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

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

To: Chiefs, Wireline Competition Bureau, Wireless Telecommunications Bureau, Office of Engineering and Technology

REPLY TO OPPOSITION TO
PETITION FOR RECONSIDERATION AND CLARIFICATION

Pursuant to Section 1.429(g) of the Commission's rules, USTelecom – the Broadband Association, ITTA - The Voice Of America's Broadband Providers, and the Wireless Internet Service Providers Association (collectively, "Petitioners") respectfully reply to the opposition and comments filed with respect to Petitioners' Petition for Reconsideration ("Petition") of the *Order*[1] adopted by the Wireline Competition Bureau, the Wireless Telecommunications Bureau, and the Office of Engineering and Technology (collectively, the "Bureaus") regarding Connect America Fund ("CAF") broadband measurement obligations and remediation processes.[2]

I. THE RECORD REFLECTS BROAD SUPPORT FOR THE PETITION

Aside from the Rural Associations'[3] unavailing opposition to some of the Petition's arguments seeking relief from the *Order*'s onerous and unsupported latency testing requirements, the record evinces complete support for the Petition by those that address it. For example,

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[1] *Connect America Fund*, Order, 83 Fed. Reg. 42052, DA 18-710 (rel. July 6, 2018) ("*Order"*).
[2] In referring to the "CAF" recipients or ETCs throughout this Reply, Petitioners refer to current and future recipients of CAF high-cost universal service support, including price cap carriers, rate-of-return carriers, rural broadband experiment support recipients, Alaska Plan carriers, and CAF Phase II auction winners.
[3] *See* Opposition of NTCA—The Rural Broadband Association, National Rural Electric Cooperative Association, and Utilities Technology Council, WC Docket No. 10-90 (Nov. 7, 2018) ("Rural Associations Opposition;" collectively, "Rural Associations").

Midcontinent Communications ("Midco") supports the Petition "in its entirety."[4] AT&T urges the Bureaus to grant the Petition,[5] and elaborates in endorsing several of its specific arguments.

The Rural Associations and AT&T back the Petition's request to reconsider the *Order*'s overly stringent framework for penalizing non-compliance, whereby certain minor performance infractions are treated much more severely than more significant non-compliance with broadband deployment milestones.[6] The Rural Associations, like Petitioners, recognize the striking asymmetry of non-compliance with certain performance measures triggering a loss of high-cost support, while larger margins of non-compliance with buildout obligations trigger only reporting obligations.[7] AT&T also agrees that it makes little sense to punish a CAF recipient more severely for a minor latency compliance gap than for a buildout compliance gap.[8] As Petitioners cautioned, the withholding of CAF funds for minor and easily correctable disparities – in already challenging high-cost areas – paradoxically could hinder a provider's ability to come into full compliance. Petitioners reiterate that, as with buildout milestones, the first tier of non-compliance with performance measures simply should trigger a reporting requirement.[9]

All commenters on the Petition concur that the Commission should clarify that compliance with speed requirements is to be tested against CAF-mandated minimums – not "advertised speed" – and that the Commission should reconsider the *Order*'s exclusion of test results due to overprovisioning.[10] In support of the requested clarification, the Rural Associations succinctly state that "the purpose of the testing framework is to verify compliance

[4] Comments of Midcontinent Communications, WC Docket No. 10-90 (Nov. 7, 2018) ("Midco Comments"), at 1.
[5] *See* Comments of AT&T, WC Docket No. 10-90 (Nov. 7, 2018) ("AT&T Comments"), at 2.
[6] *See* Petition at 12-14.
[7] *See* Rural Associations Opposition at 15-16.
[8] *See* AT&T Comments at 11-13.
[9] *See* Petition at 13.
[10] *See id.* at 15-19; Comments of Alaska Communications, WC Docket No. 10-90 (Nov. 7, 2018) ("Alaska Communications Comments"); AT&T Comments at 13-14; Midco Comments at 4-7; Rural Associations Opposition at 16-17.

with deployment obligations, only."[11] Decrying as "perplexing" and "simply . . . incorrect" the Bureaus' determination that speed test results demonstrating speeds significantly faster than advertised are "likely invalid,"[12] AT&T notes the flaw in this determination by reasoning that, "[i]f not reconsidered, the Bureaus' decision to exclude test results that show speeds faster than 150 percent of the advertised speed will punish CAF recipients for complying with the Commission's rules."[13] Similarly, Alaska Communications, which expects to deploy significant fixed wireless to meet its deployment obligations and market the service as "up to" a specific speed, contends that, "[i]n favorable conditions, this practice will increase the likelihood that speed test results would exceed the 'advertised' speed, however[] defined, by more than the Order's 150 percent threshold."[14] Rather than rendering the test results "likely invalid," however, it would reflect Alaska Communications' intent to ensure that its customers receive at least an acceptable level of service, even in unfavorable conditions.[15]

