

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
Rural Broadband Experiments)	WC Docket No. 14-259

PETITION FOR WAIVER

Northeast Rural Services, Inc. (“NRS”), hereby petitions the Federal Communications Commission (“Commission”) for a waiver of the Commission’s rules governing the Rural Broadband Experiment (“RBE”) program, pursuant to 47 C.F.R. § 1.3. Specifically, NRS requests the Commission waive the RBE rules that allow the Universal Service Administrative Company (“USAC”) to draw on NRS’s Letters of Credit to recover support funds in the event of a default and, instead, permit NRS to voluntarily relinquish the support funds disbursed to NRS for Project IDs 3 & 9.¹ For the reasons set forth herein, good cause exists to grant NRS’s requested relief.

I. Background

In 2014, NRS applied for RBE² support from the Commission. On December 5, 2014, and March 4, 2015, respectively, the Wireline Competition Bureau (“Bureau”) issued public notices identifying NRS as an entity provisionally selected to receive a total of \$8,444,336.00 in universal service support under the RBE.³ NRS’s provisional selection encompassed twelve (12)

¹ *Report and Order and Further Notice of Proposed Rulemaking*, In re Connect America Fund, ETC Annual Reports and Certifications, WC Docket Nos. 10-90 & 14-59, at p. 20 (rel. July 14, 2014) (“*RBE Order*”). Project ID 3, SAC: 436145; Project ID 9, SAC: 436147

² *See generally RBE Order.*

³ *See Wireline Competition Bureau Announces Entities Provisionally Selected for Rural Broadband Experiments; Sets Deadlines for Submission of Additional Information*, WC Docket Nos. 10-90 & 14-259, Public Notice, DA 14-

project bids covering 615 census blocks in rural Oklahoma. *Public Notice 1* identified NRS as a provisional winning bidder for Project IDs 1, 4, 6, 8, 10, & 12. *Public Notice 2* identified NRS as a provisional winning bidder for Project IDs 2, 3, 5, 7, 9, & 11.

The RBE post-selection review process, in part, required provisionally selected bidders to: (a) provide evidence demonstrating financial and technical qualifications; (b) submit a commitment letter from an acceptable banking institution to provide letter(s) of credit covering the specific RBE support amounts; and (c) within ninety (90) days of the public notices announcing provisional awards, furnish documentation proving ETC designation throughout the eligible support locations associated with the RBE census blocks.⁴

NRS complied with all of the post-selection review process requirements for all Project IDs and was authorized to begin receiving support.⁵ NRS began receiving support for the Project IDs relevant to this Petition for Waiver in 2016. Specifically, NRS received its first disbursement of support for Project IDs 3 & 9 in August 2016. To date, NRS has received support in the following amounts for each Project ID relevant to this Petition: \$22,068.28 for Project ID 3 and \$166,590.28 for Project ID 9.

1772 (Wireline Comp. Bur.) (rel., Dec. 5, 2014)(“*Public Notice 1*”) at 2; and *Wireline Competition Bureau Announces Additional Provisionally Selected Bidders for Rural Broadband Experiments and Sets Deadlines for Submission of Additional Information*, WC Docket Nos. 10-90 & 14-259, Public Notice, DA 15-288 (Wireline Comp. Bur.) (rel., Mar. 4, 2015)(“*Public Notice 2*”) at 2.

⁴ See generally *RBE Order*.

⁵ See *Rural Broadband Experiment Support Authorized for Five Winning Bids for First Step Internet, LLC and Northeast Rural Services, Inc.*, WC Docket Nos. 10-90 & 14-259, Public Notice, DA 15-1003 (Wireline Comp. Bur.) (rel., Sept. 11, 2015); *Wireline Competition Bureau Announces Rural Broadband Experiments Support for 3 Provisionally Selected Bids is Ready to be Authorized*, WC Docket Nos. 10-90 & 14-259, Public Notice, DA 15-1092 (Wireline Comp. Bur.) (rel., Sept. 29, 2015); *Rural Broadband Experiment Support Authorized for Winning Bids Submitted by Big Bend Telecom, LTD. and Northeast Rural Services, Inc.*, WC Docket Nos. 10-90 & 14-259, Public Notice, DA 16-1026 (Wireline Comp. Bur.) (rel. September 12, 2016).

