



6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket Nos. 10-90; DA 13-1113]

Connect America Fund

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) adopts 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 and adopts the procedures for a price cap carrier to elect to make a state-level commitment to serve the eligible areas.

DATES: Effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, except for those rules and requirements involving Paperwork Reduction Act burdens, which shall become effective immediately upon announcement in the Federal Register of OMB approval.

FOR FURTHER INFORMATION CONTACT: Ryan Yates, Wireline Competition Bureau, (202) 418-0886 or TTY: (202) 418-0484.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order in WC Docket No. 10-90; DA 13-1113, adopted on May 16, 2013, and released on May 16, 2013. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY-A257, 445 12th Street, SW., Washington, DC 20554, or at the following Internet address: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-13-1113A1.pdf

I. INTRODUCTION

1. In the USF/ICC Transformation Order, 76 FR 73830, November 29, 2011, the Commission comprehensively reformed and modernized the universal service and intercarrier compensation systems to maintain voice service and extend broadband-capable infrastructure to millions of Americans. As part of the reform, the Commission adopted a framework for providing support to areas served by price cap carriers known as the Connect

America Fund through “a combination of competitive bidding and a new forward-looking model of the cost of constructing modern multi-purpose networks.” In particular, the Commission will offer each price cap carrier monthly model-based support for a period of five years in exchange for a state-level commitment to serve specified areas that are not served by an unsubsidized competitor, and if that offer is not accepted, will determine support through a competitive process.

2. In this Report and Order (Order), the Wireline Competition Bureau (Bureau) adopts 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 and adopts the procedures for a price cap carrier to elect to make a state-level commitment to serve the eligible areas. We particularly encourage state public utility commissions and broadband mapping authorities to participate in the challenge process and provide any information they believe to be relevant to our consideration of which census blocks should be eligible for the offer of Phase II model-based support.

II. DISCUSSION

A. Phase II Footprint Challenge Process

3. The Phase II footprint challenge process will allow interested parties to provide input on the preliminary list of what areas should be deemed unserved by an unsubsidized competitor, and therefore eligible for Phase II model-based support. Section 54.5 of the Commission’s rules defines an unsubsidized competitor as “a facilities-based provider of residential terrestrial fixed voice and broadband service that does not receive high-cost support.” In this order, we set forth the basic framework regarding the use of presumptions, evidentiary showing, and timing of the challenge process for census blocks where Phase II funding will be offered to price cap carriers.

4. Consistent with the framework established in the USF/ICC Transformation Order, an unsubsidized competitor in areas where the price cap carrier will be offered model-based support must meet the speed criteria established by the Commission for fixed broadband service (i.e., a provider that offers 4 Mbps downstream/1 Mbps upstream service (4 Mbps/1 Mbps)), as well as non-speed broadband criteria (i.e., latency, capacity, and price) and provide voice service. In order to conduct the challenge process efficiently, we will develop the initial list of eligible census blocks based on coverage shown on the National Broadband Map, and the reporting of voice subscriptions on FCC Form 477, and then will conduct a challenge process that will provide an opportunity for parties to challenge that preliminary determination.

5. Broadband Service. Under the Commission’s rules, an unsubsidized competitor must offer fixed broadband with speeds of at least 4 Mbps/1 Mbps. We will presume that the National Broadband Map is accurate with regard to the speed of services being offered by broadband providers, with that presumption subject to rebuttal. Because the National Broadband Map does not contain data specifically for the 4 Mbps/1 Mbps benchmark, we will use the National Broadband Map’s 3 Mbps downstream and 768 kbps upstream (3 Mbps/768 kbps) advertised speed as a proxy for 4 Mbps/1 Mbps. After consideration of the record, we see no reason to depart, for purposes of Phase II implementation, from the 3 Mbps/768 kbps proxy generally recognized by Commission. Therefore, any terrestrial, fixed provider shown on the National Broadband Map as offering broadband with speeds of 3 Mbps/768 kbps will be presumed to provide broadband service meeting the speed requirement of 4 Mbps/1 Mbps.

