

March 30, 2015

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FILED ELECTRONICALLY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WC Docket Nos. 10-90 and 14-93

Dear Ms. Dortch:

On March 26 and 27, 2015, representatives of Charter Communications, Inc. spoke to Commission staff about Charter's petition for a limited waiver of the Wireline Competition Bureau's ("Bureau") decision to require parties seeking to prove that a particular census block is "served" for purpose of Connect America Fund ("CAF") Phase II support to produce evidence of current or former customers.¹ Christianna Barnhart, Charter's Vice President for Regulatory Affairs, spoke to Amy Bender of Commissioner O'Rielly's Office and Nick Degani of Commissioner Pai's Office on March 27, 2015. The undersigned spoke to Nick Degani on March 26, 2015, and, on March 27, 2015, spoke to General Counsel Jon Sallet and separately to Linda Oliver and Marcus Maher of the Office of General Counsel.

In these conversations, Charter explained that the Bureau's purported requirement that parties must present evidence of current or former customers in a census block in order to challenge the Bureau's determination that a particular block is unserved for purposes of CAF Phase II funding² exceeds the Bureau's delegation.³ The Commission's directive was to deny subsidies in "areas where an

¹ See Charter's Petition For Limited Waiver Of CAF Phase II Evidentiary Requirement, WC Docket Nos. 10-90 and 14-93 (Nov. 10, 2014) ("*Waiver Petition*").

² See Public Notice, Wireline Competition Bureau Provides Guidance Regarding Phase II Challenge Process, WC Docket No. 10-90, DA 14-864 ("*Public Notice*").

³ See *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17729, ¶¶ 170–171 (2011) ("*CAF Order*") (delegating to the Bureau the task of implementing the Commission's determination that CAF support should not be used to build broadband "in areas already served by an 'unsubsidized competitor,'" and specifically directing the Bureau to design a process whereby parties could challenge the Bureau's initial determinations of whether particular areas are served or unserved).

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unsubsidized competitor offers broadband service” in order to ensure that federal funds are limited to areas where market forces have been inadequate to promote broadband deployment and to ensure that competition is not skewed.⁴ Whether or not a provider has already served customers in a particular area is not a reasonable means of carrying out that directive. A provider may have deployed broadband and may actively offer service to customers in an area, yet still have no actual customers.⁵ Just as in areas where customers are already served, providing subsidies to another provider in such areas would waste public resources and harm competition. In both cases, “an unsubsidized competitor offers broadband service.”⁶ Accordingly, the Bureau’s evidentiary rule exceeds the Bureau’s delegation.

Charter sought waivers of the Bureau’s current-or-former-customer requirement in areas for which Charter lacks evidence of current or former customers but has evidence of the presence of its voice and broadband physical assets and makes the requisite level of service available.⁷ Good cause exists to grant these waivers, because, as explained above, the purpose of the CAF rules would not be served by rigidly applying the Bureau’s evidentiary requirement.⁸ Moreover, just as the evidentiary requirement itself exceeds the Bureau’s delegation, so too would denying a waiver of that requirement in these circumstances.⁹

Sincerely,

/s/ Samuel L. Feder

Samuel L. Feder

cc: Jon Sallet
Linda Oliver
Marcus Maher

⁴ See *id.* at 17670, 17701, 17722–23, 17767–68, ¶¶ 11, 103, 149–50, 281–84.

⁵ See *Connect America Fund*, Second Order on Reconsideration, WC Docket No. 10-90, FCC 12-47, ¶ 13 (“[A] provider may have no customers in a particular census block, even though it offers service there.”).

⁶ *Public Notice*, at 1, ¶ 2 (emphasis added) (citing *CAF Order*, 26 FCC Rcd at 17729, ¶ 170).

⁷ See *Waiver Petition* at 1-4.

⁸ See *id.*

⁹ Even though the Bureau previously denied a petition for reconsideration of its evidentiary rule, it cannot avoid reaching this challenge now that it is applying the rule. See, e.g., *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1040 (D.C. Cir. 1997) (“[W]e permit . . . challenges to an agency’s application or reconsideration of a previously promulgated rule, even if the period for review of the initial rulemaking has expired.”); *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958) (“As applied to rules and regulations, the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it.”).

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Amy Bender
Nick Degani