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

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

**OPPOSITION**
**OF**
**NTCA–THE RURAL BROADBAND ASSOCIATION**

To: Marlene Dortch, Secretary, Federal Communications Commission ("Commission")

NTCA–The Rural Broadband Association ("NTCA")[1] hereby submits this Opposition to the American Cable Association and National Cable & Telecommunications Association (collectively "Petitioners") petition for reconsideration ("PFR")[2] of the Public Notice[3] released by the Wireline Competition Bureau ("Bureau") providing guidance on the Connect America Fund ("CAF") Phase II challenge process. Specifically, Petitioners seek reconsideration of the Bureau's determination that any entity claiming that an area is "served" by an unsubsidized competitor must demonstrate that the would-be competitor currently has, or at some time in the past had, actual customers in that area.

Contrary to Petitioners' claim, the evidentiary requirement at issue in the PFR is not an "unexplained departure from past precedent."[4] To the contrary, as the Bureau explained in

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[1] NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers ("RLECs). All of NTCA's members are full service local exchange carriers and broadband providers, and many provide wireless, video, satellite, and/or long distance services as well.

[2] Petition for Reconsideration, American Cable Association and the National Cable & Telecommunications Association, WC Docket No. 10-90 (fil. Jul. 21, 2014).

[3] Wireline Competition Bureau Provides Guidance Regarding Phase II Challenge Process, WC Docket No. 10-90, Public Notice, DA 14-864 (rel. Jun. 20, 2014) ("*Public Notice*").

[4] PFR, p. 1.

detail, the requirement under attack in the PFR is the direct byproduct of lessons learned and the logical outgrowth of experience obtained. Specifically, as the Bureau explained, in the context of the challenge process conducted as part of the second round of funding distributed via the CAF Phase I mechanism, the Bureau "resolved challenges filed by over 80 providers on a host of different grounds…[and] had no prior experience administering a challenge process."[5] It was more than prudent for the Bureau to look back on the type, quantity, and quality of evidence submitted via those 80 challenges and consider ways to improve the efficiency and accuracy of the challenge process. Indeed, the Public Notice highlights that one could only speculate prior to those 80 challenges being filed as to the types of evidence that would ultimately be submitted.[6] It therefore makes perfect sense that the Bureau would refine its process based on the wisdom of experience gained after the actual submission of evidence and resolution of initial challenges.[7] In fact, the Public Notice further acknowledges that the limited guidance it provided as to the evidentiary standard for challenges produced evidence that "led the Bureau to interpret much of the evidence and statements received in a manner favorable to the putative existing providers."[8] In light of this statement, it seems surprising that Petitioners would fault the Bureau for attempting to refine and improve its evidentiary processes for resolving challenges. It therefore

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[5] *Public Notice*, ¶ 4.

[6] *Id*.

[7] *See*, Response of AT&T to Incremental Support Round 2 Challenges, WC Docket No. 10-90, p. 3 (fil. Nov. 4, 2013) (stating that "a number of challengers fail to demonstrate that they have 'customers' of broadband service at the requisite speeds in each of the challenged census blocks. Instead, these parties state that the challenged census blocks are 'serviceable' or ones where the party is 'ready to provide' broadband. 'Serviceable' and 'ready to provide' obviously are not synonymous with 'already served.') (Internal citations omitted).

[8] *Public Notice*, ¶ 4.

simply cannot be said that the Bureau's further guidance issued via the Public Notice was either inexplicable or "unexplained."[9]

Moreover, as the Public Notice also notes, the initial round of challenges was part of a mechanism that distributed "one-time rather than ongoing funding."[10] In other words, the stakes are much higher for the CAF Phase II mechanism, and the risk of "false positives" where consumers could be left without access to reasonably comparable voice and broadband services due to erroneous findings of ostensibly unsubsidized competitive presence has significantly increased. Accordingly, there was substantial cause for the Bureau to refine its procedures to protect consumers, the ultimate beneficiaries of the CAF mechanism, particularly and specifically when it has experience from which to learn. In addition, contrary to Petitioners' assertion, it can hardly be said that the Bureau "never *presaged* the adoption of a requirement that customers actually purchase service."[11] To the contrary, the Bureau could not have been more clear in the *CAF Phase II Challenge Process Order* that "evidence that [a purported unsubsidized competitor] actually is providing voice and broadband service to customers in the relevant area is likely to be the most persuasive evidence."[12] The Public Notice and the

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[9] PFR, p. 6.

