

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

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

ORDER

Adopted: December 18, 2020

Released: December 18, 2020

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In 2018, the Wireline Competition Bureau, the Wireless Telecommunications Bureau, and the Office of Engineering and Technology (collectively, the Bureaus) adopted performance requirements establishing a uniform framework for measuring speed and latency performance for recipients of high-cost support to serve fixed locations.1 More recently, the Bureaus adopted an Order on Reconsideration to address certain issues regarding testing to be conducted by high-latency bidders in the Connect America Fund (CAF) Phase II auction,2 and in the Performance Measures Reconsideration Order, the Commission reexamined and made several modifications to the Bureaus' adopted performance testing requirements.3 These changes addressed concerns expressed by carriers by increasing the time for carriers to meet certain deadlines and further minimized the costs associated with compliance, while still ensuring that carriers meet their performance obligations.

2. One party has since sought clarification regarding compliance calculations and end-of-term support recovery, and several others have informally asked questions regarding the Performance Measures Reconsideration Order.4 In this Order, we clarify aspects of the Commission's Performance Measures Reconsideration Order to provide greater certainty to carriers.

II. DISCUSSION

3. Final Milestones. First, we make clarifications regarding the support withholding in the event of a carrier's non-compliance with the performance requirements at the end of the carrier's support and build-out terms. In the Performance Measures Reconsideration Order, the Commission "note[d] that carriers have their entire support term to improve their networks and come into compliance."5 The

1 See generally Connect America Fund, WC Docket No. 10-90, Order, 33 FCC Rcd 6509 (WCB/WTB/OET 2018) (Performance Measures Order).

2 See generally Connect America Fund, WC Docket No. 10-90, Order on Reconsideration, 34 FCC Rcd 8081 (WCB/WTB/OET 2019).

3 See generally Connect America Fund, WC Docket No. 10-90, Order on Reconsideration, 34 FCC Rcd 10109 (2019) (Performance Measures Reconsideration Order or Reconsideration Order).

4 See Letter from Gerard J. Duffy, Regulatory Counsel, WTA-Advocates for Rural Broadband, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, at 2 (Jan. 16, 2020) (seeking "further clarification regarding the procedures for calculating latency and speed testing compliance percentages for performance milestone, penalty, and end-of-term recovery purposes").

5 Performance Measures Reconsideration Order, 34 FCC Rcd at 10133-34, para. 66.

Commission also explained how, “at the conclusion of a carrier’s build-out term, any failure to meet the speed and latency requirements is a failure to deploy because the carrier is not delivering the service it has committed to deliver. A failure to comply with all performance measure requirements will result in the Commission determining that the carrier has not fully satisfied its broadband deployment obligations at the end of its build-out term and subjecting the carrier to the appropriate broadband deployment non-compliance support reductions.”⁶

4. To avoid any confusion, we clarify that a carrier’s final performance testing milestone is at the end of its support term, and it is only then that a carrier may be subjected to final performance compliance withholdings.⁷ Although in some cases a carrier’s final build-out milestone may occur while the carrier is still receiving support, it is the end of the support term that dictates the carrier’s performance testing requirements. For example, although recipients of CAF Phase II auction support have a final buildout milestone at the end of the sixth year out of ten total years of support, these carriers must conduct performance testing for the entire ten years and will be subject to compliance withholding at the end of that period if their performance does not meet the Commission’s speed and latency standards. We also reiterate that carriers are permitted one year after a final milestone to address any shortcomings to ensure that their performance measurements are fully in compliance. Accordingly, CAF Phase II auction winners must fulfill their deployment obligations by the end of 2025 but will continue to be subject to performance testing until the end of the support term in 2029. If these carriers are not meeting the required speed and latency measures at the end of 2029, they will have an additional year, until the end of 2030, to come into compliance before they are subject to permanent support withholding. Similarly, recipients of CAF Phase II model-based support would have been subject to final performance testing milestones at the end of the sixth year, i.e., December 31, 2020, but are permitted an additional year, until the end of 2021, to demonstrate compliance.⁸

5. *Multiple Programs, Multiple Required Speeds, and Non-Compliance.* Next, we clarify that carriers participating in multiple high-cost programs with required testing or subject to multiple speed obligations in a state will have compliance and non-compliance (as well as any potential withholding of support) determined specifically for each program, state, and speed tier. Thus, compliance and non-compliance percentages will be calculated for each program, state, and speed tier separately.⁹ This ensures that any support withheld from a carrier for non-compliance aligns with the carrier’s level of noncompliance.

6. For carriers receiving a single amount of high-cost support associated with multiple speed tier obligations, support withheld for non-compliance with performance requirements will be tied to the relative percentage of locations for which the carrier is obligated to provide particular speeds. For example, carriers receiving Alternative Connect America Cost Model (A-CAM) II support must meet

⁶ *Id.* at 10135, para. 70.

