

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
Petition of Skybeam, LLC, for Waiver)
Petition of Midwest Energy Cooperative)
D/B/A Midwest Energy & Communications)
for Waiver)

ORDER

Adopted: January 11, 2022

Released: January 11, 2022

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau (Bureau) addresses two petitions separately filed by Skybeam, LLC (Skybeam) and Midwest Energy Cooperative d/b/a Midwest Energy & Communications (Midwest) (collectively, petitioners), seeking waiver of the Rural Broadband Experiments (RBE) default rules and modification of their associated defined deployment obligations. We find that petitioners have demonstrated that special circumstances warrant waiver of their defined deployment obligations and therefore, we reduce the defined deployment obligations of each of these petitioners to reflect the total number of actual, qualifying locations that the petitioners were able to identify during their build-out terms using reasonable and systematic methods, as documented in their petitions. We reject, however, Skybeam’s arguments in favor of retaining all support awarded and, accordingly, make pro-rata adjustments to the petitioners’ support amounts and 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 the RBEs, the Commission

1 Skybeam LLC Request for Waiver, WC Docket Nos. 10-90, 14-58 (Apr. 2, 2020) (Skybeam Petition), as supplemented, Apr. 17, 2020 (Skybeam First Supplement), June 29, 2020 (Skybeam Second Supplement), and July 13, 2021 (Skybeam Third Supplement); Midwest Energy Cooperative D/B/A Midwest Energy & Communications Petition for Waiver, WC Docket No. 14-259 (filed Aug. 21, 2019) (Midwest Petition), as supplemented, WC Docket 10-90, 14-259 (Feb. 10, 2021) (Midwest Supplement).

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).³ RBE support recipients would report annually on their progress in deploying their networks and certify, by certain deadlines, their incremental progress, measured as a percentage of their full obligation (build-out milestones).⁴ The Commission indicated that an RBE support recipient's failure to meet a build-out milestone was a performance default, triggering default measures that included 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.⁵ The Commission invited RBE support recipients to submit petitions for waiver of their build-out obligations when circumstances outside of their control prevented them from meeting their obligations.⁶

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 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.⁷ In most instances, the Commission estimated, these inaccuracies would be minor and cancel each other out across the multiple

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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).

³ *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.

⁴ *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).

⁵ *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.*

⁶ *Rural Broadband Experiments Order*, 29 FCC Rcd at 8800, para. 95. The Commission stated that if the petitioner 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.*

⁷ *December 2014 Connect America Order*, 29 FCC Rcd at 15659, para. 38, n.88.

census blocks in eligible areas in a state.⁸ In all other circumstances, the Commission 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.”⁹ 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.¹⁰ 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.¹¹

4. In November 2019, the Bureau found good cause to waive RBE default rules and modify the defined deployment obligations of two RBE support recipients that had submitted persuasive evidence of location discrepancies as part of their waiver petitions.¹² The Bureau recognized that when these recipients had 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.¹³ 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.¹⁴ In granting these waiver requests, the Bureau rebased each carrier’s support to reflect their adjusted defined deployment obligations.¹⁵

5. *Skybeam Petition for Waiver.* On April 2, 2020, Skybeam submitted a petition seeking waiver of its defined deployment obligations for ten study areas in a total of five states (Illinois, Iowa, Kansas, Nebraska, and Texas), which it subsequently amended.¹⁶ Skybeam states that as of its final deployment milestones for each of these study areas, it deployed fixed wireless voice and broadband services meeting the requisite public interest obligations to its entire service area (on a geographic basis),

⁸ *Id.* at 15659, para. 38. 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 *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, 29 FCC Rcd 15644, 15689, paras. 43 n.87, 128 (2014) (*December 2014 Connect America Order*); *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 5949, 6014-15, para. 181 (2016) (*Phase II Auction Order*).

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

¹⁰ *Id.*

¹¹ *Phase II Auction Reconsideration Order*, 33 FCC Rcd at 1389-92, paras. 23-28.

