

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

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

Adopted: May 16, 2013

Released: May 16, 2013

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In the *USF/ICC Transformation Order*, the Commission comprehensively reformed and modernized the universal service and intercarrier compensation systems to maintain voice service and extend broadband-capable infrastructure to millions of Americans.<sup>1</sup> As part of the reform, the Commission adopted a framework for providing support to areas served by price cap carriers known as the Connect America Fund through “a combination of competitive bidding and a new forward-looking model of the cost of constructing modern multi-purpose networks.”<sup>2</sup> In particular, the Commission will offer each price cap carrier monthly model-based support for a period of five years in exchange for a state-level commitment to serve specified areas that are not served by an unsubsidized competitor, and if that offer is not accepted, will determine support through a competitive process.

2. In this Report and Order (Order), the Wireline Competition Bureau (Bureau) adopts a framework for the challenge process that will be used to finalize the list of areas that will be eligible for Connect America Phase II model-based support and adopts the procedures for a price cap carrier to elect to make a state-level commitment to serve the eligible areas.<sup>3</sup> We particularly encourage state public utility commissions and broadband mapping authorities to participate in the challenge process and provide any information they believe to be relevant to our consideration of which census blocks should be eligible for the offer of Phase II model-based support.<sup>4</sup>

<sup>1</sup> See *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC 17663 (2011) (*USF/ICC Transformation Order*), *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011).

<sup>2</sup> *USF/ICC Transformation Order*, 26 FCC Rcd at 17725, para. 156.

<sup>3</sup> The decisions adopted in this Order regarding the process for determining who is an unsubsidized competitor will apply only to the development of census blocks eligible for model-based support in Phase II. The decisions in this Order in no way prejudice how the presence of an unsubsidized competitor may be determined in other contexts, such as the Phase II post-state-level-election auction or implementation of the rule limiting support where there is 100 percent overlap with an unsubsidized competitor.

<sup>4</sup> See Reply of the Pennsylvania Public Utility Commission, WC Docket No. 10-90, at 7 (filed Apr. 12, 2013) (Pennsylvania PUC Reply).

## II. BACKGROUND

3. In the *USF/ICC Transformation Order*, the Commission delegated to the Bureau the task of implementing various aspects of Connect America Phase II. Among other things, the Commission directed the Bureau, after the cost model is adopted, to “publish a list of all eligible census blocks” (specifically, those census blocks in price cap territories below the extremely high-cost threshold but above the funding threshold) and provide an opportunity for parties to “challenge the determination of whether or not areas are unserved by an unsubsidized competitor.”<sup>5</sup> The Bureau also must specify the procedures for carriers to exercise their election to accept or decline Phase II support in exchange for making a state-level commitment.<sup>6</sup> The Bureau initially sought comment on these two issues in the *Phase II Challenge Process Public Notice*.<sup>7</sup> It subsequently sought to further develop the record on specific standards to apply in the challenge process, including metrics for determining whether an unsubsidized competitor is providing voice and broadband that is reasonably comparable to offerings in urban areas, in the *Phase II Service Obligations Public Notice*.<sup>8</sup>

## III. DISCUSSION

### A. Phase II Footprint Challenge Process

4. The Phase II footprint challenge process will allow interested parties to provide input on the preliminary list of what areas should be deemed unserved by an unsubsidized competitor, and therefore eligible for Phase II model-based support. Section 54.5 of the Commission’s rules defines an unsubsidized competitor as “a facilities-based provider of residential terrestrial fixed voice and broadband service that does not receive high-cost support.”<sup>9</sup> In this order, we set forth the basic framework regarding the use of presumptions, evidentiary showing, and timing of the challenge process for census blocks where Phase II funding will be offered to price cap carriers.

5. Consistent with the framework established in the *USF/ICC Transformation Order*, an unsubsidized competitor in areas where the price cap carrier will be offered model-based support must meet the speed criteria established by the Commission for fixed broadband service (i.e., a provider that offers 4 Mbps downstream/1 Mbps upstream service (4 Mbps/1 Mbps)), as well as non-speed broadband criteria (i.e., latency, capacity, and price) and provide voice service.<sup>10</sup> In order to conduct the challenge

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<sup>5</sup> *USF/ICC Transformation Order*, 26 FCC Rcd at 17701, 17729, paras. 103, 170.

<sup>6</sup> *Id.* at 17729, paras. 170-71.

<sup>7</sup> *Wireline Competition Bureau Seeks Comment on Procedures Relating to Areas Eligible for Funding and Election to Make a Statewide Commitment in Phase II of the Connect America Fund*, WC Docket No. 10-90, Public Notice, 27 FCC Rcd 15970, para. 3 (Wireline Comp. Bur. 2012) (*Phase II Challenge Process Public Notice*).

<sup>8</sup> *Wireline Competition Bureau Seeks Further Comment on Issues Regarding Service Obligations for Connect America Phase II and Determining Who Is an Unsubsidized Competitor*, WC Docket No. 10-90, Public Notice, 28 FCC Rcd 1517 (Wireline Comp. Bur. 2013) (*Phase II Service Obligations Public Notice*).

<sup>9</sup> 47 C.F.R. § 54.5. Petitions to reconsider the definition of “unsubsidized competitor” are currently pending before the Commission. See Petition for Reconsideration of NTCH, WC Docket No. 10-90 et al., at 13 (filed Dec. 29, 2011); Petition for Reconsideration of ViaSat, WC Docket No. 10-90 et al., at 9-11 (filed Dec. 29, 2011); Petition for Reconsideration of the Wireless Internet Service Providers Association (WISPA), WC Docket No. 10-90 et al., at 4-8 (filed Dec. 29, 2011). In this Order, we adopt processes and presumptions to implement the Commission’s existing definition. This decision in no way prejudices any action the Commission may take on the pending petitions for reconsideration.

