

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

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

ORDER

Adopted: April 27, 2018

Released: April 27, 2018

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant in part a petition filed by FairPoint Communications, Inc. (FairPoint) seeking waiver of section 54.312(c)(4) of the Commission’s rules, which requires carriers accepting Connect America Phase I Round 2 incremental support to identify the areas by wire center and census block where carriers will deploy broadband to meet their deployment obligations.<sup>1</sup> Based on the record, we find that waiving the rule to the extent described below will preserve FairPoint’s efforts to advance broadband availability in unserved areas and promote the efficient and effective use of Connect America Phase I support. Specifically, we establish a limited challenge process for determining whether any unsubsidized competitors serve any of the 185 census blocks FairPoint did not identify during the earlier challenge process as of April 27, 2018.

II. BACKGROUND

2. Section 54.312(c)(4) of the Commission’s rules requires carriers electing Connect America Phase I Round 2 incremental support to notify the Commission, the Universal Service Administrative Company (USAC), the relevant state, and any affected Tribal authority of the amount of support the carrier wishes to accept, as well as the wire centers and census blocks in which broadband would be deployed using that support.<sup>2</sup> The Commission required that those carriers file their elections by August 20, 2013.<sup>3</sup>

3. After receiving the required notifications, the Bureau conducted a challenge process permitting other, unsubsidized providers to assert that a listed census block was actually served and therefore ineligible for Connect America Phase I Round 2 support.<sup>4</sup> Carriers had the option to subsequently modify their deployment plans and were required to inform the Commission, USAC, the relevant state, and any affected Tribal authority at least 90 days prior to commencing deployment in the new census blocks, with the opportunity for other providers to challenge the eligibility of blocks on the revised list.<sup>5</sup>

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<sup>1</sup> Petition for Limited Waiver to Identify, *Nunc Pro Tunc*, the Census Blocks and Locations in Virginia in which FairPoint Deployed Broadband to Meet the Requirements of CAF Phase I, Round 2, FairPoint Communications, Inc, WC Docket No. 10-90 (filed Mar. 30, 2017) (Petition).

<sup>2</sup> 47 CFR § 54.312(c)(4).

<sup>3</sup> *Connect America Fund*, Order on Reconsideration, 28 FCC Rcd 10488, 10491, para. 8 (2013).

<sup>4</sup> See 47 CFR § 54.312(c)(7).

<sup>5</sup> See 47 CFR § 54.312(c)(4).

4. On August 20, 2013, FairPoint filed its initial election of Connect America Phase I Round 2 support.<sup>6</sup> Following completion of the Connect America Phase I Round 2 challenge process, FairPoint accepted support for a total of 1,122 locations in 14 Virginia census blocks, with a deployment deadline of January 10, 2017.<sup>7</sup> USAC subsequently contacted FairPoint about an audit of its use of Connect America Phase I Round 2 support.<sup>8</sup> According to the audit, only 95 of the locations to which FairPoint reported broadband deployment were located in the 14 census blocks; the remainder of the locations were in 185 other census blocks that FairPoint failed to identify during the challenge process.<sup>9</sup> The challenge process was therefore conducted for only 14 of FairPoint's census blocks. Thus, competitors had no notice to challenge the other census blocks at that time.

5. On March 30, 2017, FairPoint filed its Petition, asking that the Commission partially waive section 54.312(c)(4) and conduct a new challenge process with the previously unidentified 185 census blocks to which FairPoint deployed between 2014 and 2016 using Connect America Phase I Round 2 support.<sup>10</sup> FairPoint explains that, during the challenge process, an employee misunderstood the Commission's requirements, and instead identified the census blocks containing the serving nodes for the locations, rather than the census blocks containing the locations themselves.<sup>11</sup> FairPoint asserts that none of the locations to which it deployed were actually "served" at the time of election within the meaning of section 54.312(c)(2)-(3).<sup>12</sup> FairPoint further explains that the 185 census blocks that were not "properly vetted in advance through the challenge process" include locations FairPoint initially identified for deployment in 2013 based on its good-faith belief that they were "unserved."<sup>13</sup> Emphasizing that it deployed to unserved and underserved locations as intended by the Commission, FairPoint therefore argues that strict enforcement of the rule would cause extreme hardship to FairPoint<sup>14</sup> and its retail and wholesale customers.<sup>15</sup> To remedy the situation, FairPoint proposes that the Bureau conduct a retrospective challenge process to confirm whether any of the locations in the previously unidentified census blocks were "served" at the time FairPoint accepted Connect America Phase I Round 2 support.<sup>16</sup> FairPoint suggests that the Bureau may require FairPoint to refund the support associated with those locations to the extent they were, in fact, already served at that time.<sup>17</sup>

