

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

In the Matter of )
Connect America Fund ) WC Docket No. 10-90
ETC Annual Reports and Certifications ) WC Docket No. 14-58
Rural Broadband Experiments ) WC Docket No. 14-259
Douglas Services, Inc. Petition for Waiver and )
Request for Relief )

ORDER

Adopted: October 25, 2022

Released: October 25, 2022

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau (Bureau) addresses a petition filed by Douglas Services, Inc., d/b/a Douglas Fast Net (DFN), seeking waiver of the Rural Broadband Experiments (RBE) default rules and modification of its associated defined deployment obligation. We find that DFN has demonstrated that special circumstances warrant waiver of its defined deployment obligation and, therefore, we reduce its defined deployment obligation to reflect the total number of qualifying locations that DFN could identify during its build-out term using reasonable and systematic methods, as documented in its petition. With this reduction in obligation, we also reduce, on an average per location basis, DFN's authorized support. Accordingly, we direct the Universal Service Administrative Company (USAC) to prorate reductions in future payments for the remainder of the support term.

II. BACKGROUND

2. On July 14, 2014, the Commission established the RBE to test future Connect America Fund (CAF) auction processes that would allocate support in price cap territories where the average cost of service exceeded a certain high-cost threshold, as determined by the Connect America Model (CAM) (exclusive of areas already served by an unsubsidized competitor). For RBE participants, the Commission defined bids at the census block level and required service to every CAM-determined qualifying location within winning bid areas (including locations for which no support would be allocated). RBE support recipients would report annually on their progress in deploying their networks

1 Douglas Services, Inc. Petition for Waiver and Request for Relief, WC Docket Nos. 10-90, 14-58, 14-259 (June 10, 2022) (DFN Petition), as supplemented, July 28, 2022 (DFN Supplement).

2 Connect America Fund, ETC Annual Reports and Certifications, WC Docket Nos. 10-90, 14-58, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8769, 8775, 8786, paras. 13, 51 (2014) (Rural Broadband Experiments Order); see also Connect America Fund; High-Cost Universal Service Support, WC Docket Nos. 10-90 and 14-93, Order, 30 FCC Rcd 2718, 2718-19, para. 3 (WCB 2015).

and certify, by certain deadlines, their incremental progress, measured as a percentage of their full obligation (build-out milestones).<sup>4</sup> The Commission indicated that an RBE support recipient's failure to meet a build-out milestone was a performance default, triggering measures that include a 12-month withholding period (with an increase in withholding after the first six months) and a subsequent draw on a letter of credit securing the full award amount.<sup>5</sup> The Commission invited RBE support recipients to submit petitions for waiver when circumstances outside of their control prevented them from meeting their obligations.<sup>6</sup>

3. In two subsequent high-cost programs—first, the offer of CAF Phase II model-based support to price cap carriers and second, the CAF Phase II auction—the Commission recognized and adopted strategies for addressing potential discrepancies between the number of CAM-estimated funded locations and the number of actual qualifying locations within eligible areas. In its *December 2014 Connect America Order*, as it was finalizing requirements and conditions for the CAF Phase II model-based offer, the Commission first acknowledged that location discrepancies could arise due to certain limitations in the CAM's underlying data inputs (i.e., 2010 Census population statistics, FCC study area boundary maps, commercial proprietary data) and demographic changes over time.<sup>7</sup> In most instances, the Commission estimated, these inaccuracies would be minor and cancel each other out across the multiple census blocks in eligible areas in a state.<sup>8</sup> In all other circumstances, the Commission

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<sup>3</sup> *Rural Broadband Experiments Order*, 29 FCC Rcd at 8775-76, paras. 13-15; *Technology Transitions et al.*, WC Docket No. 10-90 et al., Order et al., 29 FCC Rcd 1433, 1472, para. 111 (2014). If a census block is served by multiple carriers, wire centers, or splitters (Node2), then CAM v4.2, the version which calculated reserve prices for the RBEs, calculates the costs associated with each carrier, wire center, or splitter separately, on a sub-census block basis. CostQuest Associates, Inc., *Connect America Cost Model: Model Methodology* at 16 n.16 (Dec. 22, 2014), <https://transition.fcc.gov/wcb/CAMv.4.2Methodology.pdf>. This results in some census blocks having a combination of low-cost, high-cost, and/or extremely high-cost locations located within one census block. As a result, the number of funded locations in a census block was not necessarily the same as the number of locations in the block according to the U.S. Census. *See id.* at 12-13.