<sup>10</sup> See *USF/ICC Transformation Order*, 26 FCC Rcd at 17710, paras. 103-04. In response to the *Phase II Challenge Process Public Notice*, several commenters argued that we should not move forward with the Phase II challenge process until we set performance and pricing metrics for unsubsidized competitors. See Comments of the American Cable Association (ACA), WC Docket No. 10-90, at 6-7 (filed Feb. 19, 2013) (ACA Comments); Comments of the

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process efficiently, we will develop the initial list of eligible census blocks based on coverage shown on the National Broadband Map,<sup>11</sup> and the reporting of voice subscriptions on FCC Form 477, and then will conduct a challenge process that will provide an opportunity for parties to challenge that preliminary determination.<sup>12</sup>

6. *Broadband Service.* Under the Commission's rules, an unsubsidized competitor must offer fixed broadband with speeds of at least 4 Mbps/1 Mbps. We will presume that the National Broadband Map is accurate with regard to the speed of services being offered by broadband providers, with that presumption subject to rebuttal. Because the National Broadband Map does not contain data specifically for the 4 Mbps/1 Mbps benchmark, we will use the National Broadband Map's 3 Mbps downstream and 768 kbps upstream (3 Mbps/768 kbps) advertised speed as a proxy for 4 Mbps/1 Mbps. After consideration of the record, we see no reason to depart, for purposes of Phase II implementation, from the 3 Mbps/768 kbps proxy generally recognized by Commission.<sup>13</sup> Therefore, any terrestrial, fixed provider shown on the National Broadband Map as offering broadband with speeds of 3 Mbps/768 kbps will be presumed to provide broadband service meeting the speed requirement of 4 Mbps/1 Mbps.<sup>14</sup>

7. While the National Broadband Map provides valuable information regarding the availability of broadband service meeting specified speed tiers, it does not address the other criteria that the Commission has indicated are relevant to determining whether an entity should be deemed an unsubsidized competitor. There is no alternative suitable national-level source that we can rely upon to make this determination. There is ample evidence in the record, however, that providers that meet the speed requirement generally meet our other performance criteria.<sup>15</sup> For administrative ease, therefore, we

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United States Telecom Association (USTelecom), WC Docket No. 10-90, at 9-12 (filed Feb. 19, 2013) (USTelecom Comments); Reply of the Independent Telephone and Telecommunications Alliance, WC Docket No. 10-90, at 7 (filed Mar. 4, 2013) (ITTA Reply). The challenge process will not take place until after we address these issues in a future order. This Order merely adopts presumptions and procedures to facilitate efficient review of challenges.

<sup>11</sup> Commenters support using the most recent version of the National Broadband Map at the time we conduct the challenge process. *See, e.g.*, Comments of WISPA, WC Docket No. 10-90, at 4 (filed Feb. 19, 2013) (WISPA Comments). We agree that we should use the most recent version of the map available shortly before we finalize the initial list of blocks eligible for funding. We will determine what version of the National Broadband Map to use in a future order.

<sup>12</sup> Throughout this Order, "parties" is used generically to mean any person or entity.

<sup>13</sup> The Commission has previously recognized this proxy. *See USF/ICC Transformation Order*, 26 FCC Rcd at 17701, para. 103 n.168. We are not persuaded by the arguments of the price cap carriers that we should shift the proxy to 6 Mbps/1.5 Mbps for Phase II implementation. *See* USTelecom Comments at 11, ITTA Reply at 6. Doing so would increase the likelihood of funding flowing to an incumbent in census blocks where an unsubsidized competitor is, in fact, providing service meeting the speed requirements established by the Commission – 4 Mbps/1 Mbps – which is contrary to the overall framework for Phase II. *See, e.g.* WISPA Comments at 3-4.

<sup>14</sup> We are not persuaded by CTIA's argument that the Bureau has the delegated authority to define an unsubsidized competitor for the purposes of Phase II to include mobile providers. *See* Comments of CTIA – The Wireless Association, WC Docket No. 10-90, at 8-9 (filed Mar. 28, 2013). CTIA's reliance on language in the *USF/ICC Transformation Order* that specific broadband requirements would be tailored to each of the new funding mechanisms is misplaced. That language contains no grant of delegated authority to override the explicit reference to "fixed" in the definition of unsubsidized competitor codified in section 54.5 of the Commission's rules.

<sup>15</sup> *See, e.g.*, Letter from Steven F. Morris, National Cable Telecommunications Association (NCTA), to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90, at 2 (filed Apr. 5, 2013) (arguing that the Commission's Measuring Broadband America (MBA) reports demonstrate that cable operators provide their customers with broadband services that far exceed the speed and latency standards that will be applied to Connect America funding recipients, smaller operators not participating in the MBA program typically utilize the same

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conclude that it is reasonable to presume that providers that provide broadband of the required speed also meet the non-speed broadband criteria, with that presumption subject to rebuttal in particular instances.

8. It serves the public interest to presume existing providers that meet the speed criteria also meet the non-speed criteria for broadband service.<sup>16</sup> This presumption places price cap carriers in the position of contesting a preliminary decision to not provide funding to a particular census block, rather than requiring unsubsidized competitors to contest a decision to fund a census block.<sup>17</sup> This is both equitable and efficient. First, requiring price cap carriers to file a challenge likely will reduce the overall burden on respondents and the Commission while placing the burden on the party potentially receiving funds.<sup>18</sup> Second, we conclude this presumption is generally accurate in the majority of cases.<sup>19</sup> The

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technology as larger operators, and the prevalence of nationwide pricing by many cable operators ensures that prices in rural and urban areas are generally comparable); Comments of the American Cable Association, WC Docket No. 10-90, at 7 (filed Mar. 28, 2013) (ACA March 28 Comments) (similar); Comments of AT&T, WC Docket No. 10-90, at 5-6 (filed Mar. 28, 2013) (AT&T Comments) (does not object to use of a rebuttable presumption relying on SBI (National Broadband Map) data showing availability of 3 Mbps/768 kbps for cable broadband providers; “a cable operator offering 3/768 is almost always capable of offering 4/1 and satisfying the other service criteria”).

