

**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 AND ORDER ON RECONSIDERATION

Adopted: August 15, 2016

Released: August 15, 2016

By the Deputy Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order and Order on Reconsideration, the Wireline Competition Bureau (Bureau) addresses several challenges to the rural broadband experiments post-selection requirements. Specifically, the Bureau denies three separate petitions filed by Lake Region Electric Cooperative, Inc. (Lake Region), Wichita Online, Inc. (WOI), and Halstad Telephone Company (Halstad) seeking waiver of the requirement to submit, by a specified deadline, a letter from an acceptable bank committing to issue an irrevocable stand-by letter of credit (LOC) in the amount of the provisionally selected bid as well as Halstad's related petition seeking reconsideration of a Bureau order finding that Halstad had defaulted on this requirement.¹ The Bureau also dismisses as moot WOI's petition for waiver of the rural broadband experiment obligation to submit, by a specified deadline, proof of its designation as an eligible telecommunications carrier (ETC) in all areas covered by its provisionally selected bid.² In the Order on Reconsideration, the Bureau also dismisses as procedurally flawed Lake Region's petition for reconsideration of the Bureau's determination, pursuant to the Phase II challenge process, that certain

¹ Request for Limited Waiver, WC Docket Nos. 10-90 and 14-259 (filed July 15, 2015), <https://www.fcc.gov/ecfs/filing/60001093323/document/60001115539> (Halstad Waiver Request); Petition for Waiver, WC Docket Nos. 10-90 and 14-259 (filed Mar. 24, 2015), <https://www.fcc.gov/ecfs/filing/60001027372/document/60001041320> (Lake Region Waiver Request); Petition for Waiver and Request for an Extension of time in which to file Letter of Commitment and Letter of Credit, WC Docket Nos. 10-90 and 14-259 (filed June 10, 2015), <https://www.fcc.gov/ecfs/filing/60001060722/document/60001077685> (WOI Commitment Letter Waiver Request), *clarified*, Letter from James Lightfoot, P.E., President/CEO, ACRS to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed Dec. 10, 2015), <https://www.fcc.gov/ecfs/filing/60001326827/document/60001354626>; Petition for Reconsideration, WC Docket Nos. 10-90 and 14-259 (filed July 15, 2015), <https://www.fcc.gov/ecfs/filing/60001093328/document/60001115545> (Halstad Reconsideration Petition); *Connect America Fund, Rural Broadband Experiments*, WC Docket Nos. 10-90 and 14-259, Order, 30 FCC Rcd 6257, 6260-61, para. 9 (2015) (finding Halstad in default of the commitment letter filing requirement and removing Halstad from further consideration for rural broadband experiment support) (*RBE Waiver Order*).

² Petition of Wichita Online, Inc. For Waiver of ETC Designation Deadline for Rural Broadband Experiments, Request for Expedited Treatment, WC Docket Nos. 14-259, 10-90 (filed Mar. 6, 2015), <https://www.fcc.gov/ecfs/filing/60001025753/document/60001039363>, *clarified*, Letter from James Lightfoot, P.E., President/CEO, ACRS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed Dec. 30, 2015), <https://www.fcc.gov/ecfs/filing/60001367374/document/60001395771> (WOI ETC Waiver Request).

blocks included within Lake Region's bid projects were already served and thus ineligible for Phase II support.³ As an alternative and independent ground, the Bureau denies this petition on the merits.

II. RURAL BROADBAND EXPERIMENT POST-SELECTION REQUIREMENTS

A. Background

2. In the *Rural Broadband Experiments Order*, the Commission adopted rules for a limited program of rural broadband experiments and established a competitive bidding process to select projects in three separate categories from entities willing to deploy broadband to consumers in areas served by incumbent price cap carriers.⁴ The Commission also established a post-selection review process to enable the Bureau to assess provisionally selected bidders' financial and technical capabilities to meet their commitments and, ultimately, to determine whether these bidders should be authorized to receive support.⁵ Among other things, provisionally selected bidders were required to submit a letter from an acceptable bank committing to issue an irrevocable stand-by LOC in the amount of the provisionally selected bid (commitment letter);⁶ documentation of their designation as an ETC in all areas for which they were selected to receive support;⁷ and an acceptable LOC.⁸ The Commission adopted specific eligibility criteria for purposes of the rural broadband experiments.⁹ For banks located within the United States, such eligibility was generally limited to institutions insured by the Federal Deposit Insurance Corporation (FDIC) or the Farm Credit System Insurance Corporation (FCSIC), ranked among the top-100 largest U.S. banks (based on revenues in the prior year), and rated by Standard & Poor's at BBB-or better (or the equivalent from a nationally recognized credit rating agency).¹⁰

³ See Petition for Reconsideration by Lake Region Technology & Communications, LLC, WC Docket Nos. 10-90 and 14-93 (filed Apr. 29, 2015), <https://www.fcc.gov/ecfs/filing/60001030381/document/60001045186> (Lake Region Reconsideration Petition); see also *Connect America Fund; High-Cost Universal Service Support*, WC Docket Nos. 10-90 and 14-93, Order, 30 FCC Rcd 2718, 2718-19, para. 3 (WCB 2015) (*Phase II Challenge Process Resolution Order*).

