

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

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

ORDER

Adopted: April 3, 2020

Released: April 3, 2020

By the Wireline Competition Bureau:

1. In consideration of the recent substantial increase in COVID-19 (coronavirus) cases across the United States,¹ the Wireline Competition Bureau (Bureau) finds good cause to waive, on its own motion, certain network performance pre-testing requirements for recipients of Connect America Fund (CAF) Phase II model-based support.² Specifically, the Bureau will permit carriers to test less than the required number of subscriber locations during the pre-test period if testing would require installation of new equipment inside subscribers’ premises. The Bureau finds that this limited waiver would serve the public interest because it would allow carriers to complete pre-testing on schedule while minimizing unnecessary person-to-person contact and diversion of resources that are more appropriately spent on critical network maintenance at this time.

2. *Background.* In the Performance Measures orders, the Commission adopted requirements that recipients of high-cost support test their broadband networks for compliance with the appropriate speed and latency metrics and report and certify the results.³ To ensure carriers are familiar with the required testing and to allow carriers an opportunity to adjust to the new testing regime, the Commission adopted pre-testing periods in which no support reductions will occur for failing to meet the required standards.⁴ The Commission required CAF Phase II model-based support carriers to conduct two quarters of pre-testing in the first and second quarters of 2020, with testing beginning in the third quarter of 2020.⁵ Carriers have the option of deriving the required number of subscriber locations using either randomly-selected subscriber locations included in USAC’s High Cost Universal Service Broadband portal (HUBB) or a self-selected sample of any subscribers that meet minimum performance obligations in the appropriate service area.⁶ The required sample size is based on the number of

¹ Executive Office of the President, Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

² 47 CFR § 54.313(j). See 47 CFR § 1.3 (Commission may waive its rules on its own motion). The Commission adopted detailed performance measures requirements in 2018 and an order on reconsideration in 2019. See *Connect America Fund*, Order, WC Docket No. 10-90, 33 FCC Rcd 6509 (WCB 2018) (First Performance Measures Order) and *Connect America Fund*, Order on Reconsideration, WC Docket No. 10-90, 34 FCC Rcd 10109 (2019) (Performance Measures Reconsideration Order). These pre-testing requirements do not presently apply to recipients of CAF Phase II auction support.

³ Performance Measures Reconsideration Order, 34 FCC Rcd at 10110, para. 2.

⁴ *Id.* at 10139, paras. 78-79.

⁵ *Id.* at 10140, para. 81.

⁶ *Id.* at 10139, para. 78

subscribers in a particular area.⁷ The Commission allowed carriers to use a variety of testing methods, including some which may require the installation of equipment in the subscriber's home.⁸

3. *Discussion.* In consideration of the recent substantial increase in coronavirus cases across the United States, on its own motion, the Bureau waives the pre-testing sample size requirements for CAF Phase II model-based support recipients to the extent needed to avoid any additional in-home installations by carrier technicians. Generally, the Commission's rules may be waived for good cause shown.⁹ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹⁰ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹¹ Waiver is appropriate when (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.¹²

4. States and the federal government have implemented a number of measures, including social distancing, to limit person-to-person transmission of the coronavirus. At the same time, carriers are working hard to maintain and enhance their networks to ensure the ongoing availability of critical communications services – and to meet increased demand – while safeguarding the continued health and safety of their employees, including technicians who perform installation and other services at subscriber homes. In light of these unique circumstances, we find that requiring carrier technicians to enter subscriber homes to install equipment in order to meet our performance testing obligations is not in the public interest at this time. Carrier resources needed to meet increased demands for service should not be diverted to help subscribers that already have service but must install a new modem for performance measures testing.

5. Accordingly, we waive the pre-testing requirement that carriers test a specific number of subscribers to the extent that such testing would require installation of new equipment in subscriber homes.¹³ During the pre-test period, carriers using either a randomized or self-selected sample of subscribers will only be required to conduct testing based on the number of subscribers in each area (up to the required sample size) that already have the necessary equipment installed as of the date of this Order. Reducing the sample size requirement will allow carriers to focus their resources on the most pressing

⁷ First Performance Measures Order, 33 FCC Rcd at 6522-24, paras. 36-40; Performance Measures Reconsideration Order, 34 FCC Rcd at 10125-28, paras. 43-49.

⁸ First Performance Measures Order, 33 FCC Rcd at 6513, paras. 9-10.

⁹ 47 CFR § 1.3.

¹⁰ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

¹¹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

¹² *Northeast Cellular*, 897 F.2d at 1166.

¹³ In a recent *ex parte* filing, USTelecom requested that the Commission allow carriers to “(1) select additional randomly selected test locations rather than attempting to replace incompatible [sic] modems during the current emergency; (2) proceed with testing in the second quarter with samples of fewer than 50 locations; and (3) retry testing as often as they can during each testing hour if high usage is detected (even if such retry attempts do not occur once per minute), and not force testing when doing so will disrupt the customer's service.” Letter from B. Lynn Follansbee, USTelecom, to Marlene H. Dortch, Secretary, FCC, CC Docket 10-90 (filed Mar. 23, 2020). The relief adopted herein addresses USTelecom's first and second requests as carriers are now allowed to pre-test the number of locations that do not require installation of new equipment in subscriber homes, even if that is fewer than the required number of locations. However, the Commission declines to waive the testing frequency requirements. Carriers can either retry to test each minute (and not conduct the test if there is cross-talk above the adopted thresholds) or carriers can just conduct the test once during the hour period, minimizing any customer disruption. First Performance Measures Order, 33 FCC Rcd at 6519-21, paras. 27-32.

needs during this national emergency and avoid unnecessary in-person contact between technicians and subscribers.¹⁴

6. Accordingly, IT IS ORDERED that, pursuant to sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 CFR §§ 0.91, 0.291, 1.3, the CAF Phase II pre-testing requirements ARE WAIVED to the extent described above.

7. 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

¹⁴ At this time, the requirements for use of a randomly-selected sample and quarterly testing of a specific sample size will remain unchanged for CAF Phase II testing, which begins in the third quarter of 2020. The Commission will evaluate whether additional waivers are warranted based on the continued existence of a national emergency at a later date.