

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

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
ETC Annual Reports and Certifications)	WC Docket No. 14-58
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92

EMERGENCY REQUEST FOR EXPEDITED TREATMENT

PETITION OF CONSOLIDATED COMMUNICATIONS NETWORKS, INC.

Pursuant to Section 1.3 of the rules of the Federal Communications Commission (“FCC” or “Commission”),¹ Consolidated Communications Networks, Inc. (“CCNI” or the “Company”) hereby requests an expedited waiver of the Commission’s requirement that a recipient of Rural Broadband Experiment (“RBE”) funding must certify that it completed its build-out obligation to the full one hundred percent of the locations that were derived from the Connect America Model (“CAM”), in order for the recipient to be alleviated from keeping its Irrevocable Letter of Credit (“ILOC”) open.² CCNI won and accepted RBE funding for 171 extremely high cost locations in rural North Dakota. After several years of consistent broadband deployment and exhaustively searching for all 171 locations in the funded census blocks,³ the Company has been able to

¹ 47 C.F.R. § 1.3.

² See, Connect America Fund et al., WC Docket No. 10-90 et al., Order, 31 FCC Rcd 2384, 2387-88, paras. 10-13 (WCB 2016).

³ See attached map which shows the funded blocks and the 162 locations that CCNI located.

identify a total of 162 locations. CCNI has “searched high and low,” and is certain that, to the best of its knowledge, there are no more locations in its funded area, as demonstrated below.

CCNI sought guidance from USAC and the FCC’s Wireline Competition Bureau regarding a process, similar to the one currently being developed for the Connect America Fund (“CAF”) Phase II auction recipients, which would allow CCNI to have its funding reduced to the extent that the actual number of locations is less than the number of locations identified in the CAM.⁴ Because the RBE was the “testing ground” for the CAF Phase II auction, it is appropriate that the same mechanism be used to adjust build-out obligations and associated support amounts in the context of the RBE. USAC informed CCNI, that because a process currently does not exist to conduct such a true-up, CCNI must seek waiver of the Commission’s rules in order to be relieved of its ILOC obligations.

Accordingly, CCNI files this instant waiver to allow the RBE recipient to be relieved of its ILOC obligations pending a broader review of CCNI’s build-out completion and the implementation of a mechanism for CCNI and other RBE recipients to have RBE funding reduced when the actual number of locations is less than the number of locations identified in the CAM. Alternatively, CCNI requests the FCC to waive the requirement that CCNI deploy broadband to one hundred percent of the number specified in the CAM as that number does not represent the actual number of locations present in those census blocks. If the Commission takes this approach, CCNI requests that the FCC make the adjustment in the context of this waiver

⁴ See, *Connect America Fund, WC Docket No. 14-259, Order on Reconsideration, 33 FCC Rcd 1380, 1390-92, paras. 23-28* (2018) (“*Phase II Auction Reconsideration Order*”); Wireline Competition Bureau Seeks Comment on Procedures to Identify and Resolve Location Discrepancies in Eligible Census Blocks within Winning Bid Areas, WC Docket No. 10- 90, Public Notice, DA 18-929, at para. 1 (rel. Sep. 10, 2018) (“*Discrepancy PN*”) (stating that the Public Notice was issued pursuant to the *Phase II Auction Reconsideration Order* which directed the Wireline Competition Bureau to “implement a review process to evaluate requests by Phase II auction support recipients who might seek adjustments in defined deployment obligations in exchange for corresponding reductions in support in circumstances where there are not enough actual locations for the provider to serve”).

petition and instruct USAC to proceed immediately with certifying the adjusted number of locations and reduced funding amount so that the ILOC obligations can be removed upon grant of this petition.⁵

I. Background

CCNI was authorized to receive \$3,096,810 in RBE funding in August, 2015.⁶ The funded area included 103 extremely high cost census blocks wherein CCNI, as a category three project winner, was obligated to deploy, in those blocks, broadband with at least one service plan that provides “10/1 Mbps downstream/ 1 Mbps upstream with at least 100 GB of usage, and latency no greater than 100 milliseconds, and at a price that meets the Commission’s reasonable comparability benchmarks.”⁷ According to the CAM and as reported in the RBE PN, CCNI was expected to find 171 servable, qualifying locations spread out over the 103 census blocks. CCNI met the service obligations for every location it could find in the 103 census blocks—162 locations.