[10] *Public Notice*, ¶ 4.

[11] PFR, p. 5 (emphasis added).

[12] Connect America Fund, WC Docket No. 10-90, Report and Order, DA 13-1113 (rel. May 16, 2013) ("*CAF Phase II Challenge Process Order*"), ¶ 16.

evidentiary standard from which Petitioners seek relief is merely a Bureau acknowledgment that, in the future, it will expect this more reliable form of evidence.[13]

Petitioners' claim that the evidentiary standard for which they seek reconsideration is "not a reasonable means of carrying out the Commission's directive"[14] also misses the mark. The task for CAF Phase II is to distribute significant sums of ongoing support for a period of years to ensure that consumers that would otherwise lack access to voice and broadband services can access these vital services during that time. The evidentiary standard, once again built upon a solid foundation of experience with prior challenges, thus strikes a reasonable balance between the risk of overbuilding unsupported networks and the risk that a purportedly unsubsidized competitor could "merely satisfy the criteria during the pendency of the challenge process,"[15] ultimately erring on the side of caution in terms of protecting consumers from "false positives" in terms of meaningful competitive options.[16]

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[13] To be clear, as noted in prior filings, NTCA does not believe that even the challenge process for CAF Phase II, including this evidentiary standard, will be sufficient to establish the true contours and capabilities of would-be "unsubsidized competition." Opposition of NTCA, WC Docket No. 10-90 (fil. Aug. 7, 2013), pp. 4-6. Instead, NTCA believes a more robust process is required to determine whether the presence of such competition can in fact provide universal service to consumers throughout high cost rural areas such that explicit support is unnecessary. But the evidentiary standard adopted in the *Public Notice* is at least a step in the right direction, building upon the experiences of resolving CAF Phase I challenges.

[14] PFR, p. 4.

[15] Connect America Fund, WC Docket No. 10-90, Report and Order, DA 13-2115 (rel. Oct. 31, 2013) ("*CAF Phase II Service Obligations Order*"), fn. 98.

[16] *See*, *Ex Parte* Letter from David Cohen, US Telecom, WC Docket No. 10-90, p. 3 (fil. Oct. 31, 2013) (stating that "[t]hose residing in rural areas should not be denied an opportunity to have broadband facilities built out to them because a provider who has not provided service in the relevant census block now decides to make a speculative offer to provide such service without any obligation to actually do so.").

Finally, Petitioners' reliance on language from the *Phase I Challenge Resolution Order*[17] to argue that the Public Notice was a departure from past precedent is similarly misplaced. Specifically, Petitioners point to a previous statement that "[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."[18] What Petitioners miss is the fact that "none of those consumers choose to subscribe to the broadband service" may possibly indicate that the service was not offered at reasonably comparable rates or that other limitations on the service rendered it an unrealistic or undesirable alternative to consumers. While the Bureau declined to require evidence that a purported unsubsidized competitor actually serves (or at any time in the past served) customers in the census block(s) at issue in CAF Phase I, it was certainly within the scope of the Bureau's delegated authority to determine, for the purposes of CAF Phase II, that at least *some* level of actual past or present customers in that census block was a more reliable indicator of the presence of meaningful unsubsidized competition (from the consumers' perspective) than the standard previously used in CAF Phase I.

The Bureau should reject the PFR. The heightened evidentiary standard adopted by the Bureau reflects the product of useful experience in prior challenge processes, as well as a sensible recognition that the evidence of supposed unsubsidized competitive presence submitted in the CAF Phase I proceeding was insufficient to protect consumers, the ultimate beneficiaries of high cost universal service support. The Commission has a duty to undertake, and indeed has

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[17] Connect America Fund, WC Docket No. 10-90, Order, DA 14-32 (rel. Jan. 10, 2014) ("*Phase I Challenge Resolution Order*").

[18] *Id.*, ¶ 17.

professed a commitment to, a "data-driven" approach to universal service reform, and the heightened evidentiary standard puts that commitment into action. At every turn, the Commission should strive to ensure that its policies protect consumers and ensure access to reasonably comparable voice and broadband services at reasonably comparable rates throughout high-cost areas. The evidence sought in the CAF Phase II process should at least help to fulfill this objective, and thus the PFR should be dismissed.

Respectfully submitted,

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