⁴ See *Connect America Fund; ETC Annual Reports and Certifications*, WC Docket Nos. 10-90 and 14-58, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8769, 8786-93, paras. 51-71 (2014) (*Rural Broadband Experiments Order*).

⁵ See *id.*

⁶ See *id.* at 8787-88, para. 54.

⁷ See *id.* at 8788, para. 54.

⁸ See *id.*

⁹ See *id.* at 8790, para. 59.

¹⁰ See *Rural Broadband Experiments Order*, 29 FCC Rcd at 8787-88, para. 54. On May 26, 2016, in its *Phase II Auction Order*, the Commission adopted rules for the Phase II auction, including bank eligibility criteria for issuing LOCs to guarantee Phase II funding, and allowing authorized rural broadband experiment projects to use those banks going forward. See *Connect America Fund et al.*, WC Docket Nos. 10-90, 14-50, and 14-259, Report and Order and Further Notice of Proposed Rulemaking, FCC 16-64, at paras. 126-140 (rel. May 25, 2016) (*Phase II Competitive Order*); see *id.* at n.262 (dismissing as moot petitions from the National Rural Utilities Cooperative Finance Commission (CFC) and from two authorized rural broadband experiment bidders (Allamakee-Clayton Electric Cooperative, Inc. and Midwest Energy Cooperative d/b/a Midwest Connections) seeking waiver of the rural broadband experiment's eligibility criteria to allow for LOCs issued by CFC; specifically noting that the two bidders had already obtained LOCs from banks meeting the original eligibility criteria and the newly revised criteria would apply to rural broadband experiment participants on a *going-forward* basis); see *id.* at n.280 (dismissing in part waiver petition filed by the NTCA—The Rural Broadband Association on behalf of provisionally selected bidders for rural broadband experiment support regarding the top 100 bank eligibility requirement since the Commission had “expanded the potential pool of issuing banks for rural broadband experiments by adopting expanded bank eligibility requirements applicable to all recipients of support to serve fixed locations.”).

3. By public notices released on December 5, 2014, and March 4, 2015, the Bureau announced its provisional selection of rural broadband experiment bids.¹¹ As first round provisional selectees, Halstad and WOI were required to submit commitment letters by February 3, 2015.¹² As a second round provisional selectee, Lake Region was required to submit its commitment letter by May 4, 2015.¹³ Although Halstad, Lake Region, and WOI all filed commitment letters in advance of their respective deadlines, the banks issuing such letters did not qualify as eligible institutions. Halstad's letter was issued by Red River Bank, a bank not among the top-100 largest banks in the United States;¹⁴ Lake Region's letter was issued by CFC, a bank not insured by either the FDIC or the FCSIC;¹⁵ and WOI's letter was issued by Arvest Bank, a bank lacking the required credit rating.¹⁶

4. Of these three bidders, only Lake Region submitted its request for waiver of the bank eligibility requirements before its commitment letter filing deadline.¹⁷ Halstad submitted its waiver request on July 15th, approximately five months after its filing deadline, together with a petition for reconsideration of a June 15th Bureau order finding Halstad in default of this requirement.¹⁸ In its petition for reconsideration, Halstad explains that it had not filed a timely waiver petition in the docket because it had erroneously assumed that the Bureau would treat an explanatory letter it had filed with its Red River commitment letter, as an "unofficial" waiver request.¹⁹ Similarly, WOI filed its waiver request on June 10th, four months after its commitment letter deadline, explaining that until the Bureau notified it that Arvest Bank lacked the required credit rating, it held the erroneous belief that it had satisfied its commitment letter obligation.²⁰

5. In their filings, Halstad and Lake Region request that the Bureau modify the eligibility criteria and accept their letters from ineligible banks as timely filed.²¹ Halstad requests, in the alternative, that the Bureau accept a new commitment letter issued by a fully eligible bank that Halstad submitted to

¹¹ See *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 (WCB 2014) (*First Round Public Notice*); *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 (WCB 2015) (*Second Round Public Notice*).

¹² See *First Round Public Notice*, 29 FCC Rcd at 14687, Attach. A (announcing the provisional selection of Halstad's \$303,760 bid to serve 72 high-cost blocks and WOI's \$314,633 bid to serve 55 high-cost blocks).

¹³ See *Second Round Public Notice*, 30 FCC Rcd at 2047, Attach. (announcing the provisional selection of Lake Region's two bids for project numbers one and two (bid 1, bid 2) totaling \$591,987 to serve 68 high-cost blocks).

¹⁴ See Halstad Waiver Request at 2.

¹⁵ See Lake Region Waiver Request at 1.

¹⁶ See WOI Commitment Letter Waiver Request at 2.

¹⁷ See generally, Lake Region Waiver Request (filed March 24, 2015).

¹⁸ See *RBE Waiver Order*, 30 FCC Rcd at 6260-61, para. 9.