6. While the National Broadband Map provides valuable information regarding the availability of broadband service meeting specified speed tiers, it does not address the other criteria that the Commission has indicated are relevant to determining whether an entity should be deemed an unsubsidized competitor. There is no alternative suitable national-level source that we can rely upon to make this determination. There is ample evidence in the record, however, that providers that meet the speed requirement generally meet our other performance criteria. For administrative ease, therefore, we conclude that it is reasonable to presume that providers that provide broadband of the required speed also meet the non-speed broadband criteria, with that presumption subject to rebuttal in particular instances.

7. It serves the public interest to presume existing providers that meet the speed criteria also meet the non-speed criteria for broadband service. This presumption places price cap carriers in the position of contesting a preliminary decision to not provide funding to a particular census block, rather than requiring unsubsidized competitors to contest a decision to fund a census block. This is both equitable and efficient. First, requiring price cap carriers to file a challenge likely will reduce the overall burden on respondents and the Commission while placing the burden on the party potentially receiving funds. Second, we conclude this presumption is generally accurate in the majority of cases. The preliminary classification of a block as served will serve to err on the side of not providing funding, while still giving the opportunity for the price cap carrier to demonstrate that a block should be funded.

8. Voice Service. Under the Commission’s rules, an entity must provide “residential terrestrial fixed voice and broadband service” in order to be deemed an unsubsidized competitor. We conclude that the ability of the

consumer to obtain voice service from a third party is not sufficient for that broadband provider to be deemed an unsubsidized competitor for purposes of Phase II implementation because that broadband provider would not be offering a voice service. Such an interpretation would effectively read the requirement that the unsubsidized competitor be a “provider” of “voice” out of the Commission’s adopted definition, as all broadband connections offer the capability to receive an “over the top” voice over Internet protocol (VoIP) service from a third party. Therefore, we interpret the Commission’s definition as requiring the provider itself to provide voice service, in addition to broadband, in order to be designated an unsubsidized competitor.

9. We conclude, based on our FCC Form 477 data, that it would be unreasonable to presume that all broadband providers shown on the National Broadband Map are also providing voice service. We therefore will utilize both Form 477 data and the National Broadband Map when developing the initial list of blocks that will be eligible for funding. A provider will be presumed to be offering voice if it reports voice subscribers for the relevant state on its Form 477 filing, with that presumption subject to rebuttal. Supplementing the National Broadband Map with the FCC’s Form 477 data will enable challenges to the initial list of census blocks eligible for funding to be more narrowly focused, thereby reducing burdens on both interested parties and Commission staff.

10. Given the above presumptions and requirements, a provider will initially be presumed an unsubsidized competitor if (1) it is shown on the National Broadband Map as offering at least 3 Mbps/768 kbps and (2) it is reporting voice subscriptions in the relevant state on Form 477.

11. Challenges and Evidentiary Showings. Based on the above presumptions, the Bureau will publish a list of census blocks that are presumptively unserved by an unsubsidized competitor. The challenge process will focus on whether an area is served by an unsubsidized competitor. Parties may challenge this list in two ways. They may argue that the list is underinclusive – that a census block not included on the list is not served by an unsubsidized competitor and therefore should be on the list of blocks eligible for funding – or they may argue that the list is overinclusive – that a census block on the list is in fact served by an unsubsidized competitor and therefore should be excluded from the list.

12. We conclude that it is useful, given the number of census blocks potentially at issue in Phase II, to provide some advance guidance regarding what sorts of evidentiary showings will be persuasive, and to define standards so that parties, including small businesses, seeking to challenge or rebut the eligibility of a census block for funding can participate in this process without unnecessary burden or expense. Our objective is to implement the

Commission's requirement that funding not flow to an area where there is an unsubsidized competitor, while at the same time ensuring that census blocks are not unnecessarily excluded from funding.