Subsequent to beginning the build-out, NRS encountered numerous project delays. Primarily, project delays have resulted from unforeseen construction and deployment obstacles as well as unanticipated engineering issues. By illustration, construction and deployment obstacles include: (i) overly bureaucratic pole attachment permitting and associated make-ready processes; (ii) resulting increases in underground versus aerial fiber construction/installation; (iii) elevated underground construction costs arising in connection with significant amount of rock encountered; and (iv) barriers to market entry in certain towns and municipalities resulting from inequitable franchise agreement demands.

The deadline for NRS to certify its compliance with the RBE's three (3) year build-out milestone for Project IDs 2, 3, 7, 9, and 10 is October 1, 2019.⁶ NRS does not believe it will be able to meet the build-out milestones for Project IDs 3 & 9, nor does NRS believe it would be economically feasible to complete the build-out for those Projects. NRS now desires to voluntarily relinquish the disbursed support funds for Project IDs 3 & 9, in lieu of USAC drawing on NRS's Letters of Credit.

II. Discussion

Pursuant to 47 C.F.R § 1.3, the FCC may suspend, revoke, amend, or waive its rules upon the showing of good cause. The FCC's waiver of a rule is permissible when *particular facts* make strict compliance inconsistent with the public interest.⁷ The FCC "may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish 'public interest' for a broad range of situations, does not relieve it of an obligation to

⁶ Project ID 2; SAC: 436144; Project ID 7, SAC: 436146; and Project ID 10, SAC: 436148. NRS has met the three (3) year build-out milestone for Project IDs 2 & 10.

⁷ *AT&T Corporation v. Federal Communications Commission*, 488 F.3d 426, 433 (D.C. Cir. 2006), citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

seek out the ‘public interest’ in particular individualized cases.”⁸ In addition, the FCC may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁹ In the instant case, good cause exists to permit NRS to voluntarily relinquish the disbursed support funds for Project IDs 3 & 9, in lieu of USAC drawing on the Letters of Credit for recovery of the support funds. Moreover, granting the requested relief will further the public interest sought to be served by the RBE.

Good cause exists to grant NRS a waiver of the RBE rule providing that USAC will draw on NRS’s Letters of Credit to recover support funds in the event of default and, instead, permit NRS to voluntarily relinquish the support funds disbursed to NRS for Project IDs 3 & 9. The *RBE Order* provides that

if an entity fails to meet the terms and conditions of the rural broadband experiments after it begins receiving support, including the build-out milestones and performance obligations we adopt in this Order, and fails to cure within the requisite time period, the Bureau will issue a letter evidencing the failure and declaring a default, which letter, when attached by USAC to a LOC draw certificate, shall be sufficient for a draw on the LOC to recover all support that has been disbursed to the entity.¹⁰

The *RBE Order* further provides that the purpose of requiring winning bidders to obtain Letters of Credit is to “permit the Commission to protect the integrity of universal service funds that have been disbursed and immediately reclaim support that has been provided in the event that the recipient is not using those funds in accordance with the Commission’s rules and requirements to further the objectives of universal service.”¹¹ Moreover, the *RBE Order* states that Letters of

⁸ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

⁹ *Id.* at 1159.

¹⁰ *RBE Order*, at 20.

