



February 11, 2022

Notice of Ex Parte

Marlene Dortch
Office of the Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

Re: *Connect America Fund, Docket No. 10-90*

Dear Ms. Dortch:

On February 11, 2021, the undersigned visited via video conference with Ramesh Nagarajan, Acting Legal Advisor, Wireline, to Chairwoman Jessica Rosenworcel to discuss performance measurement testing. The meeting addressed treatment of certain CAF-BLS carriers that were informed recently of broader-than-anticipated obligations to begin pre-testing in January 2022.

By way of background, performance measurement testing is conducted at locations that are drawn by random from deployed locations that have been entered into the HUBB. However, there are several instances in which a CAF-BLS carrier may have a smaller number of HUBB locations than actually deployed locations. These include: (i) companies that were fully deployed prior to May 25, 2016, and to which HUBB reporting requirements have not been attached; (ii) companies that have a deployment milestone in 2023, but which to date have not yet deployed reportable locations; (iii) companies that have deployed locations after May 25, 2016, but which rely on locations deployed prior to that date for purposes of meeting buildout requirements.

In the context of these various scenarios, USAC alerted CAF-BLS carriers on or about November 9, 2021, that that it would be sending a survey to “determine their status in reporting broadband deployment data” into the HUBB for purposes of preparing pre-testing and testing requirements that would begin in January 2022. The USAC survey asked carriers to identify the reason why their respective study areas might not have locations reported into the HUBB and explained that USAC would “follow up with CAF BLS carriers . . . so that they can begin speed

and latency pre-testing in 2022.” It is the understanding of NTCA that a significant proportion of companies did not receive this or related USAC notifications. In or around late December 2021, USAC shared randomly drawn testing locations with CAF-BLS carriers. The number of locations, however, often exceeded the number of locations anticipated by the carriers, which had based their projections and work frames prior to that date on locations that had been reported into the HUBB.

An informal survey of more than a dozen affected study areas in the wake of these late 2021 notifications from USAC revealed an average increase from an anticipated four pre-testing locations to more than 30 pre-testing locations. Moreover, notice of the opening of the Performance Measuring Module (PMM) for CAF-BLS carriers did not issue until mid-January 2022. About half of the surveyed companies are concerned about meeting their pre-test obligations; more than half warn that the short notice delivered by USAC will divert resources from other projects to attempt to meet the unanticipated increase in pre-testing demands.

To be sure, the companies anticipated that at some point in the future the totality of their locations would be the numeric basis from which a larger set of randomly drawn samples would be drawn. The companies, however, similarly anticipated that reasonable notice would be given before the pre-testing obligations for the increased number of locations were to attach – certainly, something more than a matter of a few weeks for acquisition and installation at customer premises of testing equipment before pre-testing started. As the Commission is aware, failure to comply with the rules can result in the withholding of 5% of a carrier’s high-cost support. Although that support can be reinstated when the carrier comes into compliance in subsequent quarters (and the affected carriers expect that with additional time they will be fully in compliance), the present situation leaves carriers susceptible to significant negative cash flow impacts for those intervening months. The significance of the threatened impact can be evaluated inasmuch as a 5% withholding was determined to be a threshold of sufficient penalty to encourage compliance. Accordingly, it is *by definition* a meaningful potential cash flow reduction that is of concern to the affected carriers.

NTCA discussed the usefulness of individual or combined petitions for waiver that affected carriers may file. The ordinary timeline in which an individual waiver might be prepared, filed, and approved may extend well beyond the period in which a carrier would come into compliance (*e.g.*, a carrier might come into compliance within several weeks while a petition for waiver is yet being adjudicated). This leaves affected carriers in the unenviable position of being effectively boxed into a penalty withholding because even *prospectively sought* relief will not be delivered in time to avoid a penalty and its impacts. NTCA submits that this outcome, which arises out of the unreasonable timeframes effectively constructed by late administrative notice to the carriers, stumbles against principles of good governance. It is analogous in its result to situations that are “capable of repetition yet evading review.”

NTCA suggests instead that the instant problem can be resolved by extending *sua sponte* for a more reasonable period of time commencement of pre-testing obligations for non-HUBB

locations provided to CAF-BLS carriers by USAC in December 2022. In the alternative, individual or combined petitions for waiver should be permitted in the modified form described in the December 2020 Order in this docket (*see*, Connect America Fund: Order, Docket No. 10-90, DA 20-1512, at fn. 18) and addressed expeditiously by the Commission in order to avoid even temporary withholding of support. These outcomes will serve the overall interest of the performance testing program as well as the reasonable administration of the rules.

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 via ECFS.

Respectfully submitted,

s/ Joshua Seidemann

Joshua Seidemann

Vice President, Policy

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cc: Ramesh Nagarajan