

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

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

ORDER

Adopted: November 1, 2021

Released: November 1, 2021

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau (Bureau) addresses a petition filed by the Connect America Fund (CAF) Phase II Coalition (Coalition), a group of 14 carriers authorized to receive support through the CAF Phase II auction program. In its petition, the Coalition seeks relief from certain evidentiary burdens associated with the Commission’s challenge process for facilitating adjustments to the defined deployment obligations of Phase II auction support recipients in situations where the number of funded locations is greater than the number of locations qualifying for support. Specifically, the Coalition proposes that the Commission abandon this process and instead require Phase II support recipients to certify, at the end of the build-out term, that all funded locations are served. The Coalition also requests that the Commission permit support recipients to retain all support awarded so long as the number of actual locations served in the state is at least 65% of the original defined deployment obligation. We find that portions of the Coalition Petition, while stylized as a waiver request, broadly challenge substantive Commission rules and policy decisions. Therefore, we treat these portions as a petition for reconsideration and dismiss them as procedurally defective. Moreover, we independently deny these portions of the petition on the merits. As for the remainder of the petition that makes arguments for relief limited to individual circumstances, we find that the Coalition has failed to demonstrate good cause for waiver.

II. BACKGROUND

A. The Phase II Auction Location Adjustment Process

2. In the Phase II Auction Order, the Commission adopted a competitive bidding process to support deployment in price cap areas not already served by a carrier receiving high-cost support.

1 CAF America Fund Phase II Coalition, Request for Waiver of Requirement for Pro Rata Reduction in CAF Phase II auction support Based on Location Discrepancies, 10-90 (filed June 10, 2020), as supplemented, Supplement to Request for Limited Waiver (filed Mar. 23, 2021) (Coalition Petition); Letter from Nicole Tupman, Assistant General Counsel, Midco, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (Mary 14, 2021) (Midco Supplement); Letter from Daniel P. Frieson, Managing Partner and Chief Innovation Officer, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (June 1, 2021) (supplementing the Coalition Petition) (IdeaTek Supplement).

2 Coalition Petition at 5-6.

3 47 CFR § 1.429.

4 Id. § 1.3; WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972) (WAIT Radio).

5 Connect America Fund et al., WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 5949, 5968-74, paras. 51-73, 5979, para. 90 (2016) (Phase II Auction Order); see also

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Pursuant to this process, winning bidders would, as a condition of receiving support, commit to offering service to a specific number of funded locations (as determined by the Connect America Cost Model (CAM)) in all eligible areas won in the state.<sup>6</sup> The Commission set the defined deployment obligation for each support recipient as the sum of the funded locations in all of the areas the recipient won in a state.<sup>7</sup> The Commission also anticipated that Phase II auction support recipients might face unexpected obstacles in building out their networks and, accordingly, provided recipients with the flexibility to deploy to 95% of their defined deployment obligation and refund a certain amount of support (associated with the number of locations remaining unserved) in lieu of being found in default.<sup>8</sup> As of September 2020, the Commission authorized 194 winning bidders to receive a total of more than \$1.47 billion over 10 years in exchange for their commitment to serve a total of 702,745 qualifying locations in 45 states.<sup>9</sup>

3. After the adoption of the *Phase II Auction Order*, several parties sought clarification on whether the Commission would give funding recipients the opportunity to bring to the Commission's attention any discrepancies between the number of funded locations and the number of actual qualifying locations in a state (location discrepancies).<sup>10</sup> Specifically, commenters sought to reduce their defined deployment obligations (and associated support) when a location discrepancy resulted in fewer actual locations than funded locations.<sup>11</sup> To address these concerns, the Commission created a challenge process to facilitate adjustments to defined deployment obligations on a statewide basis.<sup>12</sup> While the Commission set some parameters for certain aspects of this process, it also directed the Bureau to adopt requirements and issue guidance necessary for implementation, consistent with prior Commission direction.<sup>13</sup> Pursuant

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*Wireline Competition Bureau Releases List and Map of Eligible Census Blocks for the Connect America Phase II Auction (Auction 903)*, Public Notice, 32 FCC Rcd 10381 (WCB 2017).

<sup>6</sup> *Phase II Auction Order*, 31 FCC Rcd at 5964, 5966, paras. 40, 46; CostQuest Associates, Inc., Connect America Cost Model: Model Methodology 12-15 (Dec. 22, 2014), <https://transition.fcc.gov/wcb/CAM v.4.2 Methodology.pdf>.

<sup>7</sup> *Phase II Auction Order*, 31 FCC Rcd at 5964, 5966, paras. 40, 46. The Commission also incorporated into the defined deployment obligations of Phase II auction support recipients the flexibility to serve 95% of their funded locations and refund a pro rata share of their support that is based on the number of unserved locations and one-half the average support for the top five percent of the highest cost funded locations nationwide. *Id.* at 5965-66, paras. 44-46.

