

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

**MOTION TO WITHDRAW CENSUS BLOCKS**  
**FROM RURAL BROADBAND EXPERIMENT AWARDS**  
**AND MOTION TO DISMISS ETC WAIVER PETITIONS AS MOOT**

Northeast Rural Services, Inc. (“NRS”) hereby moves the Federal Communications Commission (“Commission”) to withdraw certain rural study area census blocks from its Rural Broadband Experiment (“RBE”) awards made to NRS in Oklahoma. Upon withdrawal thereof, NRS further moves the Commission to dismiss its pending Petitions for Waiver and Extension of Time to File ETC Designation (“ETC Waivers”) as moot.<sup>1</sup> As set forth herein and pursuant to 47 C.F.R. § 1.3, NRS specifically requests the Commission remove census blocks located in the rural telephone company study areas of Chouteau Telephone Company d/b/a FairPoint Communications (“FairPoint”) and CenturyTel of Northwest Arkansas, LLC d/b/a CenturyLink (“CenturyTel”) from NRS Project IDs 2, 3, 7, 8, 9, & 10. The pending ETC Waivers pertain only to those census blocks rendering the Waivers moot upon census block removal. NRS further requests the FCC’s Wireline Competition Bureau (“Bureau”) authorize NRS as support ready for the AT&T census blocks remaining within Project IDs 2, 3, 7, 8, 9, & 10.

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<sup>1</sup> NRS filed two Petitions following each round of RBE awards for hybrid census blocks. *Connect America Fund, Rural Broadband Experiments*, WC Docket Nos. 10-90 & 14-259, Emergency Request for Expedited Treatment: Petition of Northeast Rural Services, Inc. for Extension of Time and/or Waiver of ETC Designation Deadline for Rural Broadband Experiments, before the Federal Communications Commission (Mar. 5, 2015); *Connect America Fund, Rural Broadband Experiments*, WC Docket Nos. 10-90 & 14-259, Petition for Waiver and Request for Extension of Time to File ETC Designation of Northeast Rural Services, Inc., before the Federal Communications Commission (June 2, 2015).

## **I. Background**

In 2014, NRS applied for RBE<sup>2</sup> support from the FCC. On December 5, 2014 and March 4, 2015, respectively, the 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.<sup>3</sup> NRS's provisional selection encompassed twelve (12) 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.<sup>4</sup>

NRS successfully obtained ETC designation throughout relevant AT&T exchanges effectively satisfying this requirement for all census blocks covered by six (6) RBE Project IDs

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<sup>2</sup> See generally *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 (Released July 14, 2014)(“*RBE Order*”).

<sup>3</sup> 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 14-1772 (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.

<sup>4</sup> See generally *RBE Order*.

(1, 4, 5, 6, 11, & 12).<sup>5</sup> ETC designations in FairPoint and CenturyTel study areas are necessary to receive full RBE support (exceeding \$5,000,000.00) associated with six (6) additional Project IDs (2, 3, 7, 8, 9, & 10). Despite NRS's good faith efforts to obtain ETC designation in the subject study areas,<sup>6</sup> the issues encountered with rural study area designation delayed the process and caused NRS to file the ETC Waivers.<sup>7</sup>

Throughout the *AT&T*, *FairPoint*, and *CenturyTel Causes*, PUD and FairPoint emphasized that ETC designation in rural study areas routinely requires significant adjudication time (referencing public interest determinations as the reason).<sup>8 9</sup> Despite the OCC's finding that

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<sup>5</sup> *Application of Northeast Rural Services, Inc. for Designation as an Eligible Telecommunications Carrier Pursuant to the Telecommunications Act of 1996*, Cause No. PUD 201400359 (Dec. 19, 2014) (“*AT&T Cause*”).

<sup>6</sup> See *AT&T Cause*; *Application of Northeast Rural Services, Inc. for Designation as an Eligible Telecommunications Carrier Pursuant to the Telecommunications Act of 1996*, Cause No. PUD 201500079 (Feb. 20, 2015) (“*FairPoint Cause*”); and *Application of Northeast Rural Services, Inc. for Designation as an Eligible Telecommunications Carrier Pursuant to the Telecommunications Act of 1996*, Cause No. PUD 201500081 (Feb. 20, 2015) (“*CenturyTel Cause*”).