CCNI now faces maintaining the cost of keeping its ILOC open despite having completed the build-out to the best of its abilities, as well as facing penalties if the location discrepancy is not resolved by the end of the August 7, 2020 build-out timeframe. The FCC stated in the RBE PN that “a winning bidder that has been authorized to receive rural broadband experiment support will default if it fails to meet its build-out obligations to offer service delivering the requisite speed, latency, usage and pricing, fails to keep open and renew its LOC, or fails to fulfill any other term or condition of rural broadband experiment support.”⁸ CCNI is very

⁵ If the FCC decides to take this alternative approach, CCNI hereby also seeks waiver of 47 C.F.R. §54.316 and any other relevant build-out requirements to ensure that penalties are not applied.

⁶ Rural Broadband Experiment Support Authorized for Ten Winning Bids for Skybeam, Consolidated Communications Networks, Inc., Delta Communications LLC, and Allamakee-Clayton Electric Cooperative, Inc. WC Docket Nos. 10- 90 & 14-259, Public Notice, DA 15-897 (rel. Aug. 7, 2015) (“RBE PN”).

⁷ *Id.* at n.16.

⁸ *Id.* at p. 3

concerned that, according to these rules, it would be considered in default because it failed to build out to 171 locations – despite the fact that 9 locations do not exist as evidenced by CCNI’s extensive, time consuming research which is explained in more detail below.

II. Good Cause Exists to Grant CCNI’s Waiver

Under Section 1.3, generally the Commission may exercise its discretion to waive an FCC rule “for good cause shown.”⁹ Waiver is appropriate where the “particular facts would make strict compliance inconsistent with the public interest.”¹⁰ The FCC 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.¹¹

CCNI hereby demonstrates that “good cause” exists to waive the requirement that the Company keep its ILOC open until USAC determines that the Company has completed one hundred percent of its RBE build-out obligation. Further, as described herein, the particular facts make strict compliance with this requirement inconsistent with the public interest as it would require CCNI to keep its ILOC open for months or even years until the FCC develops a mechanism to adjust build-out obligations and support when the “facts on the ground” differ from the data used in the CAM. Indeed, as has been affirmed by the Commission in the context of the CAF Phase II auction, the Commission has found it to be in the public interest to deviate from its one hundred percent build-out requirements when the “facts on the ground” differ from data used in the CAM and has ruled that adjustments, similar to those requested in this waiver,

⁹ 47 C.F.R. § 1.3.

¹⁰ 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*”).

¹¹ 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).

would be made without applying any noncompliance penalties. Accordingly, grant of this waiver is warranted.

CCNI understands the underlying importance of keeping the ILOC open until USAC completes its due diligence analysis of the RBE recipient's build-out; however, in this specific case, USAC is unable to complete its analysis because one hundred percent of the locations specified in the CAM simply do not exist. CCNI worked diligently to complete the construction to the 171 locations specified in the CAM and RBE PN scattered throughout an extremely rural area in western North Dakota. During the construction process, CCNI's engineer gathered information about every location passed and used mapping and staking sheets to track progress. CCNI also hired a firm to conduct aerial photos, which CCNI's mapping systems developer overlaid on the Company's own mapping system. Then, CCNI viewed the photos to help identify locations in the funded census blocks. The mapping systems developer also used the Stark County Assessors website¹² to get additional information about locations in the funded census blocks. The website allows users to search by street name, and every registered address is listed. CCNI used this resource to help identify addresses, and to cross-check them with its own database to make sure it did not miss any locations. Finally, CCNI's mapping systems developer did a physical drive-by of approximately 180 miles to identify locations to determine if they were habitable or not. In sum, CCNI estimates that it spent approximately 30 hours and significant costs over the course of at least three years to reach the well-researched conclusion that there are 162 locations in the funded census blocks, not the 171 that the CAM calculated.

