

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

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| In the Matter of |) | |
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| Connect America Fund |) | WC Docket No. 10-90 |
| |) | |
| ETC Annual Reports and Certifications |) | WC Docket No. 14-58 |
| |) | |
| Rural Broadband Experiments |) | WC Docket No. 14-259 |
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**COLORADO BROADBAND DEPLOYMENT BOARD
PETITION FOR WAIVER**

INTRODUCTION

Colorado shares the commitment of the Federal Communication Commission (FCC) to provide universal broadband access. During the years that the FCC has been refining the process for the Connect America Fund Phase II auction, Colorado has implemented its own funding program through the Broadband Deployment Board (the “Board”), to extend high-speed internet throughout the state at a minimum download/upload speed of 25/3 Mbps. Though the two programs share the objective of universal broadband service, it has become evident that utilizing separate programs to address the remaining and most challenging broadband deployment gaps is difficult at best, and may result in inefficient allocation of funds and delayed broadband availability. Recognizing this, the Colorado legislature recently passed House Bill 18-1116, which directs the Board to request a waiver of the rules governing the upcoming Phase II auction, necessitating this filing. The Board agrees that coordinating federal and state funds is necessary to most effectively fund and expeditiously deploy broadband in unserved areas of Colorado.

I. THE COLORADO BROADBAND PROGRAM

In 2014, the State of Colorado declared that providing universal access to broadband service was state policy.¹ Acknowledging that financial assistance might be necessary to achieve that objective, the Broadband Deployment Board was created.² With funds allocated by statute, the Board awards grants to broadband service providers who submit applications that satisfy statutory criteria. Working within the statutory parameters, the providers evaluate areas lacking broadband service and submit proposals seeking grant support.³

¹ See, e.g., COLO. REV. STAT. § 40-15-502(4) (2017).

² COLO. REV. STAT. §§ 40-15-509.5(2), -509.5(5)(a).

³ See generally COLO. REV. STAT. § 40-15-509.5(8) (outlining grant award criteria and process).

In grant applications for state funding, applicants propose new broadband projects in unserved areas of the state, where residents have demonstrated broadband speeds of less than 25/3 Mbps. Applicants must provide independent funding for at least 25% of the total cost of the proposed project, and offer broadband speeds of at least 25/3 Mbps.⁴ The program is technology neutral, with criteria that reward proposed projects for higher downstream and upstream speeds, cost-effectiveness, and reasonable end-user costs.⁵

Under the Colorado program, broadband projects must be completed within two years.⁶ Where incumbent providers successfully exercise their statutory right of first refusal, the timeline for completion is accelerated to one year or less.⁷ Successful applicants are reimbursed for documented infrastructure expenses up to the amount of the grant award on a quarterly basis, through the project's completion.⁸

The Board obtained initial funding for broadband grants in 2016. At the conclusion of the first grant cycle, the Board had awarded eight grants totaling \$2.1 million.⁹ The second grant cycle, which concluded in February 2018, resulted in \$9.4 million in funding for another nine projects.¹⁰ All told, the first two grant cycles will bring broadband service to more than 13,000

⁴ COLO. REV. STAT. § 40-15-509.5(8)(d); *see also* Colorado Broadband Fund, Who Qualifies for a Broadband Fund Grant? <https://www.colorado.gov/pacific/dora-broadband-fund/who-qualifies> (last visited Apr. 17, 2018).

⁵ COLO. REV. STAT. §§ 40-15-509.5(8)(e)-(8)(f); *see also* Broadband Deployment Board's Policy for Broadband Infrastructure Projects (adopted Mar. 31, 2016), *available at* <https://drive.google.com/drive/folders/0BzdumrwXWrz5TGs0MVJNYklra00>.

⁶ COLO. REV. STAT. § 40-15-509.5(8)(k)(III). A narrow exception exists for delays caused by a governmental entity. *Id.*

⁷ COLO. REV. STAT. § 40-15-509.5(8)(g).

⁸ Colorado Broadband Fund, How the Fund Works, <https://www.colorado.gov/pacific/dora-broadband-fund/how-fund-works> (last visited Apr. 17, 2018).

⁹ Colorado Broadband Fund, Grant Awards, <https://www.colorado.gov/pacific/dora-broadband-fund/2016-grant-awards> (last visited Apr. 17, 2018).

¹⁰ Colorado Broadband Fund, 2017 Awards, <https://www.colorado.gov/pacific/dora-broadband-fund/2017-initial-awards-right-first-refusals-and-appeals> (last visited Apr. 17, 2018).