13. To facilitate efficient and swift review of any challenges, parties must submit challenges in the format specified by the Bureau. Challengers will be required to provide the 15 digit Federal Information Processing Standard (FIPS) code and the state of the block in question; the name of the entity or entities putatively providing disqualifying service to that block according to the National Broadband Map, if applicable; the service criteria at issue; the type of supporting evidence submitted as an attachment; and a certification under penalty of perjury that the challenger has engaged in due diligence to verify statements in the challenge and that such statements are accurate to the best knowledge of the filer. Furthermore, because the Electronic Comment Filing System (ECFS) converts all files to .pdf format, in addition to posting on ECFS, we will also require parties to submit a copy of any challenge in a native format to the Commission, either by e-mail to a designated Commission staff member or by delivery of storage media to a designated Commission staff member or the Commission Secretary. A proposed form for filing challenge is available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-13-1113A1.docx.

14. We require parties submitting challenges to include specific evidence as an attachment to the challenge in support of their claims. For each challenged block, parties must provide evidence specifying the reason for the challenge. A price cap carrier contending that a particular census block is unserved by an unsubsidized competitor need only show that any one of the criteria (speed, latency, capacity, price, or voice) is not met. Given the difficulty in proving a negative (i.e., that service meeting defined criteria does not exist in a particular block), we will consider a variety of evidence in determining whether the price cap carrier has submitted sufficient evidence to warrant placing the challenge on public notice to solicit a response from interested parties. For example, a price cap carrier's evidence could consist of a signed certification that an employee of the company attempted to obtain service in a particular block, but was unable to do so, or that following a good faith search of a provider's advertising materials, it was unable to find any offering matching the Commission's Phase II service requirements. We would also consider a signed certification from an officer of the price cap carrier under penalty of perjury, that it has not ported a telephone number within the last year (or a longer period of time) to the purported unsubsidized competitor, as relevant to whether that provider is providing voice service. While we recognize that some customers may drop their landline service altogether, it would be unusual for a competitor offering voice service in the marketplace to have no voice customers at all.

15. In those instances where a potential unsubsidized competitor files a challenge contending that it does serve the area, notwithstanding evidence establishing a presumption that the block is unserved, evidence that it actually is providing voice and broadband service to customers in the relevant area is likely to be the most persuasive evidence. Thus, certifications relating to the number of customers, revenues received from customers, or customer lists (with customer identifying information redacted to preserve customer privacy) are likely to be more persuasive than propagation maps, advertisements of service offerings, or officer certifications, standing alone, that service is actually and immediately available – although we will consider each of the latter forms of evidence. We recognize that producing evidence demonstrating the existence of actual customers may be more difficult for potential competitors that have only recently begun to serve an area, but also seek some assurance that a provider is not merely advertising temporary or hypothetical service as a means of precluding Phase II funding for the price cap carrier.

16. Likewise, parties opposing challenges must provide, for each challenged census block they wish to contest, concrete and verifiable evidence supporting their claims that the challenge should not be granted. A corresponding evidentiary burden applies: respondents attempting to show that a block is served must show that all of the Commission's criteria are met, while respondents attempting to show that a block is unserved need only show that any one of the criteria is not met. We will consider an officer certification that a provider serves a particular census block with service meeting all of the Commission's criteria as some evidence that service exists; however, such a certification would be more persuasive if supported by other evidence, such as advertising materials, certifications relating to the number of customers and/or revenues received from customers, or customer lists (with customer identifying information redacted to preserve customer privacy). We also require that an officer of the company making or opposing a challenge certify to the accuracy of the information provided, subject to the penalties for false statements imposed under 18 U.S.C. 1001. Challenges and responses that do not meet these criteria will not be considered by the Bureau.

