

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Connect America Fund) WC Docket No. 10-90
)

DECLARATORY RULING AND ORDER

Adopted: March 13, 2018

Released: March 13, 2018

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. This Declaratory Ruling and Order concerns section 54.320(d)(2), which the Commission adopted when finalizing the Connect America Fund (CAF) Phase II rules.¹ This rule provides a one-year grace period for an eligible telecommunications carrier (ETC) that has not met its final buildout milestone, and establishes a framework for recovering support from ETCs that fail to complete deployment to all locations by the end of the grace period.²

2. Puerto Rico Telephone Company, Inc. (PRTC) filed a petition for a declaratory ruling, asking us to state that section 54.320(d)(2) applies not only to CAF Phase II support, but also to CAF Phase I incremental support.³ Alternatively, PRTC requests a waiver of section 54.312(c)(9) of the rules.⁴ That provision requires recipients of Phase I incremental support in price cap territories to complete deployment to all required locations within three years of providing notification of acceptance of funding.⁵ We deny PRTC's requests. First, the text and history of section 54.320(d)(2) shows that the grace period does not apply to CAF Phase I incremental support. Second, PRTC's waiver request fails to demonstrate special circumstances warranting deviation from the rule.

3. In light of the devastation of the telecommunications infrastructure in Puerto Rico caused by Hurricanes Irma and Maria, however, on our own motion, we grant a limited waiver of our rules such that no support will be recovered from PRTC for locations it served within a year of its Phase I incremental support deadlines. Allowing PRTC to retain these funds will enable it to more speedily restore, improve, and expand its network to the benefit of Puerto Rico's residents as the territory recovers from the storms.

II. BACKGROUND

4. In 2012, the Wireline Competition Bureau (Bureau) adopted an order clarifying certain

¹ See 47 CFR § 54.320(d)(2).

² *Id.*

³ See Petition for Declaratory Ruling of Puerto Rico Telephone Company, Inc., WC Docket No. 10-90 (filed Feb. 22, 2017) (Petition).

⁴ See Comments of Puerto Rico Telephone Company, Inc., WC Docket No. 10-90, at 6-7 (filed Apr. 28, 2017) (Comments).

⁵ 47 CFR § 54.312(c)(9).

rules relating to Phase I incremental support.⁶ Under section 54.312(c)(9) of the Commission's rules, support recipients must complete deployment to the required number of locations within three years of providing notification of acceptance of funding. In the *Phase I Clarification Order*, the Bureau explained that the amount of support a carrier must return for failing to meet deployment requirements would be \$775 times the number of locations to which the carrier was required to deploy service but did not.⁷

5. In 2013, the Commission adopted an order providing for a second round of CAF Phase I incremental support.⁸ In this second round, price cap carriers would be able to accept support under the rules for the first round of Phase I, with certain additional or modified requirements. As with the first round, carriers must deploy to all required locations within three years.⁹ The Bureau authorized Phase I Round Two funding for PRTC and other carriers in 2013 and 2014.¹⁰

6. On December 11, 2014, the Commission adopted an order finalizing the CAF Phase II rules, including rules addressing non-compliance.¹¹ The Commission explained that an ETC that misses its final build-out milestone will have twelve months from the deadline to come into full compliance.¹² If an ETC does not report full compliance within those twelve months, the Universal Service Administrative Company (USAC) will "recover an amount of support that is equal to 1.89 times the average amount of [model-calculated] support per location received in the state over the six-year term for the relevant number of locations that the ETC has failed to deploy to, plus ten percent of the ETC's total Phase II support received in the state over the six-year term."¹³ The Commission codified this rule at section 54.320(d)(2).¹⁴

7. In a December 2016 public notice, the Bureau reminded CAF Phase I support recipients that they must complete deployment to all required locations within three years.¹⁵ The Bureau also provided in a footnote the exact deadline for each carrier.¹⁶

8. On February 22, 2017, PRTC filed a petition for a declaratory ruling seeking clarification that section 54.320(d)(2) applies to CAF Phase I Round Two support recipients. Specifically, PRTC seeks clarification that an ETC receiving Phase I Round Two support, upon providing notification that it has not met a final build-out milestone, will receive the same grace period for buildout as Phase II recipients.¹⁷ PRTC filed the sole comments regarding the Petition. In its comments, PRTC largely

⁶ See *Connect America Fund et al.*, Order, 27 FCC Rcd 8141 (WCB 2012) (*Phase I Clarification Order*).

⁷ See *id.* at 8142-43, para. 4.

⁸ See *Connect America Fund*, Report and Order, 28 FCC Rcd 7766 (2013) (*Phase I Round Two Order*).

⁹ See *id.* at 7775-76, para. 25.

¹⁰ See *Over \$32 Million of Connect America Funding Authorized to Connect Unserved Homes and Businesses in Alaska, Hawaii, and Puerto Rico*, WC Docket No. 10-90, Public Notice, 28 FCC Rcd 14896 (WCB 2013) (*PRTC Authorization Public Notice*); *Connect America Fund*, WC Docket No. 10-90, Order, 29 FCC Rcd 181 (WCB 2014); *Additional \$16.7 Million in Connect America Phase I Support Authorized*, WC Docket No. 10-90, Public Notice, 29 FCC Rcd 2824 (WCB 2014).