<sup>8</sup> *Id.* at 5965-66, paras. 44-47. To the extent that a support recipient chooses to avail itself of this 5% flexibility, the recipient must refund support, on a per location basis, as determined through one-half the average support for the top 5% of the highest cost funded locations nationwide. *Id.* at 5966, para. 45.

<sup>9</sup> *Rural Digital Opportunity Fund Phase I Auction (Auction 904) Closes; Winning Bidders Announced; FCC Form 683 Due January 29, 2021*, WC Docket No. 19-126 et al., Public Notice, 35 FCC Rcd 13888, 13888 (RBATF, OEA, WCB 2020).

<sup>10</sup> *Connect America Fund et al.*, WC Docket No. 10-90 et al., Order on Reconsideration, 33 FCC Rcd 1380, 1389, paras. 22 (2018) (*Phase II Auction Reconsideration Order*); *see also* Request for Clarification or Partial Reconsideration of Southern Tier Wireless, Inc., WC Docket No. 10-90 et al., at 4 (filed July 20, 2016) (Tier Wireless Petition); Petition for Reconsideration of Broad Valley Micro Fiber Networks, Inc., WC Docket No. 10-90 et al., at 3-4 (filed July 20, 2016); Petition for Clarification or Reconsideration of Crocker Telecommunications, LLC, WC Docket No. 10-90 et al., at 7 (filed July 18, 2016) (Broad Valley Petition).

<sup>11</sup> *Phase II Auction Reconsideration Order*, 33 FCC Rcd at 1389, para. 22.

<sup>12</sup> *Id.* at 1389-90, paras. 23, 25-26.

<sup>13</sup> *Id.* at 1389, para. 24 (directing the Bureau "to implement this process, consistent with our prior direction to the Bureau concerning model location adjustments" and to "set the parameters of this review process, set the parameters for the audits, and adopt any other necessary implementation details"); *see also* *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, 29 FCC Rcd 15644, 15659, para. 38 & n.88 (2014) (encouraging electing price cap carriers to raise with the Commission, during their first funded year, any known disparities between the number of funded locations and the number of actual locations and delegating authority to the Bureau to address any

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to this authority, the Bureau established an Eligible Locations Adjustment Process (ELAP) consistent with the parameters set forth in the *Phase II Auction Reconsideration Order* and prior Commission guidance for making adjustments to defined deployment obligations.<sup>14</sup>

4. Pursuant to ELAP, Phase II auction support recipients participating in ELAP (ELAP participants) could submit location information (including address and geocoordinates) for every eligible location (i.e., qualifying locations and any additional locations that the support recipient is willing to commit to serving) within the areas won in the state and provide additional evidence demonstrating that no further locations could be found.<sup>15</sup> Relevant stakeholders would then have the opportunity to challenge the accuracy and completeness of such evidence and to provide their own evidence of the existence of additional eligible locations.<sup>16</sup> The Commission delegated to the Bureau the authority to decide, based on a preponderance of the evidence, whether an ELAP participant's total number of funded locations within the state exceeds the total number of eligible locations in the state, thus warranting a reduction in the participant's defined deployment obligation and a corresponding reduction in support.<sup>17</sup> The Commission also provided that all information submitted pursuant to this process would be subject to future audit.<sup>18</sup>

5. In the *Phase II Reconsideration Order*, the Commission rejected several proposals to modify the program, including a proposal that the Commission deem, on a census block basis, all CAM estimated locations as served, regardless of the number of locations actually served, if the support recipient demonstrates service to all actual locations in census block.<sup>19</sup> In rejecting this proposal, the Commission explained that this proposal could create perverse incentives to focus deployment on certain types of census blocks, "leading to fewer consumers receiving broadband overall."<sup>20</sup> The Commission also specifically noted that it had already adopted ELAP to allow support recipients to modify their obligations (and associated support) based on location discrepancies within the state.<sup>21</sup>

6. One commenter argued that support recipients be permitted to retain all awarded support even if the recipient took advantage of the end-of-term flexibility to serve 95% of its required locations, reasoning that bidders would place bids based on the estimated cost of serving the minimum number of

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such situations); *id.* at 15660, para. 40 & n.93, 15700, para. 154 (stating that electing price cap carriers may seek waiver of their build-out deadlines or obligations).

<sup>14</sup> *Connect America Fund*, WC Docket No. 10-90, Order, 34 FCC Rcd 10395, 10396-97, paras. 4-5 (2019) (*ELAP Order*).

<sup>15</sup> *Phase II Auction Reconsideration Order*, 33 FCC Rcd at 1389-90, paras. 23, 25-26; *ELAP Order*, 34 FCC Rcd at 10402-404, paras. 21-23 (defining eligible locations to include prospective as well as qualifying locations).

<sup>16</sup> *Id.* at 1390, para. 25; *ELAP Order*, 34 FCC Rcd 10399, paras. 11-12.

<sup>17</sup> *Id.* at 1389, para. 24 & n.62 (explaining that the "new support amount in the state would be reduced by (total state support/model locations) x number of deficient locations"); *ELAP Order*, 34 FCC at 10400-10401, paras. 15-17.

