

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

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

ORDER

Adopted: October 20, 2022

Released: October 20, 2022

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau (Bureau) grants a petition filed by Lumen Technologies, Inc. (Lumen) requesting that the Bureau waive limited aspects of the Commission’s Connect America Fund (CAF) Phase II Model (CAF II Model) performance testing rules.<sup>1</sup> Specifically, we find special circumstances exist to waive the testing sample size requirement in the states where some of the CAF II Model subscriber locations in Lumen’s samples were found not to be in Lumen’s eligible support area.<sup>2</sup> Because Lumen was one of the first carriers to be required to do geocoding and its testing results both with and without these locations meet our speed and latency standards, we find that waiving the sample size requirement is in the public interest.

II. BACKGROUND

2. In the *USF/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 certify and report those results to the Universal Service Administrative Company (USAC), with those results subject to audit.<sup>3</sup> In the *Performance Measures* orders, the Commission adopted standards and a specific methodology for testing broadband networks.<sup>4</sup> This 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 rural consumers.<sup>5</sup> Carriers that fail to meet the required performance standards will have universal service support withheld or recovered based on the level of non-compliance.<sup>6</sup> Carriers must test an adequate number of subscriber locations to provide a clear picture of the carrier’s performance and its customers’ broadband experience

<sup>1</sup> Lumen Technologies, Inc. Petition for Waiver, WC Docket 10-90, (filed Sept. 22, 2022) (Lumen Petition).

<sup>2</sup> *Id.* at 2-3.

<sup>3</sup> *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).

<sup>4</sup> The Commission adopted an Order setting forth detailed performance measures requirements in 2018 and 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*).

<sup>5</sup> *Performance Measures Reconsideration Order*, 34 FCC Rcd at 10110, para. 2.

<sup>6</sup> *Id.* at 10133-38, paras. 65-75; *First Performance Measures Order*, 33 FCC Rcd at 6530-33, paras. 56-67.

across a state.<sup>7</sup> Depending on the number of subscribers, a carrier must test up to 50 locations per required service-tier offering per state.<sup>8</sup> The subscribers eligible for testing must be at locations that are reported in the High-Cost Universal Service Broadband portal (HUBB), and locations reported in the HUBB must be within areas eligible for universal service support.<sup>9</sup> Carriers conduct their testing on a random sample of subscriber locations determined by USAC's Performance Measures Module (PMM) system.<sup>10</sup> Random selection ensures that providers cannot pick and choose amongst subscribers so that only those subscribers likely to have the best performance are tested.<sup>11</sup>

3. To comply with the Commission's performance testing rules, Lumen tested the speed and latency of its CAF II Model-deployed infrastructure for 1,650 subscriber locations, with 50 test locations in each of the 33 states where it received CAF Phase II Model funding.<sup>12</sup> Lumen claims that its fourth quarter 2021 testing results met or exceeded the Commission's speed and latency metrics in all 33 states.<sup>13</sup> Early in 2022, Lumen notified the Bureau that while preparing its final CAF II Model submissions and certifications, it found that 89 of the 1,650 subscriber locations tested were outside of its CAF II Model eligible census blocks.<sup>14</sup> Lumen maintains that when it initially submitted these subscriber locations to the HUBB, its geocoding indicated that the locations were within the eligible area.<sup>15</sup> Lumen states that the 89 subscriber locations that were outside of its CAF Phase II Model eligible census blocks were spread across 24 of the 33 states where it received CAF Phase II Model support.<sup>16</sup>

4. Lumen asserts that special circumstances exist to warrant a limited waiver of the Commission's CAF Phase II Model performance testing rules because the requirement to submit geocoded locations was new for CAF Phase II Model program recipients, the impact of the discrepancies in its testing sample was minimal given that the majority of the 89 subscriber locations outside of its CAF Phase II Model census blocks were within a mile of its CAF Phase II Model area, and the sample sizes tested in the affected states were not significantly reduced.<sup>17</sup>

### III. DISCUSSION

5. We find good cause to grant Lumen's request for a limited waiver of the performance testing measures' 50-subscriber location sample size requirement. Generally, the Bureau may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>18</sup> In addition, the Bureau may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>19</sup> Waiver of the Commission's rules is

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<sup>7</sup> *First Performance Measures Order*, 34 FCC Rcd at 6523, para. 37.

