

**Before the  
Federal Communications Commission  
Washington, D.C 20554**

In the matter of	)	
	)	
Establishing the Digital Opportunity	)	WC Docket No. 19-195
Data Collection	)	
	)	
Modernizing the FCC Form 477	)	WC Docket No. 11-10
Data Program	)	

**PETITION FOR RECONSIDERATION**

Microsoft Corporation, by counsel and pursuant to Section 1.429 of the Commission's rules,<sup>1</sup> hereby files this Petition for Reconsideration of the Commission's Report and Order and Second Further Notice of Proposed Rulemaking in the above-captioned proceedings.<sup>2</sup> In support of this Petition, the following is respectfully stated:

**I.     Introduction**

Microsoft shares the Commission's view that improving the quality of broadband data is essential to providing critical visibility needed for the agency to make appropriate policy choices. In addition, accurate data better informs Congress, so that it may fulfill its oversight responsibilities and make legislative course corrections, when necessary. The Commission is to be commended for adopting the new Digital Opportunity Data Collection ("DODC"), which

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<sup>1</sup> 47 C.F.R. § 1.429.

<sup>2</sup> *Establishing the Digital Opportunity Data Collection, et al.*, WC Docket No. 19-195, *et al.*, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 19-79, 84 Fed. Reg. 43705 (rel. Aug. 6, 2019) ("*R&O*"). The *R&O* was published in the Federal Register on August 22, 2019. Accordingly, this Petition, filed within thirty days of public notice, is timely.

promises to produce granular data that is significantly more accurate than what is available today through FCC Form 477 (“Form 477”).

In particular, Microsoft agrees with the Commission’s decisions in the *R&O* to:

- Require the submission of coverage polygons, which will greatly reduce the current overstatement of broadband service availability. No longer will an entire census block be deemed covered if only one customer is served;
- Sharpen the definition of fixed broadband service availability where areas are served, but limited to those areas that can be served within ten days without the expenditure of significant resources, and without charges exceeding an ordinary activation fee; and
- Facilitate public input to hold carriers providing data accountable.

As set forth below, Microsoft seeks reconsideration of the Commission’s decision to not immediately amend the Form 477 instructions<sup>3</sup> to include the new DODC definition of where broadband service is available, so as to immediately align the two FCC broadband data collections.

Under Section 1.429, a petitioner must, i) be an interested person, ii) state with particularity the respects in which the petitioner believes the action taken should be changed, iii) file within 30 days from the date of public notice of such action, and iv) raise issues that were not fully considered and rejected in the same proceeding.

As an active participant in these proceedings, Microsoft has more than demonstrated that it is an interested person and it has filed a timely Petition. In the discussion below, Microsoft will state with particularity how the Commission should change its decision with respect to the issue raised. Finally, the issue raised has not been fully considered and rejected

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<sup>3</sup> FCC Form 477, Local Telephone Competition and Broadband Reporting, Instructions (“Form 477 Instructions”), accessed at <https://transition.fcc.gov/form477/477inst.pdf>.

in the *R&O*. In fact, the Commission has made policy choices without specifically rejecting the alternative proposed in this Petition.

**II. The Commission Should Immediately Amend its FCC Form 477 Instructions to Redefine Where Broadband Service is Available.**

Under the current FCC Form 477 instructions, fixed broadband connections are deemed to be available under the following standard:

For purposes of this form, fixed broadband connections are available in a census block if the provider does, or could, within a service interval that is typical for that type of connection—that is, without an extraordinary commitment of resources—provision two-way data transmission to and from the Internet with advertised speeds exceeding 200 kbps in at least one direction to end-user premises in the census block.<sup>4</sup>

These instructions lack specificity, allowing carriers freedom to self-define a reasonable service interval, and what constitutes an extraordinary commitment of resources, shortcomings that are in part responsible for the overstated availability data now plaguing Form 477 data. Consumers living in areas where availability is overstated are harmed if they must incur unaffordable line extension or other special charges to commence service, or suffer inordinate delays to connect service.