17. We conclude this process will provide the Bureau with an adequate evidentiary basis for making a determination that a particular census block is or is not served by an unsubsidized competitor, without unduly delaying implementation of Phase II. We are not persuaded by USTelecom's proposal that state mapping authorities contact all broadband providers to determine whether they meet each element of the Commission's service obligation. Simply put, that suggestion would potentially delay completion of the challenge process, and more importantly, would impose an unanticipated, unfunded burden on the state mapping authorities.

18. We will require parties to make a good faith effort to serve notice of challenges on interested parties. For a challenge that a listed census block is in fact served, the interested party is the price cap carrier in whose territory the block falls. For a challenge that a block not on the list is unserved, the interested party is any and all entities that are shown on the National Broadband Map as providing service to that census block. This notice will assist challenged parties who may not routinely monitor the Commission's daily digest for public notices. However, we recognize that in some circumstances it may prove impossible or exceedingly difficult to identify and locate the particular person that should be given service for a provider; therefore, we stop short of requiring service of actual notice. A challenger must include a certification along with its challenge that it has made a good faith attempt at providing notice to the interested party.

19. Once the challenges have been filed in ECFS, the Bureau will review all submissions to verify that evidence has been submitted to make a prima facie case and then issue a Public Notice specifying those blocks for which rebuttals may be submitted. This Public Notice will be the official notice of all challenges, and will specify the date by which responses must be submitted.

20. Challengers will have 45 days from the date of the public notice announcing the initial eligible census blocks to submit their challenges. Respondents will have 45 days from the date of the public notice announcing the list of census blocks that warrant a response to submit replies to the challenges. This time period should give parties a sufficient opportunity to formulate their challenges and responses. This time period is consistent with that generally requested by commenters. After the close of the reply period, the Bureau will consider the challenges and responses. Where the Bureau concludes that the evidence shows it is more likely than not that the status of a census block should be changed, the Bureau will make the appropriate adjustment to the list of eligible census blocks, which will be published in a subsequent public notice setting forth the finalized list of eligible census blocks.

21. Finally, we conclude that we will not permit challenges below the census block level, such as a challenge that a particular location or group of homes within a census block is unserved. Any partially served census block will be treated as served. There are more than 6 million census blocks in price cap service territories. Conducting a sub-block challenge process on millions of blocks would pose significant burdens on both potential unsubsidized competitors as well as Bureau staff. We conclude that the administrative burden of constructing and carrying out a sub-census block challenge process far outweighs any marginal benefit from such a process.

B. Process for Electing to Make a State-level Commitment

22. We also sought comment in the Phase II Challenge Process Public Notice, 78 FR 4100, January 18, 2013, regarding the procedures for a carrier to elect to make a state-level commitment in Phase II of Connect America. In this Order, we announce the procedures that a carrier must follow to make such an election.

23. After completion of the challenge process described above, the Bureau will release a public notice announcing Connect America Cost Model-determined support amounts for each incumbent price cap carrier's funded census blocks within a given state. After the release of that public notice, incumbent price cap carriers will be given 120 days to accept or decline that support on a state-by-state basis for each state they serve. While some commenters argued that a longer election period is necessary, we conclude that 120 days strikes a balance by providing sufficient time for consideration and ensuring that transition into Phase II is completed within a reasonable timetable.

24. To elect to accept the support amount for a state, a carrier must submit a letter signed by an officer of the company declaring that the carrier accepts the support amount and commits to satisfy the service obligations for Phase II. In its acceptance letter, a carrier accepting funding must also acknowledge that if it fails to meet its service obligations, it will be subject to the penalties and/or enforcement actions, as specified by the Commission. If a letter of credit or some other form of security is required to ensure compliance with these obligations, such security must be submitted along with the letter accepting Phase II support.