<sup>16</sup> We had initially sought comment on utilizing such a presumption only for cable providers. *See Phase II Service Obligations Public Notice*, 28 FCC Rcd at 1519-20, para. 11. A number of commenters argued a presumption would be reasonable for cable operators, but not for wireless Internet service providers (WISPs). *See, e.g.*, AT&T Comments at 6; Comments of USTelecom, WC Docket No. 10-90, at 5-7 (filed Mar. 28, 2013). After consideration of the record, we now conclude that administrative efficiency warrants adopting the same rebuttable presumption for cable and WISP broadband service. Requiring the price cap carrier, rather than a WISP, to initiate a challenge lessens burdens on WISPs, many of whom are small businesses. *See* Comments of WISPA, WC Docket No. 10-90, at 2-5 (filed Mar. 28, 2013) (WISPA March 28 Comments).

<sup>17</sup> Other interested parties, including state and local government entities, may also file challenges that a particular provider shown as serving a census block on the National Broadband Map does not, in fact, meet the Commission’s requirements for an unsubsidized competitor. It is likely, however, that the majority of challenges would come from price cap carriers. Therefore, for simplicity, we shall use the term “price cap carrier” to encompass all parties that might file a challenge alleging that a particular block is not served by an unsubsidized competitor.

<sup>18</sup> Given that Phase II has a set budget, price cap carriers will not necessarily choose to challenge a preliminary decision not to fund a particular census block. If a block is challenged and becomes eligible for funding, other blocks will necessarily need to become ineligible in order to maintain the \$1.8 billion budget. If a price cap carrier were to challenge a large number of blocks, it is likely some of its own previously eligible blocks would no longer receive funding. This should reduce the financial incentive to price cap carriers to challenge a large number of blocks. Conversely, an unsubsidized competitor would likely have a strong incentive to challenge every census block in its territory, because a successful challenge eliminates the possibility of support flowing to a price cap carrier to overbuild the competitor’s broadband service in that census block. In addition, to the extent a price cap carrier does not plan to accept Phase II funding, it is less likely to challenge the eligibility of particular census blocks for funding. Putting the burden on unsubsidized competitors to challenge the eligibility of individual census blocks would place an unreasonable burden not only on those providers (many of which are small businesses), but also on the Bureau, which would be faced with the task of quickly processing those filings to avoid delaying Phase II implementation. There are 2,500 wireless Internet service providers alone, *see* WISPA March 28 Comments at 4, although the most recent version of the National Broadband Map (data as of June 2012) indicates that fewer than 800 of them provide service meeting the 3 Mbps/768 kbps proxy that we adopt herein for Phase II challenges. Additional filings could be expected from cable providers. While not all of these providers would file, even a fraction of these entities would still greatly tax the capacity of the Bureau to handle challenges, which could result in delays to the implementation of Phase II.

<sup>19</sup> *See supra* n.15. Windstream argues that we should presume a census block is not served by an unsubsidized competitor if there have been no requests for phone number porting to that census block in the last 18 months. Reply of Windstream, WC Docket 10-90, at 5 (filed Apr. 12, 2013). We decline to adopt such a presumption, but will consider such evidence in the challenge process. We do not have a uniform nationwide data set regarding

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preliminary classification of a block as served will serve to err on the side of not providing funding, while still giving the opportunity for the price cap carrier to demonstrate that a block should be funded.

9. *Voice Service.* Under the Commission's rules, an entity must provide "residential terrestrial fixed voice *and* broadband service" in order to be deemed an unsubsidized competitor. We conclude that the ability of the consumer to obtain voice service from a third party is not sufficient for that broadband provider to be deemed an unsubsidized competitor for purposes of Phase II implementation because that broadband provider would not be offering a voice service. Such an interpretation would effectively read the requirement that the unsubsidized competitor be a "provider" of "voice" out of the Commission's adopted definition, as all broadband connections offer the capability to receive an "over the top" voice over Internet protocol (VoIP) service from a third party.<sup>20</sup> Therefore, we interpret the Commission's definition as requiring the provider itself to provide voice service, in addition to broadband, in order to be designated an unsubsidized competitor.<sup>21</sup>

10. We conclude, based on our FCC Form 477 data, that it would be unreasonable to presume that all broadband providers shown on the National Broadband Map are also providing voice service.<sup>22</sup> We therefore will utilize both Form 477 data and the National Broadband Map when developing the initial list of blocks that will be eligible for funding.<sup>23</sup> A provider will be presumed to be

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porting activity for all price cap carriers. Moreover, while a lack of porting activity could be an indication of a lack of an unsubsidized competitor providing voice service, it may also be caused by consumers choosing to rely on mobile voice rather than the voice product offered by the unsubsidized competitor. These reasons weigh against creating a presumption that the census block is unserved if there is a lack of porting activity. However, we adopt Windstream's alternative proposal to allow parties to submit evidence of lack of porting in the challenge process, as discussed below.

<sup>20</sup> For recipients of funding under Phase II support, voice is the supported service. Thus, they must offer voice service to consumers. Therefore, to ensure parity between Phase II recipients and unsubsidized competitors, we also require an unsubsidized competitor to offer its own voice service. Furthermore, we conclude that excluding competitors that do not themselves offer voice furthers the Commission's overarching policy objective of ensuring that consumers have access both to voice and broadband services. If technical troubles arise, for example, consumers will know whom to contact to resolve the problem, rather than having to determine whether the problem stems from the over-the-top VoIP provider, or whether the issue is due to the underlying broadband connection.

<sup>21</sup> A broadband provider, such as a cable operator, that provides voice through an affiliated competitive local exchange company would be considered to be providing voice service. Likewise, a broadband provider that provides voice using a managed voice solution obtained from a third party vendor would be considered to be providing voice service, so long as the broadband provider is the entity responsible for dealing with any customer problems, and it provides quality of service guarantees to end user customers. In contrast, if a provider simply resells an over-the-top VoIP product without taking steps to establish quality of service for that product or making quality of service guarantees to end user customers, we would have concerns that such a provider is not providing voice service in a fashion contemplated by the Commission when it decided not to provide funding in areas served by unsubsidized competitors.