<sup>7</sup> Both the Oklahoma Corporation Commission's (“OCC”) Public Utility Division (“PUD”) and FairPoint responded to NRS's June 2, 2015 ETC Waiver. Without concession relative to the form and substance of said responses, the present Motion renders these responses moot. See *Connect America Fund, Rural Broadband Experiments*, WC Docket Nos. 10-90 & 14-259, The Public Utility Division of the Oklahoma Corporation Commission's Response and Comment to Northeast Rural Services, Inc. Petition For Waiver and Request For Extension of Time to File Proof of ETC Designation, before the Federal Communications Commission (June 26, 2015) (“*PUD Response*”) and *Connect America Fund, Rural Broadband Experiments*, WC Docket Nos. 10-90 & 14-259, Opposition of Chouteau Telephone Company to Northeast Rural Services, Inc. Petition for Waiver and Request for Extension of Time to File Proof of ETC Designation, before the Federal Communications Commission (July 14, 2015) (“*FairPoint Opposition*”).

<sup>8</sup> See *In the Matter of Petition of TracFone Wireless Inc. for Designation as an Eligible Telecommunication Carrier in the State of Oklahoma for the Limited Purpose of Offering Lifeline Service to Qualified Households*, Cause No. PUD 200900132 (June 9, 2009) (evidences significant adjudication time required in matters involving rural study areas as the petition requests ETC designation throughout the State of Oklahoma, which includes rural telephone company study areas. The cause was filed on June 9, 2009, and was voluntarily dismissed by TracFone on January 28, 2011).

<sup>9</sup> At page 6 of the *PUD Response* to NRS's June 2, 2015 ETC Waiver, PUD discusses commitment to issuing timely ETC designation to qualified entities and references four (4) ETC designations being granted in conjunction with RBE funding, including NRS's designation in the *AT&T Cause*. Notably, none of those designations involved rural telephone company study areas; See *Application of RBSC Oklahoma, LLC for Designation as an Eligible Telecommunications Carrier Pursuant to the Telecommunications Act of 1996*, Cause No. PUD 201400064, Final Order 637329 (Feb. 4, 2015); *Application of Lake Region Technology & Communications, LLC, for Designation as*

NRS's ETC designation in the *AT&T Cause* served the public interest (citing the RBE in support of such determination) the *FairPoint* and *CenturyTel Causes* were not capable of disposition prior to the subject RBE deadlines for filing proof of ETC designation.<sup>10</sup>

On July 14, 2015, NRS motioned the OCC to dismiss the *FairPoint* and *CenturyTel Causes*.<sup>11</sup> NRS cited the conflict between RBE-required deadlines for ETC designation and the time and resources required to adjudicate NRS's ETC applications in the *FairPoint* and *CenturyTel Causes* as the unfortunate reason for dismissal.<sup>12</sup> Efforts to withdraw NRS's ETC applications triggered additional briefing and adjudication before the OCC.<sup>13</sup>

NRS is in compliance with all post-selection review process requirements for RBE covered census blocks located in the relevant AT&T exchanges pertaining to Project IDs 2, 3, 7, 8, 9, & 10.<sup>14</sup> As set forth in detail below, full justification exists for the FCC to remove census

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*an Eligible Telecommunications Carrier Pursuant to 47 U.S.C. §214(e)*, Cause No. PUD 201500082, Final Order 641086 (May 26, 2015); *Application of Wichita Online, Inc. for Designation as an Eligible Telecommunications Carrier Pursuant to the Telecommunications Act of 1996*, Cause No. PUD 201500077, Final Order 641804 (June 11, 2015); *Application of Northeast Rural Services, Inc. for Designation as an Eligible Telecommunications Carrier Pursuant to the Telecommunications Act of 1996*, Cause No. PUD 201400359, Final Order 637332 (Mar. 4, 2015).

<sup>10</sup> This is true despite CenturyTel asserting it would neither oppose NRS's ETC Application nor participate in the *CenturyTel Cause*.

<sup>11</sup> See *FairPoint Cause*, Motion to Dismiss Cause (July 14, 2015); and *CenturyTel Cause*, Motion to Dismiss Cause (July 14, 2015).

<sup>12</sup> See *Id.*

<sup>13</sup> See *FairPoint Cause*, The Public Utility Division's Response to Northeast Rural Services, Inc.'s Motion to Dismiss Cause (July 21, 2015); See *FairPoint Cause*, Chouteau Telephone Company's Response to the Motion to Dismiss of Northeast Rural Services, Inc. (July 21, 2015); See *CenturyTel Cause*, The Public Utility Division's Response to Northeast Rural Services, Inc.'s Motion to Dismiss Cause (July 21, 2015). See *FairPoint Cause*, Northeast Rural Services, Inc.'s Reply to the Public Utility Divisions Response to Northeast Rural Services, Inc.'s Motion to Dismiss Cause (July 28, 2015); See *FairPoint Cause*, Northeast Rural Services, Inc.'s Reply to Chouteau Telephone Company's Response to Northeast Rural Services, Inc.'s Motion to Dismiss Cause (July 28, 2015); See *CenturyTel Cause*, Northeast Rural Services, Inc.'s Reply to the Public Utility Divisions Response to Northeast Rural Service, Inc.'s Motion to Dismiss Cause (July 28, 2015).

