



October 11, 2019

Notice of Ex Parte

Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Connect America Fund: Performance Measures for Connect America High-Cost Universal Service Support Recipients*
Docket No. 10-90; DA 17-1085

Dear Ms. Dortch:

Today, Michael Romano, Senior Vice President of Industry Affairs & Business Development, and the undersigned, on behalf of NTCA–The Rural Broadband Association (NTCA), met with Arielle Roth, Wireline Legal Advisor to the office of Commissioner Michael O’Rielly, to discuss the above-captioned docket. Consistent with its prior filings in the docket, NTCA reiterated its support for the usefulness of network testing yet commended the Commission to ensure the protocols can be implemented in ways that are both administratively and economically equitable and efficient. NTCA highlighted specific examples in this regard.

End Points for Testing

In the first instance, NTCA discussed the requirement for providers to test from the customer premises of an active subscriber to a remote test server located at or reached by passing through a Commission-designated IXP.¹ In initial comments, its *Application for Review and Request for Clarification*, and various *ex parte* presentations filed in this proceeding, NTCA has explained why only those portions of the network that are actually supported by universal service funds and under the control of the operator should be subject to testing. NTCA explained that although a rural provider may have purchased sufficient capacity and deployed adequate facilities, its ability to meet testing obligations relies at least in part upon the performance of a third-party middle

¹ *Connect America Fund: Order on Reconsideration*, Docket No. 10-90, FCC-CIRC1910-01, at para. 12 (2019) (Draft Reconsideration Order).

mile provider.² Addressing the *Performance Measures Order*³ specifically, NTCA explained that (1) small providers fundamentally lack the bargaining power the *Performance Measures Order* conjectures they possess, and (2) *arguendo* a small provider could obtain reasonable and affordable results with the transport provider, the small provider in all events would have no actual control over events beyond its network and the next-tier network from which it procures capacity directly.⁴ In a subsequent presentation, NTCA suggested additional alternatives, and illustrated the suitability of testing to the next-tier provider.⁵

In the instant *ex parte* presentation, NTCA noted the *Draft Reconsideration Order* provides no evidentiary basis for the summary conclusion that smaller operators can dictate terms like service quality in dealing with much larger national or even regional transport providers that are far upstream. Specifically, the *Draft Reconsideration Order* states, “As the Bureaus explained, carriers – even small ones – do have some influence and control over the type and quality of Internet transportation they purchase.”⁶ In support of this statement, the *Draft Reconsideration Order* cites the July 2018 *Performance Measures Order*, which posited, “. . . the carrier can influence the quality of transport purchased and can negotiate with the transport provider for a level of service that will enable it meet the Commission’s performance requirements. This is true for both price carriers and smaller carriers.”⁷ The Bureau based that finding on a similar conclusion of the *CAF Phase II Price Cap Service Obligation Order*, which stated:

. . . while a price cap carrier . . . may not have direct control over any middle-mile or transit providers with which it connects, it does have influence . . . [it] can compare the quality of service offered by transit providers and select one with a higher quality of service . . . the last-mile provider can improve its latency by purchasing additional capacity⁸

² *Connect America Fund: Performance Measures for Connect America High-Cost Universal Service Support Recipients: Comments of NTCA–The Rural Broadband Association*, Docket No. 10-90, DA 17-1085, at 9-11 (Dec. 6, 2017).

³ *Connect America Fund: Order*, Docket No. 10-90, 33 FCC Rcd 6509, at para. 12 (2018) (*Performance Measurement Order*).

⁴ *Connect America Fund: Performance Measures for Connect America High-Cost Universal Service Support Recipients: Application for Review and Request for Clarification of NTCA–The Rural Broadband Association*, Docket No. 10-90, DA 17-1085, at 3 (Sep. 19, 2019).

⁵ *Connect America Fund: Performance Measures for Connect America High-Cost Universal Service Support Recipients: Ex Parte Presentation of NTCA–The Rural Broadband Association*, Docket No. 10-90, DA 17-1085 (Feb. 28, 2019).

⁶ *Draft Reconsideration Order* at para. 15.

⁷ July 2018 Order at para. 19 (internal citation omitted).

⁸ *Connect America Fund: Report and Order*, Docket No. 10-90, 28 FCC Rcd. 15060, at para. 32 (2013) (“Further, while a price cap carrier accepting Phase II model-based support may not have direct control over any middle-mile or transit providers with which it connects, it does have influence over its transit providers. For example, a last-mile provider can compare the quality of service offered by transit providers and select one with a higher quality of service. In addition, the last-mile provider can improve its latency by purchasing additional capacity from the transit provider or by negotiating a SLA.”) This finding is unattributed.

NTCA therefore once again urged the Commission to provide reasonable flexibility and recognize the concerns faced by smaller providers as it defines what it means to test to Commission-designated IXPs. NTCA also discussed the value of a “safe harbor,” which would contemplate the establishment of industry-identified standards for purchasing middle mile capacity. Under such a safe harbor, a provider that purchased sufficient capacity and entered into reasonable arrangements to ensure service of a compliant service would be accorded a presumption of compliance if it could demonstrate that an event or events that caused a test failure occurred outside of the network segments that it owns or controls.

Remedies for Non-Compliance

The *Draft Reconsideration Order* states, “at the conclusion of a carrier’s buildout term, any failure to meet speed and latency requirements will be considered a failure to deploy.”⁹ The structure of the rule, however, appears to establish to what amounts as “double jeopardy” under certain circumstances. As explained in the remainder of the paragraph and as elucidated in the relevant footnotes,¹⁰ a carrier that fails to meet requisite speed and latency requirements will be penalized for not achieving performance metrics. Moreover, any location that does not achieve performance metrics will also not be counted as a “deployed” location, thereby subjecting the provider to a second penalty (the first for not meeting performance metrics, the other for not deploying).

Footnote 183 of the *Draft Reconsideration Order* illustrates this concerning approach with the following example: if a carrier that is required to deploy to 100 locations deploys to only 90, it will be scored with a shortfall of 10 locations. If of the 90 “actually built” locations, nine fail to meet performance obligations, then those nine will combine with the ten “missing” locations to a sum of 19 locations that fail to meet performance obligations (nine in actuality, and ten virtually). But rather than assess penalties based upon only 19 “non-performing locations,” the *Draft Reconsideration Order* then also assesses an additional penalty for 10 locations not actually built for a total of 29 penalized locations. In total, the *Draft Reconsideration Order* assess a penalty for not building a location . . . and then adds atop that another penalty for the same location as if the non-existing location failed to meet performance obligations. This outcome begs for revision to ensure that a single location, whether built or unbuilt, will not be subject to multiple sets of penalties.

Consumer Consent

NTCA also noted that consumer consent issues may yet exist where software-based testing solutions are implemented. Specifically, these will yet exist where the *current* customer equipment is incapable of supporting the software-based solution and would require replacement. Moreover, this issue may be of particular concern where the subscriber uses a customer-owned, rather than provider-provided, device. Without discounting the conclusion that certain customer consent issues are mitigated by relying upon a software-based solution, NTCA nonetheless

⁹ *Draft Reconsideration Order* at para. 69.

¹⁰ *Draft Reconsideration Order* at fn. 182, 183.

maintains that the rules should contemplate the impact of consumer perceptions of new, test-capable devices installed at their premises.

Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed with ECFS.

Respectfully submitted,

/s/ Joshua Seidemann
Joshua Seidemann
Vice President of Policy

cc: Arielle Roth