

**Before the  
Federal Communications Commission  
Washington, DC 20554**

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

**MIDWEST ENERGY COOPERATIVE D/B/A MIDWEST ENERGY &  
COMMUNICATIONS PETITION FOR WAIVER**

Midwest Energy Cooperative d/b/a Midwest Energy & Communications (“Midwest”) hereby respectfully petitions the Federal Communications Commission (the “Commission”), pursuant to 47 C.F.R. § 1.3, for a waiver of the requirement to buildout to 421 locations to fulfill its construction obligations pursuant to the Rural Broadband Experiment (“RBE”) program.<sup>1</sup> The Commission’s Connect America Cost Model initially used 2012 GeoResults and the 2010 Census to estimate that 421 locations needed broadband facilities, but now that Midwest has completed its construction, only 364 geocoded locations exist in the census blocks won by Midwest.<sup>2</sup> For the reasons explained herein, good cause exists to grant the relief requested with respect to this requirement.

**I. FACTS.**

On February 9, 2016, the Commission authorized Midwest to receive funding through the Rural Broadband Experiment program to deploy a network capable of delivering 100 Mbps

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<sup>1</sup> See 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 (Mar. 4, 2015) at 2.

<sup>2</sup> See Rural Broadband Experiment Support Authorized for Winning Bids Submitted by Midwest Energy Cooperative d/b/a Midwest Connections and Northern Valley Communications, LLC. WC Docket Nos. 10-90 and 14-259, Public Notice, DA 16-151 (2016).

downstream/25 Mbps upstream to the locations in 31 census blocks.<sup>3</sup> Midwest accepted accelerated funding and aggressively built out its network.<sup>4</sup> Midwest has filed its three-year construction milestone report in which it certified that it has completed its 2.052-mile fiber communications network that provides its members a diverse menu of smart grid programs and robust broadband services.<sup>5</sup> At the conclusion of the network construction, Midwest discovered that only 364 locations exist in the relevant census blocks.<sup>6</sup>

## **II. DISCUSSION.**

Pursuant to 47 C.F.R. § 1.3, the Commission may suspend, revoke, amend or waive its rules upon the showing of good cause.<sup>7</sup> The RBE program has achieved its stated goal. “We intend to test on a limited scale the use of a competitive bidding process to award support to provide robust broadband to serve fixed locations using both wireline and wireless technologies.”<sup>8</sup> Midwest participated in the RBE program on a limited basis and then again in a much larger scale in the CAF Phase II reverse auction.<sup>9</sup> Midwest has abided by all Commission rules and regulations regarding both programs, but now finds itself in a difficult position that requires a Commission waiver to remedy.

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<sup>3</sup> *Id.* at 3.

<sup>4</sup> *In re Connect America Fund*, WC Docket No. 10-90, Report and Order, (July 14, 2014) at para. 75 (“Rural Broadband Experiment Order”).

<sup>5</sup> Midwest’s broadband packages start at a symmetrical 25 Mbps package (25 Mbps upload and download). Midwest members can purchase a symmetrical Gigabyte package. *See* <https://www.teammidwest.com/internet/residential-internet/>.

<sup>6</sup> *See* Affidavit of Robert Hance (stating that only approximately 364 locations exist in the relevant census blocks).

<sup>7</sup> 47 C.F.R. § 1.3.

<sup>8</sup> Rural Experiment Order at para. 10.

<sup>9</sup> Midwest Energy & Communications won substantial funding to extend broadband services in unserved and underserved areas of rural Michigan.

**A. Determination of RBE Eligible Locations.**

The number of eligible locations were determined by the Commission based on information that is now fairly outdated. In the *Tech Transitions Order*, the Commission concluded, “that proposals for rural broadband experiments in price cap territories would be entertained at the census tract level, with funding provided only for locations in eligible census blocks as determined by the Connect America Cost Model.”<sup>10</sup> The Model initially used 2012 GeoResults and the 2010 Census data to estimate the number of eligible locations.

Initially, the Commission was concerned about existing locations being ineligible for support, but at that early point in the process, little consideration was given to the model overestimating eligible locations.<sup>11</sup> In the intervening years, the process has evolved and become both more accurate at the outset and the Commission developed a process for addressing the issue for the CAF Phase II reverse auction. The Commission has not applied the process it developed for revising eligible locations in the CAF Phase II reverse auction to the RBE program, but those guidelines offer some recognition that revision may be necessary and that the estimate is not infallible. Midwest does not advocate that the Commission strictly apply the CAF process since it is designed to apply to situations where substantially more locations are at issue and the potential reduction of support is material to both the Commission and to the provider.

**B. Waiver Is Appropriate and Necessary.**

In the context of the Connect America Fund Phase II Auction compliance, the Commission recently stated, “if an ETC is unable to meet the required deployment obligations

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<sup>10</sup> *Tech Transitions Order*, 29 FCC Rcd at 1472, para. 111.

