

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

In the Matter of
The Uniendo a Puerto Rico Fund and Connect
USVI Fund
WC Docket No. 18-143

ORDER

Adopted: August 24, 2020

Released: August 24, 2020

By the Wireline Competition Bureau:

I. INTRODUCTION

1. In September 2017, Hurricanes Irma and Maria struck Puerto Rico and the U.S. Virgin Islands within weeks of each other, damaging and destroying communications networks across the Territories and leaving Americans living there without voice and broadband connections. The Commission took immediate steps to enable service providers receiving support through the Universal Service Fund’s high-cost mechanism to quickly restore service. Last year, the Commission adopted stage 2 of the Uniendo a Puerto Rico Fund and Connect USVI Fund, which is making available nearly \$1 billion dollars in universal service support for fixed and mobile services in the Territories, including more than \$500 million to expand and deploy fixed networks in order to give every American in Puerto Rico access to the same high-speed broadband service as those living on the mainland. To preserve limited Universal Service Fund resources and ensure that Puerto Ricans get the maximum benefit from this funding, the Commission limited eligibility to those providers that already have experience providing broadband to end users over their own networks.

2. Blackburn Technologies II, LLC, a wholesale provider operating in Puerto Rico, seeks waiver of the requirement that only facilities-based providers offering voice and broadband service to end users in Puerto Rico are eligible for program support.1 Blackburn wishes to use Stage 2 support to further expand its wholesale network, rather than to serve Puerto Rican consumers that need broadband connections.2 Based on the record before us, we find that the petitioner has not established good cause for us to deviate from the rule and, therefore, deny the requested relief.

II. BACKGROUND

3. In the PR-USVI Stage 2 Order, the Commission adopted the Uniendo a Puerto Rico Fund, which will distribute up to \$504.7 million of high cost support over 10 years to providers of fixed voice and broadband services.3 Section 54.1505(a) of the Commission’s rules establishes the eligibility requirements for the program and states that a provider is eligible to submit an application in the Stage 2 competitive process if it had existing fixed facilities and made broadband service available in Puerto Rico

1 Request for Waiver of Blackburn Technologies II, LLC, WC Docket No. 18-143 (filed June 29, 2020) (Blackburn Waiver Petition).

2 Blackburn Waiver Petition at 1.

3 The Uniendo a Puerto Rico and the Connect USVI Fund, et al., Report and Order and Order on Reconsideration, 34 FCC Rcd 9109, 9146, para. 67 (2019) (PR-USVI Stage 2 Order).

or the U.S. Virgin Islands according to its June 30, 2018 FCC Form 477.⁴ Section 54.1505(a) further requires a provider to obtain an eligible telecommunications carrier (ETC) designation within 60 days after the Bureau announces the providers selected to receive support.⁵

4. During the rulemaking, the Commission proposed to limit Stage 2 eligibility to applicants who reported service on the June 30, 2017 FCC Form 477 to encourage participation from experienced providers and minimize the risk that recipients will default on service obligations.⁶ Based on comments received, however, the Commission modified its original proposal to limit eligibility to providers that reported service on the June 30, 2018 FCC Form 477 to encourage participation by satellite and other providers that served the islands immediately after Hurricanes Irma and Maria.⁷ Similarly, to cast a wider net, the Commission allowed broadband providers that serve only business locations to participate, but noted that it would require “any provider that receives support to serve all locations within the specified geographic area[.]”⁸

5. *Blackburn’s Petition.* Blackburn describes itself as a wholesale provider of broadband services to Puerto Rico and Latin America. Blackburn states that it provides broadband and internet access to Internet service providers (ISPs), retailers, over-the-top providers, and other service providers.⁹ According to Blackburn, it provides ISPs access to its infrastructure, which “enables these ISPs to provide high-speed, quality broadband service to their retail customers.”¹⁰ Blackburn states it is “purely [a] wholesale provider and does not provide retail services.”¹¹ In Blackburn’s view, its wholesale model advances competition by enabling new entrants and retail operators to purchase network capacity needed to offer broadband services to their end user customers.¹² Blackburn, however, has never filed an FCC Form 477 because, Blackburn asserts, companies that do not provide service directly to end users, like Blackburn, are not required by the Commission’s rules to submit an FCC Form 477. Blackburn therefore seeks waiver of the requirement that it must have filed an FCC Form 477 due in June 2018 to participate in the Stage 2 competitive process.

