

in order to conserve public resources and ensure that competition is not harmed.”³ The incumbent LECs’ oppositions essentially argue that the Bureau had discretion to authorize subsidized overbuilding with CAF Phase II funding and that such overbuilding is a necessary outgrowth of the Commission’s goal of expanding broadband availability in price cap territories.⁴ The incumbent LECs are wrong on both counts.

First, the incumbent LECs argue that the Bureau’s order was consistent with the Commission’s delegation “to exclude any area served by an unsubsidized competitor that meets our initial performance requirements.”⁵ But the Commission has not previously required customer records as evidence that an area is served. Rather, the Commission stated that areas will be ineligible for support “where an unsubsidized competitor offers broadband service”.⁶ The Bureau reiterated this standard in the *CAF Phase II Service Obligations Order*.⁷

An approach that requires unsubsidized providers to demonstrate that they offer service, but does not require them to provide customer records, is fully consistent with the Commission’s approach for subsidized providers. The Commission requires price cap LEC recipients of model-based CAF Phase II support only to offer voice and broadband service, with no requirement to identify customers as a condition of receiving support.⁸ Consequently, the Bureau’s decision to

³ Petition at 1; *see also* Letter from Jennifer McKee, Vice President and Association General Counsel, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 (Aug. 5, 2014) (NCTA August 5th *Ex Parte* Letter).

⁴ *See* NTCA Opposition at 1, 3; USTelecom Opposition at 2-4.

⁵ *See* NTCA Opposition at 3-4; USTelecom Opposition at 2.

⁶ *Connect America Fund*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17729, ¶170 (2011) (*CAF Order*).

⁷ *Connect America Fund*, WC Docket No. 10-90 *et al.*, Report and Order, 28 FCC Rcd 15060, 15077, ¶40 (Wireline Comp. Bur. 2013) (*CAF Phase II Service Obligations Order*) (“To exclude an area from Phase II support, an unsubsidized competitor must be offering broadband and voice service that would meet the Commission’s requirements for price cap carriers receiving model-based support.”).

⁸ *CAF Order*, 26 FCC Rcd at 17693, 17726, ¶¶80, 160.

require competitors to demonstrate that they have customers in a census block imposes on those entities a higher burden of proof than the companies that actually receive support, a patently unreasonable result.

The Bureau instead should treat documentation of current or past customers as persuasive evidence that a competitive provider offers service in an area, but should not preclude companies from providing other evidence if they are not able to produce a customer address within the limited timeframe of the challenge process. As we discussed with the Bureau, there are a number of reasons why a provider may not be able to provide a customer address during the challenge process.⁹ As the Commission recognized in the context of CAF Phase I support, the lack of a specific customer address does not demonstrate that a provider is not offering service within a census block.¹⁰ Providers should not be categorically denied the opportunity to present evidence that they offer service in these census blocks.

Even if the incumbent LECs are correct that the Bureau's decision was within the scope of the Commission's delegation of authority, they are wrong in asserting that it represents a sound policy choice. In particular, they are wrong to suggest that overbuilding cable operators and other providers is somehow necessary to ensure that rural households are not denied the benefits of broadband.¹¹ As NCTA has demonstrated previously, a far better approach to implementing the Commission's twin goals of expanding rural broadband while avoiding inefficient overbuilding would be to exclude from the statewide commitment process any areas with existing broadband facilities, but include in the competitive bidding process any areas

⁹ NCTA August 5th *Ex Parte* Letter at 1.

¹⁰ *Connect America Fund*, WC Docket No. 10-90 *et al.*, Second Order on Reconsideration, 27 FCC Rcd 4648, 4652, ¶13 (2012) (“a provider may have no customers in a particular census block, even though it offers service there.”).

¹¹ See NTCA Opposition at 3; USTelecom Opposition at 1.

where broadband exists but is in some way below the threshold standards established by the Commission.¹² Such an approach would enable the Commission to achieve both of its goals, rather than sacrificing efficiency and fairness by giving incumbent LECs the exclusive right to funding in areas where other providers have invested private capital.

Respectfully submitted,

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¹² *See, e.g.*, Reply to Oppositions of the National Cable & Telecommunications Association, WC Docket No. 10-90, at 4 (Jan. 23, 2014) (“NCTA argued in the application for review that these already served areas could be excluded only from the limited portion of CAF Phase II that provides exclusive access to incumbent LECs, i.e., the statewide commitment process, and that providing CAF Phase II support to such areas through the competitive bidding process was a perfectly acceptable result.”).