

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

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

Adopted: December 17, 2021

Released: December 17, 2021

By the Chief, Wireline Competition Bureau:

1. In this Order, the Bureau denies a Petition filed by Sully Telephone Association (Sully) requesting waiver of the Commission’s broadband network performance pre-testing and testing requirements through December 31, 2024.¹ Sully argues that “testing options that are compatible with [its] current customer premises equipment (CPE) and that comply with the required methodologies are not currently available on a cost-effective basis” and that waiving the Commission’s rules would permit Sully to instead commit additional investment to the deployment of broadband-capable networks in high-cost areas.² For the reasons described below, the Bureau finds that granting Sully’s waiver request is not in the public interest.

I. BACKGROUND

2. In the *CAF/ICC Transformation Order*, the Commission concluded that recipients of high-cost support should be required to test their broadband networks for compliance with speed and latency metrics, and to certify and report those results to the Universal Service Administrative Company (USAC), with those results subject to audit.³ 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.⁴ Testing must be conducted with a random sample of subscribers generated through USAC’s randomization tool.⁵ The testing is necessary to protect the investment of universal service support and ensure that carriers receiving this support deploy networks that meet the performance standards they promised to deliver to

¹ Sully Telephone Association Petition for Waiver of Broadband Performance Testing Requirements under § 54.313(a)(6) of the Commission’s Rules, WC Docket No. 10-90 (filed July 6, 2021) (Sully Petition).

² *Id.* at 1.

³ *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17705-06, para. 109 (2011).

⁴ The Commission adopted an order setting forth detailed performance measures requirements in 2018 and an expanded those requirements in 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*); *Connect America Fund*, Order on Reconsideration, WC Docket No. 10-90, 34 FCC Rcd 10109 (2019) (*Performance Measures Reconsideration Order*).

⁵ See *Performance Measures Reconsideration Order*, 34 FCC Rcd at 10140, paras. 81-82.

rural consumers.⁶ Carriers failing to meet the required standards will be subject to withholding of support, based on their level of non-compliance.⁷ When a non-compliant carrier brings its performance testing into compliance, any support that had been withheld will be restored.⁸

3. To ensure that carriers receiving Alternative Connect America Cost Model (A-CAM), Rural Broadband Experiments (RBE), or Alaska Plan support are familiar with the required testing and how to properly measure the speed and latency of their networks in accordance with Commission rules, the Commission adopted pre-testing periods in which no support reductions will occur for failing to meet the required standards, “as long as carriers actually undertake the pre-testing and report their results.”⁹ For pre-testing, the carriers are required to submit the same speed and latency test results as for the regular testing, as well as an annual certification.¹⁰ Carriers that fail to conduct pre-testing and submit results in a timely fashion will be considered at Level 1 non-compliance.¹¹ While at Level 1 non-compliance, USAC will withhold 5% of a carrier’s monthly support payments.¹² As with the testing requirements, USAC will restore withheld support once the non-compliant carrier becomes compliant by making the required filing.¹³ A-CAM II carriers, such as Sully, will be required to begin pre-testing in the first quarter 2022, with the first results due one week after the end of the quarter, while regular testing begins January 1, 2023.¹⁴

4. Sully is a small rate-of-return local exchange carrier serving approximately 640 access lines, including approximately 480 broadband lines.¹⁵ Sully began deploying a fiber-to-the-premises (FTTP) network beginning in 2015 and completed its network buildout in 2020.¹⁶ Under A-CAM II, it receives \$361,942 per year over a ten-year term ending December 31, 2028.¹⁷ Sully has 226 eligible locations under A-CAM II, to which it is obligated to deploy at least 25/3 Mbps service to at least 178 locations, and at least 4/1 Mbps service to at least an additional 12 locations.¹⁸ Pursuant to the performance testing requirements, Sully expects to conduct tests for fewer than 20 subscribers each year.¹⁹ Because its current CPE is not compatible with the testing requirements, in order to conduct performance tests, Sully would be required to replace CPE at tested locations prior to the end of its current CPE’s expected life.²⁰ Based on the best vendor proposal for outsourced performance testing,

⁶ *Performance Measures Reconsideration Order*, 34 FCC Rcd at 10110, para. 2.

⁷ *Id.* at 10133-38, paras. 65-75; *First Performance Measures Order*, 33 FCC Rcd at 6530-33, paras. 56-67.

⁸ *First Performance Measures Order*, 33 FCC Rcd at 6532, para. 64.

⁹ *Performance Measures Reconsideration Order*, 34 FCC Rcd at 10139, paras. 78-79.

¹⁰ *First Performance Measures Order*, 33 FCC Rcd at 6533, para. 67.

¹¹ *Id.*

¹² *Id.* at 6532, para. 64.

¹³ *Id.* at 6532, para. 63.

¹⁴ *See Performance Measures Reconsideration Order*, 34 FCC Rcd at 10140, para. 81.

¹⁵ Sully Petition at 2.

¹⁶ *Id.*

¹⁷ *See Wireline Competition Bureau Authorizes 171 Rate-of-Return Companies to Receive \$491 Million Annually in Alternative Connect America Cost Model II Support to Expand Rural Broadband*, WC Docket No. 10-90, Public Notice, 34 FCC Rcd 7271 (2019) (linking to Authorization Report 6.0 (*available at <https://docs.fcc.gov/public/attachments/DOC-359222A1.xlsx>*) (Authorization Report 6.0).