¹² *ACEC-Consolidated Waiver Order*, 35 FCC Rcd 10318, 10314-10316, paras. 13-18 (WCB 2019) (*ACEC-Consolidated Waiver Order*).

¹³ See *id.* at 10315-16, paras. 16-17.

¹⁴ See *id.* at 10314-15, 10316, paras. 13, 17.

¹⁵ *Connect America Fund ETC Annual Reports and Certifications, Petition of Allamakee-Clayton Electric Cooperative for Waiver of Rural Broadband Experiments Defined Deployment Obligations, Petition of Consolidated Communications Networks, Inc. for Waiver of Rural Broadband Experiments Defined Deployment Obligation*, Order, 34 FCC Rcd. 10308 (WCB 2019) (*ACEC-Consolidated Waiver*).

¹⁶ Skybeam Petition; Skybeam First Supplement; Skybeam Second Supplement; Skybeam Third Supplement; *Rural Broadband Experiment Support Authorized for Winning Bids Submitted by Skybeam, LLC, Daktel Communications, LLC, Federated Telephone Cooperative, and Paul Bunyan Rural Telephone Cooperative*, Public Notice, 30 FCC Rcd 12725 (WCB 2015); *Rural Broadband Experiment Support Authorized for Winning Bid Submitted by Skybeam, LLC*, Public Notice, 31 FCC Rcd 100 (WCB 2016).

submitted location information for, and certified service to, all qualifying locations it could find after completing a comprehensive assessment of locations using commercial geolocation data sets and imaging projects, and nonetheless, fell short of its deployment obligations for each of its RBE areas.¹⁷

6. Skybeam also requests that the Commission permit it to retain all support awarded to serve these areas, asserting that this approach would bring RBE support recipients into parity with recipients of support awarded through the Rural Digital Opportunity Fund (RDOF).¹⁸ In doing so, Skybeam incorporates into its petition all relevant arguments made by the CAF Phase II Auction Coalition for similar relief from support adjustments for location discrepancies.¹⁹ In sum, Skybeam argues that applying the RDOF process for resolving location discrepancies to RBE would have no effect on Skybeam's obligations to meet its defined deployment obligation and would further ensure regulatory parity among the programs; that pro rata reductions constitute a penalty; that Skybeam's capital costs remain unchanged despite location discrepancies even if there would be a marginal reduction in operating costs not proportionate to the reduction in support; and that pro rata reductions would limit funding available for the "provision, maintenance and upgrade of supporting facilities and services."²⁰ Skybeam argues that applying RDOF location discrepancy processes to RBE support recipients would "simplify" the process for FCC staff, USAC, and recipients by dispensing with the need for calculating support and obtaining a new letter of credit in circumstances where the recipient is not deemed to have satisfied its final milestone at the time of the location discrepancy.²¹ Skybeam then argues that the failure of the Commission to acknowledge CAM-based location discrepancies before RBE bidding commenced resulted in forcing RBE support recipients to wait until the end of their build-out period to identify discrepancies and seek relief, creating "uncertainty" in planning and budgeting during the deployment term.²²

7. *Midwest Petition for Waiver.* On April 21, 2019, Midwest submitted a petition for waiver of its defined deployment obligation to serve 421 locations in one study area in Michigan, which it amended on February 10, 2021.²³ In its initial waiver request, Midwest states that it has only been able to identify 364 qualifying locations in this study area, all of which it has deployed qualifying broadband service.²⁴ In its supplement, Midwest updates this number of qualifying locations from 364 to 382, explaining that initially, it had incorrectly treated multiple dwelling units on a single parcel as a single

¹⁷ Skybeam Petition at 3-4 (Skybeam explains that this process involved "(a) the purchase and use of mapping services from CostQuest Associates, (b) initial verification of the CQA dataset by Skybeam network planners applying definitions prescribed by the Locations Guidance and visual imagery review, (c) collaboration between Skybeam and CQA to reconcile differences."); Skybeam Second Supplement (revising methodology based on new data); Skybeam Third Supplement at 2 (disclosing findings of USAC verification). Skybeam concedes to USAC verification results in its Third Supplement, making its earlier argument premised on service to more locations than required in one SAC moot. Skybeam Petition at 9.