¹⁹ Although Halstad argues that the Bureau's failure to treat this explanatory letter as a waiver request was arbitrary and capricious, the letter included no clear indication that Halstad intended to seek waiver nor did it include the requisite "well-reasoned and adequately supported" arguments for waiver that trigger the Commission's obligation to give waiver requests a "hard look." See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); Halstad Petition for Reconsideration at 4-5. We note that in its *RBE Waiver Order*, the Bureau nonetheless explained that it lacked the resources to independently review the stability and soundness of banks not within the United States' top-100 banks. See *RBE Waiver Order*, 30 FCC Rcd at 6260-61, para. 9. Regardless, in the interest of completeness, we now address Halstad's request for waiver alongside its petition for reconsideration.

²⁰ See WOI Commitment Letter Waiver Request at 1-2.

²¹ See Lake Region Waiver Request at 2; Halstad Waiver Request at 3-4; Halstad Reconsideration Petition at 4-6.

the Commission on the same day it filed its waiver request.²² Similarly, WOI requests that the Bureau extend the commitment letter filing deadline to accommodate a new commitment letter from a fully eligible institution that it committed to filing, and ultimately did file, with the Commission on July 9, 2015.²³

B. Discussion

6. For the reasons stated below, we find that all three of the petitioners seeking relief from the commitment letter obligation have failed to demonstrate good cause for waiver, and accordingly, we deny their waiver requests.²⁴ We also deny Halstad's associated petition for reconsideration. Consequently, we remove these bidders from further consideration for rural broadband experiment support. Because we hold WOI to be in default of its commitment letter requirement and remove it from further consideration for support on this basis, we dismiss as moot WOI's waiver request seeking extension of the subsequent ETC filing deadline.

7. Through their waiver requests, Halstad and Lake Region effectively ask the Bureau to modify the eligibility criteria the Commission enacted for the rural broadband experiments, asserting that such criteria unnecessarily limited the effective participation of certain small and rural entities, which, like themselves, were unable to obtain letters from eligible institutions pursuant to the Commission's rules.²⁵ Halstad, seeking relief in the alternative, and WOI, ask the Bureau to accept letters from fully eligible institutions filed several months after the filing deadline, with Halstad pleading impossibility, and WOI, mistake, as excuse for their late-filings.²⁶ None of these bidders, however, have shown the kind of special and unique circumstances that would make strict enforcement of the rules inequitable, nor have they shown that the public interest would be served by granting their waiver requests.

8. To the contrary, granting these bidders their requested relief would be unfair to other similarly situated bidders, including those which fulfilled their commitment letter obligations despite allegedly onerous conditions and those which defaulted while pursuing letters from eligible banks and were removed from further consideration for support.²⁷ Granting these requests would be equally unfair

²² See Halstad Waiver Request at 3, Attach A; Halstad Reconsideration Petition at 2-4.

²³ See WOI Commitment Letter Waiver Request at 2.

²⁴ Good cause is a "high hurdle even at the starting gate," requiring proof of special circumstances warranting deviation from the general rule and that such deviation better serves the public interest than strict adherence to the rule. See *WAIT Radio*, 418 F.2d at 1157; 47 CFR § 1.3; *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (holding that a good cause finding requires the FCC to "explain why deviation better serves the public interest, and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation."). In assessing such waiver request, the Commission considers whether the particular facts make strict compliance with the rule inconsistent with the public interest as well as questions of hardship, equity, or more effective implementation of overall policy on an individual basis. See *WAIT Radio*, 418 F.2d at 1159.

²⁵ See Halstad Waiver Request at 3; Lake Region Waiver Request at 2-3.

²⁶ See Halstad Waiver Request at 3, Attach A; Halstad Reconsideration Petition at 2-4; WOI Commitment Letter Waiver Request at 2.

²⁷ See, e.g., *Wireline Competition Bureau Announces Rural Broadband Experiments Support for Provisionally Selected Bid Ready to Be Authorized*, WC Docket Nos. 10-90 and 14-259, Public Notice, 31 FCC Rcd 1247, 1249 (WCB 2016) (finding that New Lisbon Broadband and Communications, LLC, timely submitted its commitment letter for its provisionally selected bid); *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 and 14-259, Public Notice, 30 FCC Rcd 5038, 5039 (WCB 2015) (finding that First Step Internet, LLC had met its commitment letter obligation); *Connect America Fund*, WC Docket Nos. 10-90, 14-259, Memorandum Opinion and Order, 30 FCC 8967, 8971-72, para. 11 (2015) (as an independent and alternative basis for its decision, denying a bidder's request for waiver of the commitment letter deadline where

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to entities which may have chosen not to place bids during the bid filing window based on their assessment of their ability to satisfy the commitment letter requirements.²⁸ Indeed, Halstad's and Lake Region's broad policy arguments about the potential effects of the eligibility requirements on the size and nature of the bidder pool could have and should have been raised before the time for placing bids for rural broadband experiment support.²⁹ Absent special circumstances, individual hardships in meeting obligations cannot outweigh the compromising effects of selective enforcement on the integrity, efficiency and fairness of the rural broadband experiment program.³⁰ As the Commission has stated in the context of license auctions: "Consistent application of the auction rules to all bidders is essential to a fair and efficient licensing process, and is fair to all auction participants, including those who won licenses in the auctions and those who did not."³¹

