

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

In the Matter of)
)
Universal Service Reform – Mobility Fund) WT Docket No. 10-208
)
Request for Waiver of Pre-Approved Handset)
Requirement for Collection of Mobility Fund)
Phase II Challenge Process Speed Test Data)

ORDER

Adopted: March 1, 2019

Released: March 1, 2019

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

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau and the Wireless Telecommunications Bureau, in coordination with the Office of Economics and Analytics,¹ grant the petition of New Hampshire State Senator Jeanne Dietsch on behalf of the New Hampshire Public Utilities Commission (NH PUC) for limited waiver of the designated handset requirement adopted in the *MF-II Challenge Process Order*.² Our waiver allows the acceptance of certain speed tests undertaken during a limited period on T-Mobile’s network in New Hampshire with a handset model that was marketed, but not designated, by T-Mobile, subject to the conditions set forth herein.³ For the reasons discussed below, in these unique circumstances, we instruct the Universal Service Administrative Company (USAC) to accept the speed tests identified in the Petition for Waiver.

II. BACKGROUND

2. In the *MF-II Challenge Process Order*, the Commission established the framework for a robust and efficient challenge process to resolve disputes about areas found to be presumptively ineligible for MF-II support.⁴ The Commission concluded that government entities (state, local, and Tribal) and service providers required to file Form 477 data with the Commission were best suited to participate as

¹ See 47 CFR §§ 0.91(p), 0.131(a); see also *id.* §§ 0.21(m), (o).

² *Connect America Fund; Universal Service Reform – Mobility Fund*, Order on Reconsideration and Second Report and Order, 32 FCC Rcd 6282 (2017) (*MF-II Challenge Process Order*).

³ Petition of Jeanne Dietsch for Waiver to Accept Certain Mobility Fund Speed Test Data, WT Docket No. 10-208 (filed Nov. 27, 2018) (Petition for Waiver). On February 11, 2019, Senator Dietsch filed a Request to Supplement Waiver, which included a sworn Affidavit of Kath Mullholand, the certifier of the New Hampshire Public Utility Commission’s challenge filing, attesting to the veracity of included emails that provided additional information supplementing the Petition. Request of Jeanne Dietsch to Supplement Waiver Request, WT Docket No. 10-208 (filed Feb. 11, 2019) (Supplement) and Affidavit of Kath Mullholand, Supp. to Petition for Waiver (Mullholand Aff.). On February 28, 2019, Senator Dietsch filed an additional Request to Supplement Waiver, containing redacted emails between Mullholand and representatives of T-Mobile. Request of Jeanne Dietsch to Supplement Waiver Request, WT Docket No. 10-208 (filed Feb. 28, 2019) (2nd Supplement) and Emails of Kath Mullholand, Supp. to Petition for Waiver (Mullholand Emails).

⁴ *MF-II Challenge Process Order* at 6282, 6296-314, paras. 1, 27-64.

challengers in the MF-II challenge process (with waivers permitted for consumers and other entities).⁵ The Commission established parameters for when, where, and how the challengers could conduct speed tests, including the requirement relevant to this waiver request—that “all speed tests must be conducted . . . on pre-approved handset models.”⁶ Each mobile provider that submitted 4G LTE coverage maps for MF-II designated specific handset models for challengers to use to conduct speed tests of its network.⁷ The Commission found that tests collected using designated handsets would be a reliable form of evidence because such data would simulate consumers’ actual experience on that network.⁸

3. The NH PUC submitted an MF-II challenge through USAC’s online challenge portal, which was certified by Kath Mullholand, Director of its Regulatory, Innovation, and Strategy Division. According to the Petition for Waiver, multiple New Hampshire local governments, civic organizations, and volunteers supported the NH PUC’s challenge by raising funds to purchase necessary handsets, phone plans, and testing programs and then expending “hundreds of hours” conducting speed tests around the State of New Hampshire.⁹ One of the entities involved, the Greater Keene Chamber of Commerce, purchased from T-Mobile the Samsung Galaxy S8 (G950U) handsets,¹⁰ which were not one of the handset models that T-Mobile had designated for use to perform speed tests.¹¹ T-Mobile had instead designated two other Samsung handset models, the Galaxy Note 8 (N950U) and Galaxy S8 Active (G892U).¹² According to the petitioner, over the course of ten days of testing, between September 11 and September 30, 2018, 2,335 unique speed tests were conducted on T-Mobile’s network using the undesignated handset model.¹³ When it came to light that handsets were being used that were not on the list of pre-approved models, no further tests were completed using those handsets, and those handsets were replaced with the designated models.¹⁴ Kath Mullholand reached out to T-Mobile to discuss this issue, and T-Mobile agreed to support a waiver to allow for acceptance of the 2,335 speed tests completed on the undesignated handsets.¹⁵ Ms. Mullholand certified NH PUC’s challenge, subject to the outcome of

⁵ *Id.* at 6303-04, paras. 42-43 & n.119.

⁶ *Id.* at 6308, para. 49.

⁷ *See id.* at 6302, 6308, paras. 39, 50.

⁸ *MF-II Challenge Process Order*, 32 FCC Rcd 6282, 6306, para. 47 & n.134.

⁹ Petition for Waiver at 2. “The City of Keene, NH; Towns of Haverhill, Peterborough, Stoddard, and Wolfeboro, NH; Cheshire County, NH; Greater Keene Chamber of Commerce; Lakes Region Planning Commission; and Southwest Region Planning Commission, among others” participated in this cooperative testing effort in New Hampshire. *Id.* at 1, 2.

¹⁰ *See id.* at 2; Supplement at 2.