Moreover, once an area is deemed to be served, it is ineligible for universal service investments. As a result, citizens living in such areas will not see the benefits of improved broadband service. Over the past year, Microsoft has entered into the record data showing that in many rural areas, consumers are not using the Internet at broadband speeds shown in

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<sup>4</sup> Form 477 Instructions at 17 (Sec. 5.3).

areas where the FCC's Form 477 data show broadband to be available.<sup>5</sup> In some cases, the disparities are dramatic. Nationwide, Microsoft estimates that 162.8 million Americans are not using the Internet at speeds of 25 Mbps up/3 Mbps down, compared to the FCC's availability data showing only 21 million Americans lack broadband at that speed.<sup>6</sup> These disparities call for immediate course corrections to deliver more accurate availability data.

With the new DODC data collection, the Commission takes an important step in improving its availability data by more specifically defining where service is considered to be available:

For purposes of the Digital Opportunity Data Collection, service is actually available in an area if the reporting fixed provider has a current broadband connection or it could provide such a connection within ten business days of a customer request, without an extraordinary commitment of resources, and without construction charges or fees exceeding an ordinary service activation fee. The filer must be able to establish a connection within this timeframe to every end-user location contained in the reported broadband coverage polygon.<sup>7</sup>

Areas requiring line extension or other special construction charges are removed from the map, as are areas that require a significant expenditure of resources to serve. The *R&O* adopts

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<sup>5</sup> See Ex Parte Letter from Paula Boyd and David A. LaFuria to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-238; WC Docket No. 11-10 (filed Mar. 29, 2019), *accessed at* <https://ecfsapi.fcc.gov/file/10329025758889/2019%200329%20ex%20parte%20letter%20FINAL.pdf>; Ex Parte Letter from Paula Boyd and David A. LaFuria to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-10 (filed Jan. 2, 2019), *accessed at* <https://ecfsapi.fcc.gov/file/101032040607838/2019%200102%20ex%20parte%20letter%20FINAL.pdf>; Ex Parte Letter from Paula Boyd and David A. LaFuria to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-10 (filed Dec. 5, 2018) *accessed at* <https://ecfsapi.fcc.gov/file/1206313012489/2018%201205%20ex%20parte%20letter%20FINAL.pdf>.

<sup>6</sup> *Id.*

<sup>7</sup> See *R&O* at ¶ 13.

specific examples of what a significant expenditure looks like, adding further context for submitting carriers to follow.<sup>8</sup> These are big improvements to how broadband availability will be defined.

The Commission should immediately incorporate these new standards into FCC Form 477. If it were to take two years to fully implement the new DODC, four more FCC Form 477 filings would be made using the currently inferior definition of service availability. By incorporating the updated service availability definition now, the Commission will improve future Section 706<sup>9</sup> reports, enabling the Commission to make policy judgments and to better inform Congress. Congress deserves the most accurate data available and these new instructions, which sharpen where service is deemed available, will assist Congress in fulfilling its oversight responsibilities and improve its ability to make course corrections, where necessary.

This is the second time that the Commission has acknowledged the shortcomings of FCC Form 477. In 2017, in response to industry agreement that FCC Form 477 data was not of sufficient quality to conduct the Mobility Fund Phase II (“MF-II”) auction, the Commission ordered a “one-time” data collection to replace FCC Form 477 data as the basis for determining

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<sup>8</sup> *Id.*

<sup>9</sup> Section 706 of the Telecommunications Act of 1996 (“Section 706”), Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996), 47 U.S.C. § 1302), as amended by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008), as codified in Title 47, Chapter 12, of the United States Code.

MF-II eligible areas.<sup>10</sup> By changing the instruction for fixed service availability in the upcoming DODC, the Commission again recognizes that FCC Form 477 data is deficient.<sup>11</sup>

In the upcoming Rural Digital Opportunity Fund (“RDOF”) auction, the Commission has decided to identify eligible areas using maps based on the most recently available FCC Form 477 data collection.<sup>12</sup> This is a big decision, because \$16 billion will be disbursed to auction winners. By immediately improving this one instruction on FCC Form 477, the Commission will correspondingly improve the maps of eligible areas for the auction by opening up perhaps significant geographic areas that are currently shown incorrectly as being served. Given all of this, it would be arbitrary and capricious for the Commission to not immediately align the FCC Form 477 instructions with the DODC.<sup>13</sup>

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<sup>10</sup> See generally, *Connect America Fund, Universal Service Reform – Mobility Fund*, Order on Reconsideration and Second Report and Order, FCC 17-102, 32 FCC Rcd. 6282 (2017) at 6285-89 (¶¶4-13); id., at ¶ 5 (“For some time, commenters have expressed concerns in the record regarding using the Form 477 data for MF-II purposes.”)