¹⁸ *See* Authorization Report 6.0.

¹⁹ Sully Petition at 3.

²⁰ *Id.* at 3.

Sully expects to pay \$10,600 per year for a cloud application and \$165 per router to upgrade CPE at tested locations.²¹

II. DISCUSSION

5. The Bureau may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.²² In addition, the Bureau may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²³ Waiver of the Commission's rules is appropriate when (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.²⁴ We find that the circumstances described by Sully do not meet this standard and, accordingly, deny Sully's petition for waiver.

6. Sully essentially argues the public interest would be served by waiver because the benefit of performance pre-testing and testing is small compared to the cost Sully would incur to comply.²⁵ Sully claims that avoiding replacement of existing CPE would permit it to commit additional investment to the deployment of broadband-capable networks in the company's high-cost areas.²⁶ Sully asserts that the pre-testing and testing requirements are not necessary in its case because it "has a proven track record that demonstrates its ability and commitment to successfully meet its deployment obligations," and has already deployed gigabit-capable FTTP service throughout its service area.²⁷ It argues that pre-testing and testing is unnecessary in its case because it plans to meet its deployment obligations and to eventually comply with the Commission's testing requirements.²⁸

7. The Commission adopted the performance testing requirements in order to protect taxpayers' investment and ensure that carriers receiving high-cost support deploy networks that meet the performance standards promised to rural customers.²⁹ In adopting the pre-testing requirement, the Commission expressed that the pre-testing would "ensure that carriers are familiar with the required testing and how to properly measure the speed and latency of their networks," and allow carriers to adjust to the new testing regime.³⁰ The pre-testing and testing promotes accountability and reduces the risks of waste, fraud, and abuse in the Commission's high-cost universal service programs. As such, we consider that the public interest in performance pre-testing and testing is significant, and that there is a high bar for waiver of those requirements.

8. We find that Sully has not met this high bar in its petition. We have no doubt that Sully intends to meet its broadband deployment obligations. Consistent with the statements made in its waiver request, Sully has reported deployment of 1 Gbps/500 Mbps service to 190 eligible locations by the end of 2020, which would precisely meet its A-CAM II deployment obligations (aside from its reasonable

²¹ *Id.*

²² *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

²³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

²⁴ *Northeast Cellular*, 897 F.2d at 1166.

²⁵ *Sully Petition*.

²⁶ *Id.* at 1.

²⁷ *Id.* at 5.

²⁸ *Id.* at 5-6.

²⁹ *Performance Measures Reconsideration Order*, 34 FCC Rcd at 10110, para. 2.

³⁰ *Id.* at 10135, para. 68.

request locations).³¹ Accepting Sully's argument that the Commission should rely on Sully's self-certification of the accuracy of its reporting, however, ignores a fundamental objective of the Commission's performance testing rules: the need to verify the reported deployment made by all carriers. Accepting Sully's self-certification also would invite other carriers to make the same request, without any reason to believe that its self-certifications are inherently more reliable than those of any other carriers. Indeed, without a rigorous testing requirement, self-certifications may be subject to good faith errors, in which a carrier believes it has made the required deployment but has not in fact.

9. Moreover, we do not accept Sully's suggestion that the testing requirements create an undue expense that prevents additional investment. Although Sully cites the replacement of existing CPE as a significant cost driver, it estimates that the CPE change out would cost \$165 per router. For fewer than 20 subscriber locations that must be tested, this represents a one-time expense of \$3,165 at most, or less than 1% of its annual A-CAM II support. Sully also notes a \$10,600 annual cost of testing associated with a "cloud application," but that does not appear to be associated with the replacement of CPE. Notwithstanding this contention, we note that the vast majority of A-CAM I carriers, who were required to begin pre-testing in 2021, were able to find cost-effective solutions. We further note that the Commission first indicated in 2011 that performance measures testing would be required, and substantially established the framework for performance testing in 2018, before Sully accepted A-CAM II support. Sully has had significant time to prepare for performance testing. In conclusion, we do not find that Sully has demonstrated that the pre-testing and testing requirements create an undue expense.

10. We also note that Sully provided no details with regard to the "additional investment to deployment of broadband-capable networks" that granting a waiver would purportedly allow. Given Sully's statement that it has deployed gigabit-capable service throughout its service territory, and that it has reported at least 1 Gbps/500 Mbps to the number of eligible locations that it is required to serve under A-CAM, it is not clear what additional deployment could be reasonably promised.³² Elsewhere in its petition, Sully indicates that, absent a waiver, the costs of pre-testing and testing would need to be "absorbed," which implies a reduction of returns rather than a reduction of investment or service.³³

III. ORDERING CLAUSES

11. 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 Petition for Waiver of the Commission's performance testing and pre-testing requirements filed by Sully Telephone Association IS DENIED.

12. 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

³¹ See USAC, Connect America Fund Broadband Map, available at <https://data.usac.org/publicreports/caf-map/> (Connect America Broadband Map).

³² Sully Petition at 5; Connect America Broadband Map.

³³ Sully Petition at 6.