

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Connect America Fund) WC Docket No. 10-90
)

ORDER

Adopted: August 11, 2014

Released: August 11, 2014

By the Acting Chief, Wireline Competition Bureau:

1. In this Order, we dismiss as untimely a petition filed by the American Cable Association and the National Cable and Telecommunications Association (jointly, Petitioners) requesting reconsideration of the Wireline Competition Bureau's (Bureau) *Phase II Challenge Process Guidance Public Notice*.¹ However, as separate and independent grounds, we conclude that the arguments raised by Petitioners do not justify reconsideration of the *Phase II Challenge Process Guidance Public Notice*.²

I. PETITION NOT TIMELY FILED

2. Parties have 30 days from public notice of a Commission or Bureau action to file a petition for reconsideration.³ The *Challenge Process Guidance Public Notice* was released on June 20, 2014. Petitions for reconsideration were due on July 21, 2014.⁴ Petitioners filed the Joint Petition on July 22, 2014, after the 30-day window for filing had elapsed. Therefore, the Joint Petition is dismissed as untimely.

II. ARGUMENTS RAISED DO NOT WARRANT RECONSIDERATION

3. Even if the Joint Petition had been timely filed, we find that the arguments raised by Petitioners do not warrant reconsideration of the *Phase II Challenge Process Guidance Public Notice*. Thus, as separate and independent grounds, we deny the Joint Petition on its merits.

A. Background

4. In the *USF/ICC Transformation Order*, the Commission established a system to promote the deployment of voice and broadband-capable infrastructure in price cap territories through the Connect

¹ Petition for Reconsideration, American Cable Association et al., WC Docket No. 10-90 (filed July 22, 2014) (Joint Petition); *see also Wireline Competition Bureau Provides Guidance Regarding Phase II Challenge Process*, WC Docket No. 10-90, Public Notice, DA 14-864 (Wireline Comp. Bur. rel. June 20, 2014).

² This order does not reach the merits of the policy arguments raised in NCTA's August 5 Ex Parte Letter, which were not presented in the Joint Petition. *See* Letter from Jennifer K. McKee, Vice President and Associate General Counsel, National Cable and Telecommunications Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 (filed Aug. 5, 2014); 47 C.F.R. § 1.106(f) (prohibiting supplements to petitions for reconsideration after the expiration of the 30 day period).

³ 47 C.F.R. § 1.106(f).

⁴ Thirty days from June 20, 2014, was July 20, 2014. However, July 20 was a Sunday. When the filing date falls on a Sunday, the document is required to be filed the next business day. 47 C.F.R. § 1.4(j). In this case, filings were due the following Monday, July 21.

America Fund.⁵ Under Phase II of Connect America, ongoing support will be provided to deploy and operate such networks.⁶ However, the Commission specified that Phase II support should not be provided in areas “already served by an ‘unsubsidized competitor.’”⁷ To ensure a proper accounting of what areas were served by an unsubsidized competitor, the Commission decided that parties would be given the opportunity to challenge whether or not an area was served by an unsubsidized competitor, and it delegated the authority to conduct that challenge process to the Bureau.⁸

5. In the *Phase II Challenge Process Guidance Public Notice*, the Bureau provided guidance on several aspects of the challenge process. One item the Bureau addressed was what it means for an unsubsidized competitor “to serve” a particular area.⁹ The Bureau stated that for a party to truthfully certify that it serves a census block, the party must offer service in the census block, have plant in or adjacent to the census block, and have current or former customers in the census block in question.¹⁰

B. Discussion

6. Petitioners challenge the last prong of the Bureau’s interpretation of “to serve” on two grounds. First, Petitioners contend that requiring current or former customers as an element of “to serve” is inconsistent with the Commission’s delegation of authority to the Bureau to conduct the challenge process. Petitioners claim the Bureau exceeded its authority by making that interpretation.¹¹ Petitioners argue that in preventing funding from flowing to areas served by unsubsidized competitors, the Commission was focused on whether an unsubsidized competitor was *offering* voice and broadband service.¹² Petitioners claim that the Bureau’s interpretation is not a reasonable means of carrying out the Commission’s directive, as an unsubsidized competitor may be offering service but have no current or former customers.¹³

7. The Bureau’s interpretation that “to serve” requires current or former customers clearly falls within the Commission’s delegation of authority to administer the challenge process. While Petitioners focus on the Commission’s statement in the *USF/ICC Transformation Order* that funding should be excluded where an unsubsidized competitor “offers” service, the *USF/ICC Transformation Order* contains multiple other references that support the Bureau’s interpretation that something more than “offering” service should be required to exclude an area from Phase II support.¹⁴ The fact that the Commission does

⁵ *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order et al., 26 FCC Rcd 17663, 17673-74, paras. 21-25 (2011) (*USF/ICC Transformation Order*), *aff’d*, 753 F.3d 1015 (10th Cir. 2014).