25. We are persuaded that requiring elections to be publicly disclosed, after a brief period of Bureau review to confirm facial completeness, will serve the public interest by enabling consumers, state regulators, other providers in the area, and other interested parties to know that a particular area will be served through Phase II. The Bureau will specify in a public notice the specific procedures for submitting acceptances to a designated Commission staff member. This will give the Bureau an opportunity to review the acceptances before elections are publicly announced. Once this review is complete, the finalized elections will not be afforded confidentiality.

26. We sought comment as to what information we should require carriers to submit when making their elections. After further consideration, we conclude that it would not be productive to require carriers to specify at the time the election is made the specific locations where they intend to provide 6 Mbps downstream/1.5 Mbps upstream service, or where specifically they anticipate meeting their third year 85 percent buildout milestones. Deployment plans may change over the course of the five-year Phase II buildout period, and requiring carriers to

declare this information up front would impose a significant burden on carriers accepting funding, while providing only limited benefit to the Commission and the public. Furthermore, by not requiring this additional information, carriers should be better able to make their elections within the 120-day window provided.

27. A carrier may elect to decline funding for a given state by submitting a letter signed by an officer of the company noting it does not accept Phase II support for that state. Alternatively, if a carrier fails to submit any election letter by the close of the 120-day election period, it will be deemed to have declined support.

28. Carriers are bound by their election decisions. After the close of the election period, a carrier may not retract its election, nor may it return support in exchange for being relieved of its obligations under Phase II. Such actions will have no effect. Thus, in the case of a carrier that accepted funding, the carrier will still be obligated to meet its deployment obligations and will face the same penalties as any carrier that fails to satisfy its obligations. This restriction is necessary not only to ensure the integrity of the state-level commitment process, but also to efficiently conduct the planning and implementation of auctions for areas in which carriers declined to make state-level commitments.

III. PROCEDURAL MATTERS

A. Paperwork Reduction Act

29. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

30. In this present document, we have assessed the effects of the procedures for electing to make a statewide commitment under Phase II and find that no businesses with fewer than 25 employees will be directly affected. We have structured the challenge process to minimize burdens on businesses with fewer than 25 employees. Unsubsidized competitors, many of which are small businesses, will face reduced burden due to the use of presumptions that a provider meeting the speed requirement also meets the other non-speed criteria. Furthermore,

specifying the format and probative evidence for the challenge process in advance will likely provide certainty to small businesses in filing any challenges and reduce the burden on such parties.

B. Final Regulatory Flexibility Act Certification

31. The Regulatory Flexibility Act of 1980, as amended (RFA) requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that “the rule will not have a significant economic impact on a substantial number of small entities.” The RFA generally defines “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

32. This Order implements the rules adopted by the Commission in the USF/ICC Transformation Order. These clarifications do not create any burdens, benefits, or requirements that were not addressed by the Final Regulatory Flexibility Analysis attached to the USF/ICC Transformation Order. Therefore, we certify that the requirements of this order will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the order including a copy of this final certification, in a report to Congress pursuant to SBREFA. In addition, the order and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the **Federal Register**.

C. Congressional Review Act

33. The Commission will send a copy of this order to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

IV. ORDERING CLAUSES

Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i), 201-206, 214, 218-220, 254, 303(r), and 403 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, 47 U.S.C. 151, 154(i), 201-206, 214, 218-220, 254, 303(r), 403, 1302, sections 0.91 and 0.291 of the Commission’s rules, 47 CFR 0.91, 0.291, and the delegations of authority in paragraphs 103, 170, and 171 of the USF/ICC Transformation Order, FCC 11-161, this Report and Order IS ADOPTED, effective [INSERT DATE 30 DAYS AFTER DATE OF

PUBLICATION IN THE FEDERAL REGISTER], except for those rules and requirements involving Paperwork Reduction Act burdens, which shall become effective immediately upon announcement in the Federal Register of OMB approval.

FEDERAL COMMUNICATIONS COMMISSION.

Julie Veach
Chief, Wireline Competition Bureau.

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