9. Similarly, WOI had the responsibility, opportunity, and capability of confirming, in advance of the filing deadline, that the bank issuing its commitment letter was fully eligible to do so. Like all parties appearing before the Commission, bidders participating in the rural broadband experiments were expected to know the rules applicable to their conduct and exercise due diligence in undertaking the steps necessary to comply.³² Consistent with precedent, due diligence precludes reliance on third party statements, particularly when such statements may be readily confirmed or refuted through outside resources.³³ It is well established that personal confusion or ignorance of the law under

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bidder had explained that it needed additional time to obtain the requisite collateral to complete its ongoing negotiations with two banks) (*Rural Broadband Experiments Order on Review*); *Rural Broadband Experiments Waiver Order*, 30 FCC Rcd at 6259, para. 5 (denying request for extension of the commitment letter deadline where bidder explained it had already been turned down by two qualifying banks).

²⁸ As the Bureau has stressed in its *Rural Broadband Experiments Waiver Order*, all bidders were well aware of their post-selection obligations as of July 2014 and should have taken into account their ability to meet these requirements before placing bids. *See Rural Broadband Experiments Waiver Order*, 30 FCC Rcd at 776, para. 9.

²⁹ In setting its eligibility criteria, the Commission did not overlook its potential effects on the diversity and size of the bidder pool but weighed these concerns against other policy objectives, choosing criteria designed to incorporate greater choice and flexibility among banking institutions while limiting financial risk after accounting for the anticipated bid size. *See Rural Broadband Experiments Order*, 29 FCC Rcd at 8790, para. 59-60. Within 30 days of the release date of the *Rural Broadband Experiments Order*, prospective bidders had the opportunity to challenge the balance struck by the Commission. *See* 47 CFR § 1.429. *See also Indus. Broad. Co. v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970) ("applicant bears a heavy burden to demonstrate that his arguments for waiver are substantially different from those that have been carefully considered in rulemaking proceeding").

³⁰ *See, e.g., BellSouth Corp. v. FCC*, 162 F.3d 1215, 1225 (D.C. Cir. 1999) (holding that strict enforcement of a deadline is not per se an abuse of discretion but may be justified "by the gain in certainty and administrative ease, even if it appears to result in some hardship in individual cases.") (quoting *Turro v. FCC*, 859 F.2d 1498, 1500 (D.C. Cir. 1988)).

³¹ *Windstar Broadcasting Corporation*, Order on Reconsideration, 20 FCC Rcd 2043, 2053-54, para. 20 (2005).

³² *See, e.g., Rural Broadband Experiments Order on Review*, 30 FCC at 8972, para. 12 ("[A]pplicants were expected to familiarize themselves fully with the Commission's rules and requirements for the rural broadband experiments."); 47 CFR § 0.406 ("Persons having business with the Commission should familiarize themselves with those portions of its rules and regulations pertinent to such business.").

³³ *See, e.g., Universal Service Contribution Methodology Petition for Waiver of Universal Service Fund Rules by Outfitter Satellite, Inc.*, WC Docket No. 06-122, Order, 28 FCC Rcd 13358, 13361-62, para. 12 (2013) (emphasizing that "mistakes or negligence by employees or third party contractors are not grounds for waiver of Commission rules"); *Four Corners Broadcasting, LLC*, Letter Order, 25 FCC Rcd 9046 (WTB 2010) (denying waiver request where applicant seeking to participate in broadcast auction claimed its late upfront payment was due to a "bank error completely out of the [applicant's] control."). We note that generally, bank ratings by nationally recognized credit rating agencies are accessible online. *See, e.g.,* <https://www.standardandpoors.com>.

circumstances where the Commission has provided fair notice is not grounds for a waiver.³⁴ Therefore, regardless of whether the shared misunderstanding of WOI and Arvest Bank arose from a mistaken belief that the bank had the required credit rating or a mistaken belief that a bank rating is equivalent to a credit rating, WOI has failed to justify waiver of its filing deadline.

10. We are not persuaded that grant of these waiver requests would serve the public interest. The Commission chose to adopt specific eligibility criteria for the rural broadband experiments to avoid the need for an independent, case-by-case comparative analysis of the “stability and soundness” of a potentially vast number of institutions guaranteeing a wide range of funding.³⁵ Such an analysis would have increased the risk of disparate treatment, and diverted limited Bureau resources away from Phase II implementation.³⁶ The Commission imposed specific filing deadlines to help ensure not only that the post-selection review process would proceed in a timely manner but also to ensure the attentiveness of provisionally selected bidders in meeting Commission requirements. Grant of these bidders’ waivers would undermine these purposes and objectives.³⁷

³⁴ See, e.g., *Petition for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 29 FCC Rcd 13998, 14010, para. 26 (2014) (stating that “simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.”); *South Slope Cooperative Telephone Company, Federal-State Joint Board on Universal Service; South Slope Cooperative Telephone Company Petition for Waiver of Filing Deadline in 47 C.F.R. Section 54.307(c)*, CC Docket No. 96-45, Order, 19 FCC Rcd 17493, 17494, para. 5 (WCB 2004) (finding that “confusion regarding the rules does not establish special circumstances that warrant deviation from the Commission’s rules”).