⁶ *Id.* at 17725-33, paras. 156-80.

⁷ *Id.* at 17701, para. 103.

⁸ *Id.* at 17729, para. 170.

⁹ *Phase II Challenge Process Guidance Public Notice*, DA 14-864, paras. 8-9.

¹⁰ *Id.* at para. 9.

¹¹ Joint Petition at 3.

¹² *Id.* at 3-4.

¹³ *Id.* at 4.

¹⁴ The Commission variously described its actions as precluding funding “in areas where unsubsidized competitors are providing broadband,” *USF/ICC Transformation Order*, 26 FCC Rcd at 17673, para. 24 (emphasis added); “in areas *already served* by an ‘unsubsidized competitor,’” *id.* at 17701, para. 103 (emphasis added); areas “*served* by a competing, unsubsidized provider,” *id.* at 17725, para. 156 (emphasis added); “any area *served* by an unsubsidized competitor,” *id.* at 17729, para. 170 (emphasis added); and “all census blocks *served* by an unsubsidized competitor,” *id.* at 17730, para. 175 (emphasis added). This demonstrates that the Commission did not exclusively describe the restriction as preventing funding in areas where an unsubsidized competitor was *offering* service.

¹⁴ *Id.* at 17725, para. 156.

not consistently refer to an unsubsidized competitor *offering* service belies Petitioners' contention that the Commission clearly meant to exclude any census block where service was merely offered, to the exclusion of all other possible interpretations. The Commission delegated to the Bureau the task of implementing the challenge process,¹⁵ and it recently reaffirmed the Bureau's authority to make interpretations necessary to carry out that task.¹⁶ Thus, Petitioners' argument that the Bureau's interpretation of "to serve" exceeded its delegated authority is unavailing.

8. Second, Petitioners argue that the interpretation of "to serve" constitutes an unexplained departure from precedent.¹⁷ They note that in the Phase I challenge process, the Bureau did not require that a provider be serving customers in a particular census block to render the census block ineligible for support.¹⁸ Petitioners argue that the Bureau failed to justify or explain its departure from the standard used in Phase I.

9. The differing standards between Phase I and Phase II are not "an unexplained departure." The Bureau explicitly stated in the *Phase I Challenge Resolution Order* that the Phase I standards for determining whether an area was served would not apply in Phase II. Rather, a more robust showing would be required in Phase II to deem an area as served.¹⁹ Furthermore, as the Bureau explained in the *Phase II Challenge Process Guidance Public Notice*, the less stringent standard was used in Phase I in part due to a lack of prior guidance on what conditions a challenger must satisfy in order to exclude a census block from support; that reasoning does not apply in Phase II, as the *Phase II Challenge Process Guidance Public Notice* was issued in order to provide such guidance in advance of the challenge process.²⁰

10. For the foregoing reasons, the Joint Petition is denied on the merits.

III. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED that, pursuant to sections 0.91 and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.91, 1.106, the Petition for Reconsideration filed by the American Cable Association and the National Cable and Telecommunications Association is DISMISSED and, as separate and independent grounds, DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Matthey
Acting Chief
Wireline Competition Bureau

¹⁵ *Id.* at 17729, para. 170.

¹⁶ *Cf. Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order et al., FCC 14-54, para. 96 (rel. June 10, 2014) (noting that in regards to interpreting the definition of unsubsidized, "the authority to make that interpretation is delegated to the Bureau").

¹⁷ Joint Petition at 5.

¹⁸ *Id.*

¹⁹ In the *Phase I Challenge Resolution Order*, the Bureau made clear that statements from a potential competitor that a census block is "serviceable" or "capable of being served" would not be sufficient in Phase II to satisfy the "to serve" standard. *Connect America Fund*, WC Docket No. 10-90, Order, 29 FCC Rcd 181, 186-87, paras. 17-18 (Wireline Comp. Bur. 2014) (*Phase I Challenge Resolution Order*).

²⁰ *Phase II Challenge Process Guidance Public Notice*, DA 14-864, para. 8 n.15.