<sup>4</sup> *Rural Broadband Experiments Order*, 29 FCC Rcd at 8794, para. 74 (specifying that by the end of their third year, RBE support recipients must offer the requisite level of service to at least 85% of the number of required locations and by the end of the fifth year, 100% of all such locations); *see also id.* at 8794, para. 75 (specifying that RBE support recipients electing to receive accelerated payments were required to meet an additional 25% milestone falling 15 months after their first support disbursement).

<sup>5</sup> *Id.* at 8799-800, paras. 90-94; *see also id.* at 8800-801, para. 96 (stating that a performance default could lead to other consequences, including, among other things, potential revocation of ETC designation and disqualification from future competitive bidding for universal service support). During the 12-month withholding period, RBE funding recipients can cure their default by coming into compliance. *Id.* at 8799, para. 92. Moreover, once the Commission draws on the letter of credit, the RBE funding recipient has a one-time opportunity to cure the default at any time during the support term. *Id.* at 8800, para. 93. Once a default is cured, the RBE funding recipient is entitled to have any withheld or recovered support restored and becomes eligible to receive full support payments in accordance with the terms of its award. *Id.*

<sup>6</sup> *Rural Broadband Experiments Order*, 29 FCC Rcd at 8800, para. 95. The Commission stated that if an RBE support recipient defaulted on its performance obligations while its waiver petition was pending, the Bureau should move forward with default measures, subject to full restoration of support and support payments should the petition be subsequently granted. *Id.*

<sup>7</sup> *See 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) (*December 2014 Connect America Order*).

<sup>8</sup> *Id.* In both the CAF Phase II model-based offer proceeding and the CAF Phase II auction proceeding, the Commission set compliance reviews at the state level rather than at the study area level, which provided these funding recipients with greater flexibility in meeting their defined deployment obligations. *See id.* at 15689, paras. 43 n.87, 128; *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, 6014-15, para. 181 (2016).

encouraged price cap carriers electing to receive the offer to “promptly bring any situations involving a known disparity between the number of model-determined locations and the actual number of locations in a state to the Commission’s attention while developing their network plans in that first year.”<sup>9</sup> The Commission delegated authority to the Bureau to address such situations by appropriately adjusting the number of funded locations in the relevant state and reducing support on a pro-rata basis.<sup>10</sup> Subsequently, for the CAF Phase II auction, the Commission created an adjudicatory process designed to facilitate defined deployment obligation adjustments (and associated support) post-bid based on the winning bidders’ assessments of locations on the ground.<sup>11</sup>

4. In response to past waiver requests, the Bureau has found good cause to waive RBE default rules and modify the defined deployment obligations of RBE support recipients that have submitted persuasive evidence of location discrepancies.<sup>12</sup> The Bureau recognized that when these recipients placed their bids, the Commission had not yet acknowledged that the newly adopted CAM could overestimate the number of qualifying locations and had not yet explicitly warned bidders to conduct a thorough review of locations in their bid areas as part of their due diligence.<sup>13</sup> The Commission also recognized that without waiver, the default consequences—the full recovery of support—would deprive these carriers of any support, despite evidence demonstrating that they had made good faith efforts to deploy their networks throughout the entirety of their supported areas on a timely basis and despite only small to moderate location discrepancies.<sup>14</sup> In granting these waiver requests, the Bureau rebased each carrier’s support to reflect their adjusted defined deployment obligations.<sup>15</sup>

5. *DFN Petition for Waiver.* On December 11, 2015, the Bureau authorized DFN to receive \$2,375,000 in RBE support to serve 2,495 qualifying locations in its study area (SAC 536129) covering 325 census blocks in Oregon.<sup>16</sup> On June 10, 2022, DFN submitted a petition seeking waiver of its RBE defined deployment obligation and associated default rules, which it subsequently amended on July 28, 2022.<sup>17</sup> DFN states that it completed its build-out for the study area and has determined that, consistent with the results of USAC’s final verification, that there are only 2,183 qualifying locations within this study area.<sup>18</sup>

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<sup>9</sup> *December 2014 Connect America Order*, 29 FCC Rcd at 15659, para. 38.

