

October 15, 2019

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

***Re: Connect America Fund; WC Docket No. 10-90***

Dear Ms. Dortch,

On October 11, 2019, members and representatives of ITTA, USTelecom and WISPA (collectively, “Associations”) met with Travis Litman, Chief of Staff and Senior Legal Advisor, Wireline and Public Safety for Commissioner Rosenworcel, regarding the Commission’s DRAFT Order on Reconsideration on Measuring CAF Recipients’ Broadband Performance.<sup>1</sup> The full roster of participants, both in person and on the phone, is listed below. The Associations expressed their appreciation for the improvements to the overall testing process made since the 2018 Order that will help to relieve burdens and clarify the speed and latency testing obligations. In that spirit, the Associations focused their advocacy on the following aspects of the Draft Order.

*Procedures for Testing Customers Subscribing to a Different Tier of Service*

First, the Associations proposed changes to the Draft Order’s process proposing to require carriers to upgrade the speeds of subscribers who purchase service at a Universal Service Fund (USF) supported location but purchase a lesser speed tier than the USF-supported deployment (e.g., if a provider builds gigabit capability as required but the subscriber only purchases a 25/3 Mbps tier).<sup>2</sup> The Associations explained that, contrary to the Commission’s assumptions, there can be significant burdens associated with upgrading an individual location. This upgrade is not necessarily a seamless “back-office” upgrade and, in fact, for CAF Phase II model deployments in particular, the upgrade may require replacing consumer premises equipment (CPE), physical entry for inside wire reconfiguration, and set-up time for each device in the consumer’s home, all for a marginal benefit over their current subscription. The Associations explained that the physical processes and associated scheduling of appointments with end users, as well as the customer confusion caused with a “free” upgrade, could significantly delay the time needed prior to initiation of line speed and latency measurement. This is particularly problematic because the subscriber lists for the CAF Phase II model support program, which is scheduled to begin performance testing first in January 2020, is likely to contain many subscribers at less-than-performance speeds because, for example, many legacy

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<sup>1</sup> *Connect America Fund*, WC Docket No. 10-90, Order on Reconsideration, FCCCIRC 1910-01 (Draft Order).

<sup>2</sup> *Id.* at para. 48.

customers that are capable of receiving 10/1 Mbps subscribed to, and are content with, 10 Mbps/768kbps service.

As a means of alleviating some of the challenges with upgrading a significant number of subscribers simply for testing purposes, and in the interests of time to stand up the testing process, the Associations proposed a system for first returning to the randomized sample pool before resorting to complicated interactions with customers to meet testing sample requirements. In this process, USAC would provide the carrier a list of randomly-chosen subscribers to test in each supported area. To the extent the list contains customers subscribing to a lower speed broadband service than the USF-supported service, the first option would be for the carrier to report back to USAC that the customer(s) are not subscribing to the supported tier; USAC would then replace that subscriber to be tested with another subscriber, and hopefully that process will yield a customer subscribing at the level of service to be tested. If the new subscriber chosen is still not subscribing at the tier required for testing, then the process will repeat. Should this process fail to yield a subscriber at the tier to be tested among the randomized pool, then the carrier would be responsible for upgrading the subscriber to the tested tier. Said differently, the carrier still has an obligation to upgrade subscribers if necessary for testing the applicable tier, but the requirement for doing so would be a last resort, not the first action required. The Associations believe this to be an equitable and efficient means of achieving the Commission's goal of 1Q 2020 testing of randomized supported locations while minimizing customer confusion and disruption.

#### *More Equitable Remedies for Performance Testing Misses*

The Commission, for the first time, “clarifies” in the Draft Order that “any failure to meet the speed and latency requirements will be considered a failure to deploy.”<sup>3</sup> Further, it goes on to institute penalties for this “failure to deploy” that are exponential in nature, compounding the importance of the issue.<sup>4</sup> The Associations asked the Commission to seek further comment on this provision or at least revise this section to ensure that the penalties do not end up being completely inequitable for the magnitude of the performance failure.

As an initial matter, though the Draft Order characterizes this provision as a clarification, it was not discussed in the 2018 order and there was no prior notice that the Commission was considering adopting penalties in this manner or of this magnitude; the “clarification” is unsupported in the text. The Commission has never sought comment on incorporating performance measurements into the penalty calculation outlined in section 54.320(d)(2) of the Commission's rules. That said, the Associations asked the Commission to consider whether there are different, more proportionate means of enforcing its speed and latency requirements. One problem lies in that, due to the concentrated nature of the testing samples, problems with a very small number of locations (e.g., five) could lead to a funding penalty for 10 percent of the total locations in an entire state—a potentially massive claw back when the percentage is extrapolated. Also, the penalty does not take into account the degree of the failure. For example, a location

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<sup>3</sup> *Id.* at para. 69.