³⁵ See *Rural Broadband Experiments Order*, 29 FCC Rcd at 8787-88, para. 54; see also *Connect America Fund; Rural Broadband Experiments*, WC Docket Nos. 10-90 and 14-259, Memorandum Opinion and Order, 30 FCC Rcd 8967, 8971-72, para. 11 (2015) (“Given our limited objective to learn from these experiments about the best way to achieve our overarching policy goals through the selection of a relatively limited number of projects, we conclude it would not be productive at this time to engage in a case-by-case evaluation of various non-top 100 banks that provisionally selected bidders may wish to use for their LOCs.”) (*RBE Waiver Order on Review*).

³⁶ See *Rural Broadband Experiments*, 29 FCC Rcd at 8772, 8773, paras. 6, 10 (emphasizing the Commission’s commitment to ensuring that the experiments not delay progress on the Phase II model-based auction and other aspects of universal service implementation); see also, e.g., *RBE Waiver Order on Review*, 30 FCC Rcd at 8969, para. 6 (“While individual bidders may be disappointed by the resolution of their individual requests, we have achieved our primary objective in the experiment — to gain insights in a real-world environment regarding how particular requirements would impact potential bidders so that we could, in a timely manner, adjust and tailor our requirements, as necessary, for the larger Phase II competitive bidding process to follow.”); *Technology Transitions et al.*, GN Docket No. 13-5 et al., Order et al., 29 FCC Rcd 1433, 1471, 1499, paras. 109, 204 (2014) (explaining that the Commission does not “envision using all unallocated funds in the broadband reserve for experiments in rural areas, but rather an amount that is sufficient to enable us to award funding to a limited number of projects” capable of producing a data set sufficient to inform certain enumerated policy concerns relating to Phase II implementation).

³⁷ See *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1182 (D.C. Cir. 2003) (upholding the FCC’s decision to deny a waiver where rule was intended to ensure that bidders were “certain of their qualifications and financial capabilities before the auction so as to discourage default and avoid delays,” and defaulting bidder’s behavior was “exactly the kind of conduct the default penalty rule was designed to deter”); *Barry P. Lunderville, Coll. Creek Broad., Inc., & Cumulus Licensing LLC*, Memorandum Opinion and Order, 28 FCC Rcd 665, 671 (2013) (“Because the essential premise of a waiver is ‘the assumed validity of the general rule,’” grant of a waiver must “not undermine the policy served by the rule.”) (citations omitted). Because these bidders’ waiver requests had the *potential* to undermine administrative and substantive goals associated with the commitment letter requirement and deadline, we find irrelevant Halstad’s arguments relating to the actual effect that grant of its waiver request would have on the rural broadband experiments and Phase II processes and other rural broadband experiments participants. See Halstad Waiver Request at 4-5; Halstad Petition at 1-2, 6.

III. PETITION FOR RECONSIDERATION OF PHASE II CHALLENGE PROCESS

A. Background

11. In the *USF/ICC Transformation Order*, the Commission established, among other programs, Connect America Phase II to support the deployment of voice and broadband-capable networks in high-cost, price-cap service territories not already served by an unsubsidized competitor.³⁸ The Commission delegated to the Bureau the responsibility of determining which areas were served and which were unserved, and also specified that there be a process by which parties could challenge any initial determination.³⁹ In 2013, the Bureau set certain parameters for identifying unsubsidized competitors, and the performance metrics that they would be required to meet, before the Bureau would deem a census block as already served and thus, ineligible for Phase II support.⁴⁰ The Bureau also established a challenge process whereby an unsubsidized competitor could make a prima facie showing of service by certifying that it offered the requisite voice and broadband service in the challenged block(s), had physical assets in or adjacent to the block(s), and currently or previously had voice or broadband customers in the block(s).⁴¹ Upon such a prima facie showing, the Bureau would presume that the blocks were served unless and until a respondent provided concrete and verifiable evidence that one or more of the evidentiary standards had not been met.⁴²

12. On June 30, 2014, the Bureau commenced the Phase II challenge process, requiring submission of all challenges by August 14, 2014.⁴³ Relevant to Lake Region's petition for reconsideration, Vyve Broadband A, LLC (Vyve) challenged the designation of several blocks as unserved but also sought waiver of the prima facie evidentiary standard with respect to some of these blocks since it had only recently acquired and deployed fiber to these blocks and thus, had no prior or present customers within the blocks.⁴⁴ On August 19, 2014, the Bureau announced that it would identify blocks as already served and thus ineligible for rural broadband experiment support based on the outcome of the Phase II challenge process already underway.⁴⁵ The Bureau encouraged any prospective

³⁸ See *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order et al., 26 FCC Rcd 17663, 17701, 17729, para. 103, para. 170 (2011) (*USF/ICC Transformation Order*), *aff'd sub nom.*, *In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

³⁹ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17729, para. 170-71.

