

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

**Connect America Fund**

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**Docket No. 10-90**

**PETITION FOR WAIVER**

To the Commission:

**I. INTRODUCTION**

NTCA–The Rural Broadband Association (NTCA) hereby requests the Commission to waive limited aspects of the requirements relating to performance measurement testing as described herein and to extend for at least six months the relief granted by the Commission on its own motion in December 2020.<sup>1</sup> NTCA submits that the extraordinary conditions that led to the *sua sponte* relief nearly one year ago persist and continue to affect the ability of providers to meet performance measurement testing obligations. Accordingly, NTCA proposes an extension of the prior-issued relief and seeks a limited waiver of other requirements. This relief is in the public interest and meets the Commission standards for waiver of its rules. The extension will enable carriers to move forward with performance measurement testing while also accommodating current market conditions. NTCA notes that if supply chain conditions do not improve by June 2022, an additional extension may be warranted to ensure that providers have access to testing compatible equipment necessary to enable their complete compliance with the requirements.

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<sup>1</sup> *Connect America Fund: Order*, Docket No. 10-90, DA 20-1512 (Dec. 21, 2020) (December 2020 Order).

## II. DISCUSSION

### A. **PERSISTENT SUPPLY CHAIN DISRUPTIONS FRUSTRATE THE ABILITY OF PROVIDERS TO OBTAIN NECESSARY EQUIPMENT**

From the outset of the instant proceeding, NTCA has supported the goal of performance testing as well as in large measure the methods developed by the Commission to implement the protocols.<sup>2</sup> NTCA has engaged actively in this proceeding and certain of its recommendations have found expression in the Commission's final rules. However, forces beyond the control of the Commission and the industry continue to affect carriers and their marketplace. The Commission recognized these in December 2020, issuing on its own motion relief to accommodate the impacts of the COVID-19 pandemic, including challenges to deploying new testing compatible equipment at user locations and related supply chain disruptions that interfered with carriers' abilities to source and purchase equipment. Unfortunately, both of those conditions continue to affect the market. While materials and supply shortages are affecting many industries across many markets, the telecommunications industry has been affected significantly because it relies heavily on electronic components that have been most affected by chip shortages. A chronological review illustrates this unfolding problem.

In December 2020, the Commission noted supply-chain issues and amended pre-testing requirements. In April 2021, leading vendors were reported to be warning customers of delays.<sup>3</sup> In May 2021, the Commission issued a Public Notice seeking comment on the impact of the

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<sup>2</sup> See, *Connect American Fund: Comments of NTCA—The Rural Broadband Association*, Docket No. 10-90 (Dec. 6, 2017).

<sup>3</sup> Thomas Seal, Takshi Mochizuki, and Debby Wu, "Sixty Week Delay on Router Orders Shows Scale of Chip Crisis," *Bloomberg* (Apr. 8, 2021) ([www.bloomberg.com/news/articles/2021-04-08/next-victim-of-chip-shortage-will-be-your-home-internet-router](https://www.bloomberg.com/news/articles/2021-04-08/next-victim-of-chip-shortage-will-be-your-home-internet-router)) (visited Nov. 29, 2021).

global semiconductor shortage on the communications market.<sup>4</sup> In response, industry associations confirmed the Commission’s impressions: TIA explained, “The global semiconductor shortage has impacted nearly every element of the communications sector . . . [including] routers, switches and base stations . . . .”<sup>5</sup> Competitive Carriers Association (CCA) related that “the impact of shortage is uneven and varies from supplier to supplier.” CCA noted that while some vendors were able to fill orders “consistent with usual business expectations,” others “are unable to fill entire orders or have communicated lengthy lead times of up to a year . . . .”<sup>6</sup> NCTA–The Internet & Television Association cited delays in both the manufacture and delivery of equipment, as well as increased costs.<sup>7</sup> NTCA shared similar information, warning of escalating adverse conditions in the face of COVID-19.<sup>8</sup>

Even as there may be reports of some constrictions easing,<sup>9</sup> backlogs at U.S. ports persist and are not expected to ease until well into the next year.<sup>10</sup> Moreover, while demand for telecommunications components and supplies remains high, vendors’ ability to deliver is

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<sup>4</sup> “Wireless Telecommunications Bureau Seeks Comment on the Impact of the Global Semiconductor Shortage on the U.S. Communications Sector,” Public Notice DA 21-550, Docket No. 21-195 (May 11, 2021).

<sup>5</sup> *Comments of the Telecommunications Industry Association: Potential Impact of Global Semiconductor Shortage*, Docket No. 21-195, at 4 (Jun. 10, 2021).

<sup>6</sup> *Comments of Competitive Carriers Association: Potential Impact of Global Semiconductor Shortage*, Docket No. 21-195, at 2 (Jun. 2, 2021).

<sup>7</sup> *See, Comments of NCTA – The Internet & Television Association: Potential Impact of Global Semiconductor Shortage*, Docket No. 21-195 (Jun. 10, 2021).