¹¹ See *Connect America Fund et al.*, Report and Order, 29 FCC Rcd 15644, 15698, para. 148 (2014) (*December 2014 Connect America Order*).

¹² See *id.*

¹³ *Id.*

¹⁴ See 47 CFR § 54.320(d)(2) (2015).

¹⁵ See *Wireline Competition Bureau Reminds Connect America Phase I Round Two Support Recipients of Deployment and Certification Deadlines*, Public Notice, 31 FCC Rcd 13298 (WCB 2016).

¹⁶ See *id.* at 13298 n.2.

¹⁷ Petition at 1.

reiterates arguments from the Petition but additionally requests that, in the alternative, the Commission grant PRTC a waiver of the three-year buildout deadline.¹⁸ In support of its request for waiver, PRTC argues that granting a limited waiver of section 54.312(c)(9) will increase Puerto Ricans' access to fixed broadband Internet service, thereby advancing the Commission's goal of making broadband service available to as many locations as possible.¹⁹ PRTC also asserts that "logistical and economic obstacles present unique challenges to broadband Internet service deployment" in "insular and non-contiguous areas such as Puerto Rico."²⁰

III. DECLARATORY RULING

9. We find that section 54.320(d)(2) does not apply to CAF Phase I. The text of the provision, as originally enacted in the *December 2014 Connect America Order*, addresses only Phase II funding and indeed is inconsistent with the Phase I Round Two framework. Nor did the subsequent amendment in the *Alaska Plan Order* demonstrate any intention to apply section 54.320(d)(2) to CAF Phase I.²¹ Moreover, PRTC had no reasonable expectation that it might have a one-year grace period to complete deployment because the Commission adopted the grace period well after it authorized Phase I Round Two support.

10. It is clear that the *December 2014 Connect America Order* did not intend to modify the Phase I rules to add a one-year grace period.²² After establishing the grace period, the order also sets the amount of support to be recovered from non-compliant ETCs as "1.89 times the average amount of support per location received in the state over the *six-year term* for the relevant number of locations that the ETC has failed to deploy to, plus ten percent of the ETC's *total Phase II support* received in the state over the *six-year term*."²³ The order's references to a six-year term of support are inconsistent with the three years of support provided under Phase I. Further, it is difficult to believe that the Commission intended to address an ETC's failure to meet its *Phase I obligations* by recovering an amount based on the level of *Phase II support* the provider received. Finally, the recovery mechanism set forth also supports the view that this provision deals with Phase II and not Phase I. The order calculates the amount to be recovered by multiplying the average amount of support per location (for PRTC, \$775) by 1.89 for the relevant number of locations to which an ETC has failed to deploy, plus ten percent of an ETC's total Phase II support in the state.²⁴ This formula, however, produces a vastly greater recovery amount than what the Commission set for Phase I: \$775 multiplied by the number of locations a carrier was required to deploy to but did not.²⁵

11. The current version of the rule, as adopted by the Commission in the 2016 *Alaska Plan Order*, is broader than the original. The current version of section 54.320(d) sets out two recovery formulae, one for "Alaska Plan mobile carrier participants" and one for "other recipients of high-cost support."²⁶ The second formula no longer refers explicitly to Phase II, but it still computes a greater

¹⁸ Comments at 6-7.

¹⁹ *Id.*

²⁰ *Id.* at 6.

²¹ *Connect America Fund; Universal Service Reform – Mobility Fund; Connect America Fund – Alaska Plan*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 10139, 10156, 10160, paras. 50, 64 (2016) (*Alaska Plan Order*) (extending existing section 54.320(d)(2) to apply to the Alaska Plan)

²² See *December 2014 Connect America Order*, 29 FCC Rcd at 15698, para. 148.

²³ *Id.* (emphases added).

²⁴ *Id.*

²⁵ See *Phase I Clarification Order*, 27 FCC Rcd at 8142-43, para. 4.

²⁶ 47 CFR 54.320(d)(2) (2018).

recovery amount than what the Commission had already decided applied to Phase I.²⁷ Thus, neither this amendment nor any other part of the *Alaska Plan Order* evinced an intent to apply the grace period to Phase I support recipients.