¹⁸ Skybeam Second Supplement at 1.

¹⁹ *Id.* at 3 (citing Request for Limited Waiver of the Connect America Fund Phase Coalition, WC Docket No. 10-90 (filed June 10, 2020)).

²⁰ *Id.* at 4.

²¹ *Id.* at 6.

²² *Id.* at 7.

²³ Midwest Petition; Midwest Supplement; *Rural Broadband Experiment Support Authorized for Winning Bids Submitted by Midwest Energy Cooperative d/b/a Midwest Connections and Northern Valley Communications, LLC*, Public Notice, 31 FCC Rcd 1106 (WCB 2016).

²⁴ Midwest Petition at 1.

location.²⁵ We note that USAC, after completing its verification of each location, concurs with this number save one, finding that individual parcels with business and residential structures qualified under the Commission's standards minus one location, which Midwest did not contest. Midwest provides detailed evidence of its efforts to identify every location in its supported areas by submitting detailed aerial imagery of representative census blocks.²⁶

8. *Waiver Standard.* The Commission may waive its rules and requirements for “good cause shown.”²⁷ Good cause, in turn, may be found “where particular facts would make strict compliance inconsistent with the public interest.”²⁸ In making this determination, the Commission may “take into account considerations of hardship, equity, or more effective implementation of overall policy.”²⁹ 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.”³⁰ 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.³¹

III. DISCUSSION

9. Consistent with recent precedent, the Bureau finds that petitioners have demonstrated that special circumstances warrant waiver of their defined deployment obligations based on reasonably persuasive evidence of the number of qualifying locations within their supported study areas.³² Rather than finding these petitioners in default and recovering all support awarded, we will rebase their obligations and support (on a per-location basis) to reflect the number of actual locations that they have found.³³ Doing so serves the public interest by helping to ensure the continuing viability of the petitioners' networks in serving residential and small business locations while protecting the integrity of the bidding process in producing efficient deployment to consumers.³⁴

10. We find that both Skybeam and Midwest have demonstrated that they timely implemented reasonable network deployment plans to serve their entire RBE areas and to identify every location therein. There is no indication that either petitioner systematically or even unintentionally excluded qualifying locations based on cost or difficulty in providing service.³⁵ Both petitioners explain, and provide illustrative supporting documentation, that they have made efforts to identify all qualifying

²⁵ See Midwest Supplement at 1. See also HUBB Frequently Asked Questions at 4, <https://www.usac.org/wp-content/uploads/high-cost/documents/Tools/HC-HUBB-FAQ.pdf>.

²⁶ Midwest Supplement at 2-6 and Exhibit A.

²⁷ 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.”).

²⁸ *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

³⁰ *Ne. Cellular Tel. Co.*, 897 F.2d at 1166.

³¹ See, e.g., *Request for Permanent Renewal of, and Changes to Conditions on, Waiver Granted to SafeView, Inc.*, 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.

³² *ACEC-Consolidated Waiver Order*, 34 FCC Rcd at 10314, para. 13.

³³ *Id.*

³⁴ *Id.*

³⁵ 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. As per such visual representation, neither petitioner has omitted significant contiguous areas suggesting that they have declined to serve particularly high cost areas within their SACs.

locations within their supported areas, controlling for inaccuracies.³⁶ Based on the representations made in the petitions, as well as the supporting evidence, the Bureau concludes that both petitioners made good faith efforts to identify every actual location within their respective study areas and that such efforts have resulted in a reasonably reliable and accurate count of all qualifying locations, as summarized in the Attachment.

