

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

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| In the Matter of |) | |
| |) | WT Docket No. 10-90 |
| Connect America Fund |) | |
| Universal Service Reform – Mobility Fund |) | WT Docket No. 10-208 |

ORDER ON RECONSIDERATION

Adopted: April 30, 2018

Released: April 30, 2018

By the Chiefs, Wireless Telecommunications Bureau and Wireline Competition Bureau:

I. INTRODUCTION

1. On February 27, 2018, the Rural Broadband Auctions Task Force, in conjunction with the Wireline Competition Bureau and the Wireless Telecommunications Bureau (the Bureaus), released a Public Notice establishing the procedures to be used in the Mobility Fund Phase II (MF-II) challenge process.¹ For the reasons described below, we reconsider certain aspects of those procedures on our own motion and increase the maximum distance between speed test measurements to 800 meters (approximately one-half of one mile) and the associated buffer radius to 400 meters (approximately one-quarter of one mile).

II. BACKGROUND

2. In the *MF-II Challenge Process Procedures Public Notice*, the Bureaus determined, consistent with the Commission’s decision in the *MF-II Challenge Process Order*,² that speed test measurements submitted to support and/or respond to a challenge to an area that is initially deemed ineligible for MF-II support must be no more than one-half of one kilometer (500 meters) apart from one another.³ The Bureaus also decided to assess challenges using a uniform grid with cells of one square kilometer and a “buffer” with a radius equal to one-half of the maximum distance parameter, i.e., one-quarter of one kilometer (250 meters).⁴ Subsequent to the release of the *MF-II Challenge Process*

¹ *Procedures for the Mobility Fund Phase II Challenge Process*, Public Notice, DA 18-186 (WTB/WCB Feb. 27, 2018) (*MF-II Challenge Process Procedures Public Notice*). The Public Notice was published in the Federal Register on March 29, 2018. *Procedures for the Mobility Fund Phase II Challenge Process*, 83 Fed. Reg. 13417, 13417 (Mar. 29, 2018).

² *Connect America Fund; Universal Service Reform – Mobility Fund*, Order on Reconsideration and Second Report and Order, 32 FCC Rcd 6282, 6309, para. 51 (2017) (*MF-II Challenge Process Order*); see also *MF-II Challenge Process Procedures Public Notice* at 11, para. 19 (“The Commission decided in the *MF-II Challenge Process Order* that a challenger must submit actual outdoor speed test measurements with sufficient density to reflect actual consumer experience throughout the entire challenged area. Specifically, the Commission adopted a requirement that a challenger must take measurements that: (1) are no more than a fixed distance apart from one another in each challenged area; and (2) substantially cover the entire area.” (footnote omitted)).

³ *MF-II Challenge Process Procedures Public Notice* at 12, 23-24, paras. 21, 49.

⁴ *Id.* at 11-12, 17-19, paras. 20-21, 35-38. The Commission determined in the *MF-II Challenge Process Order* that the buffer radius will equal one-half of the maximum distance parameter. *MF-II Challenge Process Order*, 32 FCC Rcd at 6310, para. 55 n.162. Accordingly, by establishing a maximum distance parameter of 500 meters, the Bureaus also established a buffer radius of 250 meters. *MF-II Challenge Process Procedures Public Notice* at 12, para. 21.

Procedures Public Notice, RWA submitted detailed data regarding the burden a challenger would experience as a result of these decisions.⁵

III. DISCUSSION

3. Under Section 1.113(a), the Bureaus may modify or set aside any action taken pursuant to their delegated authority on their own motion within 30 days of the publication of the action in the Federal Register.⁶ In this case, the *MF-II Challenge Process Procedures Public Notice* was published in the Federal Register on March 29, 2018, thus allowing the Bureaus until April 30, 2018 to reconsider those procedures.⁷ Based on new evidence in the record, we now modify the requirement that speed test measurements must be taken no further than one-half of one kilometer apart from one another, which resulted in a buffer radius of one-quarter of one kilometer.

