Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90

To: Chief, Wireline Competition Bureau

PETITION FOR PARTIAL RECONSIDERATION

The Wireless Internet Service Providers Association ("WISPA") hereby respectfully requests partial reconsideration of the Report and Order ("*R&O*") that the Wireline Competition Bureau ("Bureau") adopted in the above-referenced docket on May 16, 2013.[1]

WISPA applauds the effort and consideration that went into analyzing the numerous comments and suggestions submitted in this proceeding, and in crafting a workable CAF Phase II challenge process. WISPA recognizes that the Bureau faced a challenging directive – assuring "that funding not flow to an areas where there is an unsubsidized competitor, while at the same time ensuring that census blocks are not unnecessarily excluded from funding,"[2] a process that involves numerous complex components and factors. WISPA appreciates that the Bureau adopted many of the suggestions and proposals WISPA presented in the record concerning the Phase II challenge process. WISPA's purpose in filing this Petition is to draw the Bureau's attention to two issues that have a direct bearing on the implementation and workability of the challenge process, and that WISPA believes must be resolved before that process is initiated.

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[1] *In the Matter of Connect America Fund*, Report and Order, DA 13-1113 (WCB rel. May 16, 2013) ("*R&O*"). The R&O was published in the Federal Register on June 3, 2013. *See* 78 Fed. Reg. 32991 (June 3, 2013). Therefore, this Petition is timely filed.

[2] *R&O* at ¶ 13.

Discussion

I. THE DEFINITION OF "UNSUBSIDIZED COMPETITOR" MUST BE REVISED.

A primary purpose of the *R&O* was to "adopt[ ] a framework for the challenge process that will be used to finalize the list of areas that will be eligible for Connect America Phase II model-based support."[3] The challenge process "will focus on whether an area is served by an unsubsidized competitor."[4] Thus, it is fundamental to the successful operation of the challenge process that the definition of "unsubsidized competitor" be appropriate, and settled. At present, it is neither.

Three petitions for reconsideration have been filed, and remain pending, addressing the very issue of properly defining who qualifies as an "unsubsidized competitor."[5] Thus, as the situation now stands, the Bureau risks implementing the challenge process using a key definition that has been called into question by numerous parties, and that WISPA believes is critically flawed. By pushing forward with the challenge process while such a question remains unresolved, the Bureau is putting the cart before the horse, and risks creating an eventual administrative predicament.

The current definition's apparent requirement – that both voice *and* broadband be provided by a single entity – is seriously misguided and, if allowed to stand, will have severe adverse policy and public interest consequences.[6] If the goal of the CAF program is to ensure that voice service is maintained and broadband-capable infrastructure extended[7] – while concurrently avoiding the misallocation of funding that would result from directing funds to

[3] *Id.* at ¶ 2.
[4] *Id.* at ¶ 12.
[5] On December 29, 2011, three entities – ViaSat, Inc., NTCH, Inc. and WISPA – filed separate petitions for reconsideration requesting revision or clarity of the definition of "unsubsidized competitor."
[6] Section 54.5 defines "unsubsidized competitor" as "a facilities-based provider of residential fixed voice and broadband service that does not receive high-cost support."
[7] *See R&O* at ¶ 1.

areas that already receive adequate voice and broadband services – then the definition of "unsubsidized competitor" *must* focus on the *availability* of voice and broadband services in a particular area, not on whether *one particular single company* offers both unsubsidized voice and broadband services in that area. Stated simply, the question should be whether a particular area has voice and broadband service meeting certain levels, not whether a single company (as opposed to two, or more, business entities) supply those services. As WISPA stated in its petition:

> In many areas, voice service may be provided by a telecommunications carrier and broadband service may be provided by a separate fixed broadband provider. If CAF funds are used to support areas where unsubsidized services already exist, taxpayer dollars would be misdirected away from areas that truly need support .... [T]he current 'unsubsidized competitor' definition creates the near certainty that CAF subsidies will be extended to . . . existing carriers that will then become direct competitors with existing unsubsidized fixed broadband providers.[8]

Surely, the current definition, if left intact, will create unjust results that contravene the intent of the CAF program. Areas that already receive service (albeit from two or more entities, rather than one particular company) will be targeted for funding at the expense of truly unserved areas. Unsubsidized providers that have invested their capital into serving particular areas will find themselves at risk of having their service areas overbuilt by new competitors that benefit from federal subsidies.