<sup>8</sup> *See, Comments of NTCA–The Rural Broadband Association: Potential Impact of Global Semiconductor Shortage*, Docket No. 21-195 (Jun. 10, 2021).

<sup>9</sup> Stella Yifan Xie, Jon Emont, Alistair MacDonald, “Supply-Chain Problems Show Signs of Easing,” Wall Street Journal (Nov. 21, 2021) (<https://www.wsj.com/articles/supply-chain-problems-show-signs-of-easing-11637496002>) (visited Nov. 29, 2021).

<sup>10</sup> Paul Berger, “U.S. Ports See Shipping Logjams Likely Extending Far Into 2022,” Wall Street Journal (Sep. 5, 2021) (<https://www.wsj.com/articles/u-s-ports-see-shipping-logjams-likely-extending-far-into-2022-11630843202>) (visited Nov. 29, 2021).

challenged: one major supplier predicted that supply-chain constrictions will not ease until the middle of 2022.<sup>11</sup> NTCA members' experiences reflect these general conditions.

In fact, if anything, NTCA member reports that problems with access to supplies are exacerbated since December 2020. In recent surveys of NTCA members regarding supply chain impacts on deployment and operations, the following data emerged: 27% of respondents are experiencing delays with CPE (including modems and home gateways); more than half of respondents report price increases of 20%-60% for finished products or components. With regard to performance measurement testing equipment, specifically, 33% of respondents reported delays of 1-12 weeks, and more than 40% reported delays of 13-26 weeks. Consistent with Commission anticipations, nearly 40% of providers are offering inducements to customers to participate in testing.<sup>12</sup> Even if some customers may have become more comfortable with permitting technicians back into their homes, more than half of companies report subscriber hesitation with respect to any monitoring of their internet services. Nearly one-third of respondents predict that they will be unable to meet 100% location requirements after the pre-test period. Given the general industry conditions, and the specific findings of NTCA inquiries among its members, NTCA petitions the Commission to extend the relief granted in the December 2020 Order – specifically, to provide an additional six months for pre-testing at 70% of the locations that would otherwise be required, with the understanding that if supply chain conditions do not ease sufficiently a further extension may be warranted.

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<sup>11</sup> ADTRAN, Inc., Form 8-K, Securities and Exchange Commission, File No. 000-24613, at 4 (Oct. 14, 2021) (available at <https://d18rn0p25nwr6d.cloudfront.net/CIK-0000926282/68b164b8-d988-43a1-8517-c8b96f5c2303.pdf>) (visited Nov. 24, 2021) (ADTRAN Form 8-K).

<sup>12</sup> See, *Connect America Fund: Order*, Docket No. 10-90, DA 18-710, at para. 40 (2018) (“Carriers may use inducements to encourage subscribers to participate in testing.”)

## **B. THE STANDARDS FOR A WAIVER ARE MET BY CURRENT CONDITIONS**

Under Section 1.3 of the Commission's rules, the Commission may waive a rule "for good cause shown."<sup>13</sup> Waiver is appropriate where the "particular facts would make strict compliance inconsistent with the public interest."<sup>14</sup> The Commission may grant a waiver of its rules where the requested relief would not undermine the policy objective of the rule in question, special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.<sup>15</sup> The instant request for relief meets all objectives that the Commission found warranted the same relief a year ago.

In the first instance, the stated intent of the performance measurement testing is to "promot[e] greater accountability for certain recipients of Connect America Fund (CAF) high-cost universal service support . . . ."<sup>16</sup> Extending the current 70% testing threshold does not diminish accountability. Rather, such action would evince recognition that market and other conditions beyond the control of high-cost recipients threaten their ability to comply with the 100% threshold infeasible during a time of supply chain disruptions and equipment shortages. Moreover, and as shared with the Commission previously,<sup>17</sup> respective interpretations of performance measurement processes by industry and USAC regarding the reporting of certain testing results have resulted in potential withholdings of high-cost support; specifically, these

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<sup>13</sup> 47 CFR § 1.3.

<sup>14</sup> See, *AT&T Wireless Services, Inc. et al. v. Federal Communications Commission*, No. 00-1304 (D.C. Cir. 2001), citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*").

<sup>15</sup> See generally, *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972); see also *Northeast Cellular* (D.C. Cir. 1990).

<sup>16</sup> *Connect America Fund: Order*, Docket No. 10-90, DA 18-710, at para. 1 (2018).

<sup>17</sup> *Connect America Fund: Notice of Ex Parte of NTCA—The Rural Broadband Association*, Docket No. 10-90 (Nov. 12, 2021).

usually involve instances in which customer interaction or power outages have disrupted testing equipment at the customer site. NTCA has also been informed of issues arising out of server capacity and their ability to manage the volume of testing data. An extension of the 70% threshold and the pre-testing mandate would not undermine the ultimate policy objective of the rule. Because carriers are still required to test, and because those test locations cannot be “cherry picked” (as they are selected randomly by USAC), high-cost recipients have every incentive to ensure that the *entirety* of their networks are ready to meet testing requirements. The temporary reduction in the number of locations to be tested simply reflects equipment shortages, but in no way signals to providers any incentive to relax their attention to network performance.