<sup>18</sup> *Id.* at 1389, para. 23. The Commission directed the Bureau "to implement this process, consistent with our prior direction to the Bureau concerning model location adjustments" and to "set the parameters of this review process, set the parameters for the audits, and adopt any other necessary implementation details." *Id.* at 1389, para. 24. After seeking notice and comment, the Bureau established procedures to ensure efficient administration of this process through a framework it named the ELAP. *ELAP Order; Wireline Competition Bureau Seeks Comment on Procedures to Identify and Resolve Location Discrepancies in Eligible Census Blocks Within Winning Bid Areas*, WC Docket No. 10-90, Public Notice, 33 FCC Rcd 8620 (2018).

<sup>19</sup> *Phase II Auction Reconsideration Order*, 33 FCC Rcd at 1391, para. 28.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* ("To the extent there are discrepancies between the number of actual locations on the ground and the CAM-estimated statewide location totals, a support recipient can take advantage of the [ELAP].").

locations to avoid default.<sup>22</sup> In rejecting this request, the Commission stated that it had provided the 5% flexibility to account for certain unexpected costs that might arise during the build-out process, that it expected support recipients to take advantage of this flexibility only as needed, and that bidders should place bids with the expectation of serving all funded locations.<sup>23</sup> The Commission also explained that Phase II bidders had the “advantage of choosing which eligible census blocks to include in their bids,” and could strategically plan by including blocks with both more and fewer locations than CAM estimates, thus permitting them to meet statewide deployment requirements.<sup>24</sup>

#### **B. The Rural Digital Opportunity Fund Process Location Adjustment Process**

7. On January 30, 2020, the Commission adopted a framework for a new high-cost program, the Rural Digital Opportunity Fund.<sup>25</sup> For this program, as with the Phase II auction, the Commission established initial defined deployment obligations based on CAM estimates; however, these obligations would be revised after a support recipient’s sixth year of deployment using a Commission-adopted listing of all qualifying locations within eligible areas (qualifying location list).<sup>26</sup> With limited exceptions, support recipients would be expected to serve every actual location identified on this list by the end of year eight, even if the list identified *more* qualifying locations than estimated by the CAM. Moreover, support recipients would be expected to serve all actual locations that were newly built after the Commission’s adoption of its qualifying location list if the consumer requested service.<sup>27</sup> In adopting this approach, the Commission explained that “[b]y requiring build-out to the entire designated area even in light of the possibility that location numbers could change, we seek to ensure the availability of broadband and voice services to as many rural consumers and small businesses within the Phase I auction areas by the end of the ten-year term as possible.”<sup>28</sup>

8. Given the focus on fully building out a network, the Commission was “persuaded by commenters who argue[d] that the costs of building and operating broadband networks are predominantly governed by the size and characteristics of the areas served rather than the precise number of locations.”<sup>29</sup> The Commission agreed with commenters that it “should not penalize support recipients when the location data used to establish milestones overstates the number of locations in an area.”<sup>30</sup> To address these concerns, the Commission provided that it would not modify the recipient’s awarded support when the qualifying location list reduced the funding recipients original obligation by no more than 35% (i.e.,

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<sup>22</sup> *Id.* at 1392, para. 31.

<sup>23</sup> *Id.* at 1393, para. 35 (explaining that Phase II auction participants would be hard pressed to demonstrate good cause for waiver if they did not plan on serving 100% of their locations at the start of the program (as adjusted, as warranted, through the Commission’s adjustment process)).

<sup>24</sup> *Id.* at 1392, para. 32; *see id.* at 1390, para. 25 (the Commission “emphasize[d] that applicants are required to conduct the necessary due diligence prior to submitting their short-form applications, including identifying locations they will serve within the eligible areas, so that they can certify that they will be able to meet the relevant public interest obligations when they submit their applications”).

<sup>25</sup> *See generally, Rural Digital Opportunity Fund; Connect America Fund*, WC Dockets 19-126, 10-90, Order, 35 FCC Rcd 686 (2020) (*Rural Digital Opportunity Fund Order*).

<sup>26</sup> *Id.* at 709, para. 45 (expressing confidence that the Commission “will have access to more accurate location data in the next few years, whether as a result of the Digital Opportunity Data Collection, the development of a broadband serviceable location database, the 2020 Census and/or some other data source”).

<sup>27</sup> *Id.* at 710-11, paras. 49-50.

<sup>28</sup> *Id.* at 710, para. 47.

<sup>29</sup> *Id.* at 709, para. 45.