<sup>11</sup> *See generally Tech Transitions Order*. The Commission acknowledged that there may be more locations in a census block than may be eligible for support. *Id.* at para. 15. The Commission required RBE awardees to serve all of the locations. Midwest accepted that obligation and fulfilled it.

due to circumstances beyond its control, it could seek waiver of the service milestones.”<sup>12</sup>

Although, the Commission also cautioned that “it does not expect such waiver requests will be granted routinely, and a failure to plan for some contingencies would make it difficult to establish that there is good cause to warrant waiver.”<sup>13</sup> Midwest does not request a waiver lightly or without adequate grounds of a circumstance beyond its control.

Good cause exists to waive the requirement that Midwest construct network facilities to 421 locations as required to comply with its RBE requirements. Good cause exists for the Commission to find that Midwest complied with all applicable deadlines and has successfully built out its network to all available locations in the RBE census blocks. It is through no fault of Midwest that inadequate locations exist to fulfill the Commission’s initial estimate of available locations.

The Commission recently recognized that some discrepancies exist regarding the estimated number of locations and the reality.<sup>14</sup> “[T]he Commission delegated authority to the Wireline Competition Bureau (Bureau) to address situations where a price cap carrier brings to the 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 must serve in the state.”<sup>15</sup> The Commission urged the Wireline Bureau to balance the public interest of providing broadband and relevant data. The Commission directed the Bureau to apply “a preponderance of the evidence that there are no additional

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<sup>12</sup> *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, 29 FCC Rcd 15644, 15700, para. 154 (2014) (*December 2014 Connect America Order*).

<sup>13</sup> *Id.* at 15660, para. 40, n.93.

<sup>14</sup> *In re Connect America Fund, Rural Broadband Experiments*, WC Docket Nos. 10-90 and 14-259, Order on Reconsideration (Jan. 31, 2018) at para. 22.

<sup>15</sup> *Id.*

locations in the relevant eligible census blocks in the state” and further directed “the Bureau to adjust the support recipient’s required state location total and reduce its support on a pro rata basis for that state.”<sup>16</sup> This direction was given in the context of multimillion dollar awards to price cap carriers, but the discretion should hold true for substantially smaller RBE recipients also.

The Commission suggested that where the number of required locations is revised, a carrier’s “support will also be reduced on a pro rata basis.”<sup>17</sup> This approach makes sense for price cap carriers receiving substantial CAF support. In the context of the RBE program, Midwest believes a retroactive reduction of support makes much less sense. Midwest received only \$211,532 to build out its locations. Midwest invested more than those funds to construct the fiber to the premise network in the relevant census blocks. Midwest respectfully requests that the Bureau not decrease its award proportionately given the relatively small amount of support at issue.

Midwest has made its best efforts to ascertain the available locations in the RBE census blocks. The Commission suggests that verification of locations can be accomplished through the High Cost Universal Service Broadband (“HUBB”).<sup>18</sup> Midwest has submitted the locations it constructed network facilities to the HUBB and respectfully asserts that there are no feasible ways to bridge the gap between the number of locations identified initially in the RBE program and the reality of the situation.

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<sup>16</sup> *Id.* at para. 23.

<sup>17</sup> *Id.* at para.24.

<sup>18</sup> *Id.* at para. 23.

### **III. CONCLUSION.**

Midwest acted in good faith in bidding on its census blocks. It built a fiber to the premise network capable of providing symmetrical gigabit service. The small discrepancy in available locations should not preclude it from retaining its full RBE award in light of the incredible efforts made to build broadband out to underserved and unserved areas in rural Michigan. Midwest urges the Commission to find that granting a waiver to revise the eligible locations to 364 serves the public interest.

Dated: August 21, 2019

Respectfully submitted,

MOSS & BARNETT, PLLC

Attorneys for Midwest Energy Cooperative  
d/b/a Midwest Connections

By: /s/ Shannon M. Heim  
Shannon M. Heim

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**AFFIDAVIT OF ROBERT HANCE**

**STATE OF MICHIGAN**       )  
                                      )**s.s.**  
**COUNTY OF CASS**        )


Robert Hance, after being duly sworn, states the following:

1. I have personal knowledge of the facts and information set forth in this Affidavit and am competent to testify to these facts if called as a witness.
2. I am the President and Chief Executive Officer of Midwest Energy & Communications ("Midwest"). Acting on behalf of Midwest, I have read the Petition to which this Affidavit is attached. I have knowledge of the facts stated in the Petition and those facts are true to the best of my knowledge and belief.
3. Midwest won Rural Broadband Experiment ("RBE") in 2016 to construct broadband facilities to 421 locations in Michigan.
4. Midwest completed the necessary construction earlier this year. As noted in the three-year report, there were only 364 locations in the RBE geographic footprint. Midwest requires a waiver of the requirement to build to 421 locations since it is unable to comply.

  
Robert Hance, President and CEO

Subscribed and sworn to before me  
this 21<sup>st</sup> day of August, 2019.

Notary Public, State of Michigan  
County of Cass  
My Commission Expires:

  
Katie Balkema  
Notary Public, Cass County, MI  
My Commission Expires: 10/29/2025  
Acting in the County of \_\_\_\_\_

