

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
)	

ORDER

Adopted: September 28, 2015

Released: September 28, 2015

By the Deputy Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau (Bureau) grants the request for an extension of time for Northeast Rural Services, Inc. (NRS) to obtain a commitment letter for a letter of credit (LOC), as required for the Connect America rural broadband experiments. Accordingly, we accept NRS' LOC commitment letter as timely filed.

II. BACKGROUND

2. In the *Rural Broadband Experiments Order*, the Commission adopted a \$100 million budget for the rural broadband experiments and objective methodology for selecting winning projects among formal applications from those entities that would deploy new, robust broadband to consumers in areas where the incumbent is a price cap carrier.¹ Additionally, the Commission established a process requiring provisionally selected bidders to submit certain information and materials by a specified deadline, subject to a post-selection review by the Bureau to determine whether these entities should be authorized to receive support.² As part of this process, the Commission required the provisionally selected bidders to submit a letter from an acceptable bank committing to issue an irrevocable stand-by original LOC to that entity.³ Requiring entities to provide LOCs from a bank is a means of securing the Commission's financial commitment to provide Connect America support and ensuring that the funds awarded are being used in furtherance of the Commission's rules and the objectives of universal service.⁴ If an entity receiving funding fails to meet the terms and conditions of the rural broadband experiments, the Bureau will issue a letter declaring a default for the entity, which will be sufficient for a draw on the LOC to recover all support that has been disbursed to the entity.⁵

¹ *Connect America Fund et al.*, WC Docket Nos. 10-90 and 14-58, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8769, 8770, para. 1 (2014) (*Rural Broadband Experiments Order*).

² *Id.* at 8786-93, paras. 51-71.

³ *Id.* at 8787-88, para. 54. The Commission required that an issuing bank meet several requirements, including that it be among the top 100 largest banks in the U.S., or for non-U.S. banks, among the top 100 largest banks in the world. *See id.* at 8790, para. 59.

⁴ *Id.* at 8788-89, para. 56.

⁵ *Id.* at 8788, para. 55.

3. On December 5, 2014, the Bureau announced the provisionally selected bidders for rural broadband experiments support.⁶ NRS was provisionally selected for six of its bids, totaling \$1,029,274.⁷ NRS timely submitted the required financial and technical information, including a LOC commitment letter from CoBank, an acceptable bank according to the Commission's requirements.⁸ Subsequently, the Bureau authorized NRS to begin receiving support for those bids.⁹

4. On March 4, 2015, the Bureau announced additional provisionally selected bidders for rural broadband experiments funding, including another six bids by NRS, totaling \$7,415,062.¹⁰ Therefore, NRS was required to submit within 60 days of the Bureau's second public notice announcing additional provisionally selected bidders another commitment letter from an acceptable bank committing to provide it with a LOC for the additional support.¹¹

5. Unlike its commitment to issue the first LOC, CoBank required collateral from NRS in exchange for its commitment to issue the second, larger LOC.¹² However, NRS had an existing broadband loan with the Rural Utilities Services (RUS), an agency within the United States Department of Agriculture (USDA), which is required by its regulations and the term of its loan to NRS to be given an exclusive first lien on the assets guaranteeing the loan.¹³ The regulations do not bar RUS from sharing a first lien,¹⁴ but RUS is required by statute to ensure that the loan guarantee remains "commensurate to the risk involved with the loan."¹⁵ Because CoBank had to negotiate an intercreditor agreement with RUS to share a first lien position on NRS' assets, NRS was not able to obtain a LOC commitment letter for its additionally selected bids from CoBank by the deadline, as it did for its first round of provisionally selected bids.¹⁶

6. When it became clear that CoBank and RUS would not complete their negotiations in time, NRS filed a petition for waiver and request for extension of time to file a bank commitment letter.¹⁷

⁶ *Wireline Competition Bureau Announces Entities Provisionally Selected for Rural Broadband Experiments; Sets Deadlines For Submission of Additional Information*, WC Docket No. 10-90, Public Notice, 29 FCC Rcd 14684 (Wireline Comp. Bur. 2014).