⁴⁰ See *Connect America Fund*, WC Docket No. 10-90, Report and Order, 28 FCC Rcd 15060, 15076-80, paras. 39-47 (WCB 2013). Before determining a particular block was already served, the unsubsidized competitor had to offer, throughout the census block, voice service and broadband service with pricing that is reasonably comparable to pricing for similar services in an urban area, and broadband service at actual speeds of at least 4 Mbps downstream and 1 Mbps upstream, with latency suitable for real-time applications, such as VoIP, and 100 GB per month. *See id.*

⁴¹ See *Wireline Competition Bureau Provides Guidance Regarding Phase II Challenge Process*, WC Docket No. 10-90, Public Notice, 29 FCC Rcd 7505, 7507-08, para. 9 (WCB 2014) (*Challenge Process Guidance Public Notice*).

⁴² See *Connect America Fund*, WC Docket No. 10-90, Report and Order, 28 FCC Rcd 7211, 7218-19, paras. 17 (WCB 2013) (*Phase II Challenge Process Order*).

⁴³ See *Wireline Competition Bureau Commences Connect America Phase II Challenge Process*, WC Docket Nos. 14-93, 10-90, Public Notice, 29 FCC Rcd 7986 (WCB 2014).

⁴⁴ See Challenge by Vyve Broadband A, LLC, WC Docket 14-93 (filed Aug. 14, 2014), <https://www.fcc.gov/ecfs/filing/60000977445/document/60000980459> (Vyve Challenge); Petition for Limited Waiver of CAF Phase II Evidentiary Requirement of Vyve Broadband A, LLC and Vyve Broadband J, LLC, WC Docket Nos. 10-90, 10-14, and 10-93 (filed Aug. 14, 2014), <https://www.fcc.gov/ecfs/filing/60000977445/document/60000980461> (Vyve Waiver Request).

⁴⁵ *Wireline Competition Bureau Announces Application Process for Entities Interest in Participating in the Rural Broadband Experiments*, WC Docket No. 10-90, Public Notice, 29 FCC Rcd 10016, 10035-36, para. 65 (WCB 2014) (*RBE Application Announcement PN*). In the *Tech Transitions Order*, the Commission had directed the

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participants in the rural broadband experiments to review pending challenges prior to placing bids for rural broadband experiment support.⁴⁶ On September 26, 2014, the Bureau granted Vyve's waiver request and announced that Vyve, along with several others, had successfully presented prima facie cases for challenge.⁴⁷ The Bureau then solicited responses to these challenges by November 10, 2014, notifying all interested parties that the Bureau would rule in favor of any prima facie challenge if no response was received.⁴⁸

13. On October 16, 2014, the Bureau announced that it would accept bids for rural broadband experiments support between October 23rd and November 7th, 2014.⁴⁹ Lake Region placed several bids, including bids covering a total of 22 blocks for which Vyve had already made a prima facie showing of service. Lake Region, however, did not respond to Vyve's challenge before the November 10, 2014, deadline. Accordingly, on March 30, 2015, the Bureau announced its final determinations regarding the Phase II challenge process, including a default finding in Vyve's favor, and removed the challenged blocks from eligibility for Phase II support.⁵⁰

14. On April 29, 2015, Lake Region petitioned the Bureau to reconsider its decision in the *Phase II Challenge Process Resolution Order* to remove 22 blocks included in its bids from Phase II funding eligibility.⁵¹ Lake Region attributes its failure to file a timely response to Vyve's challenge to Vyve's failure to provide it with service of process, emphasizing that Lake Region was "listed" among the broadband service providers in the area.⁵² Lake Region contends, however, that regardless of its failure to file a response, the record in the proceeding did not support the Bureau's determination that the

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Bureau to conduct a challenge process for the areas eligible for bidding in the experiments. *Tech Transitions Order*, 29 FCC Rcd at 1473, para. 113; *see also Rural Broadband Experiments Order*, 29 FCC Rcd at 8786, para. 51.

⁴⁶ *See RBE Application Announcement PN*, 29 FCC Rcd at 10035-36, para. 65.

⁴⁷ *See Replies Sought in Connect America Phase II Challenge Process*, WC Docket Nos. 10-90, 14-93, Public Notice, 29 FCC Rcd 11497, 11501-02 (WCB 2014) (*Prima Facie Public Notice*).

⁴⁸ *See id.* at 11501.

⁴⁹ *See Wireline Competition Bureau Announces Date for Opening of Rural Broadband Experiments Application Filing Window and Final Deadline for Applications*, WC Docket No. 10-90, Public Notice, 29 FCC Rcd 12621, 12621 (WCB 2014). On September 26, 2014, the Bureau had announced a temporary delay of the application filing window and application deadline for participation in the rural broadband experiments. *See Wireline Competition Bureau Announces Further Details Regarding the Rural Broadband Experiments*, WC Docket No. 10-90, Public Notice, 29 FCC Rcd 11495, 11495 (WCB 2014).

⁵⁰ *See Phase II Challenge Process Resolution Order*, 30 FCC Rcd at 2733, para. 48 (ruling in favor of any "challenger who presented the prima facie case that the classification of the block should be changed" when the respondent provided weak and inadequate evidence to overcome the evidence filed by the challenger); <https://www.fcc.gov/wcb/CAF%20II%20Challenge%20App%20A.zip> (listing census blocks so successfully challenged, including the 22 blocks at issue here). On March 4, 2015, the Bureau had announced the provisional selection of the two Lake Region bids that collectively covered four challenged blocks.