<sup>22</sup> Our FCC Form 477 data indicate that not all broadband providers provide voice. This is particularly true for WISPs: fewer than 30 percent of locations in the footprint of WISPs that report broadband availability according to June 2012 SBI data are in the footprint of WISPs who also report having voice subscribers in the latest round of FCC Form 477 data. The comparable figure for cable is over 90 percent (i.e., most but not all cable providers report having voice subscribers). These data describing which providers report voice subscribers are available at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/statefilers0612.xls](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/statefilers0612.xls).

<sup>23</sup> In its initial comments in response to the *Model Design Public Notice*, ACA had argued that we should supplement the National Broadband Map data with private sector data sources, specifically broadband data from Warren Media. Comments of ACA, WC Docket No. 10-90 et al, at 23-24 (filed July 9, 2012); see *Wireline Competition Bureau Seeks Comment on Model Design and Data Inputs for Phase II of the Connect America Fund*,

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offering voice if it reports voice subscribers for the relevant state on its Form 477 filing, with that presumption subject to rebuttal.<sup>24</sup> Supplementing the National Broadband Map with the FCC's Form 477 data will enable challenges to the initial list of census blocks eligible for funding to be more narrowly focused, thereby reducing burdens on both interested parties and Commission staff.

11. Given the above presumptions and requirements, a provider will initially be presumed an unsubsidized competitor if (1) it is shown on the National Broadband Map as offering at least 3 Mbps/768 kbps and (2) it is reporting voice subscriptions in the relevant state on Form 477.<sup>25</sup>

12. *Challenges and Evidentiary Showings.* Based on the above presumptions, the Bureau will publish a list of census blocks that are presumptively unserved by an unsubsidized competitor.<sup>26</sup> The challenge process will focus on whether an area is served by an unsubsidized competitor. Parties may challenge this list in two ways.<sup>27</sup> They may argue that the list is underinclusive – that a census block not included on the list is not served by an unsubsidized competitor and therefore should be on the list of blocks eligible for funding – or they may argue that the list is overinclusive – that a census block on the list is in fact served by an unsubsidized competitor and therefore should be excluded from the list.

13. We conclude that it is useful, given the number of census blocks potentially at issue in Phase II, to provide some advance guidance regarding what sorts of evidentiary showings will be persuasive, and to define standards so that parties, including small businesses, seeking to challenge or rebut the eligibility of a census block for funding can participate in this process without unnecessary

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WC Docket Nos. 10-90, 05-337, Public Notice, 27 FCC Rcd 6147 (Wireline Comp. Bur. 2012) (*Model Design Public Notice*). ACA noted that a blend of National Broadband Map and Warren Media data would better portray coverage, especially for cable, than National Broadband Map data alone. *See id.* at 24. However, it has been nearly a year since ACA raised those arguments, and subsequently ACA suggested that the Bureau should rely on the National Broadband Map as the presumptive source of accurate information. Reply of ACA, WC Docket No. 10-90, at 5-6 (filed Jan. 24, 2013). We conclude that it is reasonable to rely upon that SBI data alone for our presumption regarding the presence of broadband service. In any event, to the extent any individual cable company believes an area shown on the map as unserved is in fact served, it is free to bring that information to the Bureau's attention in the challenge process.

<sup>24</sup> Because voice subscriptions are reported at the state level, the reporting of voice subscribers on Form 477 is not necessarily probative of whether a cable operator or WISP is actually providing voice service in a particular census block. Absent a more granular source of data regarding voice availability, however, it is the best data source that we have at this time. In developing the initial list of census blocks eligible for funding, we will look at whether any affiliated entity is reporting voice on FCC Form 477, and not just at whether the entity reporting broadband also reports voice on Form 477.

<sup>25</sup> Providers are required to report their interconnected VoIP subscribers on Form 477. Interconnected VoIP is a service that enables real-time, two-way voice communications; requires a broadband connection from the user's location; requires Internet-protocol compatible customer premises equipment; and permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network. *See* 47 C.F.R. § 9.3. A provider of interconnected VoIP must, among other things, comply with the Communications Assistance for Law Enforcement Act, abide by the rules for the appropriate handling of customer proprietary network information, conform to the requirements for E911, and contribute to the universal service fund.

<sup>26</sup> The Bureau plans to make available information about the identity of the firm or firms that are presumptively deemed to be unsubsidized competitors by census block.

<sup>27</sup> Any person or entity may file a challenge. As noted above, both state public utility commissions and broadband mapping authorities may participate in the challenge process, and indeed we encourage them to do so.

burden or expense.<sup>28</sup> Our objective is to implement the Commission's requirement that funding not flow to an area where there is an unsubsidized competitor, while at the same time ensuring that census blocks are not unnecessarily excluded from funding.

14. To facilitate efficient and swift review of any challenges, parties must submit challenges in the format specified by the Bureau.<sup>29</sup> Challengers will be required to provide the 15 digit Federal Information Processing Standard (FIPS) code and the state of the block in question; the name of the entity or entities putatively providing disqualifying service to that block according to the National Broadband Map, if applicable; the service criteria at issue;<sup>30</sup> the type of supporting evidence submitted as an attachment; and a certification under penalty of perjury that the challenger has engaged in due diligence to verify statements in the challenge and that such statements are accurate to the best knowledge of the filer.<sup>31</sup> Furthermore, because the Electronic Comment Filing System (ECFS) converts all files to .pdf format, in addition to posting on ECFS, we will also require parties to submit a copy of any challenge in a native format to the Commission, either by e-mail to a designated Commission staff member or by delivery of storage media to a designated Commission staff member or the Commission Secretary.<sup>32</sup>

15. We require parties submitting challenges to include specific evidence as an attachment to the challenge in support of their claims. For each challenged block, parties must provide evidence specifying the reason for the challenge.<sup>33</sup> A price cap carrier contending that a particular census block is unserved by an unsubsidized competitor need only show that any one of the criteria (speed, latency, capacity, price, or voice) is not met.<sup>34</sup> Given the difficulty in proving a negative (i.e., that service meeting

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<sup>28</sup> Furthermore, requiring that challengers make a prima facie case that a block is subject to challenge reduces the risk that challengers, typically price cap carriers, might make baseless challenges, necessitating those providers, many of whom may be small businesses, to expend time and resources in opposing such challenges.