<sup>8</sup> *Id.* at 6522, para. 36.

<sup>9</sup> *Id.*

<sup>10</sup> *Performance Measures Reconsideration Order*, 34 FCC Rcd at 10140, paras. 81-82.

<sup>11</sup> *Id.* at 6524, para. 40.

<sup>12</sup> Lumen Petition at 2.

<sup>13</sup> *Id.* Compliance with the performances measures standards is be determined based on one year, i.e., four consecutive quarters, of testing. If a carrier is out of compliance based upon when results are considered on an annual basis, but comes into compliance before or during the end of term testing, USAC will not recover any support. *Performance Measures Reconsideration Order*, FCC Rcd at 10137, para. 73.

<sup>14</sup> Lumen Petition at 2.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 3.

<sup>18</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

appropriate when (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.<sup>20</sup> The Commission adopted the performance testing requirements in order to protect ratepayers' investment and ensure that carriers receiving high-cost support deploy networks that meet the performance standards promised to rural customers.<sup>21</sup> Performance measures testing promotes accountability and reduces the risks of waste, fraud, and abuse in the Commission's high-cost universal service programs. The testing regime is designed to encourage carriers to provide high quality broadband, not to punish carriers.<sup>22</sup>

6. Lumen asserts that special circumstances warrant a deviation from the general rule in this case because although carriers have previously been required to report their build-out to demonstrate compliance with the universal service high-cost program rules, submitting geocoded locations is new and technically complex.<sup>23</sup> Lumen argues that a minor deviation from the rule in this instance will serve the public interest because Lumen otherwise met or exceeded the performance testing requirements in the 33 states where it received CAF II Model funding.<sup>24</sup>

7. We agree with Lumen that special circumstances exist here because reporting geocoded locations in the HUBB was a novel and unfamiliar process, so it is reasonable that some locations were initially inaccurately coded as being within eligible areas. The randomized testing samples were selected at the end of 2019,<sup>25</sup> when carriers were still gaining experience with geocoding. Moreover, the inaccurate locations had no impact on Lumen's compliance. When considering the testing results only for those locations within CAF II Model eligible blocks, Lumen passed the performance testing standards for speed and latency. If we include the locations that Lumen tested outside of its eligible census block area, Lumen still passed the performance testing requirements. Further, the locations that Lumen erroneously tested outside of its census block area were in close proximity to the eligible area where testing was required.<sup>26</sup> The results of Lumen's testing lead us to conclude that Lumen built a network that provides the speed and latency required by the CAF II Model program.

8. Further, we note that Lumen recertified its 2021 performance results excluding the ineligible locations. Absent a waiver, Lumen would fail performance testing and would be subject to support recovery, when in fact Lumen did deploy a network that meets the required standards. Granting a waiver of the performance testing measures' 50-subscriber location sample size requirement in this instance will not frustrate the purpose of the Commission's performance testing rules or the sample size requirement. We note, however, that now that the industry has had numerous years of experience with geocoding, we expect that locations filed in the HUBB will be accurately geocoded and that carriers in our current support programs have ample time to revise their geocoding for their testing samples prior to the end of their support terms.

#### IV. ORDERING CLAUSES

9. 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 requirements' 50-subscriber location sample size IS GRANTED.

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<sup>19</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

<sup>20</sup> *Northeast Cellular*, 897 F.2d at 1166.

<sup>21</sup> *Performance Measures Reconsideration Order*, 34 FCC Rcd at 10140, para. 2.

<sup>22</sup> *Id.* at 10133, para. 66.

<sup>23</sup> Lumen Petition at 4.

<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Performance Measures Reconsideration Order*, 34 FCC Rcd at 10110, para. 81.

<sup>26</sup> Lumen Petition at 3.

10. 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

Trent B. Harkrader  
Chief  
Wireline Competition Bureau