⁷ Carriers with coterminous support and build-out terms may be subject to the potential final withholding calculations that account for both lack of deployment and non-compliance with the performance requirements at the end of these terms, as described in the *Performance Measures Reconsideration Order* and in section 54.320(d)(2) of the rules. *See* 47 CFR § 54.320(d)(2). Such calculations are not applicable to other carriers, which would face their final deployment milestones before their final performance testing milestones.

⁸ The Commission allowed CAF Phase II model carriers an optional seventh year of support to facilitate the transition to the Rural Development Opportunity Fund. Therefore, these carriers will receive support until the end of 2021. *See Rural Digital Opportunity Fund; Connect America Fund*, WC Docket Nos. 19-126, 10-90, Report and Order, 35 FCC Rcd 686, 740-741, para. 127 (2020). However, this additional transition year of support does not change the compliance deadlines, i.e. CAF Phase II carriers must be in compliance with deployment and performance requirements by the end of 2021 or support reductions will become permanent.

⁹ *See Performance Measures Reconsideration Order*, 34 FCC Rcd at 10127, para. 47 (explaining that “a carrier will receive a separate random sample of testing locations for each program for which it must do performance testing”).

final milestones for deployment with minimum speeds of 25/3 Mbps and 4/1 Mbps.¹⁰ If such a carrier is in non-compliance with the performance requirements for its 25/3 Mbps locations in a single state, any support that is withheld would be drawn from the percentage of its total A-CAM support in that state that is equal to the percentage of locations where it is required to deploy 25/3 Mbps service. Thus, if the carrier is obligated to deploy 25/3 Mbps to 50% of its locations in a state and 4/1 Mbps for the other 50% of its locations in the state, and it is in Level 1 non-compliance for its 25/3 Mbps locations but in full compliance for its 4/1 Mbps locations, it would have 5% of 50% of its monthly support (or 2.5% of its total monthly support) in that state withheld.¹¹ Similarly, if a carrier is participating in two programs in one state, such as A-CAM and the Rural Digital Opportunity Fund, any withholding of support would apply solely to the support received for the particular program for which the carrier has not met its speed and latency requirements.

III. PROCEDURAL MATTERS

7. *Paperwork Reduction Act.* This document does not contain any new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA).¹² In addition, therefore, the Order does not contain any new or modified information collection burdens for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002.¹³

8. *Final Regulatory Flexibility Act Certification.* The Regulatory Flexibility Act of 1980, as amended (RFA),¹⁴ requires agencies to prepare a regulatory flexibility analysis for rulemaking proceedings, unless the agency certifies that “the rule will not have a significant economic impact on a substantial number of small entities.”¹⁵ The RFA generally defines “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹⁶ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹⁷ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹⁸

9. We hereby certify that the clarifications adopted in this Order will not have a significant economic impact on a substantial number of small entities. This Order clarifies rules adopted in the *Performance Measures Reconsideration Order* to assist in the implementation of that decision and reduce

¹⁰ *Wireline Competition Bureau Provides Guidance Regarding Alternative Connect America Model Final Deployment Obligations*, WC Docket No. 10-90, Public Notice, 34 FCC Rcd 5337, 5337 (WCB 2019).

¹¹ See *Performance Measures Order*, 33 FCC Rcd at 6532-33, para. 64 (explaining that Level 1 non-compliant carriers will have 5% of monthly support withheld).

¹² Pub. Law No. 104-13; 44 U.S.C. Part 35.

¹³ Pub. Law No. 107-198; see 44 U.S.C. § 3606(c)(4).

¹⁴ The RFA, see 5 U.S.C. § 601 *et seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

¹⁵ 5 U.S.C. § 605(b).

¹⁶ 5 U.S.C. § 601(b).

¹⁷ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

¹⁸ Small Business Act, 15 U.S.C. § 632.

confusion for impacted parties. These revisions do not create any burdens, benefits, or requirements that were not addressed by the Supplemental Final Regulatory Flexibility Analysis attached to the *Performance Measures Reconsideration Order*.¹⁹ The Commission will send a copy of this Order, including a copy of this final certification, to the Chief Counsel for Advocacy of the SBA.²⁰ In addition, the Order (or a summary thereof) and certification will be published in the Federal Register.²¹

10. *Congressional Review Act.* The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs that these rules are non-major under the Congressional Review Act, 5 U.S.C. § 804(2). The Commission will send a copy of this Order to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).²²

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, that pursuant to the authority contained in sections 1, 2, 4(i), 201-203, 220, 254, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 201-203, 220, 254, and 403, and pursuant to sections 0.91, 0.201(d), and 0.291 of the Commission's rules, 47 CFR §§ 0.91, 0.201(d), and 0.291, IS ADOPTED.

12. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act.²³

13. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

14. 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

¹⁹ See *Performance Measures Reconsideration Order*, 34 FCC Rcd at 10150-52, Appx. C.

²⁰ 15 U.S.C. § 632.

²¹ *Id.*

²² See 5 U.S.C. § 801(a)(1)(A).

²³ *Id.*