Colorado residences and businesses located in at least 20 of the state's 64 counties. Funding for the third grant cycle is expected no later than September 2018. Consistent with past practice, it is anticipated that the Board will fund all deserving projects that meet the statutory requirements, to the limit of the cash available in the broadband fund. Additionally, on April 2, 2018, Governor Hickenlooper signed into law Senate Bill 18-002, which provides broadband funding upward of \$100 million over the next six years.¹¹ It is this funding stream that the Board believes can be utilized as a foundation to combine with federal funds to significantly impact broadband efforts in Colorado.

The recent legislation funding future broadband efforts was one of four broadband-related bills enacted in this legislative session, demonstrating Colorado's continued commitment to broadband deployment. The first of these, House Bill 18-1116, was signed into law by Governor John Hickenlooper on January 29, 2018, and requires the Board to apply for federal broadband funding to supplement the funding under the state's program.¹² With respect to the instant filing, the legislature had very specific instructions: "[T]he board shall immediately petition the FCC for a waiver from the auction rules that prohibit a state entity from applying for Connect America Fund Phase II auction money to allow the board itself to allocate auction money for broadband deployment projects approved by the board."¹³ The legislation also expressly permitted the Board to coordinate with the FCC to develop and to comply with any conditions to be imposed by the FCC should it grant the petition for waiver.¹⁴

¹¹ See Greg Avery, *Colorado Law Finds \$100 Million for Rural Broadband*, DENVER BUSINESS JOURNAL, Apr. 2, 2018, <https://www.bizjournals.com/denver/news/2018/04/02/colorado-law-finds-100-million-for-rural-broadband.html?s=print>.

¹² H.B. 18-1116, 71st Gen. Assem., 2nd Reg. Sess. (Colo. 2018) (adding subsection (10.5) to COLO. REV. STAT. § 40-15-509.5).

¹³ *Id.* (see COLO. REV. STAT. § 40-15-509.5(10.5)(b)(I)).

¹⁴ *Id.* (see COLO. REV. STAT. § 40-15-509.5(10.5)(b)(II)-(III)).

Accordingly, the Board files this petition for a waiver of the Connect America Fund Phase II (“Phase II”) auction rules.¹⁵

II. GOOD CAUSE EXISTS TO WAIVE THE PHASE II AUCTION RULES FOR THE COLORADO BROADBAND DEPLOYMENT BOARD

The FCC may waive its rules “for good cause shown.”¹⁶ Good cause exists where strict compliance with the rules would be contrary to the public interest due to particular facts.¹⁷ Special circumstances must be present in order to deviate from the rules, and the deviation must serve the public’s interest.¹⁸

A. Special Circumstances Exist in Colorado

In Colorado, special circumstances warrant deviation from the Phase II auction rules.

First, the areas in Colorado that are eligible for the Phase II auction are unlikely to attract a winning bid. The requirement that bidders in the Phase II process bid on census block groups effectively eliminates the ability for local providers to economically maintain service offerings. For example, a successful bid on the single census block group for Delta County would require a provider to serve all addresses in the area even though the area contains two separate federally managed land areas, a major river, spans a total area of 222 square miles, and has an elevation change of 4,600 feet.¹⁹ This is but one example. A majority of Colorado’s unserved areas are in

¹⁵ The Board appreciates consideration of the instant filing, particularly given the long and careful process that has resulted in the Phase II auction rules.

¹⁶ 47 C.F.R. § 1.3 (2018).

¹⁷ *Northeast Cellular Tele. Co., L.P. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁸ *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

¹⁹ See Colorado Governor’s Office of Information Technology, Block Group Summary for Delta County, https://drive.google.com/drive/folders/1EuRN4Wj0yJU_uSfM1mRxsebJOJdDqIHx (last visited Apr. 17, 2018); see also Delta County Geographic Information Systems, Interactive Map, <http://www.arcgis.com/apps/webappviewer/index.html?id=d39142d5a1844b108ff048e15eadb348&extent=-12044548.9301%2C4676540.763%2C-12019324.7108%2C4693796.4221%2C102100> (last visited Apr. 17, 2018).

the Eastern Plains, which is vast and sparsely populated, or in mountainous regions, where the difficulty of providing broadband to a small, scattered population is magnified by challenging topography and a short building season.²⁰ As such, these areas are unlikely to appeal to providers in a nationwide auction. Additionally, as the process for identifying available areas is based on census block groups it miscalculates areas as served and unserved, leaving many households without any hope for federal support. In contrast, the Board relies on data managed by the Colorado Broadband Office, which focuses on much more granular geography using the Public Land Survey System, and future processes will ensure that unserved areas are more precisely identified by household.²¹