<sup>29</sup> A form for filing challenges is included as the Appendix to this Order. OMB approval will be sought for this form. In addition to the information required regarding the challenge itself, we also will require certain identifying information to aid in processing challenges. Such information will include the name of the filing entity; its FCC Registration Number (FRN) if applicable; the name, address, e-mail, and phone number of the person filling out the form; and the name, address, e-mail, and phone number of the person certifying the accuracy of the information provided. If a party challenging the status of a block as unserved does not have an FRN due to not previously filing Form 477, it should provide other evidence to support its assertion that it provides voice in the relevant census block.

<sup>30</sup> We are not persuaded by NCTA's argument that, for areas served by cable, the challenge process should be limited to whether or not a particular block is served by a cable provider, and that the Bureau should not entertain challenges that a particular cable provider's service is not meeting the performance criteria for speed, latency, or capacity. *See* Comments of NCTA, WC Docket No. 10-90, at 5-6 (filed Mar. 28, 2013). While we expect that cable service will often meet these performance criteria, we have no basis in the record before us to categorically conclude that cable service meets all such criteria in all instances. Adopting a rebuttable presumption ensures that Phase II support is properly focused on areas that are not served by an unsubsidized competitor, consistent with the Commission's overall framework for Phase II.

<sup>31</sup> If more than one entity is shown on the National Broadband Map as providing disqualifying service to a block, evidence must be presented that each provider fails to meet the requirements of an unsubsidized competitor. A challenge that fails to do so will not be considered facially complete.

<sup>32</sup> Details on making such submissions, including what formats will be accepted and what staff persons are designated to receive the files, will be provided in a public notice preceding the start of the challenge process.

<sup>33</sup> If the same evidence is submitted in support of a challenge to multiple blocks, the challenge should briefly describe the type of evidence for each block, and attach only one copy of the supporting evidence for all of the blocks.

<sup>34</sup> Parties may submit whatever evidence they believe to be probative, including, but not limited to, advertising materials, customer statements, engineering reports, affidavits of corporate officers, or billing information, that

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defined criteria does not exist in a particular block), we will consider a variety of evidence in determining whether the price cap carrier has submitted sufficient evidence to warrant placing the challenge on public notice to solicit a response from interested parties. For example, a price cap carrier's evidence could consist of a signed certification that an employee of the company attempted to obtain service in a particular block, but was unable to do so, or that following a good faith search of a provider's advertising materials, it was unable to find any offering matching the Commission's Phase II service requirements.<sup>35</sup> We would also consider a signed certification from an officer of the price cap carrier under penalty of perjury, that it has not ported a telephone number within the last year (or a longer period of time) to the purported unsubsidized competitor, as relevant to whether that provider is providing voice service.<sup>36</sup> While we recognize that some customers may drop their landline service altogether, it would be unusual for a competitor offering voice service in the marketplace to have no voice customers at all.

16. In those instances where a potential unsubsidized competitor files a challenge contending that it does serve the area, notwithstanding evidence establishing a presumption that the block is unserved, evidence that it actually is providing voice and broadband service to customers in the relevant area is likely to be the most persuasive evidence. Thus, certifications relating to the number of customers, revenues received from customers, or customer lists (with customer identifying information redacted to preserve customer privacy) are likely to be more persuasive than propagation maps, advertisements of service offerings, or officer certifications, standing alone, that service is actually and immediately available – although we will consider each of the latter forms of evidence.<sup>37</sup> We recognize that producing evidence demonstrating the existence of actual customers may be more difficult for potential competitors that have only recently begun to serve an area, but also seek some assurance that a provider is not merely advertising temporary or hypothetical service as a means of precluding Phase II funding for the price cap carrier.<sup>38</sup>

17. Likewise, parties opposing challenges must provide, for each challenged census block

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shows that at least one of the required criteria is not being met. When price cap carriers are challenging the status of a census block as served, we do not require the initial challenge to present evidence relating to all the criteria because information may not be readily available to the price cap carrier. For instance, we recognize that the advertising materials of a potential unsubsidized competitor are unlikely to provide information about latency and also may not describe the provider's practices regarding data usage. In contrast, when asserting that a census block designated as unserved is, in fact, served by an unsubsidized competitor, the challenger must present evidence showing that all broadband performance metrics and pricing requirements are met, in addition to evidence that voice meeting the Commission's requirements is provided.

<sup>35</sup> While such evidence may be probative, it is not determinative.

<sup>36</sup> Several parties contend that evidence relating to number porting is relevant to whether a firm is providing service in the area. *See, e.g.*, Comments of Windstream, WC Docket No. 10-90, at 8-9 (filed Jan. 9, 2013). We note that a lack of porting to any of the census blocks purportedly served by an unsubsidized competitor is likely to be more persuasive than evidence of no porting to a single census block. We also note that the longer the time period in which no porting is reported, the more reasonable the inference that the purported competitor is not operating in the area.

<sup>37</sup> Any proprietary business information may be submitted subject to the protective order in this proceeding.