⁵¹ Although Lake Region asserts that it was "provisionally selected to receive support from the FCC for rural broadband experiments in [the 22 blocks]," Lake Region was only provisionally selected to receive support in four of the challenged blocks, three of which were covered by its bid 1 (census block identification numbers 400219778001060, 400219783002093, and 401010014004045) and one of which was covered by its bid 2 (census block identification number 400219778002046). *See Lake Region Reconsideration Petition* at 6, Attach. A; *Second Round Public Notice*, 30 FCC Rcd at 2047, Attach. The 22 blocks that Lake Region references in its petition for reconsideration do not include the challenged block covered by its provisionally selected bid 2. *See Lake Region Reconsideration Petition* at 6, Attach. A.

⁵² *See id.* at 2 n.4.

challenged blocks were served.⁵³ In support of this contention, Lake Region points to evidence on Vyve's own website showing that in certain zip codes (which included several challenged census blocks that Lake Region specifically identifies), Vyve had not yet made service available.⁵⁴

B. Discussion

15. By filing a petition for reconsideration after the deadline for submitting a response to a prima facie challenge, Lake Region effectively seeks to circumvent the deadlines for participating in the challenge process.⁵⁵ Such an action, if permitted, would undermine the integrity and finality of agency processes.⁵⁶ Section 1.106(b)(1) of the Commission's rules guards against such an outcome by limiting non-party petitions for reconsideration to those adversely affected entities capable of showing "good reason why it was not possible ... to participate in the earlier stages of the proceeding."⁵⁷ Lake Region has failed to satisfy these limitations.

16. As summarized above, the Bureau publicly announced that census blocks successfully challenged as served during the Phase II challenge process would be ineligible for rural broadband experiment support and separately solicited responses to prima facie challenges, advising all potentially affected parties that the failure to respond would result in a default judgment in favor of the challenger.⁵⁸ Despite such explicit notice, Lake Region claims that it could not have participated earlier in the proceeding because it was unaware of the preexisting challenges to the blocks at the time it submitted its bids.⁵⁹ Lake Region blames its failure to respond to Vyve's prima facie challenge on the fact that Vyve did not provide Lake Region with service of process.⁶⁰ This argument is not persuasive. Unsubsidized competitors challenging the Bureau's initial determination that blocks were unserved were not required to search out and serve notice on any provider in the area which might place a bid for rural broadband experiment support. These unsubsidized competitors could not have known which providers might place such bids. Accordingly, the Bureau explicitly placed the onus on prospective bidders for rural broadband experiment support to protect their own interests. The Bureau required unsubsidized challengers to make a good faith effort to serve the only interested party they could readily identify, the price cap carrier serving the territory in which the challenged blocks were located.⁶¹ Vyve had neither the obligation nor

⁵³ See *id.* at 3. Although Lake Region also emphasizes that this funding was particularly "inexplicable" in light of the Bureau's decision in the same order to deny Vyve's waiver request, we note that the request for waiver addressed in the *Phase II Challenge Process Resolution Order* was a second, separate petition for waiver filed by Vyve not involving blocks covered by Lake Region's bids. See *Phase II Challenge Process Resolution Order*, 30 FCC Rcd at 2728, para. 27; *Vyve Broadband A, LLC and Vyve Broadband J, LLC (Vyve) Petition for Limited Waiver of CAF Phase II Evidentiary Requirement*, WC Docket No. 14-93 at 5 (filed Nov. 10, 2014), <https://www.fcc.gov/ecfs/filing/60000977445/document/60000980461>. The Bureau granted the relevant waiver request in its *Prima Facie Public Notice*. See *Prima Facie Public Notice*, 29 FCC Rcd at 11497; *Petition for Limited Waiver of CAF Phase II Evidentiary Requirement*, WC Docket No. 10-90, 14-93 at Append. 3-A (filed Aug. 14, 2014) (listing "serviceable" addresses by census block and zip code), <https://www.fcc.gov/ecfs/filing/6018264211/document/7521763086>.

⁵⁴ See Lake Region Reconsideration Petition at 3.

⁵⁵ See *id.* at 3-4.

⁵⁶ See, e.g., *United Church of Christ v. FCC*, 911 F.2d 803, 808 (D.C. Cir. 1990) ("Underlying [Section 1.106(b)(1) and 1.115(a) of the Commission's rules] are principles of finality and exhaustion of administrative remedies: Interested persons seeking to participate in FCC proceedings are required to join the proceedings at the earliest opportunity.") (citations omitted).

⁵⁷ 47 CFR § 1.106(b)(1).

⁵⁸ See *supra* notes 45-46 and accompanying text; *supra* note 48 and accompanying text.

⁵⁹ See Lake Region Petition for Reconsideration at 1-2, 2 n.4.

⁶⁰ See *id.* at 2 n.4.

the ability to serve its challenge on Lake Region. It was upon Lake Region to determine whether a challenge had been filed on any blocks it was considering for bidding.