11. The Bureau finds good cause to modify the petitioners' deployment obligations. For the reasons explained in the *ACEC-Consolidated Waiver Order*, we find that the petitioners have established special circumstances by demonstrating adequate due diligence in assessing locations and bringing discrepancies to the attention of the Commission.³⁷ To sum, 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).³⁸ 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 petitioners can maintain robust networks where they are offering supported services.³⁹ In contrast, denying the relief would result in a draw on the letters of credit securing all support payments, threatening their ability to continue serving already deployed areas without reinforcing the seriousness of not meeting Universal Service Fund obligations in full.⁴⁰

12. We reject, however, Skybeam's arguments in favor of retaining all support awarded.⁴¹ Skybeam asserts that because we impute no expectation of location assessment at the time of bid placement, RBE support recipients lacked information necessary to make informed financial and technological decisions relating to network build throughout the deployment period.⁴² The Commission, however, explained the potential for CAM-related location discrepancies and encouraged affected parties to bring such discrepancies to the Commission's attentions early in the deployment period in its *December 2014 Connect America Order*, well in advance of these petitioners' authorization to receive support and the beginning of the deployment term.⁴³ Moreover, RBE support recipients placed bids and accepted a set amount of support in exchange for a commitment to serve a set number of locations, subject to a default finding that would require recovery of all support awarded.⁴⁴ Our decision here to modify those consequence on an equitable basis does not compel us to extend a windfall to these recipients by permitting them to keep support allocated for deployment to locations that do not exist. Consistent with our reasoning in the *CAF Phase II Coalition Waiver Order*, we do not thereby penalize funding recipients, even if the adjustment is disproportionate to the reduction in costs associated with serving less locations.⁴⁵ We also reject any analogy between this requested relief and the approach

³⁶ Skybeam Petition at 3-4; Skybeam Second Supplement; Skybeam Third Supplement at 2 (disclosing findings of USAC verification); Midwest Supplement at 2-8 and Exhibit A.

³⁷ See *ACEC-Consolidated Waiver Order*, 34 FCC Rcd at 10315-16, paras. 15-16.

³⁸ See *id.*

³⁹ See *id.* at 10316, para. 17; *Rural Broadband Experiments Order*, 29 FCC Rcd at 8799-800, paras. 92-93.

⁴⁰ See *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.

⁴¹ See Skybeam Second Supplement.

⁴² See *id.* at 7.

⁴³ See *December 2014 Connect America Order*, 29 FCC Rcd at 15659, para. 38, n.88.

⁴⁴ *Rural Broadband Experiments Order*, 29 FCC Rcd at 8775-76, paras. 13-15.

⁴⁵ See *CAF Phase II Coalition Waiver Order*, DA 21-1369, para. 19.

adopted for resolving location discrepancies arising in the RDOF since that program involved different financial and technological commitments at the time of bid placement.⁴⁶

13. In conclusion, we find that based on the totality of the circumstances, grant of the petitions is warranted. In granting these waiver requests, 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.⁴⁷ We direct USAC to prorate remaining support payments due to these carriers based on such adjustments.

IV. ORDERING CLAUSES

14. 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.

15. IT IS FURTHER ORDERED that the Petition for Waiver filed Midwest Energy Cooperative d/b/a Midwest Energy & Communication IS GRANTED as described herein, and that the Petition for Waiver filed by Skybeam, LLC IS GRANTED IN PART and DENIED IN PART as described herein. We direct the Universal Service Administrative Company to take further action in accordance with the terms of this Order.

16. 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

⁴⁶ See *id.* at 17-19.

⁴⁷ *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.

ATTACHMENT

Skybeam, LLC

Summary of Location Information				
Study Area Code	Defined Deployment Obligation	Served Locations	Compliance Gap	Percentage of Defined Deployment Obligation Served
446139	1,907	1,677	230	87.92%
446119	2,454	2,103	351	85.70%
416118	914	698	216	76.39%
376138	1,188	890	298	74.88%
376137	2,761	2,393	368	86.66%
356136	794	531	263	66.90%
356135	1,528	1,304	224	85.33%
356134	1,926	1,472	454	76.40%
346117	1,988	1,790	198	90.02%
346116	1,291	1,118	173	86.57%

Midwest Energy Cooperative d/b/a/Midwest Energy & Communications

Summary of Location Information				
Study Area Code	Defined Deployment Obligation	Served Locations	Compliance Gap	Percentage of Defined Deployment Obligation Served
316131	421	381	40	91%