As regards the second prong of the waiver standard, special circumstances warrant a deviation from the general rule. It is unprecedented that a major supplier of telecommunications would at once report “record demand” and a substantial quarterly loss in the same report. Notably, the vendor’s decrease in gross margin and profitability was attributed to “supply chain constraint-related expenses . . . .”<sup>18</sup> The company also noted “actions that have been taken and that may be taken by the Company, its customers, suppliers and counterparties in response to the pandemic . . . which may delay the timing of some orders and expected deliveries . . . .”<sup>19</sup> Another major supplier recently warned of concerns “associated with our global supply chain that may cause delays in production, protracted product shortages and unavailability of systems to meet customer orders . . . due to the COVID-19

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<sup>18</sup> ADTRAN 8-K, at 4.

<sup>19</sup> *Id.* at 5.

pandemic . . . .”<sup>20</sup> These statements by major vendors are objective and made independently of any Commission proceeding; they reflect frank assessments of the companies in generally issued statements. While the enumeration of the discrete impacts of a particular vendor’s disruptions on NTCA members is not necessarily obtainable, as that information is generally be guarded within the confines of non-disclosure agreements between sellers and buyers, a causal relationship may be drawn rationally between: (1) the points of general media reports with respect to supply chain concerns; (2) the specific concerns articulated publicly by telecommunications vendors; and (3) the aggregate delays reported by NTCA members in surveys. These collective impacts constitute by even broad measures “special circumstances” that warrant a waiver of the general rule.

Finally, grant of the requested relief will serve the public interest. The matter of performance measurement testing contemplates a trifecta of efforts among high-cost recipients. Compliance depends upon the seamless interaction of many moving parts; the pre-test periods implemented by the Commission recognized implicitly the need to balance mastery of those moving parts to ensure “the ability of all carriers to undertake the required performance testing.”<sup>21</sup> Carriers must source equipment; deploy equipment at subscriber locations; and test and report to USAC. As related to Commission staff in a recent *ex parte* presentation, customer reluctance to participate in testing has not abated. Respondents to a recent NTCA survey report that one-fifth of customers decline participation, citing as reasons, *inter alia*, concerns about COVID or so-called “monitoring” of their internet. NTCA members continue to offer, as the Commission predicted might be necessary, incentives to participate; about 40% of respondents

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<sup>20</sup> CALIX, Inc., Form 8-K, Securities and Exchange Commission, File No. 001-34674, at 17 (Oct. 25, 2021) (available at <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001406666/02913911-74f5-4722-9d51-3c8e830aa4f7.pdf>) (visited Nov. 24, 2021).

<sup>21</sup> *Connect America Fund: Order on Reconsideration*, Docket No. 10-90, FCC 19-104, at paras. 78, 79 (2019).

offer higher levels of service, service credits, or Wi-Fi routers at no charge. And, as providers work to introduce these new requirements to customers, industry and USAC continue to work together to achieve mutually consistent reporting, including Status 3 results that have been found to have been recorded incorrectly. These ongoing efforts to clarify reporting standards buttress the foresight of the Commission in establishing the pre-testing period, and continuing work in this regard supports an extension of the pre-testing period.

Global supply disruptions occasioned by the coronavirus and its variants undermine the ability to achieve full compliance with performance measurement testing. These factors remain beyond the control of high-cost recipients. Moreover, continued dialogue between industry and USAC will clarify reporting and other implementation obligations. An extension of relief granted by the Commission in December 2020 as well as an extension of the pre-testing period will enable the industry to navigate both market conditions and reporting processes. Such extension is in the public interest because it will enable the providers to move forward with testing that ensures customers receive the level of supported service to which they subscribe while ensuring that providers are not subjected to non-compliance penalties due to conditions over which they have no control.

### **III. CONCLUSION**

WHEREFORE the reasons stated herein and above, NTCA requests the Commission to extend until at least June 30, 2022 (or longer if conditions warrant an additional extension): (1) the relief granted in the December 2020 Order to allow A-CAM/RBE/Alaska carriers to pre-test only 70% of their USAC-selected samples;<sup>22</sup> (2) the form of simple waiver request set forth in the

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<sup>22</sup> December 2020 Order at para. 4.



December 2020 Order;<sup>23</sup> and (3) the pre-testing rules for A-CAM/RBE/Alaska carriers.<sup>24</sup> This relief will accommodate carriers' needs arising out of the global supply chain disruption as well as provide additional opportunity for the industry and USAC to refine their implementation of reporting requirements. This relief, as explained above, will not undermine the policy objective of the rule in question, is necessary in light of special circumstances that warrant a deviation from the general rule, and will serve the public interest.

Respectfully submitted,

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<sup>23</sup> December 2020 Order at fn. 18.

<sup>24</sup> See, *Connect America Fund: Order on Reconsideration*, Docket No. 10-90, FCC 19-014, at paras. 78, 79 (Oct. 31, 2022).