<sup>10</sup> *Id.*

<sup>11</sup> *Connect America Fund et al.*, WC Docket No. 10-90 et al., Order on Reconsideration, 33 FCC Rcd 1380, 1389-92, paras. 23-28 (2018) (*Phase II Auction Reconsideration Order*).

<sup>12</sup> *Connect America Fund et al.*, WC Docket No. 10-90 et al., Order, DA 22-27, at 6-9, paras. 9-13 (rel. Jan. 11, 2022) (*Midwest Waiver Order*); *Connect America Fund et al.*, WC Docket Nos. 10-90, 14-58, Order, 34 FCC Rcd 10308, 10314-16, paras. 13-18 (WCB 2019) (*ACEC-Consolidated Waiver Order*).

<sup>13</sup> See *Midwest Waiver Order*, DA 22-27, at 6, para. 11; *ACEC-Consolidated Waiver Order*, 35 FCC Rcd at 10315-16, paras. 16-17.

<sup>14</sup> See *Midwest Waiver Order*, DA 22-27, at 6, para. 11; *ACEC-Consolidated Waiver Order*, 34 FCC Rcd at 10314-15, 10316, paras. 13, 17.

<sup>15</sup> See *Midwest Waiver Order*, DA 22-27, at 7, para. 13; *ACEC-Consolidated Waiver Order*, 34 FCC Rcd at 10316, para. 18.

<sup>16</sup> *Rural Broadband Experiment Support Authorized for Winning Bids Submitted by BARC Electric Cooperative, Douglas Services, Inc., and Northeast Rural Services, Inc.*, WC Docket Nos. 10-90 and 14-259, Public Notice, 30 FCC Rcd 14126 (WCB 2015).

<sup>17</sup> See DFN Petition; DFN Supplement.

<sup>18</sup> See DFN Supplement at 1. DFN initially stated that there was a total of 2,252 locations but concedes, based on the results of USAC’s verification of these locations, that this number should be reduced to 2,183 locations.

6. *Waiver Standard.* The Commission may waive its rules and requirements for “good cause shown.”<sup>19</sup> Good cause, in turn, may be found “where particular facts would make strict compliance inconsistent with the public interest.”<sup>20</sup> In making this determination, the Commission may “take into account considerations of hardship, equity, or more effective implementation of overall policy.”<sup>21</sup> Waiver of the Commission’s rules is “appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”<sup>22</sup> To make such a public interest determination, the waiver cannot undermine the purposes of the rule, and there must be a stronger public interest benefit in granting the waiver than in applying the rule.<sup>23</sup>

### III. DISCUSSION

7. Consistent with recent precedent, the Bureau finds that DFN has demonstrated that special circumstances warrant waiver of its defined deployment obligation based on persuasive evidence of the number of qualifying locations within its supported study area.<sup>24</sup> Rather than finding DFN in default and recovering all support awarded, we will rebase DFN’s obligations and support (on a per-location basis) to reflect the number of actual locations.<sup>25</sup> Doing so serves the public interest by helping to ensure the continuing viability of DFN’s networks in serving residential and small business locations while protecting the integrity of the bidding process in producing efficient deployment to consumers.<sup>26</sup>

8. We find that DFN has demonstrated that it timely implemented reasonable network deployment plans to serve its entire RBE areas and to identify every location therein. There is no indication that DFN systematically or even unintentionally excluded qualifying locations based on cost or difficulty in providing service.<sup>27</sup> DFN provides complete aerial imagery taken in 2022 that details the sources it consulted to assess every location in its service area.<sup>28</sup> The use of these multiple, up-to-date resources controls for inaccuracies in individual sources. Based on the representations made in the Petition, as well as the supporting evidence, the Bureau concludes that DFN has made good faith efforts to identify every qualifying location within its respective study area and that such effort has resulted in a reasonably reliable and accurate count of all qualifying locations, as summarized in the Attachment.

9. The Bureau finds good cause to modify DFN’s deployment obligation. For the reasons explained in the *Midwest Waiver Order* and the *ACEC-Consolidated Waiver Order*, we find that DFN has established special circumstances by demonstrating adequate due diligence in assessing locations and

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<sup>19</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.”).

<sup>20</sup> *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>21</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

<sup>22</sup> *Ne. Cellular Tel. Co.*, 897 F.2d at 1166.