<sup>14</sup> For Project IDs 2, 3, 7, & 9, RBE compliance is contingent upon the Bureau granting NRS's request for an extension of time relative to the Commitment Letter to issue Letter of Credit requirement (Commitment Letter

blocks located in the rural telephone company study areas of FairPoint and CenturyTel from NRS Project IDs 2, 3, 7, 8, 9, & 10 (“Subject Projects”). Once removal is granted, NRS respectfully requests the Bureau authorize NRS as support ready for the AT&T census blocks remaining within the Subject Projects.<sup>15</sup>

## **II. Discussion**

The Commission has broad latitude to revise the RBE award made to NRS. 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.<sup>16</sup> 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 seek out the ‘public interest’ in particular individualized cases.”<sup>17</sup> In addition, the FCC may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>18</sup>

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Extension). See *Connect America Fund, Rural Broadband Experiment*, WC Docket Nos. 10-90 & 14-259, Emergency Petition for Waiver and Request for Extension of Time to File LOC Commitment Letter, before the Federal Communications Commission (May 4, 2015); and *Connect America Fund, Rural Broadband Experiment*, WC Docket Nos. 10-90 & 14-259, Supplement to Emergency Petition for Waiver and Request for Extension of Time to File LOC Commitment Letter (June 17, 2015).

<sup>15</sup> If NRS’s Commitment Letter Extension is granted, the Bureau could also authorize NRS as ready to receive support for Project IDs 5 & 11, as NRS would have effectively satisfied all post-selection review process requirements for these Project IDs.

<sup>16</sup> *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)).

<sup>17</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

<sup>18</sup> *Id.* at 1159.

As discussed herein and in NRS's previously filed ETC Waivers, good cause exists for: (1) removing census blocks located in FairPoint and CenturyTel rural telephone company study areas from the Subject Projects (and adjusting support awards related thereto, as applicable); (2) dismissing the ETC Waivers as moot following removal; and (3) authorizing NRS as support ready for all remaining AT&T census blocks covered by the Subject Projects. Granting NRS's requested relief furthers the RBE's primary goal of advancing the deployment of voice and broadband-capable networks in rural, high-cost areas, including extremely high-cost areas, while ensuring that rural Americans benefit from the historic technology transitions that are transforming our nation's communications services.<sup>19</sup>

The Commission anticipated that the RBE would be a learning process for new industry participants and the Bureau.<sup>20</sup> Particularly, the Bureau ". . . sought to learn whether providers are willing and able to deliver services with performance characteristics well in excess of the minimum standards that *price cap carriers* accepting model-based support are required to offer to all funded locations, for at most the same amount of support as calculated by the model."<sup>21</sup> The Bureau did not anticipate compliance issues associated with RBE census blocks located in rural study areas resulting from rate-of-return carriers traditionally serving those blocks being acquired by price cap carriers. Inclusion of these rural study area census blocks created a unique situation which affected the regulatory process relative to ETC designation at the state level. Rather than invest further human and financial resources to obtain the required ETC designation,

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<sup>19</sup> *RBE Order*, at § 1, para. 1.

<sup>20</sup> *RBE Order* at para. 3.

<sup>21</sup> *RBE Order* at para. 3 (emphasis added).

NRS believes the best alternative is to remove the rural study area census blocks from the RBE awards made to NRS.

Particular facts of the instant matter render census block removal consistent with the RBE's public interest objectives. NRS is headquartered in northeast Oklahoma where many of the surrounding areas are remote and rural Oklahomans are vastly underserved. NRS proposes to offer broadband reaching speeds up to 1 gigabit to residential and business customers. NRS's capability to provide needed services is evinced by the OCC's designation of NRS as an ETC in the *AT&T Cause*.<sup>22</sup> Further construction of NRS's fiber plant will facilitate the provision of supported services to customers in rural Oklahoma. The anticipated RBE support is vital to NRS's successful accomplishment of its public interest goals.

Unfortunately, the *FairPoint* and *CenturyTel Causes* depict the significant obstacles associated with obtaining ETC designation (within RBE timeframes) in rural telephone company study areas and hinder the ultimate purpose of the RBE. Requiring NRS to submit proof of ETC designation in the FairPoint and CenturyTel rural study areas would have a detrimental effect on underserved Oklahoma citizens residing in AT&T census blocks covered by the Subject Projects. This unintended effect directly contravenes the RBE's overall objective. Therefore, in NRS's particular situation, strict compliance with ETC designation requirements relative to FairPoint and CenturyTel study areas is inconsistent with the public interest, and good cause exists for census block removal.