AT&T also questions the *Order's* "on-net" testing obligation, echoing the Petition's call for clarification that on-net servers are suitable for testing and compliance purposes, "FCC-designated IXP" includes any IXP operating in metropolitan areas identified in the *Order*, and that carriers may test to "the nearest internet access point."[16] As AT&T explains, the *Order* designates just 16 cities as "FCC-designated IXPs," significantly increasing in some, if not many, cases the distances over which tests are performed, and thereby artificially reducing measured network performance. This limitation contradicts the Bureaus' own reasoning that they want a CAF recipient's testing to "'show whether [a] customer is able to enjoy high-quality

[11] Rural Associations Opposition at 16.
[12] *Order* at 20, para. 51 n.145.
[13] AT&T Comments at 13; *see also* Midco Comments at 6 (excluding speeds that are 150 percent of advertised speeds is a disincentive to providers to continually invest in and upgrade their networks).
[14] Alaska Communications Comments at 5.
[15] *Id.*
[16] *See* Petition at 21.

real-time applications,'" insofar as determining whether customers can enjoy "real-time" applications requires testing that measures the real-world experience of broadband customers, which the Bureaus acknowledge may not be the case because increasing the distance to the nearest IXP may adversely affect performance.[17] AT&T adds that the Bureaus did not explain why a CAF recipient must test only at remote servers located in one of the *Order*'s delineated cities, as opposed to a remote test server located at "the nearest Internet access point," as the Commission required in 2011.[18]

The Petition's call for clarification that CAF recipients are permitted to use the same subscribers for both speed and latency testing also drew acclaim from commenters.[19] Consistent with the Petition's contention that there is no reason that the number of subscribers required for both speed and latency should not be identical,[20] the Rural Associations assert that "there is no discernible reason" to require the use of different panels for speed and latency testing.[21] Compounding the superfluous costs involved in testing twice the number of subscribers than is necessary,[22] AT&T explains how, "recognizing the efficiencies with testing both speed and latency at the same time, AT&T developed a testing solution to do precisely that," and argues that CAF recipients should not be required to expend additional resources modifying already developed testing solutions, especially in the absence of any explanation as to why CAF

[17] *See* AT&T Comments at 4-5 (quoting *Order* at 8, para. 19, and citing *Order* at 9, para. 21); *cf.* Petition at 20 ("allowing ETCs the flexibility to test to the nearest IXP of their choice also ensures that test results will best reflect the service delivered to their CAF customers").
[18] *See* AT&T Comments at 4; s*ee also* Midco Comments at 7-8. Petitioners note that NTCA, a member of the Rural Associations, also significantly challenged these provisions of the *Order* in its separate application for review of the *Order*. *See* Application for Review and Request for Clarification of NTCA-The Rural Broadband Association, WC Docket No. 10-90 (filed Sept. 19, 2018) ("NTCA AFR"), at 2-9.
[19] *See* Petition at 21-23; *see also, e.g.*, Midco Comments at 7-8.
[20] *See* Petition at 22; *see also* NTCA AFR at 22.
[21] Rural Associations Opposition at 18.
[22] *See* Petition at 21; Rural Associations Opposition at 17-18.

recipients should not be permitted to test the same, randomly-selected subscribers for both speed and latency.[23] Petitioners agree.

Finally, the Rural Associations support the Petition's request that the *Order* be clarified to reflect that CAF recipients are afforded certain flexibility in satisfying their obligations to complete hourly tests during the peak period window.[24] As the Rural Associations observe, if the testing frequency requirement is satisfied, there should be no practical difference as to whether testing occurs at the top, middle, or closer to end of an hour within the testing window.[25] The peak period testing requirements are already burdensome as is; such obligations need not be exacerbated by overly prescriptive requirements that serve no meaningful purpose.

II. THE COMMISSION SHOULD REJECT ARGUMENTS THAT SEEK TO PRESERVE ONEROUS LATENCY TESTING REQUIREMENTS

A. The Bureaus Failed to Comply with the Administrative Procedure Act

The Rural Associations incorrectly assert that the Bureaus adequately addressed its notice obligations under the Administrative Procedure Act ("APA").[26] As addressed in the Petition,[27] the Bureaus did not provide adequate notice pursuant to Section 553 of the APA that they were considering different CAF testing frequencies for the latency as opposed to the speed measurement framework, and nothing in the Rural Associations Opposition rebuts that claim.