⁷ *Id.*

⁸ Petition for Waiver and Request for Extension of Time of Northeast Rural Services, Inc., WC Docket Nos. 10-90 and 14-259, at 1 (filed May 4, 2015) (NRS Petition).

⁹ *Rural Broadband Experiment Support Authorized for Five Winning Bids for First Step Internet, LLC and Northeast Rural Services, Inc.*, WC Docket Nos. 10-90 and 14-259, Public Notice, DA 15-1003 (Wireline Comp. Bur. rel. Sept. 11, 2015).

¹⁰ *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 and 14-259, Public Notice, 30 FCC Rcd 2045 (Wireline Comp. Bur. 2015) (*Additional Rural Broadband Experiments Bidder Selection Public Notice*).

¹¹ *See id.* at 2046 (stating that within 60 days of the Bureau's announcement of additionally selected winning bidders, the selected bidders must submit a letter of commitment from an acceptable bank to provide the entity with a LOC for each winning bid).

¹² NRS Petition at 2-3.

¹³ 7 C.F.R. § 1738.154(b).

¹⁴ 7 C.F.R. § 1738.154(b).

¹⁵ 7 U.S.C. § 950bb(h).

¹⁶ NRS Petition at 2.

¹⁷ *See generally id.* at 1.

Subsequently, on June 12, 2015, CoBank issued a commitment letter to provide LOC for each of NRS's provisionally selected bids, after coming to an agreement with RUS.¹⁸

III. DISCUSSION

7. Based on the special circumstances presented by NRS, we find that a limited extension of time for submission of the required LOC commitment letter is warranted. Therefore, we waive the established May 4, 2015 deadline and accept NRS' LOC commitment letter as timely filed.

8. Generally, the Commission's rules may be waived if good cause is shown.¹⁹ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.²⁰ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²¹ Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.²² "[D]eadlines can only be waived under 'unusual or compelling circumstances.'"²³

9. In this case, we find that NRS has established good cause for a limited extension of the deadline. Based on the record before us, we conclude that NRS timely sought to obtain a LOC commitment letter from CoBank for its additional provisionally selected bids.²⁴ NRS had previously successfully obtained a LOC commitment letter from CoBank for its first set of bids. It was reasonable that NRS would go back to the same financial institution to secure a second LOC commitment letter.²⁵ However, NRS' selection for a second set of bids was for a much larger amount of support, which changed the circumstances for CoBank.

10. We conclude that NRS' delay in obtaining a LOC commitment letter was a sufficiently unique situation to find good cause for a waiver. CoBank's need to resolve the priority of liens on the assets at issue with another federal agency's requirements was outside of NRS' control. While negotiating the intercreditor agreement between RUS and CoBank continued past the deadline, the two parties were ultimately able to come to an agreement, and NRS was able to file a LOC commitment letter.²⁶ In the Mobility Fund Phase I auction, the Wireless Telecommunications Bureau found there was good cause to waive a letter of credit commitment deadline due in part to the Tribal entity needing more time to follow Tribal government approval processes.²⁷ In this limited instance, we similarly conclude it is appropriate to

¹⁸ See Supplement to Emergency Petition for Waiver and Request for Extension of Time to File LOC Commitment Letter of Northeast Rural Services, Inc., WC Docket Nos. 10-90 and 14-259 (filed June 17, 2015) (NRS Supplement).

¹⁹ 47 C.F.R. § 1.3.

²⁰ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

²¹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

²² *Northeast Cellular*, 897 F.2d at 1166.

²³ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 126 (D.C. Cir. 2008) (citation omitted).

²⁴ See NRS Petition at 2 (stating that NRS immediately initiated negotiations with CoBank after being selected for additional rural broadband experiment funding and maintained ongoing communication with the financial institution up through the May 4, 2015 deadline, at which point RUS and CoBank had still not agreed to terms).

²⁵ See *id.* at 1.

