

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

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

PROTECTIVE ORDER

Adopted: March 16, 2021

Released: March 16, 2021

By the Chief, Wireline Competition Bureau:

1. In connection with the Commission’s process to adjust the defined deployment obligations of CAF Phase II auction support recipients, with associated support reductions, i.e., the Eligible Locations Adjustment Process (ELAP),¹ the Wireline Competition Bureau (Bureau) adopts this ELAP Protective Order. The ELAP Protective Order applies to the review and use of confidential information submitted through the ELAP module of the Universal Service Administrative Company (USAC) High Cost Broadband Portal (HCBP) as described in the *ELAP Order*.

2. CAF Phase II auction support recipients may seek to reduce their defined deployment obligations by demonstrating that the number of actual eligible locations is less than the number of originally funded obligations in their Winning Bid Areas.² To obtain a reduction, the Commission requires those recipients (Participants) to submit location information (including address and geocoordinates) for every location within the areas they won in each state and to provide additional evidence demonstrating that no further locations could be found.³ In the *ELAP Order*, the Bureau recognized that much of this evidence could reveal competitively sensitive information regarding the Participants’ future deployment plans.⁴ The Bureau also recognized that information filed by individuals or entities challenging the completeness and accuracy of Participant information (Stakeholders) could contain competitively sensitive, proprietary, or PII.⁵ Accordingly, the Bureau indicated that it would treat portions of ELAP submissions as presumptively confidential, except for information that is generally publicly available and for the following information that USAC will publish on a publicly-available map:⁶

¹ See *Connect America Fund*, WC Docket No. 14-259, Order on Reconsideration, 33 FCC Rcd 1380, 1390-92, paras. 23-28 (2018) (*Phase II Auction Reconsideration Order*); *Connect America Fund*, WC Docket No. 10-90, Order, 34 FCC Rcd 10395 (WCB 2019) (*ELAP Order*).

² *ELAP Order*, 34 FCC Rcd at 10396, para. 3.

³ *Id.*, citing *Phase II Auction Reconsideration Order*, 33 FCC Rcd at 1389-90, paras. 23, 25-26.

⁴ *Id.* at 10412-13, para. 50. Participants must not submit information about third parties that contains Personally Identifiable Information (PII), whether obtained from subscribers or other sources (including public records), or that is otherwise treated as private or confidential under federal and state laws. Such information is not essential to the process. Moreover, if Participants discover that such third-party information has been inadvertently submitted into the ELAP module, they must immediately take corrective action. PII is defined as information that can be used to distinguish or trace an individual’s identity, either alone or when combined with other personal or identifying information that is linked or linkable to a specific individual. Managing Information as a Strategic Resource, OMB Circular A-130, at 3, para. 33 (2016), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A130/a130revised.pdf>.

⁵ *ELAP Order*, 34 FCC Rcd at 10413, para. 53.

⁶ *Id.* at 10412, 10413, paras. 10, 50, 53.

the Participant's name, the study area code where the location sits, the reported type of location (qualifying, nonqualifying, prospective), the geocoordinates of the location, the postal address (or other physical identification of location if postal address is unavailable), and the number of relevant units. This information may also be published as part of the Bureau's order identifying participants that have met their prima facie evidentiary standard to continue with the ELAP (Prima Facie Order). Only information as submitted and certified by the Participants deemed by the Bureau to have met their prima facie requirements in the Prima Facie Order will be published. All other information submitted by Participants will be treated as presumptively confidential.

3. The Bureau also indicated that it would afford Stakeholders access to confidential information subject to specific limitations in order to protect from misuse any competitively sensitive, proprietary information, or PII that might be submitted.⁷ The Bureau prohibited individuals or entities with a controlling interest in a competitor of the Participant from participating in the ELAP.⁸ The Bureau also determined that Stakeholders would be permitted to access confidential Participant location information only for the census blocks in which the Stakeholder has demonstrated a verifiable interest in ensuring service and for the bordering census blocks.⁹ As indicated in the Bureau's *ELAP Order*, Stakeholders may access all confidential information submitted by a Participant, subject to the terms of this ELAP Protective Order, unless the information clearly and exclusively relates to locations and areas outside of these relevant census blocks.¹⁰

4. The information submitted by parties in the ELAP and other information the Bureau may request is relevant and material to the issues raised and constitute the record on which the Commission will evaluate Participants' requests for modification of their defined deployment obligations (and associated support).¹¹ While we are mindful of the sensitive nature of some of the information involved, we are also mindful of the general right of affected members of the public, and of our desire for such parties, to meaningfully participate in this proceeding. We find that allowing limited access to sensitive materials pursuant to the procedures set forth in this ELAP Protective Order allows parties to do so while also protecting such information from improper disclosure and use. Accordingly, sensibly balancing the public and private interests involved, we conclude that these procedures set forth in the ELAP Protective Order serve the public interest and adopting them "best conduce[s] to the proper dispatch of the Commission's business and to the ends of justice."¹²

5. *Definitions.* As used herein, capitalized terms not otherwise defined in this ELAP Protective Order shall have the following meanings:

"Acknowledgment" means the Acknowledgment of Confidentiality attached as Appendix A hereto.