There is ample precedent demonstrating that the Bureaus failed to meet their APA obligations to provide adequate notice of their final rule. An accepted principle of administrative law is that the public must be given sufficient notice of a rule change, as judged by the particular facts, to comment on issues important to the agency's decision. The APA specifically requires

[23] AT&T Comments at 8-9.
[24] *See* Petition at 23-24.
[25] *See* Rural Associations Opposition at 18.
[26] 5 U.S.C. § 553.
[27] *See* Petition at 4-8.

agencies to provide notice of a rule that contains "either the terms or substance of the proposed rule or description of the subjects and issues involved."[28]

In *Prometheus Radio Project v. FCC*, the Third Circuit overturned the Commission's attempt to regulate ownership of different types of media, including newspapers, radio and TV stations.[29] In reviewing the charge of inadequate process, the majority emphasized the purposes of the APA's framework to assure testing of the proposal through public comment, which in turn ensures fairness to all affected parties. It quoted an earlier decision by the D.C. Circuit for the proposition that an agency "has an obligation to make its views known to the public *in a concrete and focused form* so as to make criticism or formulation of alternatives possible."[30] Here, the Bureaus clearly neglected that obligation, failing to "'describe the range of alternatives being considered with reasonable specificity.'"[31] This failure, in turn, means that "'interested parties [did] not know what to comment on, and notice [did] not lead to better-informed agency decision-making.'"[32] The Third Circuit's finding in *Prometheus* that the Commission's use of the phrase "characteristics of markets" was "too open-ended to allow for meaningful comment on the Commission's approach"[33] is equally relevant here.

The Rural Associations are simply incorrect in asserting that the *2017 Public Notice*[34] "provided reasonable notice, read either separately or together with its ancestor notices" because neither the Bureaus nor the Commission ever provided adequate notice regarding the frequency

[28] *See* 5 U.S.C. § 553(b).
[29] *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) ("*Prometheus"*).
[30] *Id.* at 449-50 (citing *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977)) (emphasis added).
[31] *Id.* at 450 (citing *Horsehead Res. Dev. Co., Inc. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (internal citations omitted)).
[32] *Id.* (citing *Horsehead*, 16 F.3d at 1268 (internal citations omitted)).
[33] *Id*.
[34] *See* Public Notice, *Comment Sought on Performance Measures for Connect America Fund High-Cost Universal Service Support Recipients*, 32 FCC Rcd 9321 (WCB 2017).

of latency testing.[35] This absence of adequate notice runs counter to the Third Circuit's conclusion in *Prometheus*. As noted by the Petitioners, over the course of five years, "the Bureaus consistently signaled that they would harmonize speed and latency testing rules, and never offered a hint that they would adopt such radically different testing regimes nor that they would fail to consider the burdens such testing parameters would place on small CAF recipients."[36] Contrary to the Rural Associations' claims, the Bureaus failed to provide adequate notice under the APA, and the Commission should therefore reconsider their decision.[37]

B. The Rural Associations Present no Legal or Factual Basis for Requiring Substantially More Latency Tests than Speed Tests

In addition to opposing Petitioners' argument that the Bureaus failed to comply with the APA in adopting onerous latency requirements not contemplated by the *Public Notice*, the Rural Associations appear to oppose harmonization between the reasonable frequency of speed testing and the over-reaching frequency of latency testing.[38] To support their position, the Rural Associations offer broad statements about the importance of low-latency service and the need for rigorous latency testing standards – about which there is no disagreement.[39] Indeed, Petitioners made clear that they "support a framework for speed and latency testing that is appropriately balanced between ensuring that CAF recipients meet their obligations, and ensuring that administrative efficiency and overall integrity of the programs are achieved for both the Commission and support recipients."[40] Where reason gives way to rhetoric is in the Rural Associations' bare claim that "there is logic in a protocol that tests for latency more frequently

[35] Rural Associations Opposition at 9.
[36] Petition at 8.
[37] *See also* AT&T Comments at 6-8 (asserting APA notice infirmities and suggesting that the requirements could not survive an OMB Paperwork Reduction Act review).
[38] *See* Rural Associations Opposition at 5.
[39] *See id.* at 5, 6.
[40] Petition at 4.

than speed."[41] They then attempt to equate the need to test for "millisecond variables" in latency with the *frequency* of such testing.[42] This misses the mark – the quality of testing and the frequency of testing are two separate things.