<sup>4</sup> *Id.* at para. 69 at nn. 182-183 (providing examples of how USAC would recover support for this location covering the entire supported time period multiplied by 1.89).

that provides 7.5 Mbps is penalized at the same rate as a location providing 0.5 Mbps. This disproportionality, combined with the problem of extrapolation, causes significant concern about end-of-term testing. This can cause a snowball effect and disincent and/or discourage future participation in USF programs because of the difficulties associated with obtaining a letter of credit, which is required under the CAF Phase II Auction and proposes for use in the Rural Digital Opportunity Fund. Banks will be very reluctant to lend given the possibility of these draconian penalties 10 years down the line when all prior indications showed that the network was appropriately deployed. This will either drive up the cost of the letter of credit or discourage banks from issuing them altogether, which in turn will depress participation in the Commission's high cost USF programs. Finally, it is not clear which measurement period would be used in the section 54.320(d) (2) calculation. In the CAF auction program, compliance with the deployment obligation is based on the deployment status on the milestone date (six years after funding was authorized). However, performance measurements are collected for one week each quarter and then reported for the calendar year as a whole by the following July 1.

The Associations are currently discussing potential solutions to this problem that take into account the Commission's desire for program compliance and accountability but still lead to a more rational result for end-of-term testing.

#### *Grandfathering Latency Testing Regimes*

The Associations once again revisited the issue of the frequency of latency testing. The Draft Order continues to require parties to conduct latency testing once per minute, while speed tests are required only once per hour. The Associations have previously advocated that there was inadequate notice of this requirement and AT&T has twice submitted actual comparative test results on the record that prove there is no statistically significant different compliance result if latency data is collected once per hour just as required for speed data.<sup>5</sup> Both sets of results are well within CAF compliance standards and, in fact, the per-hour testing frequency appears to be a somewhat more rigorous standard from a compliance perspective.

If the Commission does not modify the test frequency to once per hour for all recipients, it should at a minimum make a discrete change to the order to allow for carriers that have already made substantial investments in performance testing without the benefit of the Commission's decision. Specifically, the Associations requested that CAF Phase II Model participants and Rural Broadband Experiment participants, both of whom are already at the end of their program cycle, should be allowed the option of using either once-per-minute testing or once-per-hour testing. The Associations explained that given how close these programs are to completion, some carriers already invested in testing equipment and it would cost over \$1 million to upgrade this equipment to meet the Commission's new standard, all for a testing program that will

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<sup>5</sup> See Letter from Cathy Carpino, Assistant Vice President – Senior Legal Counsel, AT&T Services, Inc., to Marlene Dortch, Secretary, FCC WC Docket No. 10-90 (Apr. 12, 2019); Letter from Cathy Carpino, Assistant Vice President – Senior Legal Counsel, AT&T Services, Inc., to Marlene Dortch, Secretary, FCC WC Docket No. 10-90 (May 21, 2019).

conclude shortly.<sup>6</sup> Simply put, the costs of requiring a change to legacy programs at this point significantly outweigh the benefits.

*Additional Clarifications*

We asked the Commission to clarify that the language in paragraph 18 of the 2018 order, which provides that a carrier may test to a “test server located at or reached by passing through an FCC-designated IXP” still applies. In particular, the Commission should modify paragraph 19 of the Draft Order to state that a provider may test to a *test server located at or reached by passing through* “any building facility or location housing a public Internet gateway that has an active interface” to a qualifying ASN.

Please contact me with any questions.

Respectfully submitted,

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Mike Saperstein  
Vice President, Policy & Advocacy

cc: Travis Litman

Participants (in person)

Mike Jacobs (ITTA)  
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Participants (on the phone)

Tom Freeberg (CenturyLink)  
Ann Morrison (Consolidated)  
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Bob DeBroux (TDS Telecom)

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<sup>6</sup> AT&T’s filing with the Office of Management and Budget detailing the burdens associated with switching from once-per-hour to once-per-minute latency testing is attached as Appendix A. At the very least, the Commission should permit such carriers to forgo once-per-minute testing during the pre-testing period as they make modifications to their systems.