"Competitive Decision-Making" means a person's activities, association, or relationship with any of his or her employers or clients involving advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of the employer or client in competition with or in a business relationship with the Submitting Participant. For purposes of this definition, a person may be his or her own employer.

⁷ *Id.* See, e.g., 47 U.S.C. § 222; 47 U.S.C. § 552(b)(6) (protecting information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy"); *Id.* § 552(b)(4) (protecting "trade secrets and commercial or financial information obtained from a person and privileged or confidential").

⁸ *ELAP Order*, 34 FCC Rcd at 10407-408, para. 34.

⁹ *Id.* at 10413, para. 52.

¹⁰ *Id.*

¹¹ *Id.* at 10417, para. 3.

¹² 47 U.S.C. § 154(j).

“Counsel” means an attorney employed by a Party in this proceeding or employed by an affiliated entity and who is actively engaged in the conduct of this proceeding.

“Document” means any written, recorded, electronically stored, or graphic material, whether produced or created by the Participant or another person.

“ELAP Confidential Information” means information that is submitted through the USAC HCBP that either a) is not otherwise available from publicly available sources and subject to protection under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Commission’s implementing rules, or b) constitutes Personally Identifiable Information (PII)— information that can be used to distinguish or trace an individual’s identity, either alone or when combined with other information that is linked or linkable to a specific individual and that is protected under the Privacy Act of 1974, 5 U.S.C. 552a, *except that* ELAP Confidential Information does not include information that the Bureau has directed USAC to publish on a publicly-available map, i.e., the Participant’s name, the study area code where the location sits, the reported type of location (qualifying, nonqualifying, prospective), the geocoordinates of the location, the postal address (or other physical identification of location if postal address is unavailable), and the number of relevant units. ELAP Confidential Information also includes any information derived from ELAP Confidential Information that could reveal ELAP Confidential Information.

“Geographically Limited Information” means ELAP Confidential Information that clearly and exclusively relates to locations and areas outside of: a) the relevant census blocks where the Stakeholder has demonstrated a verifiable interest in ensuring service and b) those census blocks bordering the relevant census blocks.

“Reviewing Party” means a person who has obtained access to ELAP Confidential Information pursuant to paragraphs 7 or 10 of this ELAP Protective Order.

“Support Personnel” means employees of a Reviewing Party or its Counsel, third-party contractors, and employees of third-party contractors who are assisting the Reviewing Party in this proceeding, provided such persons are involved solely in performing clerical or ministerial functions with regard to documents and information connected with this proceeding, including performing one or more aspects of organizing, filing, coding, converting, storing, or retrieving documents or data or designing programs for handling data connected with this proceeding.

“USAC” means the Universal Service Administrative Company.

6. *Designation of Information as Geographically Limited Information.* A Participant may designate ELAP Confidential Information as Geographically Limited Information with respect to any specific qualifying Stakeholder. The Participant must make such a designation and submit a new version of any of the files it is required to submit (i.e., a locations data file, a methodology file, and a supporting evidence file) with the Geographically Limited Information removed within three days of receiving information from USAC where the Stakeholder has established its geographic area of interest.¹³ The Bureau will determine whether the designated Geographically Limited Information pertains exclusively to geographic areas outside a Stakeholder’s area of interest within five business days of the Participant’s designation. If an objection is filed to this determination within three business days, only the designated Geographically Limited Information will be disclosed to the relevant Stakeholder pending resolution of the objection.

7. *Procedure for Obtaining Access to ELAP Confidential Information.* Any person other than Support Personnel seeking access to ELAP Confidential Information shall sign and date the Acknowledgment agreeing to be bound by the terms and conditions of this ELAP Protective Order, and file the Acknowledgment in the USAC HCBP, so that it is received at least five business days prior to

¹³ The Participant should take this opportunity review all files to ensure that there is no third-party PII or other private or confidential information contained therein and to redact such information before disclosure to requesting parties. *See supra* note 4. To receive the information about a stakeholder’s geographic area of interest, the Participant must first complete this protective order process.

such person's reviewing or having access to the ELAP Confidential Information. Each Participant shall have an opportunity to object to the disclosure of its ELAP Confidential Information to any such person. A Participant must file any such objection within the USAC HCBP and serve it on Counsel representing, retaining or employing such person, or serve it directly on such person if he or she does not have counsel, within three business days after that person's Acknowledgment has been filed with the Commission. Until any timely objection is resolved by the Commission in favor of the person seeking access and, if a motion for a judicial stay is timely filed, until such a motion is acted upon, a person subject to an objection from a Participant shall not have access to that Participant's ELAP Confidential Information. If an objection is untimely filed with the Commission, the Commission will nonetheless consider the objection and retains its discretion to prohibit further access to ELAP Confidential Information by the Reviewing Party until the objection is resolved.