The Rural Associations also misconstrue Petitioners' argument that the *Order* departs from the Measuring Broadband America ("MBA") standards that establishes a single testing framework for speed and latency.[43] Petitioners do not, as the Rural Associations allege, argue that the Bureaus departed from agency *precedent* or that there was "a reasonable expectation or even a mere proposition that the MBA practices would be adopted whole cloth for purposes of the Commission's rules here."[44] Petitioners' point is not that the Bureaus were bound to follow the MBA program, but that the Bureaus failed to explain why they did not consider past decisions and instead adopted a two-pronged approach that requires substantially more frequent latency testing.

Noticeably absent from the Rural Associations Opposition is any assertion that the gross disparity between the frequency of speed testing and the frequency of latency testing cannot, from a factual standpoint, be reconciled. The Rural Associations fail to oppose Petitioners' sound reasoning that "the significant disparity in the number of quarterly tests for speed and latency will make it difficult for CAF recipients to combine the instructions for testing into a single process. Testing every minute may also overload some testing methods and cause testing to be disrupted."[45] Nor do the Rural Associations attempt to bolster the lack of any justification in the *Order*, which offered "no reason to require such extensive latency testing to prove that a

[41] Rural Associations Opposition at 5.
[42] *Id.*
[43] *See id.* at 6-7.
[44] *Id.* at 7.
[45] Petition at 9.

recipient has met its CAF requirement."[46] In the end, the Rural Associations have only flimsy legal arguments to help prop up the Bureaus' conclusions, and no factual response that significantly greater latency testing is somehow necessary or even desirable.[47]

C. The Rural Associations Present No Basis for Requiring a More Exacting Latency Compliance Threshold

The Rural Associations also oppose Petitioners' request to more align the 95 percent compliance threshold the Bureaus adopted for latency with the 80/80 standard the Bureaus adopted for speed compliance.[48] The Rural Associations state that "[v]ariations in speed of up to 20 percent affect satellite and terrestrial providers. This is caused by networking protocols, interference and other variances that affect all providers and whose accommodation is technology neutral."[49] They then jump to a *non sequitur* – "Similar factors, however, do not implicate latency, and therefore a 95 percent threshold is supported fully by the record."[50]

The Rural Associations fail to appreciate that latency, too, can be affected by variables or anomalies in the network, some of which may be the result of external or upstream factors. Because of this reality, a 95 percent compliance threshold with a standard that would find even one millisecond above the standard out of compliance is draconian.[51] By contrast, Petitioners presented evidence based on consumer expectations in suggesting a standard requiring a CAF recipient to meet 175 percent of the latency standard 95 percent of the time.[52]

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[46] *Id.*
[47] *See* Midco Comments at 3-4 (concurring with Petition's arguments that the *Order* does not support its divergent speed and latency testing requirements).
[48] *See* Rural Associations Opposition at 12-13; *but cf.* AT&T Comments at 9-11, Midco Comments at 3 (both asserting that the compliance framework should be identical for speed and latency testing).
[49] Rural Associations Opposition at 13.
[50] *Id.* (citation omitted). The "record" to which the Rural Associations cite is a Vantage Point Solutions document regarding satellite latency – not anything from the *Order*.
[51] *See* Petition at 11.
[52] *See id.* at 12.

The Commission should also reject the arguments of ViaSat, Inc. in its Petition for Reconsideration filed in this proceeding, which seeks to eliminate the requirement for "real-world" conversational-opinion testing.[53] Petitioners agree with Hughes Network Systems LLC that the standards ViaSat objects to were "established prior to the auction . . . and prospective bidders made bidding decisions based upon them – including decisions regarding whether or not to bid."[54] Given the principles of fairness, and the valid auction legitimacy issues raised by Hughes, the Commission should deny the ViaSat Petition.[55]

Conclusion

The Bureaus should grant the Petition for the reasons set forth herein and in the Petition.

Respectfully submitted,

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[53] Petition for Reconsideration of ViaSat, Inc., WC Docket No. 10-90 (Sept. 19, 2018), at 5.
[54] Opposition of Hughes Network Systems LLC, WC Docket No. 10-90 (Nov. 7, 2018), at 1.
[55] ViaSat cannot maintain it was caught off guard by the *Order* requiring a testing framework outside of a laboratory setting. In its 2011 *USF/ICC Transformation Order*, the Commission stated that speed and latency under the CAF would be measured "on each ETC's access network *from the end-user interface* to the nearest Internet access point." *Connect America Fund*, 26 FCC Rcd 17663, 17696, ¶ 111 (2011) (emphasis added).