The Bureau recognizes the unresolved status of WISPA's petition (and of the other two petitioners) and claims that its decision to "adopt processes and presumptions to implement the Commission's *existing definition* [of unsubsidized competitor] . . . in no way prejudices any action the Commission may take on the pending petitions for reconsideration."[9] WISPA has no complaint with the Bureau relying on the rules as they stand today. That said, however, the

[8] WISPA Petition for Reconsideration, WC Docket No. 10-90, *et al.* (Dec. 29, 2011) at 6.
[9] *R&O* n.9.

Bureau should not move forward with the limited challenge process it adopted until the full Commission has acted on the pending petitions seeking reconsideration of a definition that will have a significant bearing on the criteria that will be used to determine those census blocks that will be considered for Phase II funding. Certainly, revising the definition to clarify that voice *and* broadband services need not be provided by a solitary entity would have a *major impact* on which census blocks would be eligible for CAF Phase II funding, and on how the Phase II challenge process would proceed. Revising the definition *after* the challenge process has commenced will prove disruptive and burdensome both to the Bureau and to the parties involved in a challenge process. WISPA therefore asks the Bureau to defer initiation of the challenge process until the full Commission acts on the pending petitions for reconsideration.

II. THE BUREAU SHOULD ELEVATE THE EVIDENTIARY STANDARD GOVERNING THE CHALLENGE PROCESS TO "CLEAR AND CONVINCING."

In the *R&O*, the Bureau sets forth comprehensive and useful guidance regarding the evidentiary showings that will be necessary when challenging a determination of a census block as served or unserved. The *R&O* contains nearly four pages of such information.[10] Yet it contains only one sentence establishing the standard of proof that the Bureau will employ in evaluating this detailed evidence – the "more likely than not" standard – and justifies the selection of this standard by stating merely that it is "more suitable for this type of fact-finding inquiry."[11] WISPA disagrees and asks the Bureau to elevate the evidentiary standard to that of "clear and convincing" evidence.

A "more likely than not" standard (also known as a "preponderance of the evidence" standard) is a more lenient standard that the Commission employs in, for example, administrative

[10] *See id.* ¶¶ 13-18.
[11] *Id.* ¶ 21 and n.48.

hearings.[12] A "clear and convincing" evidence standard, on the other hand, is designed to erect a somewhat higher hurdle. In this instance, its use would accurately reflect the credence that the Commission places on the information reflected in the National Broadband Map ("NBM") and on FCC Form 477, and would indicate that the Bureau intends for successful challenges to that information to be genuine, resolute and well-formed.

Such a standard is warranted for the challenge process, as demonstrated by the varied level and quality of evidence and detail contained in the response to the Bureau's previous request for mapping corrections for Phase I.[13] Only the best quality of evidence should be permitted during the challenge process, and this higher standard will ensure that accurate information on the NBM and in the Form 477 is not mistakenly and erroneously "corrected." By employing the "clear and convincing" evidence standard, the Bureau will ensure that fewer unfounded and/or "close call" challenges are lodged, and will likely reduce the overall number of challenges submitted. Furthermore, the Bureau will face fewer difficult line-drawing exercises when evidence is evaluated under the higher standard; the Bureau will only need to change the status of a census block (whether from "unserved" to "served" or vice versa) when it is "highly probable"[14] that information in the NBM or on Form 477 in inaccurate. This, in turn, will reduce the Bureau's overall administrative burden of administering the challenge process, and lead to a cleaner and more efficient challenge process for existing providers as well as carriers seeking funding.

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[12] *See James A. Kay, Jr.*, 17 FCC Rcd 1834, 1837 (2002).

[13] *See* Public Notice, *Wireline Competition Bureau Seeks Comment on Areas Shows as Unserved on the National Broadband Map for Connect America Phase I Incremental Support*, DA 12-1961 (rel. Dec. 5, 2012); *see also* Public Notice, *Wireline Competition Bureau Updates the List of Potentially Unserved Census Blocks in Price Cap Areas and Extends the Deadline for Comment on the List*, DA 12-2001 (rel. Dec. 10, 2012).

[14] *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (defining clear and convincing evidence).

Conclusion

It is imperative that, prior to launching the Phase II challenge process, the Commission act on the pending petitions for reconsideration (including WISPA's) which seek modification of the definition of "unsubsidized competitor," and revise that definition to better reflect the intention of the CAF program. Proceeding with the challenge process now, under the present questionable definition, would lead to inequitable results and a potential administrative quandary. In addition, the Bureau should raise the evidentiary standard applicable to the evidence submitted during the challenge process from "more likely than not" to "clear and convincing."

Respectfully submitted,

July 3, 2013

WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

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