¹¹ *Id.*

Credit “have the added advantage of minimizing the possibility that the support becomes property of a recipient’s bankruptcy estate for an extended period of time, thereby preventing the funds from being used promptly to accomplish our goals.”¹²

The Commission concluded that requiring winning bidders to obtain Letters of Credit is “necessary to protect the ability of the Commission to recover support from parties that fail to perform” and “requiring LOCs is an effective means of protecting the government’s interests.”¹³ The Commission further stated, “we find that the advantages of LOCs in ensuring that Connect America Support can quickly be reclaimed to protect the Universal Service Fund, and that the support is protected from being included in a bankruptcy estate, outweigh the potential costs of LOCs for the winning bidders.”¹⁴ Essentially, Letters of Credit provide the Commission with “the safeguard of allowing the Commission to immediately take back support if it turns out that the recipient fails to meet the requirements.”¹⁵

NRS will not be able to meet the build-out milestones for Project IDs 3 & 9 and further recognizes that completing the build-outs of those Projects will not be economically feasible. Permitting NRS to voluntarily relinquish the disbursed support funds for Project IDs 3 & 9 will not subvert the purpose of the requirement to obtain Letters of Credit. The purpose of the Letters of Credit is to ensure that government assets are protected and the disbursed support can be quickly reclaimed in the event of default. Allowing NRS to voluntarily relinquish the disbursed support funds will still allow the Commission to quickly reclaim the funds and will not diminish

¹² *Id.* at 21.

¹³ *Id.* at 21, fn. 103.

¹⁴ *Id.* at 23.

¹⁵ *Id.* at 24.

the protection afforded by the Letters of Credit. In fact, NRS is willing to voluntarily relinquish the funds prior to the end of the one year cure period that will follow the issuance of a letter evidencing default for the relevant Project IDs. As such, the Commission could recover the funds sooner by allowing the voluntary relinquishment than by waiting for the conclusion of the cure period before drawing on the Letters of Credit. Moreover, language contained in an order recently released by the Commission addressing petitions for waiver of Connect America Fund Phase II rules related to the Letter of Credit requirements implies that winning bidders who default may voluntarily pay back disbursed support. Specifically, the order states, “If an Auction 903 recipient does not meet its service milestones or take advantage of the opportunities to cure ***or pay back the relevant support***, the Commission will draw on the letter of credit to recover all of the support that has been disbursed to the recipient.”¹⁶ NRS is in possession of the full amount of the disbursed support and proposes relinquishing the funds to USAC or the Commission, via wire transfer, if that is acceptable to the Commission.

Furthermore, permitting NRS to voluntarily relinquish the funds will further the public interest sought to be served by the RBE by allowing NRS to avoid the penalties associated with a draw on the Letters of Credit. In the case of the RBE, the universal service objectives include the advancement of voice and broadband-capable networks into rural, high costs areas while ensuring Americans benefit from the technology transitions occurring within the communications industry.¹⁷ NRS can use the resources saved by avoiding the penalties associated with a draw on the Letters of Credit to more efficiently effectuate the build-out of the

¹⁶ *In the Matter of Connect America Fund, Connect America Fund Phase II Auction*, Order, WC Docket No. 10-90; AU Docket No. 17-182, DA 19-428, ¶ 5 (rel. May 15, 2019) (emphasis added).

¹⁷ *See Report and Order and Further Notice of Proposed Rulemaking*, Order, WC Dkt. Nos. 10-90, 14-58, *In re Connect America Fund et al.*, FCC 14-59 at ¶ 1 (rel., July 14, 2014).

RBE projects NRS will be able to complete, furthering the advancement of broadband-capable networks into rural areas, placing rural Oklahomans on a playing field that is more similar to those that live in urban areas. Therefore, good cause exists to grant NRS a waiver of the rules providing that USAC will draw on NRS's Letters of Credit to recover support funds in the event of default and, instead, permit NRS to voluntarily relinquish the support funds disbursed for Project IDs 3 & 9 to either USAC or the Commission, via wire transfer.

III. Conclusion

For the foregoing reasons, good cause exists for granting the waiver requested herein. NRS respectfully requests the Commission grant NRS a waiver of FCC rule(s) governing the RBE program providing that USAC will draw on NRS's Letters of Credit to recover support funds in the event of default and, instead, permit NRS to voluntarily relinquish the support funds disbursed to NRS for Project IDs 3 & 9.

DATED this 1st day of October, 2019.

Respectfully submitted,

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