<sup>11</sup> See *R&O* at ¶ 10 (footnote omitted):

It has become increasingly clear that the fixed and mobile broadband deployment data collected on the Form 477 are not sufficient to support the specific imperative of our USF policy goals. We conclude that in order to continue to advance our statutory universal service obligations, it is necessary to create a new data collection, calculated to produce broadband deployment maps that will allow the Commission to precisely target scarce universal service dollars to where broadband service is lacking.

<sup>12</sup> *Rural Digital Opportunity Fund*, WC Docket No. 19-126, *Connect America Fund*, WC Docket No. 10-90, Notice of Proposed Rulemaking, FCC 19-77, 84 Fed. Reg. 43,543 (rel. Aug. 2, 2019).

<sup>13</sup> Agency determinations based on the record are reviewed under the “arbitrary and capricious” standard. 5 U.S.C. § 706(2)(A). Under the standard, a reviewing court must consider whether an agency’s decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989); see *Motor Vehicle Mfrs. Ass’n v. State Farm Auto. Inc. Co.*, 463 U.S. 29, 43 (1983). In this case, the Commission has failed to make revisions to the provisions in Section 5.3 of the Form 477 Instructions to determine the availability of broadband connections in a census block, notwithstanding its recognition of the insufficiencies of Form 477 data and notwithstanding its adoption of DODC provisions that toughen the test for determining broadband availability. The Commission’s decision not to revise Section 5.3 fails to consider relevant factors and could be seen as meeting the “clear error in judgment” standard.

Once the new DODC collection is fully implemented and the Commission is satisfied that it is a superior data collection, having two broadband access data collections (DODC and Form 477) running on parallel tracks, using inconsistent definitions of service availability, is not a best practice. It complicates the Commission's and outside parties' ability to conduct meaningful analysis of the data. In addition, the submission of FCC Form 477 and DODC broadband access data using separate definitions needlessly adds to filing burdens on all carriers, especially small ones.

Yet, immediately amending the Form 477 service availability instructions to match the new DODC instructions would not result in the Commission's collecting information that "is ... unnecessarily duplicative of information otherwise reasonably accessible to" the Commission.<sup>14</sup> There would be no collection of duplicative information for a temporal reason, namely that the new DODC is not currently in effect, and perhaps will not take effect for more than a year.<sup>15</sup> Only Form 477 data using the new instructions would be collected in the interim. Moreover, even if there were a temporary overlap in the Form 477 and DODC filing instructions during the transition to DODC, there would be no collection of duplicate data because distinct types of information would be gathered by Form 477 and DODC: Form 477 requires submission of a list

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<sup>14</sup> 44 U.S.C. § 3506(c)(3)(B).

<sup>15</sup> The *R&O* directs the Commission's Office of Economics and Analytics ("OEA") to "publish[ ] complete instructions for filing data and issu[e] an order, based on the record received in response to the *Second Notice*, that designates the precise specifications for the broadband coverage polygons ...." *R&O* at ¶ 15. In addition, OEA must oversee the development of a new online portal and the filing processes that will enable service providers to submit the polygons. *Id.* Thus, it will be some time before DODC filing instructions will be developed, published, and reviewed by the Office of Management and Budget.

of covered census blocks, while DODC requires submission of polygons depicting coverage certified by the filing carrier. These two submissions are not duplicative data.

Accordingly, the Commission can immediately align the Form 477 instructions to the DODC, as requested herein. And, it can implement an orderly transition from Form 477 to DODC without running afoul of any statutory information collection requirements. In so doing, the Commission will serve the public interest by immediately improving the quality of its service availability data.

Microsoft notes that the arguments raised above concerning the need to immediately amend the Form 477 instructions, while discussed in the record, were not specifically considered and rejected in the *R&O*. There is no discussion of whether to immediately amend Form 477 to conform to the new DODC. Accordingly, this issue is appropriate for the Commission to decide on reconsideration.

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**III. Conclusion.**

For the reasons set forth above, Microsoft respectfully requests the Commission to reconsider its decision and immediately amend its Form 477 instructions to include the new DODC definition of where broadband service is available, so as to immediately align the two broadband data collections.

Respectfully submitted,

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