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<sup>6</sup> Letter from Michael T. Skrivan, Vice President for Regulatory, FairPoint, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 (filed Aug. 20, 2013).

<sup>7</sup> See Petition at 3; *Wireline Competition Bureau Announces Deadlines for Connect America Phase I Round Two*, Public Notice, 29 FCC Rcd 11445, 11445 n.5 (2014).

<sup>8</sup> See Petition at 4-5.

<sup>9</sup> See *id.* at 5.

<sup>10</sup> See *id.* at 1.

<sup>11</sup> See *id.* at 5.

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

<sup>13</sup> See *id.* at 5-6.

<sup>14</sup> "In the absence of a waiver," FairPoint notes, "it is possible that USAC would disqualify all of the 1,027 locations to which FairPoint deployed broadband in the previously unidentified 185 census blocks, and require refund of the support associated with that deployment. Such a result would leave FairPoint with a substantial deficit of approximately \$575,000 – an amount that otherwise would be dedicated to continued expansion of its advanced service capabilities." *Id.* at 7.

<sup>15</sup> See *id.* at 6-7.

<sup>16</sup> See *id.* at 8.

<sup>17</sup> See *id.*

6. The Bureau sought comment on the Petition in a public notice.<sup>18</sup> Only NCTA – The Internet & Television Association (NCTA) filed comments, proposing that the Commission look at Form 477 data to determine whether a census block was unserved, rather than requiring broadband providers' participation in another challenge process.<sup>19</sup> NCTA suggests that the Commission identify whether unsubsidized providers offer broadband at the requisite speeds in those areas.<sup>20</sup> In such census blocks, NCTA argues, FairPoint should be required to refund any support it received to provide broadband to locations in those census blocks, or should be required to build elsewhere in eligible areas.<sup>21</sup>

7. FairPoint filed reply comments agreeing that any of the locations that are found to have been served at the relevant time may be disqualified.<sup>22</sup> FairPoint argues that using the Form 477 data is not the best way to resolve the question, because (1) the 2013 Form 477 data does not show census blocks or locations where broadband was *available*, only the census blocks where a provider had subscribers; and (2) subsequent Form 477 data indicate which census blocks are “served” but do not identify which locations within those census blocks are served.<sup>23</sup> FairPoint’s reply also addresses NCTA’s claim that the Commission should consider whether unsubsidized competitors currently serve any of the areas to which FairPoint has deployed. FairPoint asserts that all locations it built to were unserved at the time of election; thus, to the extent a competitor did decide subsequently to deploy in the same census blocks, it either did so at different locations within the census blocks at issue or over-built FairPoint, in which case competitors should have done their own due diligence before commencing construction.<sup>24</sup>

### III. DISCUSSION

8. We grant in part FairPoint’s Petition and establish a limited challenge process to determine which of the blocks FairPoint elected for Connect America Phase I Round 2 support, but did not identify as part of the challenge process, are currently served by an unsubsidized competitor.<sup>25</sup>

9. We conclude that FairPoint has demonstrated that special circumstances warrant some limited waiver of section 54.312(c)(4) of our rules. As the Commission required, FairPoint has already reported broadband deployment to 1,122 locations that previously were either unserved or underserved. FairPoint failed to properly identify in advance 185 census blocks to which it intended to deploy broadband. This error may be inconsequential, however, if FairPoint did not deploy to blocks already served by unsubsidized competitors, or if FairPoint returns the support associated with its reported

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<sup>18</sup> *Wireline Competition Bureau Seeks Comment on Petition for Limited Waiver from FairPoint Communications, Inc.*, Public Notice, 32 FCC Rcd. 2886 (2017).

