



May 1, 2019

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

**Re: *Ex Parte* Communication: WC Docket No. 10-90**

Dear Ms. Dortch:

On April 29, 2019, Mike Saperstein of USTelecom, Jeff Lanning of CenturyLink, Ken Pfister and Dave Junker of Great Plains Communications,<sup>1</sup> Mary Henze of AT&T, and the undersigned of ITTA, as well as Steve Coran of Lerman Senter PLLC, Nathan Stooke of Wisper Internet, and Sam Curtis of AtLink (all three representing WISPA), met separately with Arielle Roth of the Office of Commissioner O’Rielly, Travis Litman of the Office of Commissioner Rosenworcel, and Randy Clarke of the Office of Commissioner Starks,<sup>2</sup> regarding the *Order* in the above-referenced proceeding, as well as the pending petitions for reconsideration and applications for review of it, and responsive pleadings thereto.<sup>3</sup>

During the meetings, we focused primarily on issues raised in the letter ITTA, USTelecom, and WISPA recently filed jointly in this proceeding.<sup>4</sup> First, we emphasized that AT&T latency testing data recently submitted in the record by Petitioners,<sup>5</sup> as well as more granularly by AT&T itself,<sup>6</sup> support our request that the Commission harmonize the frequency of latency testing with the frequency of speed testing by requiring one latency test per hour. The

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<sup>1</sup> Messrs. Pfister and Junker participated by telephone.

<sup>2</sup> Mr. Lanning did not participate in the meeting with Mr. Clarke.

<sup>3</sup> See *Connect America Fund*, Order, 33 FCC Rcd 6509 (WCB/WTB/OET) (*Order*); see also, e.g., Comments of ITTA – The Voice of America’s Broadband Providers, WC Docket No. 10-90 (Nov. 7, 2018); Petition of USTelecom – The Broadband Association, ITTA – The Voice of America’s Broadband Providers, and the Wireless Internet Service Providers Association for Reconsideration and Clarification, WC Docket No. 10-90 (Sept. 19, 2018) (Joint Petition); Reply of USTelecom, ITTA, and WISPA to Opposition to Petition for Reconsideration and Clarification, WC Docket No. 10-90 (Nov. 19, 2018).

<sup>4</sup> Letter from Michael J. Jacobs, Vice President, Regulatory Affairs, ITTA, Mike Saperstein, Vice President, Law and Policy, USTelecom, and Claude Aiken, President & CEO, WISPA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed Apr. 10, 2019) (Petitioners’ Apr. 10 Letter). We refer to ITTA, USTelecom, and WISPA as “Petitioners” in light of our joint advocacy in this proceeding commencing with the Joint Petition.

<sup>5</sup> See *id.* at 1-2.

<sup>6</sup> See Letter from Cathy Carpino, Assistant Vice President – Senior Legal Counsel, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed Apr. 11, 2019).

data evince no statistically significant difference between testing latency once per minute, as the *Order* currently requires, and once per hour as we have proposed; specifically, the average latency reported was nearly identical regardless of the testing frequency, the standard deviation to the average latency was nearly identical under both methodologies, and the overall compliance rate based on the per-minute testing was 99.8% versus 100% for per hour testing. In addition, there is no record basis for the Commission to adopt a once-per-minute latency testing regime, doing so would violate the APA,<sup>7</sup> and the burdens of potentially requiring providers to conduct 60 times more testing than is necessary are significant<sup>8</sup> and cannot survive a cost-benefit analysis. We suggested that the Commission require one latency test *per hour* during the testing period, but continue to afford providers flexibility to do more than the minimum required number of latency tests at subscriber test locations, so long as they include the results from all tests performed during testing periods in their compliance calculations.<sup>9</sup>

The *Order*'s latency testing regime is also infirm insofar as its once-per-minute testing requirement *appears* to be informed by latency testing in the context of the Measuring Broadband America (MBA) program.<sup>10</sup> If, indeed, that is the case, it is problematic for several reasons. For one thing, as Petitioners have pointed out, the MBA program has tested latency one per hour.<sup>11</sup> Furthermore, the MBA program is a voluntary testing program designed to be descriptive of the performance of the entire broadband ecosystem that a packet traverses while, in contrast, the *Order*'s framework is intended to test the performance of providers' "broadband service *in their supported areas*."<sup>12</sup> While the MBA program tests performance through providers' networks and the public Internet, the Commission's intention in establishing the broadband performance testing framework that the *Order* attempted to implement was to test on-net performance up to the Internet gateway, which is the "peering point between the broadband provider and the public Internet for a given consumer connection."<sup>13</sup>

In that regard, we urged the Commission to provide Connect America Fund (CAF) support recipients maximum flexibility as to the endpoints of speed and latency testing.<sup>14</sup> In the

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<sup>7</sup> See, e.g., Joint Petition at 5-9.

<sup>8</sup> See Petitioners' Apr. 10 Letter at 2; Joint Petition at 8-9.

<sup>9</sup> See *Order*, 33 FCC Rcd at 6519, para. 27.

<sup>10</sup> While Petitioners have observed that the *Order* references the MBA program in setting forth latency testing requirements, see, e.g., Joint Petition at 6, the crux of the matter is that Petitioners have not been able to discern, whether from the MBA testing program or otherwise, any precedent or justification for testing latency once per minute,

<sup>11</sup> See *id.* at n.13 (citing MBA testing documentation stating that latency testing occurs hourly).

<sup>12</sup> *Order*, 33 FCC Rcd at 6510, para. 3 (emphasis added). See also *id.* ("Recipients of high-cost support must . . . test *their broadband networks* for compliance with speed and latency metrics") (emphasis added); Joint Petition at 7 ("The purposes of MBA and CAF are very different").

