

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

**PETITION FOR RECONSIDERATION OF THE AMERICAN CABLE ASSOCIATION
AND THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The American Cable Association (ACA) and the National Cable & Telecommunications Association (NCTA) submit this petition for reconsideration of the Wireline Competition Bureau's (Bureau) Public Notice Providing Guidance Regarding the Phase II Challenge Process.¹ Specifically, ACA and NCTA seek reconsideration of the Bureau's decision to require that parties present evidence of current or former customers in a census block in order to challenge the Bureau's determination that the block is unserved.² The consequence of this evidentiary requirement is that areas where unsubsidized providers already offer broadband services will be erroneously treated as if they are unserved—an outcome that is flatly inconsistent with the Commission's determination that broadband subsidies should be precluded in areas where unsubsidized competitors offer service in order to conserve public resources and ensure that competition is not harmed. The Bureau's decision to adopt this new evidentiary requirement also represents an unexplained departure from past precedent, in which the Bureau recognized that an area is served regardless of whether customers have yet purchased service. For these reasons, the Bureau should grant the instant petition and reverse the decision.

¹ Public Notice, Wireline Competition Bureau Provides Guidance Regarding Phase II Challenge Process, WC Docket No. 10-90, DA 14-864 (*Public Notice*).

² See *id.* at 3-4, ¶¶ 8-9.

INTRODUCTION

In 2011, the Commission reformed its distribution of universal service high-cost support consistent with several important public policy goals.³ Among them were bringing broadband to “[u]nserved communities across the nation”; “reducing waste and inefficiency”; “ensuring that public investments are used wisely to deliver intended results”; and “encourag[ing] technologies and services that maximize the value of scarce program resources and the benefits to all consumers.”⁴ Consistent with these policy goals, the Commission stated that CAF support would not be used to build broadband “in areas already served by an ‘unsubsidized competitor.’”⁵ It then delegated to the Bureau the task of implementing this rule, specifically directing the Bureau to design a process whereby parties could challenge the Bureau’s initial determinations of whether particular areas are served or unserved.⁶

The Bureau first developed such a process for use in CAF Phase II. It adopted FCC Form 505 for use in filing challenges and responses, and it required parties to submit an accompanying certification.⁷ Before Phase II funding was implemented, however, the Commission provided for a second round of CAF Phase I support, allowing parties to challenge eligibility determinations reflected on the National Broadband Map. In reviewing those challenges, the Bureau accepted evidence that service was available from an unsubsidized competitor, regardless of whether any customer had yet purchased service. As the Bureau explained, “[t]he Commission did not specifically require . . . that a provider actually have customers in a particular census block in order

³ See *Connect America Fund*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*CAF Order*).

⁴ *Id.* at 17670, ¶ 11.

⁵ *Id.* at 17701, 17722–23, 17767–68, ¶¶ 103, 149–50, 281–84.

⁶ *Id.* at 17729, ¶¶ 170–171.

⁷ *Connect America Fund*, WC Docket No. 10-90, Report and Order, 28 FCC Rcd 15060, 15076–80, ¶¶ 39–47 (Wireline Comp. Bur. 2013) (*Phase II Service Obligations Order*).

to preclude eligibility for funding.”⁸ Rather, the Bureau concluded, “the Commission spoke in terms of whether an area ‘lacks Internet access’ of a particular speed. A provider could offer broadband access to consumers in a census block, but none of those consumers choose to subscribe to the broadband service. Such a census block would still qualify as having access to broadband even though the block contains no broadband customers.”⁹

In the *Public Notice*, the Bureau fundamentally altered this evidentiary rule: In order to preclude CAF funding, not only must the provider offer service in a particular area, but it must also serve, or have previously served, *customers* in the area.¹⁰ The only explanation the Bureau offered for this abrupt change in course was a terse statement that it had previously “accepted a wide range of assertions as sufficient evidence that an area is served, in part because [it] had not previously specified precise language that parties should use in responding to challenges from price cap carriers.”¹¹ The Bureau offered no explanation of how this change in policy is a reasonable means of fulfilling the Commission’s directive.

I. THE BUREAU’S DECISION TO REQUIRE EVIDENCE OF CUSTOMERS IS INCONSISTENT WITH THE COMMISSION’S DELEGATION OF AUTHORITY.

In the *CAF Order*, the Commission concluded that it would “exclude [from CAF funding] areas where an unsubsidized competitor offers broadband service that meets the broadband performance requirements described above.”¹² In doing so, the Commission necessarily recognized that federal funds should be limited to areas where market forces have been inadequate to promote broadband deployment. Because the presence of one or more unsubsidized wireline

⁸ *Connect America Fund*, WC Docket No. 10-90, Order, 29 FCC Rcd 181, 186–87, ¶ 17 (Wireline Comp. Bur. 2014) (*Phase I Challenge Resolution Order*).

⁹ *Id.*

¹⁰ *Public Notice*, at 3–4, ¶ 9.

