to adopt its proposal for the reasons explained below.

First, the Commission's proposal reasonably balances the burdens to challengers with the need for an efficient process to distribute federal universal service support to deploy mobile wireless broadband services in unserved rural areas. Given wireless providers' existing disclosures about data management practices, prospective challengers should have sufficient information to choose and disclose the type of plans selected for testing.⁸ Additionally, there is nothing in the record suggesting that challengers frequently will need substantial amounts of data during the challenge period. And, the fact that a challenger will not be able to further respond to a responding carrier's evidence of throttling is consistent with the Commission's determination not to permit challenger replies as a matter of administrative efficiency. Further, the *Challenge Process Report and Order* sets forth that, "in light of the steps . . . taken" to improve the accuracy of initial eligibility determinations (*i.e.*, the unique, one-time data collection), the burden of proof in the challenge process should be "on the challenger" to promote "administrative efficiency."⁹ The same considerations support the adoption of the Bureaus' proposal. To that end, the Bureaus previously have

⁷ See Letter from Caressa D. Bennet, General Counsel, and Erin P. Fitzgerald, Regulatory Counsel, RWA to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-208, WC Docket No. 10-90, GN Docket No. 17-258, at 3 (Dec. 8, 2017); see also Comments of Competitive Carriers Association at 4, WC Docket No. 10-90, WT Docket No. 10-208, (Nov. 8, 2017) ("CCA urges the Commission to refrain from adopting this proposal. Whether a carrier engages in throttling for network management purposes should not form part of the consideration of whether an area is eligible for MF-II support. Moreover, the proposal unnecessarily creates a loophole for challenged parties to argue that the challenger's collected data [are] wrong without providing the challenger an opportunity to respond."); Reply Comments of NTCA – The Rural Broadband Association 4, WC Docket No. 10-90, WT Docket No. 10-208 (Nov. 29, 2017) ("[T]his practice would undermine, if not eviscerate, the validity of the challenge process—it risks becoming the exception that swallows the rule. . . . Rather than placing the burden on would-be challengers, however, a more appropriate solution, as suggested by RWA, is to require that the challenger and challenged party work together to ensure that no throttling of data occurs during the challenge period.").

⁸ See, *e.g.*, 47 C.F.R. § 8.3. The Commission recently adopted revisions to its transparency rule for Broadband Internet Access Services service, but the new rule is not yet in effect. Based on the Commission's *Restoring Internet Freedom Report and Order*, the revised transparency rule will continue to require public disclosure of data management practices. See *In re Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, ¶¶ 215-220 (2018).

⁹ *Challenge Process Report and Order*, 32 FCC Rcd at 6313-14 ¶ 63.



determined that the benefits of increasing the “accuracy” of the challenge process and preventing overbuilding outweigh the “relatively small” burdens on challengers.¹⁰

Second, commenters proposing alternative approaches to the Commission’s *Challenge Process PN* do not explain why their proposals are necessary to ensure the integrity of the challenge process. Commenters have not explained how wireless providers would have any ability to selectively throttle challengers’ service during the challenge window. Indeed, they would not because carriers do not have the ability to identify challengers by their devices during the challenge period in order to engage in such behavior. Further, to submit evidence of routine data management, if it ever becomes relevant, the responding carrier would have to submit reliable, credible evidence, under penalty of perjury;¹¹ this proposal consequently is not susceptible to abuse, and any conceivable malfeasance would be readily apparent to Commission staff. Moreover, areas implicated by this proposal will be areas that already have been determined to be presumptively ineligible to receive support based on one-time, standardized data demonstrating the availability of unsubsidized 4G-LTE service. Thus, evidence of routine data management will be additive to, and consistent with, the available 4G-LTE coverage data. Additionally, even if responding carriers were prohibited from furnishing evidence that speed tests were subject to throttling, the responding carriers would still be able to submit other “additional data/information.”¹² Allowing responding carriers to include evidence of routine data management practices will reduce the burden on the Bureaus in evaluating the challenge. Absent such information, it could be more difficult to reconcile conflicting speed information from two different tests, based on the same parameters.¹³

¹⁰ See *Mobility Fund Phase II Challenge Process Handsets and Access Procedures for the Challenge Process Portal*, Public Notice, WC Docket No. 10-90, WT Docket No. 10-208, DA 17-1218 ¶ 6 (rel. Dec. 20, 2017) (declining to limit the cost of approved handsets because “handset acquisition costs are likely to be relatively small when compared to the total cost of testing and submitting challenges”; because limitation was inconsistent with the Commission’s “requirements mandating use of the latest devices” accurately to “reflect[] current consumer experience”; and because limiting the cost of handsets “could preclude use of some of the most recent handset models that support the most recent spectrum deployments and technologies,” thereby “reduc[ing] the accuracy of data collected”).

¹¹ *Challenge Process Report and Order*, 32 FCC Rcd at 6312-13 ¶¶ 60, 61.

¹² *Id.* at 6311-12 ¶¶ 59-60.

¹³ *Id.* at 6313 ¶ 63 (“Following the close of the response window, the Bureaus will adjudicate certified challenges based upon . . . the evidence submitted by the challenger and challenged party(ies) to determine whether adjustments to the initial eligibility map are appropriate. The Bureaus will weigh the evidence submitted by challengers and challenged parties, based on its reliability . . .”).



Third, even if the alternative proposals had merit, which they do not, the Bureaus lack the authority to adopt them. As noted, the *Challenge Process Report and Order* requires challengers to “purchase an appropriate service plan” that currently exists for the service area.¹⁴ CTIA is not aware that any wireless carrier currently offers a service plan that allows subscribers to disable routine data management policies. To achieve its express purpose that challengers’ tests “reflect consumer experience in the challenged area,”¹⁵ the Commission cannot grant RWA’s request and force carriers to create new service plans, exclusively for the purpose of administering the MF II challenge process.

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The Commission’s MF-II Auction is a unique opportunity to use limited federal universal service funds to support the deployment of 4G-LTE mobile wireless broadband to rural and other high-cost areas that otherwise would remain on the wrong side of the digital divide. For the foregoing reasons, the Bureaus should adopt the proposal in the *Challenge Procedures PN* to allow carriers to include evidence of data management practices in responses to MF-II Auction challenges.

¹⁴ *Id.* at 6308 ¶ 50.

¹⁵ *Id.*



Sincerely,

/s/ Matthew Gerst

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