<sup>38</sup> For example, we would be concerned if a broadband-only provider temporarily offered a voice service simply to preclude funding for price cap carriers in its area. While we may consider evidence from challengers that they have publicly announced intentions to serve an area by a date certain or within a reasonable period, we may give such evidence less weight if it appears such assertions are made strategically to prevent funding for a particular area, with no evidence of an intent to follow through on buildout commitments. On the other hand, we would be more likely to consider such evidence in cases where the potential competitor itself had received government support to extend broadband to an unserved area, and buildout is substantially complete.



they wish to contest, concrete and verifiable evidence supporting their claims that the challenge should not be granted.<sup>39</sup> A corresponding evidentiary burden applies: respondents attempting to show that a block is served must show that all of the Commission's criteria are met, while respondents attempting to show that a block is unserved need only show that any one of the criteria is not met. We will consider an officer certification that a provider serves a particular census block with service meeting all of the Commission's criteria as some evidence that service exists; however, such a certification would be more persuasive if supported by other evidence, such as advertising materials, certifications relating to the number of customers and/or revenues received from customers, or customer lists (with customer identifying information redacted to preserve customer privacy).<sup>40</sup> We also require that an officer of the company making or opposing a challenge certify to the accuracy of the information provided, subject to the penalties for false statements imposed under 18 U.S.C. § 1001. Challenges and responses that do not meet these criteria will not be considered by the Bureau.

18. We conclude this process will provide the Bureau with an adequate evidentiary basis for making a determination that a particular census block is or is not served by an unsubsidized competitor, without unduly delaying implementation of Phase II. We are not persuaded by USTelecom's proposal that state mapping authorities contact all broadband providers to determine whether they meet each element of the Commission's service obligation.<sup>41</sup> Simply put, that suggestion would potentially delay completion of the challenge process, and more importantly, would impose an unanticipated, unfunded burden on the state mapping authorities.<sup>42</sup>

19. We will require parties to make a good faith effort to serve notice of challenges on interested parties.<sup>43</sup> For a challenge that a listed census block is in fact served, the interested party is the price cap carrier in whose territory the block falls. For a challenge that a block not on the list is unserved, the interested party is any and all entities that are shown on the National Broadband Map as providing service to that census block. This notice will assist challenged parties who may not routinely monitor the Commission's daily digest for public notices.<sup>44</sup> However, we recognize that in some circumstances it may prove impossible or exceedingly difficult to identify and locate the particular person that should be given service for a provider; therefore, we stop short of requiring service of actual notice. A challenger

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<sup>39</sup> Note that the response period is provided to respond to challenges; it is not an extension of the earlier challenge period. The Bureau will only entertain responses that are made in direct reply to a challenge.

<sup>40</sup> Any proprietary business information provided to rebut a challenge may be submitted subject to the protective order in this proceeding.

<sup>41</sup> USTelecom Comments at 5-7. Nor are we convinced by parties that suggest we should ask state regulators to make the determination of who is an unsubsidized competitor in a particular area. *See* ITTA Reply at 7-8; Comments of the National Telecommunications Cooperative Association, the National Exchange Carrier Association, Inc., and the Western Telecommunications Alliance, WC Docket No. 10-90, at 9-10 (filed Feb. 19, 2013) (arguing for an evidentiary hearing before a state regulatory commission). The Commission delegated to the Bureau the task of implementing the challenge process, and we are not persuaded we should rely on another entity to complete the job delegated to the Bureau by the full Commission.

<sup>42</sup> Reply of ACA, WC Docket No. 10-90, at 6-7 (filed Mar. 4, 2013) (ACA Reply); Reply of NCTA, WC Docket No. 10-90, at 2-3 (filed Mar. 4, 2013) (NCTA Reply).

<sup>43</sup> USTelecom, ITTA, ACA, NCTA, and WISPA are in general agreement that good faith efforts to provide actual notice, coupled with Bureau publication of the list of blocks subject to challenge, should provide interested parties with sufficient notice of challenges. Letter from Ryan Yates, Attorney Advisor, FCC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, at 2 (filed Apr. 16, 2013).

<sup>44</sup> Notice is only required for challenges; it is not required for responses. The purpose of the notice is to give the party an opportunity to oppose a challenge that has been made. As there is no process for responding to a response, notice in such cases would serve no purpose.

must include a certification along with its challenge that it has made a good faith attempt at providing notice to the interested party.

20. Once the challenges have been filed in ECFS, the Bureau will review all submissions to verify that evidence has been submitted to make a prima facie case and then issue a Public Notice specifying those blocks for which rebuttals may be submitted.<sup>45</sup> This Public Notice will be the official notice of all challenges, and will specify the date by which responses must be submitted.

21. Challengers will have 45 days from the date of the public notice announcing the initial eligible census blocks to submit their challenges. Respondents will have 45 days from the date of the public notice announcing the list of census blocks that warrant a response to submit replies to the challenges. This time period should give parties a sufficient opportunity to formulate their challenges and responses. This time period is consistent with that generally requested by commenters.<sup>46</sup> After the close of the reply period, the Bureau will consider the challenges and responses.<sup>47</sup> Where the Bureau concludes that the evidence shows it is more likely than not that the status of a census block should be changed,<sup>48</sup> the Bureau will make the appropriate adjustment to the list of eligible census blocks, which will be published in a subsequent public notice setting forth the finalized list of eligible census blocks.

22. Finally, we conclude that we will not permit challenges below the census block level, such as a challenge that a particular location or group of homes within a census block is unserved. Any partially served census block will be treated as served. There are more than 6 million census blocks in price cap service territories. Conducting a sub-block challenge process on millions of blocks would pose significant burdens on both potential unsubsidized competitors as well as Bureau staff. We conclude that the administrative burden of constructing and carrying out a sub-census block challenge process far outweighs any marginal benefit from such a process.<sup>49</sup>

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<sup>45</sup> As challengers and respondents will only have one opportunity each to submit evidence, parties will have an incentive to submit a full evidentiary record at the time they make their submissions. We also take this opportunity to remind parties of the Commission's rules regarding frivolous filings. In signing a filing, an attorney is certifying that "he has read the document; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." 47 C.F.R. § 1.52. The Commission has previously held that the rules regarding frivolous pleadings extend to non-attorneys. *See Warren C. Havens, Applications to Provide Automated Maritime Telecommunications System Stations at Various Locations in Texas et al.*, File No. 852997 et al., Memorandum Opinion and Order, 27 FCC Rcd 2756, 2759, para. 10 (2012). Willfully making frivolous filings can result in sanctions. 47 C.F.R. § 1.52.