6. Commenters submitted comments in support and opposition to Blackburn’s waiver petition. In general, commenters in support of Blackburn’s waiver petition noted the lack of competition and deficiencies of the local telecommunications market.¹³ Commenters opposing the waiver petition

⁴ 47 CFR §1505(a) (“A provider shall be eligible to submit an application for support from Stage 2 of the fixed Uniendo a Puerto Rico Fund or of the fixed Connect USVI Fund if it had its own fixed network and provided broadband service in Puerto Rico or the U.S. Virgin Islands, respectively, according to its June 2018 FCC Form 477 data. A provider must obtain eligible telecommunications carrier designation no later than sixty (60) days after public notice of selection to receive fixed support.”).

⁵ *Id.*

⁶ See *The Uniendo a Puerto Rico and the Connect USVI Fund, et al.*, Notice of Proposed Rulemaking, 33 FCC Rcd 5405, 5416, para. 42 (2018) (*PR-USVI Stage 2 NPRM*).

⁷ *PR-USVI Stage 2 Order*, 34 FCC Rcd. at 9137-38, para. 47.

⁸ *Id.* at 9138, para. 48

⁹ Blackburn Waiver Petition at 2-3.

¹⁰ *Id.* at 4.

¹¹ *Id.* at n.9.

¹² *Id.* at 5; *Ex Parte* Reply Comments of Blackburn Technologies II, LLC, WC Docket No. 18-143 (filed July 17, 2020) (Blackburn *Ex Parte* Reply). An end user means “a residential, business, institutional, or government entity that subscribes to a service, uses that service for its own purposes, and does not resell that service to other entities.” 47 CFR § 1.7001.

¹³ Comments of Sandra E. Torres Lopez, President, Telecommunications Bureau of Puerto Rico, WC Docket No. 18-143 (filed July 13, 2020) (TBPR Comments); Puerto Rico Hospital Association Comments; Hon. Luis G. Fortuño Comments; Comments of Alexandra Fernandez-Navarro, Associate Member, Puerto Rico Public Service

(continued....)

argue, among other things, that Blackburn is ineligible to participate in the Stage 2 competitive process because it will not fulfill the public interest obligations to provide voice and broadband services to end users.¹⁴

III. DISCUSSION

7. Generally, the Commission may exercise its discretion to waive its rules for good cause.¹⁵ Waiver of the Commission's rules is appropriate only if both: (1) special circumstances warrant a deviation from the general rule, and (2) such deviation will serve the public interest.¹⁶

8. Based on the record, we deny the waiver petition filed by Blackburn, finding no good cause justifying deviation from section 54.1505(a) of the Commission's rules, and that waiving the Form 477 filing requirement for participating in the Uniendo a Puerto Rico Stage 2 program does not serve the public interest. Notwithstanding the compelling reasons justifying the Commission's decision to limit participation in the Uniendo a Puerto Rico and Connect USVI Funds to providers with experience serving end users in the Territories, we must reject Blackburn's petition because Blackburn is unwilling to meet the public interest obligations that apply to all recipients of high-cost universal service support.¹⁷

9. For the Uniendo a Puerto Rico Fund and Connect USVI Fund, the Commission limited the eligibility to participate in the Stage 2 competitive process to providers with existing network facilities and that reported making broadband service available to end user customers according to the June 30, 2018 FCC Form 477.¹⁸ Blackburn contends that a waiver is warranted because it is an experienced "neutral wholesale broadband provider"¹⁹ and capable of expanding its existing network without a "significant risk of default" of the Commission's deployment obligations.²⁰

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Regulatory Board, WC Docket No. 18-143 (filed July 10, 2020); Pazos FBO Services Comments; KA Consulting LLC Comments; BBR IT Synergy LLC Comments; Gigifi Networks Comments; Exacto Networks Comments; Partnership for Modern Puerto Rico Comments; TAG Solutions Comments; Farmacia Reyes Comments; Patricia Eaves Comments; Casa Grande Interactive Comments; Melvin Carrion Rivera Comments; 4H Consulting Comments; Lourdes M. Rovira Comments; Pariter Wealth Management Group Comments; Puerto Rico Manufacturers Association Comments; Enrique L. Costas Comments.

¹⁴ Comments of Liberty Cablevision of Puerto Rico LLC, WC Docket No. 18-143 (filed July 13, 2020); Comments of Puerto Rico Telephone Company, Inc., WC Docket No. 18-143 (filed July 13, 2020) (PRTC Comments); Comments of Virgin Islands Telephone Corporation dba Viya, WC Docket No. 18-143 (filed July 13, 2020) (Viya Comments); Opposition to Waiver Request of Critical Hub Networks, Inc., WC Docket No. 18-143 (filed July 13, 2020) (Critical Hub Comments); Opposition to Request for Waiver of Aeronet Wireless Broadband, LLC, WC Docket No. 18-143 (filed July 13, 2020) (Aeronet Comments).