The FCC's own RBE Reports and Orders further support NRS's request for census block removal and applicable support award adjustments resulting therefrom. In the January 31, 2014,

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<sup>22</sup> In granting ETC designation, the OCC relied, in part, on PUD testimony opining designation to be in the public interest.

in the *Tech. Transitions Order* preceding the *RBE Order*, the Commission stated its desire to entertain proposals for extending next generation networks in areas where the incumbent provider is a rate-of-return carrier.<sup>23</sup> In the *RBE Order*, the Commission opined:

We also decide that we will accept rural broadband experiment proposals only from entities that seek to provide service in *price cap territories*. Over the coming months, we will be focused on reviewing the record we will shortly receive regarding near term and long term reforms to develop a Connect American Fund for rate-of-return carriers. We believe it prudent to focus our efforts on these issues, *rather than confronting the many difficult issues with potential implementation of rural broadband experiments in rate-of-return areas.*<sup>24</sup>

The footnote to the above-excerpt clarifies that winning bidders under the RBE are prohibited from building in portions of census blocks served by rate-of-return carriers and experiment funding is only to be used in price cap territories.<sup>25</sup>

From NRS's review of relevant materials, ambiguity seems to exist relative to the *RBE Order* and a situation involving a "hybrid" rate-regulated carrier. As discussed in its first ETC Waiver, upon conferring with FairPoint's counsel, NRS learned FairPoint is a price cap carrier for purposes of federal universal services support, but is a rate-of-return carrier in relation to other aspects of its service provision. Ambiguity in the *RBE Order* relative to a "hybrid" rate-regulated carrier supports FairPoint census block removal on grounds of ineligibility. Previously, the FCC removed a census block contained within NRS Project ID 4 upon determining the same was

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<sup>23</sup> *Technology Transitions et al.*, GN Docket No. 13-5 *et al.*, Order, *et al.*, 29 FCC Rcd 1433, 1500 at para. 205. (2014).

<sup>24</sup> *RBE Order*, 29 FCC Rcd at 8778, para. 17. (Emphasis added).

<sup>25</sup> *Id.* at para. 17, FN 43.

ineligible for RBE support because an unsubsidized competitor served said census block.<sup>26</sup> Considering the concept of ineligibility and FairPoint’s “hybrid” status in terms of rate regulation, the RBE does not permit NRS to construct facilities using experiment funding in rate-of-return areas. To the extent the subject FairPoint census blocks are deemed to be located in a rate-of-return area, said blocks are ineligible under the RBE. Thus, removal of the FairPoint census blocks is justified on the same basis as the removal of blocks served by an unsubsidized competitor – ineligibility.

The FCC may wish to consider whether NRS’s requested relief raises arguments different from those considered in the rule-making process preceding the *RBE Order* when determining existence of good cause.<sup>27</sup> NRS respectfully submits the Commission did not anticipate the potential obstacles arising in connection with RBE timing issues relative to ETC designation in rural telephone company study areas or “hybrid” rate-regulated carriers. NRS’s situation reveals a gap in the RBE and, as such, good cause exists for granting NRS’s relief requested herein.

### **III. Provisional Support Award Adjustments**

Rural study area census block removal results in adjustments to NRS’s provisional support

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<sup>26</sup> Wireline Competition Bureau Announces Rural Broadband Experiments Support for 15 Provisionally Selected Bids is Ready to be Authorized and Releases Updated Frequently Asked Questions, WC Docket Nos. 10-90 & 14-259, Public Notice, DA 15-635 (Wireline Comp. Bur. Rel. May 27, 2015).

<sup>27</sup> See *Industrial Broadcasting Co. v. FCC*, 437 F.2d 680 (D.C. Cir. 1970).

awards for the Subject Projects as follows:

<b>Project ID</b>	<b>Original Award</b>	<b>Award after Removal</b>
2	\$463,540	\$190,361.01
3	\$291,898	\$71,572.96
7	\$2,924,527	\$835,129.46
8	\$30,401	\$30,401
9	\$1,150,697	\$551,101.23
10	\$110,785	\$45,672.50

See Exhibit “A” identifying precise census blocks to be retained and removed.

#### **IV. Conclusion**

NRS has consistently committed its resources to providing services to rural Oklahomans. As discussed above, upon a showing of good cause, the FCC may (1) remove census blocks located in FairPoint and CenturyTel rural telephone company study areas from NRS Project IDs 2, 3, 7, 8, 9, & 10 (“Subject Projects”) (and adjust applicable support awards related thereto); (2) dismiss the ETC Waivers as moot following removal; and (3) authorize NRS as support ready for all remaining AT&T census blocks. Granting the relief requested herein will advance the RBE’s objective by allowing NRS to provide affordable, reliable, and dearly needed services to rural Oklahoma citizens in the AT&T census blocks covered by the Subject Projects, and thus, good cause exists for granting this Motion.

DATED this 14th day of August, 2015.

Respectfully submitted,

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