<sup>46</sup> *See, e.g.*, ACA Comments at 7-8; ACA March 28 Comments at 2-3 (arguing for "at least 40 days"); WISPA Comments at 6 (arguing for 45 days for challenges and 30 days for replies); ITTA Reply at 8 (arguing for 45 days to file initial challenge).

<sup>47</sup> The Bureau does not intend to consider evidence or arguments related to the eligibility of a block for Phase II support unless that evidence or argument is raised within the specified time period for filing challenges and responses. This is necessary to ensure fairness to parties in responding to challenges.

<sup>48</sup> Some commenters had argued that we should require challengers to prove their claims by clear and convincing evidence. *See, e.g.*, ACA March 28 Comments at 7-8. We conclude that a preponderance of the evidence test is more suitable to this type of fact-finding inquiry.

<sup>49</sup> *See* ACA Comments at 10 (arguing that the Bureau should not conduct sub-census block challenges); ACA March 28 Comments at 10; Comments of NCTA, WC Docket No. 10-90, at 3 (filed Feb. 19, 2013) (NCTA Feb. 19 Comments); WISPA Comments at 4. We are not persuaded that excluding partially served census blocks from funding eligibility "runs the risk of repeating the earlier broadband availability assessment practice in which a whole county was considered served if one customer in that county subscribed to a retail broadband access service." Pennsylvania PUC Reply at 7. Census blocks provide a far more granular level of detail than county data.

**B. Process for Electing to Make a State-level Commitment**

23. We also sought comment in the *Phase II Challenge Process Public Notice* regarding the procedures for a carrier to elect to make a state-level commitment in Phase II of Connect America.<sup>50</sup> In this Order, we announce the procedures that a carrier must follow to make such an election.

24. After completion of the challenge process described above, the Bureau will release a public notice announcing Connect America Cost Model-determined support amounts for each incumbent price cap carrier's funded census blocks within a given state. After the release of that public notice, incumbent price cap carriers will be given 120 days to accept or decline that support on a state-by-state basis for each state they serve. While some commenters argued that a longer election period is necessary,<sup>51</sup> we conclude that 120 days strikes a balance by providing sufficient time for consideration and ensuring that transition into Phase II is completed within a reasonable timetable.

25. To elect to accept the support amount for a state, a carrier must submit a letter signed by an officer of the company declaring that the carrier accepts the support amount and commits to satisfy the service obligations for Phase II.<sup>52</sup> In its acceptance letter, a carrier accepting funding must also acknowledge that if it fails to meet its service obligations, it will be subject to the penalties and/or enforcement actions, as specified by the Commission.<sup>53</sup> If a letter of credit or some other form of security is required to ensure compliance with these obligations, such security must be submitted along with the letter accepting Phase II support.<sup>54</sup>

26. We are persuaded that requiring elections to be publicly disclosed, after a brief period of Bureau review to confirm facial completeness, will serve the public interest by enabling consumers, state regulators, other providers in the area, and other interested parties to know that a particular area will be served through Phase II.<sup>55</sup> The Bureau will specify in a public notice the specific procedures for submitting acceptances to a designated Commission staff member.<sup>56</sup> This will give the Bureau an opportunity to review the acceptances before elections are publicly announced. Once this review is complete, the finalized elections will not be afforded confidentiality.

27. We sought comment as to what information we should require carriers to submit when making their elections.<sup>57</sup> After further consideration, we conclude that it would not be productive to require carriers to specify at the time the election is made the specific locations where they intend to provide 6 Mbps downstream/1.5 Mbps upstream service, or where specifically they anticipate meeting

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<sup>50</sup> See *Phase II Challenge Process Public Notice*, 27 FCC Rcd at 15976-77, paras. 23-27.

<sup>51</sup> Comments of Alaska Communications Systems, WC Docket No. 10-90, at 13 (filed Feb. 19, 2013) (ACS Comments) (recommending 180 days). However, other commenters supported a 120-day period. See USTelecom Comments at 12 (recommending no fewer than 120 days); ITTA Reply at 9 (agreeing with USTelecom that the period should be no fewer than 120 days). Also, as noted below, we have decided that only minimal information is required to be submitted when making the election. This should reduce the burden on carriers, allowing them to make their elections within the allotted 120 days.

<sup>52</sup> See ACA Comments at 10; NCTA Feb. 19 Comments at 4; Reply of WISPA, WC Docket No. 10-90, at 3 (filed Mar. 4, 2013) (WISPA Reply).

<sup>53</sup> See *USF/ICC Transformation Order*, 26 FCC Rcd at 17863, para. 618.

<sup>54</sup> Issues regarding the requirement for a letter of credit or other form of security, if necessary, will be addressed in a future order.

<sup>55</sup> See ACA Comments at 10; NCTA Feb. 19 Comments at 4; WISPA Reply at 3.

<sup>56</sup> The designated Commission staff member will be specified in a public notice at a later date.

<sup>57</sup> *Phase II Challenge Process Public Notice*, 27 FCC Rcd at 15976-77, para. 25.

their third year 85 percent buildout milestones. Deployment plans may change over the course of the five-year Phase II buildout period,<sup>58</sup> and requiring carriers to declare this information up front would impose a significant burden on carriers accepting funding, while providing only limited benefit to the Commission and the public.<sup>59</sup> Furthermore, by not requiring this additional information, carriers should be better able to make their elections within the 120-day window provided.

28. A carrier may elect to decline funding for a given state by submitting a letter signed by an officer of the company noting it does not accept Phase II support for that state. Alternatively, if a carrier fails to submit any election letter by the close of the 120-day election period, it will be deemed to have declined support.

29. Carriers are bound by their election decisions. After the close of the election period, a carrier may not retract its election, nor may it return support in exchange for being relieved of its obligations under Phase II. Such actions will have no effect. Thus, in the case of a carrier that accepted funding, the carrier will still be obligated to meet its deployment obligations and will face the same penalties as any carrier that fails to satisfy its obligations. This restriction is necessary not only to ensure the integrity of the state-level commitment process, but also to efficiently conduct the planning and implementation of auctions for areas in which carriers declined to make state-level commitments.