17. Moreover, Lake Region lacks any kind of colorable personal injury-in-fact arising from the Phase II challenge process.⁶² Eighteen of the 22 challenged blocks at issue were included in bids not provisionally selected for support while the remaining four blocks were included within provisionally selected bids for which we have separately and independently concluded above that Lake Region has defaulted. Because Lake Region has failed to meet the conditions on non-party petitions for reconsideration, we dismiss its petition for reconsideration as procedurally flawed.⁶³

18. Even were we to consider Lake Region's petition for reconsideration on the merits, however, as a separate and independent ground, we would nonetheless affirm the prior Bureau's determination that the subject blocks were already served.⁶⁴ Lake Region has not presented the kind of concrete and verifiable evidence sufficient to overcome the Bureau's determination that Vyve's challenge met the Phase II evidentiary standards.⁶⁵ Lake Region relies on Vyve's website to argue that services are not yet available in some zip codes included within the challenged blocks.⁶⁶ When the Bureau decided that Vyve had made a prima facie showing of service, however, it was well aware that Vyve had not yet established a customer base for the supported services in the challenged areas.⁶⁷ Consistent with the Commission's overarching policy objective for Phase II, the Bureau concluded that the more efficient use of limited funding would be to direct such funding toward areas where there was no indication that an unsubsidized competitor had already deployed physical network infrastructure and intended to provide the required broadband and voice services.⁶⁸ Nothing in Lake Region's petition for reconsideration undermines the viability of this conclusion.

IV. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to the authority contained sections 1, 2, 5(c), 254, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 155(c), 254, and 405, and sections 0.91, 0.291, and 1.106 of the Commission's rules, 47 CFR §§ 0.91, 0.291, 1.106, that this Order and Order on Reconsideration IS ADOPTED.

(Continued from previous page)

⁶¹ See *Phase II Challenge Process Order*, 28 FCC Rcd at 7219-7220, para. 19.

⁶² See *Jeff Scott Cofsky d/b/a Texas License Consultants, Waiver of Upfront Payment Deadline for Auction No. 48*, Memorandum Opinion and Order, 22 RCC Rcd 1857, 1858, para. 5 (WTB 2007) ("To determine if a party's interests have been adversely affected, the Commission frequently relies upon the three-pronged standing test under which a party must establish: (1) a distinct and palpable personal injury-in-fact that is (2) traceable to the respondent's conduct and (3) redressable by the relief requested.").

⁶³ See, e.g., *Chevron USA, Inc*, Order, 19 FCC Rcd 15292, 15294, para. 7 (WTB 2004) (finding that the failure to demonstrate adversely affected interest is grounds for dismissal); *GTE Mobilnet of Houston Ltd. Partnership*, Order, 8 FCC Rcd 27282, 2729, para. 5 (CWD 1993) (finding that the failure to show why it was not possible to participate earlier in the proceeding is grounds for dismissal).

⁶⁴ See, e.g., *New York Telephone Company*, Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 3303, 3304, para. 10 (1991) (declining to dismiss a petition for reconsideration that did not satisfy the requirements of section 1.106(b)(1) of the Commission's rules because the public interest would be best served by "exercising our discretion to address petitioners' claims and clarify our action in this proceeding").

⁶⁵ See *Prima Facie Public Notice*, 29 FCC Rcd at 11497.

⁶⁶ See *Lake Region Reconsideration Petition* at 3 & n.6. Notably, none of the four challenged blocks for which Lake Region had been provisionally selected to receive support were among those blocks included in the zip codes for which Vyve's website stated service had not yet been made available.

⁶⁷ See *Prima Facie Public Notice*, 29 FCC Rcd at 11497.

⁶⁸ See *id.*

20. IT IS FURTHER ORDERED, pursuant to section 1.3 of the Commission's rules, 47 CFR § 1.3, that the petitions for waiver of the bank eligibility requirements for filing commitment letters filed by Halstad Telephone Company, Lake Region Electric Cooperative, Inc., and Wichita Online, Inc. on July 15, 2015, March 24, 2015, and June 10, 2015, respectively, ARE DENIED.

21. IT IS FURTHER ORDERED that the petition for waiver of the rural broadband experiments deadline for filing proof of designation as an eligible telecommunications carrier in all areas covered by a provisionally selected bid, filed by Wichita Online, Inc. on March 6, 2015, IS DISMISSED AS MOOT.

22. IT IS FURTHER ORDERED, pursuant to the authority contained in section 405 of the Communications Act of 1934, as amended, 47 USC § 405, and section 1.106 of the Commission's rules, 47 CFR § 1.106, that the Petition for Reconsideration filed by Halstad Telephone Company on July 15, 2015, IS DENIED.

23. IT IS ORDERED, contained in pursuant to the authority contained in section 405 of the Communications Act of 1934, as amended, 47 USC § 405, and section 1.106 of the Commission's rules, 47 CFR § 1.106, that the Petition for Reconsideration of Lake Region Technology & Communications, LLC filed on April 29, 2015, IS DISMISSED, and as an independent and alternative basis for the decision, IS DENIED.

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

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Matthey
Deputy Chief
Wireline Competition Bureau