4. In the *MF-II Challenge Process Procedures Public Notice*, we stated that we were not persuaded by the evidence in the record that adopting our proposal to use a one square kilometer grid cell and a buffer radius of one-quarter of one kilometer to assess challenges would create an “insurmountable burden.”⁸ Upon consideration of new evidence in the record, which was unavailable at the time of our prior decision,⁹ we are now persuaded that applying a buffer radius of one-quarter of one kilometer may be unduly burdensome to some challengers.¹⁰ The new evidence illustrated the considerable increase in area covered by speed test measurements resulting from using a radius of one-quarter of one mile rather than a radius of one-quarter of one kilometer.¹¹ Since the Commission determined in the *MF-II Challenge Process Order* that the radius of the buffer will equal one-half of the maximum distance parameter,¹² we will require that speed test measurements be taken no further than 800 meters (eight-tenths of one kilometer) apart from one another, resulting in an associated buffer radius of 400 meters (four-tenths of one kilometer). These modified parameters will reduce the number of speed test measurements needed to file a successful challenge.¹³ Therefore, based upon our review of the record,¹⁴

⁵ See generally Letter from Caressa D. Bennet, General Counsel, RWA, and Erin P. Fitzgerald, Regulatory Counsel, RWA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-208 et al. (Mar. 21, 2018) (RWA Mar. 21, 2018 *Ex Parte*) (focusing on challenges to certain ineligible areas in Alabama, Kansas, Montana, North Dakota, Oklahoma, and Wyoming). RWA warns that, “[i]f unchanged, the challenge process parameters will impose significant and unnecessary costs on prospective challengers.” *Id.* at 2.

⁶ 47 CFR § 1.113(a); see *id.* § 1.4(b)(1).

⁷ *Id.* § 1.113(a); see *id.* § 1.4(b)(1); see also generally *Procedures for the Mobility Fund Phase II Challenge Process*, 83 Fed. Reg. at 13417.

⁸ See *MF-II Challenge Process Procedures Public Notice* at 12-13, para. 22; see also ATN Comments at 3-4; accord RWA Reply at 7.

⁹ The new evidence that RWA submitted into the record is based, in part, on the initial eligible areas map which was made available to the public the same day the *MF-II Challenge Process Procedures Public Notice* was released. See *Mobility Fund Phase II Initial Eligible Areas Map Available; Challenge Window Will Open March 29, 2018*, Public Notice, DA 18-187 at 1 (WCB/WTB Feb. 27, 2018); see also RWA Mar. 21, 2018 *Ex Parte*, Attachments A-D.

¹⁰ See RWA Mar. 21, 2018 *Ex Parte* at 2.

¹¹ See RWA Mar. 21, 2018 *Ex Parte*, Attachments A-D.

¹² *MF-II Challenge Process Order*, 32 FCC Rcd at 6310, para. 55 n.162.

¹³ As explained in the *MF-II Challenge Process Procedures Public Notice*, we will determine whether a challenger’s speed test points substantially cover a challenged area (i.e., cover at least 75 percent of the challenged area) by buffering each speed test point that reports a downstream speed less than 5 Mbps, calculating the buffered area, and then comparing the area of the buffered points to the challengeable area within a 1 km by 1 km grid cell. *MF-II Challenge Process Procedures Public Notice* at 11, para. 20; see also *MF-II Challenge Process Order*, 32 FCC Rcd at 6310, para. 55. By increasing the size of the buffer radius, the buffered area around each speed test measurement

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we expect that applying a slightly larger maximum distance parameter and, correspondingly, a slightly larger buffer radius will significantly reduce the burden on potential challengers while not unduly compromising the Commission's interest in collecting accurate data that reflects consumers' experience.

IV. PROCEDURAL MATTERS

A. Congressional Review Act

5. The Commission will send a copy of this Order on Reconsideration to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.¹⁵

B. Paperwork Reduction Act Analysis

6. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198.¹⁶

C. Final Regulatory Flexibility Certification

7. The Regulatory Flexibility Act of 1980, as amended (RFA),¹⁷ requires that a regulatory flexibility analysis be prepared for a notice-and-comment rulemaking proceeding, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."¹⁸ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹⁹ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.²⁰ 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 SBA.²¹

8. As required by the RFA,²² the Commission prepared Initial Regulatory Flexibility Analyses (IRFAs) in connection with the *USF/ICC Transformation FNPRM*, the *2014 CAF FNPRM*, and

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will cover a larger area of the grid cell. As a result, by increasing the buffer radius to 400 meters, a challenger will be able to meet the 75% threshold with fewer speed test measurements.

¹⁴ RWA Mar. 21, 2018 *Ex Parte* at 2 (explaining that using a one-quarter of one mile buffer radius will make it easier to collect speed test measurements).

¹⁵ See 5 U.S.C. § 801(a)(1)(A).