8. *Review of ELAP Confidential Information.* USAC shall make available for review, through the USAC HCBP, ELAP Confidential Information to parties who have signed the Acknowledgment, subject to the provisions of paragraph 7. Access to the information will be available to users and agents designated in USAC E-file system.

9. *Use of ELAP Confidential Information.* Persons obtaining access to ELAP Confidential Information under this ELAP Protective Order shall use the information solely for the preparation and conduct of this proceeding before the Commission and any subsequent judicial proceeding arising directly from this proceeding and, except as provided herein, shall not use such documents or information for any other purpose, including without limitation business, governmental, or commercial purposes, or in any other administrative, regulatory, or judicial proceedings. Should the Commission reveal any ELAP Confidential Information in its orders in this proceeding, it will do so either by redacting such ELAP Confidential Information from the public version of the order and by making the unredacted version of the order available only to a court and to those persons entitled to access to ELAP Confidential Information under this Protective Order, as appropriate, or as otherwise permitted by law.

10. *Permissible Disclosure.* A Reviewing Party may discuss and share the contents of ELAP Confidential Information with another Reviewing Party who has obtained access to that ELAP Confidential Information pursuant to this ELAP Protective Order, with Support Personnel, as appropriate, and with the Commission and its staff. A Participant's ELAP Confidential Information may be disclosed to employees and Counsel of the Participant, and a Third-Party Interest Holder's Confidential Information may be disclosed to employees and Counsel of the Third-Party Interest Holder.

11. *Filings with the Commission.* A party making a filing in this proceeding that contains ELAP Confidential Information that is not submitted through the USAC HCBP shall do so by submitting to the Secretary's Office two copies of the filing containing ELAP Confidential Information (the "Confidential Filing") and an accompanying cover letter. The cover or first page of the Confidential Filing and each page of the Confidential Filing that contains or discloses ELAP Confidential Information shall be clearly marked "ELAP CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN WC DOCKET NO. 10-90 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION." The accompanying cover letter shall also contain the appropriate legend. The party shall submit a copy of the filing in redacted form, i.e., containing no ELAP Confidential Information. The Redacted Confidential Filing and the accompanying cover letter shall be stamped "REDACTED – FOR PUBLIC INSPECTION." The cover letter accompanying the Redacted Confidential Filing shall state that the party is filing a redacted version of the filing. Each Redacted Confidential Filing shall have the same pagination as the Confidential Filing from which it is derived. To the extent that any page of the ELAP Confidential Filing contains ELAP Confidential Information, only the ELAP Confidential Information may be redacted and the page of the unredacted ELAP Confidential Filing shall clearly distinguish among the ELAP Confidential Information and the non-confidential information. Parties should not provide courtesy copies of pleadings containing ELAP Confidential Information to Commission staff unless the staff so requests, and any such courtesy copies shall be submitted under seal.

12. *Non-Disclosure of ELAP Confidential Information.* Except with the prior written consent of the Participant or as provided under this Protective Order, ELAP Confidential Information shall not be disclosed further.

13. *Protection of ELAP Confidential Information.* A Reviewing Party shall have the obligation to ensure that access to ELAP Confidential Information is strictly limited as prescribed in this ELAP Protective Order. A Reviewing Party shall have the further obligation to ensure that ELAP Confidential Information is used only as provided in this ELAP Protective Order.

14. *Requests for Additional Disclosure.* If any person requests disclosure of ELAP Confidential Information outside the terms of this ELAP Protective Order, such a request will be treated in accordance with sections 0.442 and 0.461 of the Commission's rules.¹⁴

15. *Client Consultation.* Nothing in this ELAP Protective Order shall prevent or otherwise restrict Counsel from rendering advice to their clients relating to the conduct of this proceeding and any subsequent judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of ELAP Confidential Information to which they have access under this ELAP Protective Order; *provided, however*, that in rendering such advice and otherwise communicating with such clients, Counsel shall not disclose ELAP Confidential Information .

16. *No Waiver of Confidentiality.* Disclosure of ELAP Confidential Information as provided herein by any person shall not be deemed a waiver by any Participant of any privilege or entitlement to confidential treatment of such ELAP Confidential Information. Reviewing Parties, by viewing this material, agree: (1) not to assert any such waiver; (2) not to use ELAP Confidential Information to seek disclosure in any other proceeding; and (3) that accidental disclosure of ELAP Confidential Information by a Participant to a Reviewing Party shall not be deemed a waiver of any privilege or entitlement provided that the Participant takes prompt remedial action.