<sup>30</sup> *Id.* at 709-710, para. 46.

the 35% threshold);<sup>31</sup> however, if the reduction exceeded this 35% threshold, the Commission would modify the support on a pro rata basis.<sup>32</sup> The Commission also explained that in situations where the qualifying location list resulted in an increased deployment obligation of 35% or less, support recipients would be required to serve these locations without additional funding unless deployment costs would be unreasonable or the identified qualifying location became non-qualifying by the end of the build out period.<sup>33</sup>

### C. The Coalition's Waiver Petition

9. On June 10, 2020, the Coalition filed a petition urging the Commission to waive certain ELAP requirements by retroactively applying to Phase II auction support recipients, the “same [location adjustment] approach,” applied to Rural Digital Opportunity Fund recipients.<sup>34</sup> Specifically, the Coalition proposes that the Commission abandon ELAP and instead make adjustments to a support recipient's deployment obligations at the end of the build-out term if the funding recipient certifies 1) that it has served every actual location qualifying for support within the state, and 2) that such deployment has been made to at least 65% of the recipient's deployment obligation (certification-only proposal).<sup>35</sup> Support would only be reduced under the same 35% thresholds as for Rural Digital Opportunity Fund carriers.<sup>36</sup> The Coalition states that such a change would alleviate administrative burdens on both support recipients and the Commission.<sup>37</sup> However, the Coalition does not argue that Phase II auction support recipients should be subject to increased deployment obligations based on the qualifying location list.<sup>38</sup>

10. Two members of the Coalition, Midcontinent Communications (Midco) and IdeaTek Telecom, LLC (IdeaTek), submitted supplements to the Coalition Petition.<sup>39</sup> Midco explains that it conducted some due diligence prior to participating in the auction, including the completion of site surveys to evaluate the factors impacting facility placement and fiber paths and an engineering study to plan its network build.<sup>40</sup> Both Midco and IdeaTek also separately explain that *after being authorized to receive support*, they evaluated locations on the ground and determined, based on such evaluation, that ELAP's per location adjustment would result in a significant reduction in support when compared to the reduction in costs associated with a reduced deployment obligation.<sup>41</sup>

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<sup>31</sup> *Id.* at 710, para. 51; 47 CFR § 54.802(c)(1)(ii).

<sup>32</sup> *Id.* at 710, para. 51.

<sup>33</sup> *Id.* at 710-711, para. 49-50; 47 CFR § 54.310(c)(1)(i).

<sup>34</sup> Coalition Petition at 4.

<sup>35</sup> *Id.* at 5.

<sup>36</sup> *Id.* at 1, 4-5; compare *Phase II Auction Reconsideration Order*, 33 FCC Rcd at 1390-92, paras. 23-28 with *Rural Digital Opportunity Fund Order*, 35 FCC Rcd at 709-711, paras. 46-47, 51.

<sup>37</sup> Coalition Petition at 5-6. Several parties filed comments in support of the Coalition's proposed approach to modify ELAP and instead apply the 35% threshold adopted for the Rural Digital Opportunity Fund support adjustment process. Letter from Jennifer K. McKee, NTCA – The Rural Broadband Association to Marlene H. Dortch, Secretary, FCC (filed May 27, 2021); Chariton Valley Communications Corporation Comment (filed Jun. 29, 2020); Comments of the Wireless Internet Service Providers Association (WISPA) (filed June 29, 2020). Because the assertions in these filings paralleled those raised by the Coalition, we do not separately address these comments in this Order.

<sup>38</sup> *Id.* at 7-8.

<sup>39</sup> See generally, Midco Supplement; Idea Tek Supplement.

<sup>40</sup> See Midco Supplement at 2-3.

<sup>41</sup> See Midco Supplement at 2; IdeaTek Supplement at 1-2.

### III. DISCUSSION

11. Interested parties may seek relief from Commission obligations by either challenging the adopted rule or by seeking waiver from the adopted rule. A petition for reconsideration allows interested parties the opportunity to request rule changes within 30 days after their finalization<sup>42</sup> based on events that have occurred or circumstances that have changed since the last opportunity to present such matters to the Commission.<sup>43</sup> The Commission may also reconsider a final rulemaking at any time if it determines such reconsideration is necessary to serve the public interest.<sup>44</sup> In comparison, a waiver request presumes the validity and general applicability of the underlying rule and requests relief of narrow applicability.<sup>45</sup> Petitioners seeking waiver must establish “good cause” by demonstrating that special circumstances warrant deviation from the general rule and that such deviation better serves the public interest than strict adherence to the rule.<sup>46</sup> In assessing waiver requests, the Commission considers whether particular facts make strict compliance with the rule inconsistent with the public interest as well as questions of hardship, equity, or more effective implementation of overall policy *on an individual basis*.<sup>47</sup>

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<sup>42</sup> 47 U.S.C. § 405 (limiting the Commission’s power to consider petitions for reconsideration to those filed within 30 days from public notice of the order, decision, report or action complained of); 47 CFR § 1.429(d) (“The petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of such action, as that date is defined in § 1.4(b)"); *id.* § 1.4(b)(1) (“for all documents in notice and comment and non-notice and comment rulemaking proceedings required by the Administrative Procedure Act, 5 U.S.C. 552, 553, to be published in the Federal Register, including summaries thereof, the date of publication in the Federal Register”). Generally, the Commission must deny consideration of late-filed pleadings that raise arguments and facts that could have been presented within the 30-day deadline unless “extraordinary circumstances” warrant extension of this deadline. *See Reuters Limited v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986) (narrowly construing judicially created “extraordinary circumstances” exception to statutory time limit for filing petitions for reconsideration).

