

October 18, 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 and Joshua Seidemann of NTCA–The Rural Broadband Association, Michael Saperstein of USTelecom, Michael Jacobs of ITTA, Gerry Duffy on behalf of WTA, and Robert DeBroux of TDS Telecom (collectively, the Parties) participated in a conference call with Preston Wise of the office of Chairman Ajit Pai during which the above-captioned proceeding was discussed. Other signatories to this letter not listed above did not participate in the call but join the Parties in presenting this letter to the Commission.

The Parties expressed their continuing shared concerns regarding statements in the *Draft Reconsideration Order* that stipulate that “any failure to meet speed and latency requirements will be considered a failure to deploy.”<sup>1</sup> While the *Draft Reconsideration Order* appears to take some steps to mitigate what amounts as “double jeopardy” under certain circumstances, numerous questions remain surrounding the potentially cascading impacts that would be occasioned through a combination of the heretofore separate penalty regimes contemplated for deployment and speed/latency testing failures.<sup>2</sup>

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

<sup>2</sup> *See*, fn. 182, 183 of the *Draft Reconsideration Order*. Footnote 183 develops the scenario that a carrier that fails to meet requisite speed and latency requirements will be penalized not only for not achieving performance metrics but would also be subject to an additional penalty for not having “built” the location. The contemplated separate nature of these regimes, however, is reflected in the July 2018 Order, which states the penalty regime for non-compliant results “resembles the noncompliance framework for interim deployment milestones in section 54.320(d) of the Commission’s rules.” *Connect America Fund: Order*, Docket No. 10-90, 33 FCC Rcd 6509, at para. 65 (2018) (*Performance Measurements Order*) (emphasis added).

To be clear, each of the buildout and speed/latency testing obligations is a distinct and important part of ensuring proper incentives for recipients of universal service support to deliver on the commitments attached to such funding. The proposed stitching together of these two disparate penalty regimes presents the potential for significant complications and unintended consequences, however, and also transcends the boundaries of the “incentives” that the original *Performance Measurements Order* otherwise seeks to advance.<sup>3</sup> Failure to obtain a satisfactory speed/latency measurement result should not be equated with an outright failure to deploy. Instead, consistent with the structure originally contemplated by the *Performance Measurements Order*, the Parties urge the Commission to modify the *Draft Reconsideration Order* to decouple the separate penalty regimes for speed/latency measurements and buildout obligations. Each penalty structure is intended to address distinct outcomes in carrier activities arising out of distinct and separate regulatory obligations, and each should therefore operate independently of the other. For instance, while deployment is an all-or-nothing matter—either the infrastructure is in place (or could be within 10 business days) or it is not—speed and latency compliance are a matter of degree.

To clarify how a speed/latency measurement failure in the final test should be addressed at the end of the support term (following a reasonable opportunity to cure), rather than converting a failure of the final performance test into a failure to deploy, this can be achieved by simply modifying the testing penalty structure to require a provider to return what would otherwise be a withheld sum under the speed/latency testing regime if that failure occurred earlier in the term. In this regard, the speed/latency testing compliance framework both provides for rigorous levels of withholding or reimbursement, and accounts for degrees of non-compliance via its tiered approach.<sup>4</sup> To illustrate how this would work, if a provider met the “80/80” speed threshold but only had a 94.7 percent latency compliance percentage at the end of the term,<sup>5</sup> the Commission would be entitled to recover five percent of the support for the final year of the term if the provider is unable to come into compliance within a year from the end of the term.<sup>6</sup>

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<sup>3</sup> “We emphasize that the goal of this compliance framework is to provide incentives, rather than penalize.” *Performance Measurement Order* at para. 65.

<sup>4</sup> *See id.* at para. 64.

<sup>5</sup> *See id.* at para. 61 (describing how compliance percentages are to be calculated).

<sup>6</sup> *See id.* at para. 64. To the extent paragraph 64 of the *Performance Measurement Order* refers to withholding monthly support, in the end-of-term compliance context, it could replace that reference with reimbursement of [X] percent of support for the final year.

The Parties note, as well, positions and recommendations set forth by ITTA, USTelecom and WISPA in their filings in this docket, and likewise commend to the Commission to ensure that the decoupling of the speed/latency measurement and deployment penalty regimes is accompanied by the clarifying statements proposed by those organizations.<sup>7</sup>

Respectfully submitted,

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cc: Preston Wise

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<sup>7</sup> See, *Connect America Fund: Ex Parte Presentation of ITTA, USTelecom and WISPA*, Docket No. 10-90 (Oct. 18, 2019).