¹² See <https://stark.northdakotaassessors.com/>

In the context of the CAF Phase II auction, the FCC found that the number of locations based upon “facts on the ground” may differ from the number specified in the CAM.¹³ To address this situation, the FCC ruled that it would grant CAF Phase II auction recipients the same flexibility afforded to price cap carriers that accepted CAF Phase II funding which is that they must deploy to at least 95 percent of the required number of locations in each state and would be required to refund support based on the number of locations which were lacking.¹⁴ The Commission ruled further that, similar to price cap carriers electing CAF Phase II support, CAF Phase II auction recipients would be afforded the opportunity to bring to the Wireline Competition Bureau’s attention “any known disparity between the number of locations identified by the CAM and the number of locations actually on the ground by adjusting the number of funded locations a price cap carrier [or CAF Phase II auction recipient] must serve in the state and the associated funding levels on a pro rata basis.”¹⁵

Specifically, in the context of the CAF Phase II auction, the FCC clarified:

[W]e will permit Phase II auction support recipients to bring to the Commission’s attention disparities between the number of locations estimated by the CAM and the number of locations actually on the ground in the eligible census blocks within their winning bid areas in a state. If a support recipient can sufficiently demonstrate that it is unable to identify enough actual locations on the ground across all the eligible census blocks to meet its total state requirement, its obligation will be reduced to the total number of locations it was able to identify in the state and its support will also be reduced on a pro rata basis. Specifically, within one year after release of the Phase II auction closing public notice, a recipient that cannot identify enough actual locations must submit evidence of the total number of locations in the eligible areas in the state, including geolocation data (indicating the latitude/longitude and address of each location), in a format to be specified by the Bureau, for all the actual locations it could identify. We direct the Bureau to establish the procedures and specifications for the submission of this information, such as collecting the data through the Universal Service Administrative Company’s (USAC) High Cost Universal Service Broadband (HUBB) online location reporting portal. Relevant stakeholders would have the opportunity to review and comment on the information and to identify other locations, following which the Bureau

¹³ *Phase II Auction Reconsideration Order* at para. 29.

¹⁴ *Id.*

¹⁵ *Id.* at paras. 22-23.

shall issue an order addressing the recipient's showing and any such comments. The evidence submitted by a support recipient will also be subject to potential audit.¹⁶

The FCC has now initiated a proceeding pursuant to this order in the Discrepancy PN. Certainly, because the Commission has acknowledged that there can be discrepancies between “facts on the ground” and data in the CAM and to make provisions for recipients of CAF Phase II support (price cap carriers and auction winners) to have their build-out obligations and associated support adjusted when the recipients are able to demonstrate the discrepancies, it should make similar provisions for RBE recipients as their support is also based on the CAM. Failure to do so would be arbitrary and capricious and contrary to the public interest. Accordingly, it is CCNI's understanding that once the mechanism to address discrepancies has been developed for CAF Phase II auction recipients, a similar process will be adopted for RBE recipients. If that is the case, and the mechanism is established within a year after the close of the CAF Phase II auction as required by the *Phase II Auction Reconsideration Order*, then the Commission need only grant CCNI a limited waiver which would relieve the Company of the requirement to keep its ILOC open while this mechanism is being developed.

The public interest demands that this waiver be expeditiously granted so that CCNI would not have to continue to undergo the heavy burden of keeping its ILOC open as it has deployed broadband to every available actual location in the funded census blocks while the FCC develops a mechanism to reduce funding for the nine “phantom” locations. The public interest would be even greater served by the FCC granting this waiver and, in addition to reducing

¹⁶ *Id.* at para. 23 (footnotes omitted).

funding for the phantom locations, instructing USAC to move forward with certifying completion of the actual locations that have been identified.¹⁷

III. CONCLUSION

CCNI followed the RBE rules from start to finish. CCNI is not asking for the FCC to make a special exception because the Company made a mistake or failed to complete its build-out obligation for reasons that could have been avoided. There simply does not exist 171 locations to serve in CCNI's RBE-awarded area, and the Company has done the research to support that there are no more than 162 locations to serve, and all of them have been served as of June 1, 2018. CCNI respectfully requests that the FCC grant the Company relief from keeping its ILOC open while the FCC implements a mechanism for USAC to use to handle location discrepancies when model-based USF recipients elect to certify the completion of their build-out obligations. Alternatively, CCNI requests the FCC to direct USAC to move forward with certifying completion of the actual locations that have been identified and instruct USAC as to how to make the adjustment to reflect the discrepancy in actual versus phantom locations.

Respectfully Submitted,

/s/ Ken Weisenberger

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Attachment

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¹⁷ CCNI also urges the Commission to also use this opportunity to allow the same flexibility afforded to price cap carriers and CAF Phase II auction winners of allowing a 5% grace amount and observes that the gap between the actual number and the number in the CAM is very close to this grace amount.

Attachment

ATTACHMENT - CCNI RBE LOCATIONS