¹⁶ See 44 U.S.C. § 3506(c)(4).

¹⁷ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

¹⁸ 5 U.S.C. § 605(b).

¹⁹ 5 U.S.C. § 601(6).

²⁰ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

²¹ 15 U.S.C. § 632.

²² 5 U.S.C. § 603.

the *MF-II FNPRM* (collectively, *MF-II FNPRMs*).²³ A Supplemental Initial Regulatory Flexibility Analysis (Supplemental IRFA) was also filed in the *MF-II Challenge Process Comment Public Notice* in this proceeding.²⁴ The Commission sought written public comment on the proposals in the *MF-II FNPRMs* and in the *MF-II Challenge Process Comment Public Notice*, including comments on the IRFAs and Supplemental IRFA. The Commission received three comments in response to the *MF-II FNPRM* IRFA.²⁵ No comments were filed addressing the other IRFAs or the Supplemental IRFA. The Commission included Final Regulatory Flexibility Analyses in connection with the *2014 CAF Order*, the *MF-II Order*, and the *MF-II Challenge Process Order*,²⁶ and a Supplemental Final Regulatory Flexibility Analysis in connection with the *MF-II Challenge Process Procedures Public Notice*.²⁷

9. This Order on Reconsideration modifies the Bureaus' decision in the *MF-II Challenge Process Procedures Public Notice* that speed test measurements submitted to support and/or respond to a challenge to an area that is initially deemed ineligible for MF-II support must be no more than one-half of one kilometer (500 meters) apart from one another. This Order on Reconsideration increases the maximum distance parameter to 800 meters (approximately one-half of one mile) and, correspondingly, increases the associated buffer radius used to assess challenges to 400 meters (approximately one-quarter of one mile). By reducing the number of speed test measurements needed to submit a successful challenge, we expect that these modified parameters will reduce the burden on potential challengers. Therefore, we certify that the requirements of the Order on Reconsideration will not have a significant economic impact on a substantial number of small entities.

10. The Commission will send a copy of this Order on Reconsideration, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act.²⁸ In addition, this Order on Reconsideration and this final certification will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the Federal Register.²⁹

V. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to the authority contained in Sections 4(i), 254, 303(r), and 332 of the Communications Act of 1934, as amended, and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. §§ 154(i), 254, 303(r), 332, 1302, and Section 1.113(a) of the Commission's rules, 47 CFR § 1.113(a), that this Order on Reconsideration is ADOPTED.

²³ *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 18364-95, Appx. P, Initial Regulatory Flexibility Analysis (2011) (*USF/ICC Transformation FNPRM*); *Connect America Fund et al.*, Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 7051, 7216-44, Appx. D, Initial Regulatory Flexibility Analysis (2014) (*2014 CAF Order* or *2014 CAF FNPRM*); *Connect America Fund*; *Universal Service Reform – Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 2152, 2269-73, Appx. C, Initial Regulatory Flexibility Analysis (2017) (*MF-II Order* or *MF-II FNPRM*).

²⁴ *Comment Sought on Mobility Fund Phase II Challenge Process Procedures and Technical Implementation*, Public Notice, 32 FCC Rcd 7596, 7607-09, paras. 31-35 (WCB/WTB 2017) (*MF-II Challenge Process Comment Public Notice*).

²⁵ Those comments were addressed in the *MF-II Challenge Process Order* Final Regulatory Flexibility Analysis. *MF-II Challenge Process Order*, 32 FCC Rcd at 6317-18, Appx. A, paras. 4-5.

²⁶ *2014 CAF Order*, 29 FCC Rcd at 7190-215, Appx. C, Final Regulatory Flexibility Analysis; *MF-II Order*, 32 FCC Rcd at 2258-68, Appx. B, Final Regulatory Flexibility Analysis; *MF-II Challenge Process Order*, 32 FCC Rcd at 6317-25, Appx. A, Final Regulatory Flexibility Analysis.

²⁷ *MF-II Challenge Process Procedures Public Notice* at 31-34, paras. 70-83.

²⁸ See 5 U.S.C. § 801(a)(1)(A).

²⁹ See 5 U.S.C. § 605(b).

12. IT IS FURTHER ORDERED that, pursuant to Section 1.103 of the Commission's rules, 47 CFR § 1.103, this Order on Reconsideration SHALL BECOME EFFECTIVE thirty (30) days after the date of publication in the Federal Register.

13. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this Order on Reconsideration to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

14. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order on Reconsideration, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

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