#### IV. PROCEDURAL MATTERS

##### A. Paperwork Reduction Act

30. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

31. In this present document, we have assessed the effects of the procedures for electing to make a statewide commitment under Phase II and find that no businesses with fewer than 25 employees will be directly affected. We have structured the challenge process to minimize burdens on businesses with fewer than 25 employees. Unsubsidized competitors, many of which are small businesses, will face reduced burden due to the use of presumptions that a provider meeting the speed requirement also meets the other non-speed criteria. Furthermore, specifying the format and probative evidence for the challenge process in advance will likely provide certainty to small businesses in filing any challenges and reduce the burden on such parties.

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<sup>58</sup> For example, a carrier might ultimately deploy 6 Mbps/1.5 Mbps broadband infrastructure or meet its three-year deployment milestone by building to different locations than originally planned. .

<sup>59</sup> *See* ACS Comments at 16-17; USTelecom Comments at 13-14; Reply of ACS, WC Docket No. 10-90, at 9 (filed Mar. 4, 2013); ITTA Reply at 9. Some commenters favored requiring Phase II recipients to submit this information at the time of election. *See* ACA Reply at 9; NCTA Reply at 3; WISPA Reply at 3. Unlike for recipients of Phase I support, where a recipient could choose what eligible locations it would build to, carriers in Phase II are required to build to all locations in supported census blocks in five years. This should give interested parties reasonable notice of where most Phase II buildout can be expected. Any benefit from providing initial plans on the specific locations where 6 Mbps/1.5 Mbps or third year build-out requirements will be met is limited by the fact that Phase II recipients would be free to adjust those plans over the course of the subsequent years.

**B. Final Regulatory Flexibility Act Certification**

32. The Regulatory Flexibility Act of 1980, as amended (RFA)<sup>60</sup> requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that “the rule will not have a significant economic impact on a substantial number of small entities.”<sup>61</sup> The RFA generally defines “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>62</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>63</sup> 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 Small Business Administration (SBA).<sup>64</sup>

33. This Order implements the rules adopted by the Commission in the *USF/ICC Transformation Order*.<sup>65</sup> These clarifications do not create any burdens, benefits, or requirements that were not addressed by the Final Regulatory Flexibility Analysis attached to the *USF/ICC Transformation Order*.<sup>66</sup> Therefore, we certify that the requirements of this order will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the order including a copy of this final certification, in a report to Congress pursuant to SBREFA.<sup>67</sup> In addition, the order and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register.<sup>68</sup>

**C. Congressional Review Act**

34. The Commission will send a copy of this order to Congress and the Government Accountability Office pursuant to the Congressional Review Act.<sup>69</sup>

**V. ORDERING CLAUSES**

35. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i), 201-206, 214, 218-220, 254, 303(r), and 403 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151, 154(i), 201-206, 214, 218-220, 254, 303(r), 403, 1302, sections 0.91 and 0.291 of the Commission’s rules, 47 C.F.R. §§ 0.91, 0.291, and the delegations of authority in paragraphs 103, 170, and 171 of the *USF/ICC Transformation Order*, FCC 11-161, this

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<sup>60</sup> The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>61</sup> 5 U.S.C. § 605(b).

<sup>62</sup> 5 U.S.C. § 601(6).

<sup>63</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 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.”

<sup>64</sup> Small Business Act, 15 U.S.C. § 632.

<sup>65</sup> *See USF/ICC Transformation Order*, 26 FCC Rcd at 17729-32, paras. 171-78.

<sup>66</sup> *See id.* at 18324-63, App. O.

<sup>67</sup> *See* 5 U.S.C. § 801(a)(1)(A).

<sup>68</sup> *See* 5 U.S.C. § 605(b).

<sup>69</sup> *See* 5 U.S.C. § 801(a)(1)(A).

Report and Order IS ADOPTED, effective thirty (30) days after publication of the text or summary thereof in the *Federal Register*, except for those rules and requirements involving Paperwork Reduction Act burdens, which shall become effective immediately upon announcement in the Federal Register of OMB approval.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach  
Chief  
Wireline Competition Bureau

**APPENDIX**

**Cover Sheet**

OMB Control Number [#####] FCC Form 505	
Filing Entity:	
FRN (if applicable):	
Name of Person Filing Out Form:	
Mailing Address of Person Filing Out Form:	
Email Address of Person Filing Out Form:	
Phone Number of Person Filing Out Form:	
Name of Person Certifying Data within Form:	
Mailing Address of Person Certifying Data within Form:	
Email Address of Person Certifying Data within Form:	
Phone Number of Person Certifying Data within Form:	

**Served to Unserved Challenge**

Census Block 15 Digit FIPS Code	State	Provider Name As Listed in National Broadband Map	Insert X if Speed Criteria Not Met	Insert X if Usage Allowance Criteria Not Met	Insert X if Latency Criteria Not Met	Insert X if Price Criteria Not Met	Insert X if Voice Criteria Not Met	Type of Supporting Evidence	Additional Comments	OMB Control Number [#####]

**Unserved to Served Challenge**

Census Block 15 Digit FIPS Code	State	Name of Entity Providing Service	FRN used to File Form 477 (if challenge being filed by the service provider)	Insert an X if you certify that this census block is served by unsubsidized broadband and voice services meeting the Commission's performance and pricing criteria	Type of Supporting Evidence	Additional Comments	OMB Control Number [###]

**Response to Challenge**

Census Block 15 Digit FIPS Code	State	Name of Entity Making Initial Challenge	FRN of Entity Making Challenge (if provided)	Insert X if Speed Criteria is at Issue	Insert X if Usage Allowance Criteria is at Issue	Insert X if Latency Criteria is at Issue	Insert X if Price Criteria is at Issue	Insert X if Voice Criteria is at Issue	Type of Supporting Evidence	Additional Comments	OMB Control Number [###]