¹⁵ 47 CFR § 1.3.

¹⁶ See *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969), cert. denied, 93 S.Ct. 461 (1972)) (*Northeast Cellular*).

¹⁷ Blackburn suggests in a recent *ex parte* submission that "to the extent the Commission has interpreted Section 214(e) as requiring a direct customer relationship with the end user," we can forbear from applying this requirement. Letter from Tom W. Davidson, Counsel to Blackburn Technologies II, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-143, at 7 n.25 (Aug. 4, 2020). The Commission's rules set forth strict procedural requirements for petitions for forbearance, including that they be filed as separate pleadings, be identified as petitions for forbearance in the caption, and contain certain specified information. See 47 CFR §§ 1.53 and 1.54. Because Blackburn has not fulfilled these requirements, we are not considering its submission as a Petition for Forbearance or analyzing whether the Communications Act permits or requires forbearance in this case.

¹⁸ *PR-USVI Stage 2 Order*, 34 FCC Rcd at 9137, para. 46; 47 CFR § 54.1505(a).

¹⁹ Blackburn Waiver Petition at 12-15.

²⁰ *Id.* at 15-16.

10. However, Blackburn does not simply wish to compete on even footing with other service providers in the Uniendo a Puerto Rico Fund, but instead proposes using any universal service support it may win through the competitive process to expand its wholesale network in hopes that other service providers will eventually come along and agree to serve the homes and businesses in its service area rather than providing service to those consumers itself.²¹ Blackburn argues that granting its waiver petition will advance the Commission's goal to improve and expand broadband networks in Puerto Rico as a result of its wholesale model.²² We disagree.

11. For Puerto Rico, as well as the U.S. Virgin Islands, the Commission concluded that the provision of resilient service to all locations in the Territories was of significant public interest following the devastation of Hurricanes Irma and Maria.²³ To this end, the Commission designed the competitive process to ensure that end users will receive quality service supported by program funding. Like the Commission's other high-cost universal service programs, the Commission accomplishes its universal service goals by requiring recipients of Uniendo a Puerto Rico Fund and Connect USVI Fund support to offer voice and broadband service to the homes and businesses in the recipients' supported service areas.²⁴ This requirement is fundamental to realizing Congress's direction to the Commission to ensure the availability to all consumers of services that "are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas."²⁵

12. The Commission's goal to bring telecommunications service directly to all consumers in Puerto Rico cannot be achieved by funding Blackburn's wholesale broadband network, based on the record before us. In particular, Blackburn states that it is purely a wholesale provider and does not provide retail services to end users.²⁶ Nor does Blackburn commit to the Commission or the Puerto Rico Telecommunications Regulatory Board that it will make voice and broadband services directly available to residents should its waiver be granted. In fact, Blackburn states that it remains committed to serving its wholesale customers.²⁷ We disagree that Blackburn's "end-to-end" wholesale network meets the

²¹ See, e.g., Blackburn Waiver Petition at 18, 19 (explaining that Blackburn intends to construct a fiber backbone to that will "be used by Blackburn's customers to provide fixed broadband services to business and residential customers" and "Blackburn's business model is premised on enable multiple operators to provide end user service").

²² *Id.* at 17, 19 (explaining that as a wholesaler, multiple providers may access its network to provide end user retail service).

²³ *PR-USVI Stage 2 Order*, 34 FCC Rcd at 9143, para. 59.

²⁴ See 47 CFR § 54.1515(a) (recipients of Stage 2 Uniendo a Puerto Rico and the Connect USVI Fund fixed support are required to offer broadband service with latency suitable for real-time applications, including Voice over internet Protocol, and usage capacity that is reasonably comparable to comparable offerings in urban areas, at rates that are reasonably comparable to rates for comparable offerings in urban areas).

²⁵ 47 U.S.C. § 254(b)(3).

²⁶ Blackburn Waiver Petition at 4, n.9.