<sup>43</sup> *See id.* § 1.429(b)(1). Specifically, petitions for reconsideration that rely on facts or arguments which have not previously been presented to the Commission will be granted only under the following circumstances: (1) the facts or arguments relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission; (2) the facts or arguments relied on were unknown to petitioner until after its last opportunity to present them to the Commission, and it could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity; or (3) the Commission determines that consideration of the facts or arguments relied on is required in the public interest. *Id.*

<sup>44</sup> *See N. Am. Telecomms Ass’n v. FCC*, 772 F.2d 1282, 1286 (7th Cir. 1985) (explaining that section 1.429(b)(3) is a “catch-all provision that allows the Commission to reconsider its decision de novo even if no new material is presented”).

<sup>45</sup> *See id.* at 1158 (“The very essence of waiver is the assumed validity of the general rule, and also the applicant’s violation unless waiver is granted.”); *Reuters Ltd.*, 781 F.2d at 950–51 (This two-part test recognizes “that an agency must adhere to its own rules and regulations,” and “[a]d hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned, for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action.”); *Indus. Broad. Co. v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970) (An “applicant bears a heavy burden to demonstrate that his arguments for waiver are substantially different from those that have been carefully considered in rulemaking proceeding”).

<sup>46</sup> 47 CFR § 1.3 (“Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”). *See WAIT Radio*, 418 F.2d at 1157; *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (holding that a good cause finding requires the FCC to “explain why deviation better serves the public interest, and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.”).

<sup>47</sup> *See WAIT Radio*, 418 F.2d at 1159.

### A. The Coalition Petition Is Procedurally Defective

12. The Coalition Petition, while presented as a request for waiver, is actually a request for reconsideration of the Commission's rules.<sup>48</sup> The Coalition asks that the Commission reconsider the evidentiary burdens of ELAP and adopt, for all Phase II auction support recipients, a general certification requirement at the end of the build-out term.<sup>49</sup> The Coalition also requests that the Commission reevaluate its decision to make per capita support adjustments when a Phase II auction support recipient receives a defined deployment obligation adjustment within 65% of its original obligation as a result of the ELAP process.<sup>50</sup> If the Commission were to grant these requests, it would be retroactively changing the terms and conditions of location adjustments for all Phase II auction support recipients based on policy considerations; it would not be limiting applicability of its rules to a limited subset of recipients based on equity. Therefore, we find that the Coalition is seeking reconsideration of the Commission's rules rather than waiver of these rules.<sup>51</sup>

13. As a petition for reconsideration, this filing is untimely and procedurally defective.<sup>52</sup> The Coalition filed the Petition on June 10, 2020, more than three years after the 30-day deadline for filing a petition for reconsideration of the *Phase II Auction Order*.<sup>53</sup> The Coalition also makes no attempt to demonstrate that its arguments could not have been timely raised. Similar to other parties, the Coalition could have proposed methods to resolve discrepancies between funded and actual locations in a timely-filed petition for reconsideration.<sup>54</sup> Indeed, petitioners seeking reconsideration of the *Phase II Auction Order* made closely analogous arguments seeking to retain support in location adjustment situations, which were specifically rejected by the Commission.<sup>55</sup>

14. We are not persuaded by the Coalition's efforts to analogize the requested relief to certain parts of the Rural Digital Opportunity Fund or its assertion that "harmonizing the standards for both the CAF and [Rural Digital Opportunity Fund] programs will promote consistency."<sup>56</sup> The mere adoption of a different method of resolving location discrepancies between actual and funded locations in different universal service programs with different policy goals is not a new event or new circumstance, even if the Commission ultimately adopts an alternative approach to address well known circumstances, i.e., the concentration of network build out costs in capital outlays.<sup>57</sup> Accordingly, for the reasons stated above,

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<sup>48</sup> Coalition Petition at 5, 7.

<sup>49</sup> *Id.* at 5.

<sup>50</sup> *Id.* at 5, 8-9.

<sup>51</sup> See, e.g., *Association of College and University Telecommunications Administrators, American Council on Education, and National Association of College and University Business Officers*, Memorandum Opinion and Order, 8 FCC Rcd 1781 (1993) (dismissing self-styled petition for clarification as untimely filed petition for reconsideration).

<sup>52</sup> See, e.g., *United Church of Christ v. FCC*, 911 F.2d 803, 808 (D.C. Cir. 1990).

<sup>53</sup> A summary of the *Phase II Auction Order* was published in the Federal Register on April 13, 2018. 83 Fed. Reg. 15982.

<sup>54</sup> *Phase II Auction Reconsideration Order*, 33 FCC Rcd at 1389, para. 22; see Tier Wireless Petition at 4; Broad Valley Petition at 7.

<sup>55</sup> *Phase II Auction Reconsideration Order*, 33 FCC Rcd at 1390-91, 1393, paras. 27, 35 (rejecting arguments that all CAM-identified locations in a census block should count toward satisfaction of the deployment obligation and that support recipients should retain all support awarded even if choosing to take advantage of the end-of-term 5% flexibility).