12. The history of section 54.320(d) also supports this interpretation of its meaning. The Bureau authorized CAF Phase I Round Two support for all recipients, including PRTC, prior to the Commission's adoption of the *December 2014 Connect America Order* and, along with it, section 54.320(d)(2). In 2012, the Bureau clarified how to calculate the amount of Phase I support a carrier must return for failing to meet deployment requirements,²⁸ and in 2013 the Commission decided to provide a second round of Phase I support, with no changes to the term of support or the amount of support to be recovered from ETCs failing to meet deployment requirements.²⁹ The Bureau authorized Phase I Round Two support for PRTC on October 31, 2013,³⁰ and finalized funding for all other recipients by March 14, 2014.³¹ Not until December 2014 did the Commission adopt the *December 2014 Connect America Order*. In other words, section 54.320(d)(2) did not exist when the Bureau authorized Phase I Round Two support for PRTC and the other ETCs. Phase I Round Two support recipients therefore had no expectation that they would effectively have four years, rather than three, to deploy to all required locations. Nor could they have expected that the amount of support reduction for failing to deploy to all required locations would be so much greater than the simple formula the Bureau stated in 2012.³²

IV. ORDER

13. We turn now to PRTC's alternative request for a waiver of its buildout deadline. We find that PRTC has not demonstrated that special circumstances warrant deviation from application of section 54.319(c) and therefore deny its waiver request. Generally, the Commission's rules may be waived for good cause shown.³³ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.³⁴ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an

²⁷ "For other recipients of high-cost support [who fail to meet their deployment obligations at the expiration of the one-year grace period], USAC will then recover the percentage of support that is equal to 1.89 times the average amount of support per location received in the state for that carrier over the term of support for the relevant number of locations plus 10 percent of the eligible telecommunications carrier's total relevant high-cost support over the support term for that state." *Id.*

²⁸ See *Phase I Clarification Order*, 27 FCC Rcd at 8142-43, para. 4.

²⁹ See *Phase I Round Two Order*, 28 FCC Rcd at 7772, para. 13 ("With the exception of the rules we explicitly change in this Order, all the rules and requirements from the first round of Phase I apply *mutatis mutandis* to the second round of Phase I."); *id.* at 7776, para. 25 ("A carrier accepting Phase I support must complete deployment of broadband-capable infrastructure to two-thirds of the required locations within two years and must complete deployment to all required locations within three years.").

³⁰ See *PRTC Authorization Public Notice*, 28 FCC Rcd at 14896, 14898.

³¹ See *Connect America Fund*, WC Docket No. 10-90, Order, 29 FCC Rcd 181 (WCB 2014); *Additional \$16.7 Million in Connect America Phase I Support Authorized*, WC Docket No. 10-90, Public Notice, 29 FCC Rcd 2824 (WCB 2014).

³² PRTC's policy arguments also fail to convince us to depart from the plain language of section 54.320(d)(2). See Petition at 4-5. PRTC fails to address the Commission's strong countervailing interest in bringing service meeting the Commission's standards to consumers by the relevant deadline. See, e.g., *December 2014 Connect America Order*, 29 FCC Rcd at 15694, para. 141 (explaining that the Commission "will enforce the terms and conditions of high-cost support vigorously"); *id.* at 15694, para. 142 (concluding that "support reductions that scale with the extent of an ETC's noncompliance will create incentives for ETCs to come into compliance as soon as possible").

³³ 47 CFR § 1.3.

³⁴ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

individual basis.³⁵ Waiver of the Commission's rules is appropriate if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.³⁶

14. We recognize that deploying broadband Internet service to unserved locations in Puerto Rico presents certain challenges. But PRTC must have recognized those potential challenges when deciding to accept Phase I Round Two support and the associated obligations, including deployment to all required locations within three years. Those foreseeable challenges then do not present special circumstances warranting any deviation from the general rule. We therefore deny PRTC's request for waiver.

15. Nonetheless, on our own motion, we grant a limited waiver of our rules and direct USAC not to recover Phase I Round Two support from PRTC for locations for which the carrier missed its deadline but served within a year of its Phase I incremental support deadlines. In light of the unique hardships created by the 2017 hurricanes and the work that remains to be done to restore, improve, and expand telecommunications access on the island, we find that the public interest would not be served by recovering funds from PRTC at this time.³⁷ Specifically, we believe that requiring repayment of these funds would deprive PRTC of resources that would otherwise be used for its restoration efforts in Puerto Rico. As these funds have been made available to PRTC under section 254(e) of the Act and section 54.7 of the Commission's rules, PRTC "shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."³⁸

V. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 4(i), 5, 201(b), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155, 201(b), and 254, and the authority delegated by sections 0.91, 0.291, and 1.2 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.2, that this Declaratory Ruling and Order is ADOPTED.

17. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 4(i) and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 254, and the authority delegated by sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the request for waiver filed by Puerto Rico Telephone Company, Inc. on April 28, 2017 is DENIED.

18. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 4(i) and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 254, and the authority delegated by sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the support-recovery rule described in the *Phase I Clarification Order* is WAIVED to the extent described above.³⁹

³⁵ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

³⁶ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

³⁷ See *Connect America Fund*, Order, 32 FCC Rcd 7981, 7981, para. 3 (2017). We also note that, although it completed deployment late, PRTC alleges it served all required locations within twelve months of the deadline and, in many locations, offered 10/1 Mbps broadband service when it was only required to offer 4/1 Mbps service. Petition at 4-5; Comments at 6-7.

³⁸ 47 U.S.C. § 254(e); 47 CFR § 54.7(a).

³⁹ See *Phase I Clarification Order*, 27 FCC Rcd at 8142-43, para. 4.

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

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief
Wireline Competition Bureau