<sup>23</sup> See, e.g., *Request for Permanent Renewal of, and Changes to Conditions on, Waiver Granted to SafeView, Inc.*, ET Docket No.04-373, Order, 26 FCC Rcd 10250, 10252 (OET 2011) (citing *Ne. Cellular Tel. Co.*, 897 F.2d at 1166); see also *WAIT Radio*, 418 F.2d at 1155, 1157.

<sup>24</sup> See *Midwest Waiver Order*, DA 22-27, at 5, para. 9; *ACEC-Consolidated Waiver Order*, 34 FCC Rcd at 10314, para. 13.

<sup>25</sup> See *Midwest Waiver Order*, DA 22-27, at 5, para. 9; *ACEC-Consolidated Waiver Order*, 34 FCC Rcd at 10314, para. 13.

<sup>26</sup> See *Midwest Waiver Order*, DA 22-27, at 5, para. 9; *ACEC-Consolidated Waiver Order*, 34 FCC Rcd at 10314, para. 13.

<sup>27</sup> Geolocation information for locations reported into the HUBB toward satisfaction of defined deployment obligations is available on the CAF Broadband Map, <https://data.usac.org/publicreports/caf-map/>. Such locations are displayed on a publicly accessible map that allows for optional overlays, including eligible areas.

<sup>28</sup> DFN Petition at Exhibit B.

bringing discrepancies to the attention of the Commission.<sup>29</sup> To summarize, RBE recipients received support pursuant to a nascent program designed to identify limitations of the CAM, did not receive specific notice of the CAM limitations at the time of bid placement, and in general, did not have the flexibility afforded other recipients of CAM-based support because their deployment obligations were not defined at the state level (as were the obligations of CAF Phase II support recipients and electing price cap carriers).<sup>30</sup> We likewise find that this waiver serves the public interest because it is consistent with the underlying policy goals of the RBE while simultaneously helping to ensure that RBE support recipients can maintain robust networks where they are offering supported services.<sup>31</sup> In contrast, denying the relief would result in a draw on the letter of credit securing all support payments, threatening DFN's ability to continue serving already deployed areas; moreover, the Commission's message that not meeting Universal Service Fund obligations in full is a serious breach of carriers' commitments is not undermined.<sup>32</sup>

10. In conclusion, we find that based on the totality of the circumstances, grant of the petition is warranted. In granting this waiver request, we make pro-rata adjustments to reflect the difference between the CAM-determined location count and the actual location count, based on the average support per location, consistent with Commission guidance for adjustments to defined deployment obligations of price cap carriers accepting CAM-based support and Phase II Auction support recipients.<sup>33</sup> We direct USAC to prorate remaining support payments due to DFN based on such adjustments.

#### IV. ORDERING CLAUSES

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

IT IS FURTHER ORDERED that the Petition for Waiver filed by DOUGLAS SERVICES, INC. IS GRANTED as described herein. We direct the Universal Service Administrative Company to take further action in accordance with the terms of this Order.

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

Trent B. Harkrader  
Chief  
Wireline Competition Bureau

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<sup>29</sup> See *Midwest Waiver Order*, DA 22-27, at 6, para. 11; *ACEC-Consolidated Waiver Order*, 34 FCC Rcd at 10315-16, paras. 15-16.

<sup>30</sup> See *Midwest Waiver Order*, DA 22-27, at 6, para. 11; *ACEC-Consolidated Waiver Order*, 34 FCC Rcd at 10315-16, paras. 15-16.

<sup>31</sup> See *Midwest Waiver Order*, DA 22-27, at 6, para. 11; *ACEC-Consolidated Waiver Order*, 34 FCC Rcd at 10316, para. 17; *Rural Broadband Experiments Order*, 29 FCC Rcd at 8799-800, paras. 92-93.

<sup>32</sup> See *Midwest Waiver Order*, DA 22-27, at 6, at para. 11; *ACEC-Consolidated Waiver Order*, 34 FCC Rcd at 10315-16, paras. 15-16; *Rural Broadband Experiments Order*, 29 FCC Rcd at 8799-800, paras. 92-93.

<sup>33</sup> See *December 2014 Connect America Order*, 29 FCC Rcd at 15659, para. 38, n.88; *Phase II Auction Reconsideration Order*, 33 FCC Rcd at 1389, para. 24, n.62.