²⁷ See Blackburn Waiver Petition at 5, 14-15, 18, 22 (stating that its network provides improved redundancy to its customers "and of the services provided by [its] customers to end users;" explaining that its neutral wholesale operator model enables operators "to purchase capacity needed to offer broadband services to their end user customers;" providing that "Blackburn presently offers IP services and broadband capacity on a wholesale basis to its customers in Puerto Rico, all of whom provided broadband and other services directly to end users;" explaining that its future fiber backbone will be used by Blackburn customers to provide fixed broadband services to business and residential customers"). See also Letter from Tom W. Davidson, Counsel for Blackburn Technologies II, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-143, at 7 (filed Aug. 4, 2020) (Blackburn *Ex Parte* Letter) (explaining that it provides last mile connections directly to end users "through its partnership relationships with its ISP and carrier clients," and "enters into arrangements with any requesting clients whereby the client selects the services that Blackburn will provide over its network").

requirement to provide service to all end users.²⁸ Rather than making service available to all consumers as required, Blackburn deflects fulfilling the requisite end user service onto the company's wholesale customers to provide retail services to consumers. Blackburn presents only a best-case hypothetical in which it is able to secure wholesale customers to serve all locations in the geographic areas for which Blackburn may receive support and that those wholesale customers will provide the supported services at authorized rates. Blackburn can make no such guarantees.²⁹ Moreover, directly funding Blackburn's wholesale model would undermine the Commission's ability to ensure that any services offered over its universal service-funded network met the performance and price requirements of our rules. We therefore must conclude that Blackburn cannot meet the required service requirements by merely making its network available to third-party customers who provide retail services to some end users.³⁰

13. This likewise necessitates our conclusion that we should deny Blackburn's request to waive the requirement of the Stage 2 competitive process that it have filed a June 2018 FCC Form 477.³¹ Blackburn contends that there is good cause to grant a waiver of the FCC Form 477-based eligibility requirement because the requirement is an arbitrary "proxy for determining eligibility" for experienced providers that may successfully meet the service obligations.³² Blackburn argues that, as a wholesale provider that does not serve end users, it is not required to file a FCC Form 477, but that it nevertheless has sufficient experience to justify participating in the program.³³

14. The Commission expressly limited program participation to providers that can establish to the Commission's satisfaction they have experience serving retail customers in Puerto Rico and can meet the program's service requirements in order to ensure that finite universal service support is spent wisely and will advance the Commission's goals of closing the digital divide.³⁴ The Commission concluded that those providers with experience providing service to end users—and thus required to file Form 477—in the Territories are best positioned to meet deployment and service requirements with the least risk of default.³⁵ We need not determine whether Blackburn's experience as a wholesale provider is equivalent to the experience of facilities-based providers serving end-user customers because, as discussed above, it is plainly contrary to the public interest to permit an entity such as Blackburn to participate in a universal service program in which it has disclaimed any willingness to meet the fundamental public interest obligations that all recipients of high-cost universal service support must meet.

15. We are unpersuaded by commenters citing the need for additional competition in the local telecommunications market. Even assuming that Blackburn's business model spurs greater

²⁸ See, e.g., Blackburn *Ex Parte* Letter at 6 (stating that it provides an end to end solution for its customers to provide supported services).

²⁹ We disagree that the provision of service to a local insurance agency "on a test basis" and to a flight services company on an emergency basis meets the Commission's requirement to provide service to end users as demonstrated by the Form 477. Blackburn Waiver Petition at 14. Moreover, we note that Blackburn expressly states that it presently offers IP services on a wholesale basis rather than to end users. *Id.* at 14-15. Likewise, Blackburn concedes that it does not have a direct relationship with end users, notwithstanding its "partnerships" with its wholesale customers to provide end user service. Blackburn *Ex Parte* Letter at 7-9.

³⁰ We agree with opposing commentators that it is not in the public interest to waive section 54.1505(a) because Blackburn is unable or does not intend to meet these statutory requirements. PRTC Comments at 2-6; Viya Comments at 2-3; Critical Hub Comments at 2-3; Aeronet Comments at 8.

³¹ 47 CFR § 54.1505(a).

³² Blackburn Waiver Petition at 12-13.

³³ *Id.* at 22.

³⁴ *PR-USVI Stage 2 Order*, 34 FCC Rcd at 9121, 9137-39, paras. 21, 46-49.

³⁵ *Id.*

competition in the Stage 2 competitive process, Blackburn's participation in the Stage 2 process would further its own wholesale network but divert limited program funding from directly supporting access to all end users, thereby frustrating universal service principles of section 254(b).³⁶ We therefore conclude the public interest is not served by waiving provider eligibility requirements to allow Blackburn to compete for, and thus divert, limited fixed high-cost support available as part the Stage 2 competitive process away from end users in Puerto Rico for the deployment of its wholesale network.

16. For these reasons explained above, we deny Blackburn's waiver petition.

IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 CFR §§ 0.91, 0.291, 1.3, that this Order IS ADOPTED.

18. IT IS FURTHER ORDERED that the Request for Waiver filed by Blackburn Technologies II, LLC June 29, 2020 is DENIED.

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

³⁶ 47 U.S.C. § 254(b).