¹¹ *Id.* at 3, ¶ 8 n.15.

¹² *CAF Order*, 26 FCC Rcd at 17729, ¶ 170.

competitors ensures that consumers will have access to broadband service even absent government subsidies, funding must be limited to areas in which no unsubsidized competitor already offers service meeting the performance requirements specified by the Commission.¹³ A contrary approach would not only waste public resources, but also harm competition, as providers relying on their own capital would compete at a disadvantage with providers financed in part by the government.

Whether or not a provider has already served customers in a particular area is thus not a reasonable means of carrying out the Commission's directive. A provider may have deployed broadband networks and may actively offer service to customers in an area, yet still have no actual customers.¹⁴ Just as in areas where customers are already served, providing subsidies to another provider in such areas would waste public resources and harm competition. In both cases, "an unsubsidized competitor offers broadband service."

As the Bureau itself stated in the Notice, "[t]he Commission determined that Phase II support would *not* be available in areas served by an unsubsidized competitor that offers voice and broadband service meeting the Commission's broadband performance requirements."¹⁵ It was "the task of implementing the specific requirements of *this* rule" that the Commission delegated to the Bureau, further specifying that "there should be a process that provides parties with an opportunity to challenge the Bureau's determination of whether an area is unserved."¹⁶ Yet the Bureau's decision to require evidence of actual customers directly contradicts the specific requirements of

¹³ *See id.*

¹⁴ *See Connect America Fund*, Second Order on Reconsideration, WC Docket No. 10-90, FCC 12-47, ¶ 13 ("[A] provider may have no customers in a particular census block, even though it offers service there.").

¹⁵ *Public Notice*, at 1, ¶ 2 (emphasis added) (citing *CAF Order*, 26 FCC Rcd at 17729, ¶ 170).

¹⁶ *Id.* (emphasis added).

the rule it was charged with implementing. In doing so, the Bureau exceeded the authority delegated to it by the Commission.

II. THE BUREAU’S DECISION IS ALSO AN UNEXPLAINED DEPARTURE FROM PAST PRECEDENT.

The Bureau’s decision is flawed for the additional reason that it departs from past precedent without adequate explanation.¹⁷ During the Phase I challenge process, the Bureau explicitly “decline[d] to require evidence that the provider is currently serving customers in a particular census block, so long as there is some indication that it offers service in the area and is able to provide service within a commercially reasonable time frame.”¹⁸ As the Bureau proceeded to explain, “[a] provider could offer broadband access to consumers in a census block, but none of those consumers choose to subscribe to the broadband service. Such a census block would still qualify as having access to broadband even though the block contains no broadband customers.”¹⁹ While the Bureau did caution that challengers during the Phase II process would be required to show “that they *offer* service to locations within the census block” at issue,²⁰ it never presaged the adoption of a requirement that customers actually purchase service. Indeed, as quoted above, it provided a compelling justification against such a requirement.

Nor did the Bureau provide a reasoned explanation of its departure from past precedent in the *Public Notice*. Although it acknowledged that it had previously “construed statements that a

¹⁷ See, e.g., *Fox Television Stations, Inc. v. FCC*, 556 U.S. 502, 515–16 (2009) (explaining that, as a general matter “[a]n agency may not . . . depart from a prior practice *sub silentio* or simply disregard rules that are still on the books” and further noting that a heightened standard may apply where the agency “disregard[s] facts and circumstances that underlay or were engendered by [a] prior policy”); *Ind. Boxcar Corp. v. R.R. Retirement Bd.*, 712 F.3d 590, 591 (D.C. Cir. 2013) (“An agency acts unreasonably for purposes of the APA when, for example, it departs from its past precedent without reasonably explaining and justifying the departure.”); cf. *Northpoint Tech. Ltd. v. FCC*, 412 F.3d 145, 156 (D.C. Cir. 2005) (“A statutory interpretation premised in part on either a non-existent [statutory] factor or one that results from an unexplained departure from prior Commission policy and practice is not a reasonable one.”).

¹⁸ *Phase I Challenge Resolution Order*, 29 FCC Rcd at 186, ¶ 17 (emphasis added).

¹⁹ *Id.*

²⁰ *Id.* at 187, ¶ 18.

census block in question is ‘serviceable’ or ‘capable of being served’ as a statement that the block was ‘served’ for purposes of the Phase I challenge process,” it failed to justify its abandonment of that position in Phase II. It simply remarked that it “had no prior experience administering a challenge process” when it conducted the challenge process for Phase I without explaining why the experience it subsequently gained counseled in favor of the new evidentiary requirement adopted for the Phase II process.²¹ Because bare acknowledgement does not amount to reasoned explanation, the Bureau’s decision to adopt this new requirement warrants reconsideration.

CONCLUSION

For the reasons provided above, the Bureau should reconsider its decision to require evidence of current or former customers by providers challenging initial determinations that an area is unserved.

Respectfully submitted,

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²¹ *Public Notice*, at 2 ¶ 4.