<sup>56</sup> The *Rural Digital Opportunity Fund Order* summary was published in the Federal Register on March 10, 2020. 85 Fed. Reg. 13773.

<sup>57</sup> The Commission may have been more receptive to treating the Coalition Petition as a timely reconsideration of the *Rural Digital Opportunity Fund Order*, if the Coalition Petition was seeking limited extension of specific and

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we find that the Petition constitutes a late-filed petition for reconsideration that plainly fails to meet the procedural requirements set forth in section 1.429 of the Commission's rules. We thus dismiss this petition as procedurally defective.<sup>58</sup>

**B. The Coalition Petition Fails to Establish a Public Interest Rationale for Reconsideration of the Commission's Rules**

15. As an independent and alternative basis for our decision, we reject the Coalition's arguments for retroactive application of a limited and advantageous subset of Rural Digital Opportunity Fund rules to Phase II auction support recipients. Granting the Coalition's requested relief by abandoning ELAP in favor of its certification-only proposal would remove any evidentiary basis for reducing defined deployment obligations as well as greatly diminish public accountability.<sup>59</sup> Moreover, such an approach would create a perverse incentive for Phase II auction support recipients not to serve locations in the highest cost areas of the state, particularly because the support per qualifying location is based on the average cost of deployment in eligible high-cost areas across the state.<sup>60</sup>

16. The Coalition states that its certification-only proposal would be subject to future validation and produce more accurate and ubiquitous reporting because it would not be a voluntary process.<sup>61</sup> The Commission's ability to conduct rigorous validations of the completeness of these certifications, however, would depend in large part upon support recipients completing and retaining information that ELAP participants are required to submit or, alternatively, retroactively using the qualifying location list.<sup>62</sup> We note, however, that the Coalition specifically states that it would commit to participating in ELAP rather than being subjected to scrutiny under a retroactive application of the qualifying location list.<sup>63</sup> Thus, a certification-only approach would not only subject Phase II auction support recipients to the burdens associated with identifying every actual location within the state at the end of the build-out term but also deprive them of the advantages afforded by the timing of ELAP. For example, under the current process, support recipients are able to strategically plan network outlays during their build-out period based on a revised defined deployment obligation (and associated support

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limited differences between the programs that could not be anticipated, such as the adopting of the 35% threshold of the Rural Digital Opportunity Fund program (as opposed to the entire policy underlying the adopting of this threshold).

<sup>58</sup> 47 CFR § 1.429(l)(9) (petitions for reconsideration that "plainly do not warrant consideration by the Commission," including late-filed petitions or petitions that fail to raise new factual or legal arguments that could have been timely submitted, may be dismissed or denied by the relevant Bureau).

<sup>59</sup> We note that when adopting its adjustment process for Phase II auction support recipients, the Commission expressed concern that funding recipients could attempt to "cherry pick" qualifying locations, failing to identify and serve such location where the costs exceeded the average per location amount of support received, even though such average is derived from the estimated total costs of deployment to all funded locations in the state.

<sup>60</sup> *Phase II Auction Reconsideration Order*, 33 FCC Rcd at 1390, para. 25 ("By requiring applicants to submit geolocation data and demonstrate that there are no additional locations in the relevant areas, providing an opportunity for relevant stakeholders to comment on the findings, and conducting audits, we also intend to prevent any cherry picking that might occur if support recipients only identify the easiest-to-serve locations and ignore harder-to-serve locations."); *Phase II Auction Order*, 31 FCC Rcd at 5971-72, paras. 64-65.

<sup>61</sup> Coalition Petition at 5.

<sup>62</sup> In rejecting this certification-only proposal, the Bureau is in no way agreeing to limit future validations of ELAP information or deployment information based on all available resources, such as the Commission's qualifying location list. For example, the list could be used to create a presumption of existing locations at the end of the build-out period subject to challenge by the Phase II auction support recipient (noting that the location was not qualifying or in existence as of the end of its build-out period).

<sup>63</sup> Coalition Petition at 7-8.

amount) that is not subject to future increase, regardless of conditions on the ground.<sup>64</sup> Moreover, the current process allows support recipients to use data produced during the ELAP process in subsequent deployment reporting.<sup>65</sup> Finally, Phase II auction support recipients risk default if they choose not to participate in ELAP and fail to build out to at least 95% of the requisite number of funded locations, providing sufficient motivation to participate in ELAP and to accurately identify and serve every qualifying actual location in the state as of the end of their build-out period.<sup>66</sup>

17. We similarly are not persuaded to selectively apply to Phase II auction support recipients only those parts of the Rural Digital Opportunity Fund program that could potentially provide a financial benefit without imposing correlated parts of the program that may increase financial costs. For example, the defined deployment obligations of Phase II auction support recipients cannot exceed the original funded location count (or the ELAP adjusted location count), even if there is an increase in the number of actual locations within the state during the build-out period.<sup>67</sup> Conversely, Rural Digital Opportunity Fund support recipients' defined deployment obligations are subject to a potential 35% increase (without an associated increase in support) six years into their eight year build-out period.<sup>68</sup> Further, Rural Digital Opportunity Fund support recipients must serve any new qualifying locations (within reasonable costs parameters) even after the release of the Commission's qualifying location list.

