

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

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 14-93
)	
)	DA 14-1397

**PETITION FOR LIMITED WAIVER OF
CAF PHASE II EVIDENTIARY REQUIREMENT**

Vyve Broadband A, LLC and Vyve Broadband J, LLC (together “Vyve” or “the Company”) hereby petitions the Commission, pursuant to Section 1.3 of the Commission’s rules,¹ for a limited waiver of the Wireline Competition Bureau’s (“Bureau”) determination that under Phase II of the Connect America Fund (“CAF”) challenging parties must produce evidence of actual or former customers in a census block in order to establish that the block is “served” for purposes of determining whether the price cap incumbent local exchange (“LEC”) in that area is entitled to Phase II support.

I. INTRODUCTION

The Bureau’s evidentiary requirement should be waived because the application of the “served” criteria will result in the disbursement of subsidies to price cap LECs to overbuild networks already deployed by Vyve, an unsubsidized competitor. Waiver of the evidentiary criteria is consistent with the Bureau’s recent decision to grant Vyve’s (and other competitors’) initial request for a waiver of the application of the Bureau’s “served” criteria in those areas where Vyve has deployed facilities and is offering voice and broadband services, but does not

¹47 C.F.R. § 1.3.

have a current or former customer.² The Bureau found that the public interest would be served by granting a waiver of the “served” criteria under the circumstances presented by Vyve.³

Subsequently, several price cap LECs have filed served-to-unserved challenges of more than 103 census blocks in areas where Vyve has deployed physical network assets over which it offers broadband and voice services to the residents of those areas. As such, these areas are, in fact, served by broadband and voice as indicated on the National Broadband Map. The Commission has determined that subsidizing overbuilds in such areas is a waste of public resources and undermines competition. As such, good cause exists to waive the same criteria as applied to the census blocks identified in Vyve’s reply to various price cap LEC Phase II unserved-to-served challenges.

II. ARGUMENT

The Wireline Competition Bureau’s Public Notice dated June 20, 2014 purports to impose an evidentiary requirement that parties responding to challenges in the CAF Phase II proceeding present evidence of current or former customers in a census block in order to challenge the Bureau’s determination that the block is unserved.⁴ As a result, in those blocks where a responding party has deployed physical assets to provide broadband and voice service, and offers such services in that area (but has no current or former customers), the Bureau’s determination will result in a designation that the block is unserved. That, in turn, will permit the price cap incumbent LEC in that area to receive CAF Phase II support to deploy facilities that

²See Public Notice, Wireline Competition Bureau, Replies Sought in Connect America Phase II Challenge Process, WC Docket No. 10-90, DA 14-1397 at 3-4 (rel. Sept. 26, 2014) (hereafter “*CAF Phase II Waiver*”).

³*Id.* at 4.

⁴See Public Notice, Wireline Competition Bureau Provides Guidance Regarding Phase II Challenge Process, WC Docket No. 10-90, DA 14-864 at ¶ 9 (rel. June 20, 2014).

will be used to overbuild and compete directly with the unsubsidized competitor that has already deployed facilities to that area.

That outcome is inconsistent with the Commission's determination that broadband subsidies should not be directed to areas where unsubsidized competitors offer service. In the 2011 Connect America Funder Order the Commission determined that it would "exclude [from CAF funding] areas where an unsubsidized competitor offers broadband service..."⁵ Instead, the Commission determined that CAF support should only be directed to areas that "lack Internet access."⁶ This decision rests upon the sound policy determination that federal subsidies should be directed to those areas where market forces have not provided sufficient incentives to deploy broadband to unserved areas. Accordingly, the Commission recognized that funding should not be directed to areas in which an unsubsidized competitor already offers service.

Concomitant to that principle is the recognition that the government should not create an uneven playing field by subsidizing the deployment of facilities in those areas where an unsubsidized competitor (relying on private capital) has already deployed facilities. The government should not be subsidizing providers to compete with unsubsidized competitors because such policies undermine competition and waste public resources. Further, such policies create a significant disincentive for broadband providers to raise private capital in order to deploy networks in unserved and underserved areas.