²⁶ NRS also requested that the Commission consider modifying the top 100 bank requirement in favor of a "shorter, less stringent LOC commitment obligation allowing entities lacking the required collateral...to carry out the [Commission's] universal service goals." See *id.* 4. We dismiss this request as moot given that NRS ultimately obtained a LOC Commitment letter from an acceptable top 100 bank.

²⁷ See *Standing Rock Telecommunications, Inc. Request for Limited Extension of Time to Submit Bank Commitment Letter for Mobility Fund Phase I Support (Auction 901)*, Order, 28 FCC Rcd 12853, 12855-857, paras. 8, 13

grant a short extension to allow the parties to reach a solution that accommodates the statutory requirements of RUS's rural broadband program.²⁸

11. NRS' circumstances are distinguishable from our decision to deny an extension of the letter of credit commitment letter deadline for a provisionally selected bidder that was merely turned down by two potential LOC issuing banks late in the rural broadband experiments process.²⁹ There, the inability to obtain the letter of credit was not due to the requirements of another governmental entity. In this case, NRS immediately commenced efforts to obtain a LOC commitment letter from CoBank, and CoBank did not turn down NRS' requests outright. Rather, NRS and CoBank continued ongoing negotiations,³⁰ and ultimately, CoBank was willing to negotiate a commitment letter subject to meeting certain conditions required by RUS. These circumstances impacting the second set of bids were unforeseeable and outside of NRS' control.³¹

12. Furthermore, unlike for other provisionally selected bidders that sought waiver of various filing deadlines, NRS' inability to resolve the situation by the deadline had no impact on the offer of support to price cap carriers because it had not missed the deadline at the time the Bureau finalized the list of census blocks to receive the offer of model-based support. Prior to the April 29th announcement of the offer of model-based support, the Bureau removed all census blocks associated with the second set of provisionally selected bids from the offer to the price cap carriers. The Commission's offer of model-based support had already been extended to price cap carriers before the May 4th LOC commitment letter deadline.³²

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, that this Order IS ADOPTED.

14. IT IS FURTHER ORDERED that the request for an extension of the May 4, 2015 deadline for obtaining a letter of credit commitment letter filed by Northeast Rural Services, Inc. IS GRANTED IN PART and DISMISSED IN PART as described herein.

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(Wireless Tel. Bur. 2013) (granting a waiver to extend the deadline to file a LOC commitment letter due to unique and unavoidable challenges outside the entity's control where the Tribal Council cancelled a meeting required before the Tribally-owned entity could obtain a LOC commitment letter).

²⁸ See 7 U.S.C. § 950bb(h).

²⁹ Cf. *Connect America Fund; Rural Broadband Experiments*, WC Docket Nos. 10-90 and 14-259, Order, DA 15-698, para. 5 (Wireline Comp. Bur. rel. June 15, 2015) (finding that the withdrawal of two financial institutions late in the rural broadband experiment process was not a unique and unavoidable circumstance to warrant an extension or waiver of the LOC deadline).

³⁰ NRS Petition at 2.

³¹ See *Wireline Competition Bureau Announces Rural Broadband Experiment Support for 15 Provisionally Selected Bids is Ready to Be Authorized and Releases Updated Frequently Asked Questions*, WC Docket Nos. 10-90 and 14-259, Public Notice, 30 FCC Rcd 5038, 5039-40 (waiving the deadline to obtain an eligible telecommunications carrier (ETC) designation where the entity showed good faith in attempting to obtain an ETC designation and where the delay was a result of state ETC application process, which the Bureau deemed to be out of the entity's control).

³² See *Wireline Competition Bureau Announces Connect America Phase II Support Amounts Offered to Price Cap Carriers to Expand Rural Broadband*, WC Docket No. 10-90, Public Notice, 30 FCC Rcd 3905 (Wireline Comp. Bur. 2015) (announcing the Commission's offer of model-based support).

15. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Matthey
Deputy Chief
Wireline Competition Bureau