¹¹ *See MF-II Challenge Process Provider Handsets*, available at: <https://www.fcc.gov/mobility-fund-phase-ii-mf-ii> (updated Nov. 1, 2018).

¹² *See id.*; *see also* Petition for Waiver at 1-2; Mullholand Emails at 3 (email from Kath Mullholand, Director, New Hampshire Public Utilities Commission Regulatory, Innovation, and Strategy Division, to T-Mobile representative, (Oct. 24, 2018, 9:37 EDT) noting that the two undesignated phones on which testing was performed were Samsung Galaxy 8 phones).

¹³ Petition for Waiver at 2-3; Mullholand Emails at 3. In the Petition, Senator Dietsch requested acceptance only for 2,335 of 2,379 speed tests from these handsets submitted to USAC because “some records were duplicates or invalid for other reasons.” Petition for Waiver at 3. However, we note that the Commission could consider the rest of the submitted speed tests from these handsets in adjudicating challenges. *See Procedures for the Mobility Fund Phase II Challenge Process*, Public Notice, 33 FCC Rcd 1985, 1998, para. 27 (WCB/WTB 2018) (*MF-II Challenge Process Procedures Public Notice*) (noting that the Commission may review “all submitted data” in adjudicating

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the Petition for Waiver.¹⁶

III. DISCUSSION

4. The Commission may waive its rules and requirements where there is “good cause shown” to do so.¹⁷ Good cause, in turn, may be found “where particular facts would make strict compliance inconsistent with the public interest.”¹⁸ A waiver is therefore “appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”¹⁹

5. We conclude that good cause has been shown for granting the requested waiver. The Commission required each challenger to submit actual outdoor speed test data using provider-specified handsets as evidence of a lack of unsubsidized, qualified 4G LTE coverage and concluded “that such ‘on the ground’ data collected using standardized parameters are a reliable form of evidence because they simulate consumers’ actual experience.”²⁰ The Samsung Galaxy S8 (G950U) model handsets used to run the speed tests in question were sold by T-Mobile and were current-model handsets from the same manufacturer as two of T-Mobile’s designated handsets, the Galaxy Note 8 (N950U) and Galaxy S8 Active (G892U).²¹ Moreover, T-Mobile supports granting a waiver limited to the specified speed tests run through September 30, 2018.²² For these reasons, speed tests using the Samsung Galaxy S8 model handsets should have accurately reflected consumers’ actual, on-the-ground experience in New Hampshire. Moreover, Ms. Mullholand has certified, under penalty of perjury, that: (1) these speed tests were otherwise conducted in accordance with our technical requirements; (2) she has examined all data submitted; and (3) all data and statements contained in the submission were generated in accordance with the specifications and are true, accurate, and complete to the best of her knowledge, information, and

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challenges).

¹⁴ Petition for Waiver at 2-3; Mullholand Emails at 3.

¹⁵ Petition for Waiver at 3; Mullholand Emails at 1 (email from T-Mobile representative to Kath Mullholand, Director, New Hampshire Public Utilities Commission Regulatory, Innovation, and Strategy Division, (Oct. 30, 2018, 14:39 EDT), stating support for a grant of a waiver limited to the testing already completed on the two Samsung devices stated through September 30).

¹⁶ Petition for Waiver at 2; *see also* Mullholand Aff. at 2 (emails from Kath Mullholand, Director, New Hampshire Public Utilities Commission Regulatory, Innovation, and Strategy Division, to Commission staff, (Nov. 26, 2018, 12:04 EDT and 12:19 EDT), regarding identifying the handsets for certification and acceptance by the challenge process system contingent on the grant of the waiver request).

¹⁷ 47 CFR § 1.3 (“Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”).

¹⁸ *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). In making this determination, the Commission may “take into account considerations of hardship, equity, or more effective implementation of overall policy.” *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

¹⁹ *Ne. Cellular Tel. Co.*, 897 F.2d at 1166.

²⁰ *MF-II Challenge Process Order*, 32 FCC Rcd 6282, 6306, para. 47 & n.134.

²¹ The Samsung Galaxy S8 was a handset model available from the T-Mobile website as of the close of the challenge process on November 26, 2018 (www.t-mobile.com, last visited December 17, 2018).

belief.²³ Further, we conclude that the purpose of the requirement would not be served by disallowing those speed tests or requiring those tests to be conducted again.

6. Thus, we conclude that there is good cause for granting the requested waiver and instruct USAC to accept certain submitted speed tests and process them for analysis of the New Hampshire entities' challenge to T-Mobile's assertions of coverage.

IV. ORDERING CLAUSES

7. 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 sections 0.91, 0.291, 0.131(a), 0.331, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 0.131(a), 0.331, and 1.3, that the Petition for Waiver of State Senator Jeanne Dietsch is HEREBY GRANTED to permit acceptance of 2,335 speed tests run on the Samsung Galaxy S8 (G950U) model handsets through September 30, 2018, in the MF-II challenge process, as discussed herein.

8. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 CFR § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief
Wireline Competition Bureau

Donald K. Stockdale
Chief
Wireless Telecommunications Bureau

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²² Petition for Waiver at 3; see also Mullholand Emails at 1 (email from T-Mobile representative to Kath Mullholand, Director, New Hampshire Public Utilities Commission Regulatory, Innovation, and Strategy Division, (Oct. 30, 2018, 14:39 EDT), stating support for a grant of a waiver limited to the testing already completed on the two Samsung devices through September 30).

²³ *MF-II Challenge Process Order*, 32 FCC Rcd at 6308, para. 49; *MF-II Challenge Process Procedures Public Notice*, 33 FCC Rcd at 2003, paras. 39-40 & n.143.