The Bureau waived the evidentiary rule for several challengers following the filing of several limited requests for waiver similar to this one.⁷ The Bureau did so in recognition of the fact that the public interest would be served by waiving application of the "served" criteria in

⁵See *Connect America Fund*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 at ¶ 170 (2011) ("CAF Order").

⁶*Connect America Fund*, Order, WC Docket No. 10-90, 29 FCC Rcd 181 at ¶ 17 (2014) (citing Phase I Order, 28 FCC Rcd at 7771-72, ¶ 15).

⁷*CAF Phase II Waiver* at 3-4.

those instances where Vyve demonstrated that it may lack a current or former customer, but has deployed facilities capable of delivering voice and broadband services to such census blocks.⁸ As the Bureau's decision recognizes, there may be several reasons this occurs, including due to low population density of the census blocks, higher poverty in such areas (and thus less disposable income to spend on broadband services), and/or recent/ongoing facilities deployment or network upgrades.

Good cause exists to waive the Bureau's evidentiary requirement as applied to Vyve's CAF Phase II unserved-to-serve reply because the problems previously articulated by the Commission, such as avoiding the potential subsidization of overbuilds and wasting public resources, will become an unfortunate reality in many areas served by Vyve absent a waiver of the rule. Vyve has deployed broadband and voice-capable network assets (i.e., physical plant and networking equipment) in 103 census blocks that will be treated as "unserved" under Phase II if the Bureau's evidentiary requirement is not waived. As the Commission has recognized, there may be circumstances where a provider has deployed broadband networks and is actively offering service, but does not yet have any customers.⁹

That is the case with Vyve in 103 census blocks where Vyve has deployed physical network assets capable of delivering broadband and voice services to prospective customers. It can generally deliver service within seven to ten days of a request, absent extraordinary measures. Further, Vyve is actively marketing and advertising its service in these areas. Thus, Vyve serves these blocks with voice and broadband service and these areas clearly do **not** "lack access to Internet."

⁸*Id.*

⁹See *Connect America Fund*, Second Order on Reconsideration, WC Docket No. 10-90, 27 FCC Rcd 4648, ¶ 13 (2012) ("[A] provider may have no customers in a particular census block, even though it offers service there.").

The reasons that Vyve does not have current customers in these areas are several. First, these are very rural areas with a low population density per census block. As a result, the number of potential customers per census block is significantly lower than in more populated urban and suburban area. Second, many of these census blocks are in areas where the income level is quite low, and residents may not have the means (or desire) to purchase broadband service. Nonetheless, Vyve has deployed facilities in these areas and continues to offer services to the residents of these census blocks.

Absent a waiver, in these 103 census blocks the price cap incumbent LEC will be entitled to CAF support to deploy broadband networks alongside those network facilities already deployed by Vyve. The price cap LEC will then be in a position to leverage that subsidized network to compete directly with Vyve in these areas. That result is untenable. The Commission must not create an uneven playing field by subsidizing price cap LECs in those areas where Vyve has already deployed facilities through the expenditure of private capital.

III. CONCLUSION

Accordingly, Vyve respectfully requests a limited waiver of the Bureau's evidentiary rule to permit Vyve to submit evidence that it serves 103 census blocks by offering broadband and voice service to such areas. Grant of this waiver would permit the Bureau to determine that these

areas are “served” for purposes of Vyve’s reply to certain price cap LECs’ served-to-unserved CAF Phase II challenges, and that Phase II support is therefore not permitted in such census blocks.

Respectfully submitted,

/s/ K.C. Halm

K.C. Halm

Adam Shoemaker

Davis Wright Tremaine LLP

1919 Pennsylvania Ave., NW, Suite 800

Washington, D.C. 20006

202-973-4287

kchalm@dwt.com

*Counsel to Vyve Broadband A, LLC and Vyve
Broadband J, LLC*

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