17. *Subpoena by Courts, Departments, or Agencies.* If a court or a federal or state department or agency issues a subpoena for or orders the production of ELAP Confidential Information that a party has obtained under the terms of this ELAP Protective Order, such party shall promptly notify each relevant Participant and each known Third-Party Interest Holder of the pendency of such subpoena or order. Consistent with the independent authority of any court, department, or agency, such notification must be accomplished such that each Participant and Third-Party Interest Holder has sufficient opportunity to oppose such production prior to the production or disclosure of any ELAP Confidential Information.

18. *Violations of the ELAP Protective Order.* Should a Reviewing Party violate any of the terms of this ELAP Protective Order, such Reviewing Party shall immediately convey that fact to the Commission and to the relevant Submitting Parties. Further, should such violation consist of improper disclosure of ELAP Confidential Information, the violating person shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this ELAP Protective Order, including but not limited to suspension or disbarment of Counsel or Consultants from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to ELAP Confidential Information in this or any other Commission proceeding. Nothing in this ELAP Protective Order shall limit any other rights and remedies available to the Participant or any Third-Party Interest Holder at law or in equity against any person using ELAP Confidential Information in a manner not authorized by this ELAP Protective Order.

19. *Termination of Proceeding.* The provisions of this ELAP Protective Order shall not terminate at the conclusion of this proceeding. Within two weeks after conclusion of this proceeding and any administrative or judicial review, Reviewing Parties shall destroy all copies of documents containing ELAP Confidential Information. No material whatsoever containing or derived from ELAP Confidential Information may be retained by any person having access thereto, except Outside Counsel and Outside

¹⁴ 47 CFR §§ 0.442, 0.461.

Consultants may retain, under the continuing strictures of this ELAP Protective Order, two copies of pleadings (one of which may be in electronic format) prepared in whole or in part by that party that contain ELAP Confidential Information and one copy of any FCC order containing ELAP Confidential Information. All Reviewing Parties shall certify compliance with these terms and shall deliver such certification to Counsel for the Participant and file such certification with the Commission not more than three weeks after conclusion of this proceeding. Such certification shall be made pursuant to 28 U.S.C. § 1746 and is subject to 18 U.S.C. § 1001. The provisions of this paragraph regarding retention of ELAP Confidential Information shall not be construed to apply to the Commission or its staff.

20. *Questions.* Questions concerning this ELAP Protective Order should be addressed to Nissa.Laughner@fcc.gov, (202) 418-1358, Wireline Competition Bureau, Federal Communications Commission, or to Joel Rabinovitz, Joel.Rabinovitz@fcc.gov, (202) 418-0689, Transaction Team, Office of General Counsel, Federal Communications Commission.

21. *Authority.* This Order is issued pursuant to section 254 of the Communications Act of 1934, as amended, 47 U.S.C. § 254, section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and authority delegated under sections 0.91 and 0.291 of the Commission's rules, 47 CFR §§ 0.91 and 0.291, and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Kris A. Monteith
Chief
Wireline Competition Bureau

APPENDIX A

Acknowledgment of Confidentiality

WC Docket No. 10-90

I am seeking access to ELAP Confidential Information.

I hereby acknowledge that I have received and read a copy of the foregoing ELAP Protective Order in the above-captioned proceeding, and I understand it.

I agree that I am bound by the ELAP Protective Order and that I shall not disclose or use ELAP Confidential Information except as allowed by the ELAP Protective Order.

I acknowledge that a violation of the ELAP Protective Order is a violation of an order of the Federal Communications Commission (Commission). I further acknowledge that the Commission retains its full authority to fashion appropriate sanctions for violations of this ELAP Protective Order, including but not limited to suspension or disbarment of Counsel or Consultants from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to ELAP Confidential Information in this or any other Commission proceeding.

I acknowledge that nothing in the ELAP Protective Order limits any other rights and remedies available to a Participant at law or in equity against me if I use ELAP Confidential Information in a manner not authorized by this ELAP Protective Order.

I certify that I am not involved in Competitive Decision-Making.

I acknowledge that it is my obligation to ensure that ELAP Confidential Information is not duplicated except as specifically permitted by the terms of the Protective Order and to ensure that there is no disclosure of ELAP Confidential Information in my possession, in the possession of those who work for me or in the possession of other Support Personnel, except as provided in the ELAP Protective Order.

I certify that I have verified that there are in place procedures to prevent unauthorized disclosure of ELAP Confidential Information.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the ELAP Protective Order.

Executed this ___ day of _____, 20__.

[Name]
[Position]
[Contact Information]