18. Because of this variable obligation, Rural Digital Opportunity Fund support recipients must substantially complete a full network build within the first six years of their build-out period, regardless of the number or situs of qualifying locations in existence at the time of bid placement. In exercising reasonable due diligence when placing bids, these support recipients were expected to estimate costs based on the network build rather than a per-location cost, and indeed, could not accurately estimate per location costs. Accordingly, the Commission adopted its 35% threshold to help ensure that the ultimate consequences of retroactive application of the Commission's qualifying location list did not unfairly disadvantage some Rural Digital Opportunity Fund support recipients over others where the recipients exercised reasonable due diligence at the time of bid placement.<sup>69</sup>

19. Phase II auction support recipients, however, have greater flexibility to plan network deployments. Bidders in this program assumed responsibility for estimating per location costs when placing bids, including any costs associated with the loss of funding due to discrepancies between actual and funded locations.<sup>70</sup> The recovery of Phase II auction support on a per-location basis at the conclusion

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<sup>64</sup> *ELAP Order*, 34 FCC Rcd at 10410, para. 43.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 10412, para. 49 (“If the participant cannot demonstrate compliance with the readjusted defined deployment obligation, the Bureau will find the participant in performance default and subject to the Commission’s default measures.”); see *Phase II Auction Order*, 31 FCC Rcd at 6016-6018, paras. 188-194.

<sup>67</sup> See *Phase II Auction Reconsideration Order*, 33 FCC Rcd at 1390, para. 25 (declining to permit support applicants to identify additional locations to serve above their required state total with an accompanying increase in support).

<sup>68</sup> *Rural Digital Opportunity Fund Order*, 35 FCC Rcd at 710, para. 47 (“By requiring build-out to the entire designated area even in light of the possibility that location numbers could change, we seek to ensure the availability of broadband and voice services to as many rural consumers and small businesses within the Phase I auction areas by the end of the ten-year term as possible.”).

<sup>69</sup> *Id.* at 709-710, para. 46 (agreeing with most commenters that the Commission “should not penalize support recipients when the location data used to establish milestones overstates the number of locations in an area,” and concluding that it would “not reduce support if the Bureau’s updated location counts indicate fewer actual locations in the awarded areas in most circumstances”).

<sup>70</sup> Generally, an overestimation of locations by the CAM in eligible areas would be discoverable through ordinary due diligence measures and should be reflected in bid strategies. See, e.g., *Phase II Auction Reconsideration Order*, 33 FCC Rcd at 1393, para. 35 (explaining that Phase II auction participants would be hard pressed to demonstrate

(continued....)

of the ELAP does not unfairly disadvantage some Phase II auction support recipients in comparison to others when both recipients conducted similar levels of due diligence prior to bid placement but places all Phase II auction support recipients on an equal playing field. Indeed, the Commission specifically stated in the *Phase II Auction Reconsideration Order* that its ELAP would ensure that Phase II auction support recipients were *not penalized* for location discrepancies resulting from inaccurate CAM estimates.<sup>71</sup>

20. Accordingly, we find that modifying the *Phase II Reconsideration Order* based on the policy arguments raised in the Coalition's waiver request would not serve the public interest. Indeed, granting the Coalition's request would in fact retroactively disadvantage bidders in the Phase II process by altering commitments made and risks assumed without a corresponding benefit to the public.

### C. The Coalition Petition Fails to Demonstrate Good Cause for Waiver

21. We also find that Coalition members have failed to demonstrate good cause for waiver. The Coalition has not shown the kind of special and unique circumstances that would make strict enforcement of the rules inequitable when applied to Coalition members, nor have they shown that granting their waiver requests, on an individualized basis, would serve the public interest by fulfilling the Commission's policy objectives.

22. In its petition, the Coalition provides limited information about certain discrepancies in the number of qualifying locations and the number of funded locations. Specifically, the Coalition mentions that three of its members (which are unidentified) have location discrepancies of 13%, 22%, and 30%.<sup>72</sup> However, the Coalition fails to allege, let alone prove, that these discrepancies could not be identified or anticipated in advance of bid placement in the course of standard due diligence. Further, the Coalition argues that the costs and operation of networks are primarily tied to topology and demographics but offers no specific evidence that a per capita support reduction for any of its members would significantly and disproportionately effect the ratio of funding and costs in ways that could not have reasonably been anticipated.<sup>73</sup>

23. Although two members of the Coalition, Midco and IdeaTek, provided more detailed information about their due diligence and the impact of ELAP per location adjustments of support in supplemental filings, these supplements also fall short of demonstrating special circumstances justifying a waiver of ELAP support adjustment rules. Midco indicates that before bid placement, it focused its review of circumstances on the ground to network build costs.<sup>74</sup> Neither Midco nor IdeaTek indicate, however, that they conducted any kind of location study (or purchased location information) until after