<sup>19</sup> See Comments of NCTA – The Internet & Television Association, WC Docket No. 10-90, at 3-4 (filed May 4, 2017).

<sup>20</sup> See *id.* at 3.

<sup>21</sup> See *id.* at 4.

<sup>22</sup> See Reply Comments of FairPoint Communications, Inc., WC Docket No. 10-90, at 2 (filed May 18, 2017).

<sup>23</sup> See *id.* at 3-4.

<sup>24</sup> See *id.* at 4.

<sup>25</sup> Generally, the Commission’s rules may be waived for good cause shown. 47 CFR § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission’s rules is appropriate if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

locations in blocks that are served. Either of these circumstances can be remedied by FairPoint's proposal to conduct a challenge process and offer to return support associated with locations already served at the time it accepted Connect America Phase I Round 2 support. These facts present special circumstances warranting deviation from the general rule.

10. We further conclude that the public interest will be served by granting a limited waiver of section 54.312(c)(4) and determining which, if any, of the census blocks FairPoint elected for Connect America Phase I Round 2 are served by unsubsidized competitors. Strict enforcement of the rule—that is, not permitting any reconciliation of the census blocks to which FairPoint deployed using Connect America Phase I Round 2 support with other carriers' existing deployments—would potentially require FairPoint to return support used to deploy broadband to previously unserved and underserved high-cost locations, otherwise consistent with the Commission's universal service goals. Waiving the rule to the extent described herein would preserve the Commission's policy objective of not providing support in areas served by unsubsidized competitors.<sup>26</sup>

11. Therefore, we establish a challenge process for FairPoint's list of 185 previously unidentified census blocks associated with the 1,027 locations for which it used Connect America Phase I Round 2 support. This challenge process will mirror the Connect America Phase I Round 2 challenge process, but will determine whether census blocks were served as of April 27, 2018. As NCTA notes, requiring broadband providers that did not receive Connect America Phase I support to identify the status of their deployments years ago would require significant time and resources.<sup>27</sup> Notwithstanding, NCTA's suggested alternative of relying exclusively on FCC Form 477 data is inconsistent with Commission policy.<sup>28</sup> Instead, we find that relying on unsubsidized competitors to identify blocks they currently serve would serve the public interest and strike the appropriate balance between preserving the eligibility of FairPoint's broadband deployment in unserved and underserved areas and protecting broadband deployment by unsubsidized competitors.

#### IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 2, 4(i), 5, 10, 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, 403, and 503 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151, 152, 154(i), 155, 160, 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, 403, 503, 1302, and sections 1.1 and 1.3 of the Commission's rules, 47 CFR §§ 1.1, 1.3 that the petition for waiver, filed by FairPoint Communications, Inc. on Mar. 30, 2017, IS GRANTED, to the extent described herein.

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<sup>26</sup> See *Connect America Fund; ETC Annual Reports and Certifications*, Order, 32 FCC Rcd 968, 975-76, para. 21 (2017). See also *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17701, para. 103 (2011) (“[A]ll broadband obligations for fixed broadband are conditioned on not spending the funds to serve customers in areas already served by an ‘unsubsidized competitor.’”), *aff’d sub nom. In re FCC 11-161*, 753 F.3d 1015 (10<sup>th</sup> Cir. 2014).

<sup>27</sup> NCTA Comments at 3.

<sup>28</sup> The Commission permitted the Bureau to consider FCC Form 477 data in evaluating Connect America Phase I Round 2 challenges to the National Broadband Map, but purposefully designed a process that required more evidence than just FCC Form 477 data. See *Connect America Fund*, Report and Order, 28 FCC Rcd 7766, 7780, para. 33 (2013).

13. IT IS FURTHER ORDERED that, pursuant to section 1.103(a) of the Commission's rules, 47 CFR § 1.103(a) this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith  
Chief  
Wireline Competition Bureau