Moreover, even if Colorado census block groups were to garner successful auction bids, the timeline of the federal program would put those areas at a distinct disadvantage. The Phase II program gives winning bidders three full years before any service to residents must be certified, and up to six years to before all residents must receive service.²² By contrast, if those same areas were instead to receive Colorado grants, all residents would be guaranteed broadband service within two years—and within one year where a grant is awarded to an incumbent provider exercising its right of first refusal.²³ In effect, Colorado residents benefiting from Phase II auction

²⁰ See John Aguilar, *Colorado Divide: Broadband Gaps Threaten to Leave Rural Areas in the Dust of Digital Age*, DENVER POST, Sept. 8, 2017, <https://www.denverpost.com/2017/09/08/rural-colorado-broadband-gaps/>.

²¹ See S.B. 18-002, 71st Gen. Assem., 2nd Reg. Sess. (Colo. 2018) (amending definition of “unserved area” from a census-block basis to a household-based designation) (effective Aug. 2018).

²² *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 5949, 5964, para. 40 (2016).

²³ See COLO. REV. STAT. §§ 40-15-509.5(8)(k)(III), -509.5(8)(g) (timing unaffected by amendments in Colo. S.B. 18-002).

funding may find themselves subject to a years-long delay in receiving broadband service by virtue of obtaining funding through the federal program rather than state funding.

Nor, unfortunately, is there any way for broadband providers to leverage available federal and state funding in bringing broadband service to unserved parts of Colorado. Historically, the Board has been barred from duplicating federal broadband support and from overbuilding.²⁴ As a result, Colorado's unserved areas may benefit from either Phase II funds or Board-awarded grants, but probably not both.

Finally, there is another potential negative consequence for Colorado consumers from a piecemeal approach by federal and state broadband programs. Depending on the location of any census block groups that were to receive Phase II auction funds, nearby unserved areas may have less commercial appeal to another broadband provider—notwithstanding the incentive of state funding. In this scenario, the existence of federal support may have the unintended consequence of inhibiting broadband providers from applying for state grants in the future, thereby making it more likely that pockets of the state will remain unserved. Though the Board's process allows applicants to customize their geographic coverage area to take into account the nuances of the challenging terrain and specific population distribution that exist in Colorado, it simply may not be economically viable for an applicant to carve out any Phase II-funded census block groups. In this way, a lack of coordination could prove disastrous for Colorado's unserved areas, as a disjointed funding approach may lead to some eligible residents ending up with no support whatsoever.

²⁴ COLO. REV. STAT. § 40-15-509.5(8)(c) (effective through July 2018); *see also* Colo. S.B. 18-002 (amending COLO. REV. STAT. § 40-15-509.5(8)(c) and creating COLO. REV. STAT. § 40-15-509.5(8)(c.5)) (effective Aug. 2018).

B. The Requested Waiver Is in the Public Interest

For the reasons set forth above, there are special circumstances regarding the Phase II auction process in Colorado. Because an accommodation for Colorado is in the public interest, there is good cause to grant the requested waiver of the Phase II auction rules.

Allowing the Board to oversee the deployment of broadband using federal funding could remedy a number of disadvantages presented by the current lack of coordination between the state and federal programs. For example, as noted above, the speed of broadband deployment could increase significantly if the Board were able to award federal funds pursuant to Colorado's existing, shorter timeline. Coordination of the two programs would reduce the risk of overbuilding and help ensure that broadband deployment will extend to all remaining unserved communities. Further, Board members have significant knowledge about the Colorado broadband industry and about local unserved areas, which in a coordinated process would inform the federal funding process as it has Board grants.²⁵ Moreover, if a waiver is granted, the Board has the ability to tailor its program administration to accommodate any additional FCC requirements.²⁶

²⁵ See COLO. REV. STAT. § 40-15-509.5(5) (noting composition of Board membership); *see also* Colo. S.B. 18-002 (amending COLO. REV. STAT. § 40-15-509.5(5)(c)(III) to increase industry representation on the Board by adding a rural cable provider in place of one public member).

²⁶ See Colo. H.B. 18-1116 (permitting coordination with FCC while petition is under consideration and in event petition is granted).

CONCLUSION

The Colorado Broadband Deployment Board respectfully requests that the Federal Communications Commission waive its Connect America Fund Phase II auction rules and allow the Board to coordinate in allocating federal auction funds in Colorado, in order to combine the resources and efforts at the federal and state level in the interest of most efficiently funding the expansion of broadband in Colorado.

Respectfully submitted this 23rd day of April, 2018.

By:

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