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good cause for waiver if they did not plan on serving 100% of their locations at the start of the program (as adjusted, as warranted, through the Commission's adjustment process); *see Phase II Auction Order*, 31 FCC Rcd at 5966, para. 47 (acknowledging that the risk of noncompliance is a factor in the bidding process but emphasizing that recipients of support awarded through a competitive bidding process generally have control over project areas and size and bid amounts). The Coalition also states that the losses associated with Phase II auction support reductions are compounded by the loss in potential revenue associated with fewer potential subscribers. Coalition Petition at 9. This consideration, however, is a natural extension of bidders' due diligence obligations when estimating build-out costs on a per location basis when placing bids.

<sup>71</sup> *Phase II Auction Reconsideration Order*, 35 FCC Rcd at 1390, para. 25; *Phase II Auction Order*, 31 FCC Rcd at 5965-66, paras. 44-45; *Phase II Auction Comment Public Notice*, 32 FCC Rcd at 6258-59, paras. 65-70.

<sup>72</sup> Coalition Petition at 3.

<sup>73</sup> *Phase II Auction Reconsideration Order*, 33 FCC Rcd at 1393, para. 33 (acknowledging that in addition to utilizing the 5% flexibility, a funding recipient could seek additional waiver relief in circumstances of unforeseeable network costs or obstacles to deployment) (citing *December 2014 Connect America Order*, 29 FCC Rcd at 15660, 15700, paras. 40 n.93, 154).

<sup>74</sup> *See id.* at 1393, para. 35.

the Commission authorized them to receive support.<sup>75</sup> Indeed, underscoring Midco's access to at least some general information about rural areas in advance of bid placement, Midco links its identification of location discrepancies after its support authorization to a 2017 United States Department of Agriculture (USDA) study documenting "rural flight."<sup>76</sup> Without a more fulsome demonstration that their alleged location shortages were the result of unforeseeable circumstances and could not reasonably be anticipated at the time of bid placement, we are not persuaded that these Coalition members could not have factored at least some of the location discrepancy (and the associated support adjustment) into their bids.

24. Absent special circumstances, individual hardships in meeting obligations cannot outweigh the compromising effects that selective application of the ELAP support adjustments would have on the integrity, efficiency, and fairness of the program.<sup>77</sup> Granting relief in the absence of special circumstances greatly increases the risk of disparate treatment and diverts limited funds and resources away from future processes intended to ensure unserved and underserved areas become served.<sup>78</sup> Indeed, grant of the Coalition's waiver would undermine the purposes and objectives of the Phase II auction: the service of a specific number of funded locations.<sup>79</sup> For these reasons, we are not persuaded that the Coalition has established good cause to grant its waiver request and accordingly, deny this request.

#### IV. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED, pursuant to the authority contained in section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and sections 0.91, 0.291, and 1.429 of the Commission's rules, 47 CFR §§ 0.91, 0.219, 1.429, that the Connect America Fund Phase II Auction Coalition Petition is DISMISSED, and as an independent and alternative basis for the decision, IS DENIED.

26. IT IS FURTHER ORDERED, as an independent and alternative basis for the decision, pursuant to section 1.3 of the Commission's rules, 47 CFR § 1.3, that the Connect American Fund Phase II Auction Coalition Petition is DENIED.

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<sup>75</sup> Midco Supplement at 2-3.

<sup>76</sup> *Id.* at 3 (citing USDA, Rural Areas Show Overall Population Decline and Shifting Regional Patterns of Population Change, Sept. 5, 2017, <https://www.ers.usda.gov/amber-waves/2017/september/rural-areasshow-overall-population-decline-and-shifting-regional-patterns-of-population-change/> (discussing rural flight and shifting rural populations). We also note that in 2018, before the bidding deadline, Minnesota published summary census data from 2017 about population changes since 2010, noting a trending slight population declines in northeast Minnesota despite an overall population increase in the state. *See* Population Changes in Northeast Minnesota July 2018, <https://mn.gov/deed/newscenter/publications/review/july-2018/regional-spotlight.jsp> (evaluation of 2017 census data).

<sup>77</sup> *Windstar Broadcasting Corporation*, Order on Reconsideration, 20 FCC Rcd 2043, 2053-54, para. 20 (2005) ("Consistent application of the auction rules to all bidders is essential to a fair and efficient licensing process, and is fair to all auction participants, including those who won licenses in the auctions and those who did not.").

<sup>78</sup> *See id.*

<sup>79</sup> *See Barry P. Lunderville, College Creek Broadband, Inc., & Cumulus Licensing LLC*, Memorandum Opinion and Order, 28 FCC Rcd 665, 671 (2013) ("Because the essential premise of a waiver is 'the assumed validity of the general rule,'" grant of a waiver must "not undermine the policy served by the rule.") (citations omitted).

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

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith  
Chief  
Wireline Competition Bureau