<sup>13</sup> *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17706, para. 111 (2011) (*USF/ICC Transformation Order*), *aff'd sub nom.*, *In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

<sup>14</sup> See Petitioners' Apr. 10 Letter at 3-4.

landmark *USF/ICC Transformation Order*, where the Commission first set forth the prospective requirement that CAF recipients test their broadband networks for compliance with speed and latency metrics,<sup>15</sup> the Commission concluded that speed and latency should be tested “from the end-user interface to the nearest Internet access point.”<sup>16</sup> While providers should be permitted to test to or through a “Commission-designated IXP” if they wish, and the Commission should provide for maximum flexibility as to facilities and servers within those designated cities, for most providers, being forced to route their traffic to cities hundreds of miles away, merely for testing purposes, presents a complete artificiality that, by its very nature, potentially contravenes the Commission’s goal of simulating service from the customer’s perspective.<sup>17</sup> Moreover, many smaller CAF recipients rely on upstream bandwidth providers and have no control over the destination of internet traffic. For most providers, “on net” testing simply is a better representation of end users’ real world experiences. Because “providers will be subject to audit of all testing data,”<sup>18</sup> the Commission need not and should not contrive uniform testing endpoints that bear no resemblance to providers’ real-world traffic flows.

Third, we reiterated that the Commission should more closely align Tier 1 of the *Order*’s compliance framework for latency and speed benchmarks with Tier 1 of the broadband deployment compliance framework, as the goals of both compliance frameworks are to ensure providers meet their service obligations. The *Order* unfairly imposes more substantial Tier 1 penalties on CAF recipients that fail to meet speed and latency benchmarks, including suspension of funding for *any* non-compliance, over those that fail to meet deployment milestones, in which quarterly reporting – not suspension of support – is imposed for a compliance gap of 5-15 percent. In doing so, the misaligned non-compliance regimes convey presumably unwittingly the impression that the Commission values adherence to speed and latency performance requirements more than it does ensuring timely broadband availability for Americans who do not currently enjoy it.<sup>19</sup> The immediate suspension of funding is draconian insofar as it does not differentiate between minuscule and substantial non-compliance, and it paradoxically compounds a provider’s inability to meet its broadband service obligations, forcing it to divert reduced funding either from coming into full compliance or from broadband deployment efforts.<sup>20</sup> Similarly, although, as Petitioners have asserted repeatedly, our members understand the importance of, and fully support, a broadband metrics testing program that

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<sup>15</sup> *USF/ICC Transformation Order*, 26 FCC Rcd at 17705, para. 109.

<sup>16</sup> *Id.* at 17706, para. 111.

<sup>17</sup> *See Order*, 33 FCC Rcd at 6516, para. 19.

<sup>18</sup> *Id.* at 6509, para. 2.

<sup>19</sup> *See, e.g.*, Letter from Mary L. Henze, Assistant Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, at 2 (filed Mar. 15, 2019) (AT&T Mar. 15 Letter).

<sup>20</sup> *See* Joint Petition at 13 (withholding of CAF funds for minor shortfalls, in already challenging high-cost areas, could hinder a provider’s ability to come into full compliance); AT&T Mar. 15 Letter at 2 (“it is counterproductive to remove the funding the carrier relies on to continue to deploy broadband. As the Commission has explained, the goal of the deployment compliance framework is to ensure carriers meet their broadband commitment; it is not to cripple their ability to do so by sanctioning them for a minor, and temporary, miss of a milestone. The same rationale should apply to performance measurements...”).

maintains the integrity of the CAF programs, another self-defeating consequence of the immediate suspension of funding could be to disincite providers from marketing their supported services to potential customers until they have *absolute* certainty that they can provision broadband service to deployed locations at a performance level that will avert exposure for non-compliance.

Finally, we advocated for a revised testing and reporting implementation period, in accordance with our detailed suggestions in our April 10<sup>th</sup> letter.<sup>21</sup> Among the features of our proposal are two “categories” of implementation timing based on whether certain of the CAF program’s deployment milestones already have passed, a transitional “test the testing” period for each category, and reporting requirements that would kick in sooner relative to testing following the transitional period than they would under the *Order*’s originally contemplated timeline. The proposal is consistent with how the Commission approached implementation of broadband deployment reporting to the HUBB Portal, and recognizes that it is impractical to require performance testing by support recipients until their obligations to deploy the broadband to be tested are verified, as represented by the first milestone. Moreover, the timing suggested by Petitioners for implementing testing and reporting of performance of second category program services – the vast majority of which are provided by smaller carriers<sup>22</sup> -- should adequately address concerns expressed by many in the record regarding a revised initial testing and reporting timetable that accommodates reasonable time to implement the Commission’s forthcoming order as well as for cost-effective testing equipment to become sufficiently available in the marketplace.<sup>23</sup> It also would, for each second category program, furnish USAC with sufficient time to generate, and providers to set up testing for, the randomly selected sample of test subjects that will be based on the first HUBB filing following the first milestone.

Please do not hesitate to contact the undersigned with any questions regarding this submission.

Respectfully submitted,

/s/

Michael J. Jacobs  
Vice President, Regulatory Affairs

cc: Arielle Roth  
Travis Litman  
Randy Clarke

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<sup>21</sup> See Petitioners’ Apr. 10 Letter at 4-9.

<sup>22</sup> See *id.* at 4-5, 7-9.

<sup>23</sup> See, e.g., Letter from Michael J. Jacobs, Vice President, Regulatory Affairs, ITTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, at 1-2 (filed Feb. 27, 2019).