

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

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

ORDER

Adopted: April 6, 2022

Released: April 6, 2022

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we address several petitions for waiver of the Commission’s performance pre-testing requirements for recipients of Connect America Fund Broadband Loop Support (CAF BLS) and Alternative Connect America Model II (A-CAM II) support. Specifically, we grant, in part, the petitions for waiver of two carriers, Castleberry Telephone Company, Inc. (Castleberry) and Ringsted Telephone Company (Ringsted),1 that demonstrated that they could not comply with the Commission’s requirement to pre-test during certain quarters of 2022, despite reasonable efforts, while denying the petition of Venus Telephone Company (Venus)2 because it has not demonstrated that it made reasonable efforts to comply.

II. BACKGROUND

2. 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.3 Testing must be conducted with a random sample of subscribers generated through USAC’s randomization tool.4 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 rural consumers.5 Carriers failing to meet the required standards will be subject to withholding of support, based on their level of non-compliance.6

1 Castleberry Telephone Company, Inc. Petition for Temporary Waiver, WC Docket No. 10-90 (filed Mar. 25, 2022) (Castleberry Waiver Petition); Ringsted Telephone Company Petition for Temporary Waiver, WC Docket No. 10-90 (filed Mar. 15, 2022) (Ringsted Waiver Petition).

2 Venus Telephone Corporation Petition for Waiver, WC Docket No. 10-90 (filed Mar. 21, 2022) (Venus Waiver Petition).

3 The Commission adopted detailed performance measures requirements in 2018 and 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).

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

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

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

3. To ensure that carriers receiving 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.”⁷ For pre-testing, the carriers are required to submit the same speed and latency test results as they will be required to submit for the regular testing, as well as an annual certification.⁸ Carriers that fail to conduct pre-testing and submit results in a timely fashion are considered to be at Level 1 non-compliance.⁹ While at Level 1 non-compliance, USAC will withhold 5% of a carrier’s monthly support payments.¹⁰ USAC will restore withheld support once the non-compliant carrier becomes compliant by making the required filing.¹¹

4. In January 2022, due to the ongoing pandemic, the Bureau granted a waiver allowing CAF BLS and A-CAM II carriers to pre-test only 70% of their USAC pre-selected samples during the four quarters of pre-testing in 2021.¹² The Bureau stated, however, that “we urge these carriers to work to pre-test 100% of their sample as quickly as possible.”¹³ The Bureau acknowledged that some carriers may not be able to reach even 70% of their test sample because they may not be able to obtain sufficient amounts of testing equipment.¹⁴ The Bureau specified that any such carrier should file a waiver request, supported by 1) an affidavit signed by a company official explaining that the carrier does not have sufficient testing equipment, the reason that it does not have sufficient testing equipment, and when the company anticipates having sufficient equipment, and 2) documentary evidence showing when the order was placed.¹⁵

III. DISCUSSION

5. For the reasons set forth below, we grant, in part, the petitions for waiver of two petitioners while denying another.¹⁶ The Bureau may exercise its discretion to waive a rule where the

⁷ *Performance Measures Reconsideration Order*, 34 FCC Rcd at 10139, paras. 78-79.

⁸ *First Performance Measures Order*, 33 FCC Rcd at 6533, para. 67.

⁹ *Id.*

¹⁰ *Id.* at 6532, para. 64.

¹¹ *Id.* at 6532, para. 63.

¹² *Connect America Fund*, WC Docket No. 10-90, DA 22-1, Order (WCB rel. Jan. 3, 2022).

¹³ *Id.* at 4, para. 9.

¹⁴ *Id.* at 4, para. 10.

¹⁵ *Id.*

¹⁶ Several A-CAM I carriers filed petitions for waivers of certain quarters of pre-testing last year. Those carriers have completed pre-testing so we dismiss the following petitions as moot: Central Scott Telephone Company Waiver Request, WC Docket No. 10-90 (filed Apr. 6, 2021); Chillicothe Telephone Company Petition for Waiver of Informal Performance Testing Schedule, WC Docket. No. 10-90 (filed Mar. 29, 2021); Cordova Telephone Cooperative Petition for Limited Waiver of Broadband Performance Testing Non-Compliance Penalty Requirements, WC Docket No. 10-90 (filed July 2, 2021); Fulton Telephone Company Emergency Petition for Waiver of First Quarter 2021 Broadband Performance Testing Requirements, WC Docket No. 10-90, (filed Mar. 29, 2021); Petition for Waiver of Matanuska Telephone Association, Inc.’s First Quarter 2021 Broadband Performance Pre-Testing Requirements, WC Docket No. 10-90 (filed May 17, 2021); Mt. Horeb Telephone Company (MHTC) Emergency Petition for Waiver of First Quarter Broadband Performance Testing Requirements, WC Docket No. 10-90 (filed Mar. 26, 2021); Olin Telephone Company, Inc. Emergency Petition for Waiver of First Quarter 2021 Broadband Performance Testing Requirements, WC Docket No. 10-90 (filed Apr. 6, 2021); Superior Telephone Cooperative Petition for Limited Waiver of Broadband Performance Testing Requirements, WC Docket No. 10-90 (filed Apr. 7, 2021); Petition for Partial Waiver of United Utilities, Inc. of First Quarter 2021 Performance Measurements Testing Requirements, WC Docket No. 10-90 (filed Apr. 7, 2021); Petition for Waiver of Informal

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particular facts make strict compliance inconsistent with the public interest.¹⁷ In addition, the Bureau may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁸ 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.¹⁹

6. We find that it is appropriate to grant, in part, the waiver requests filed by Castleberry and Ringsted on the grounds that they have demonstrated reasonable effort to comply with the rule. We find that a binding agreement to purchase testing equipment substantially in advance of the testing commencement demonstrates a good faith attempt to comply with the pre-testing requirements in a timely manner. On the other hand, a carrier that merely “identified” or “selected” a vendor without actually committing to the purchase of necessary equipment or services for testing prior to the start of the quarter should have recognized it was at risk of not meeting its pre-testing obligations in the event that its preferred vendor would no longer commit to delivering within the necessary time frame. We therefore deny the petition for waiver filed by Venus Telephone Company alleging an inability to complete testing due to failures by vendors where there was no binding purchase agreement substantially prior to the start of the testing period.

7. We note that the circumstances underlying pre-testing waiver requests do not readily justify the waiving of the rules. The consequence of failing to complete and submit the results of pre-testing is the withholding of 5% of the carrier’s high-cost support, to be restored when the carrier makes filings bringing it into compliance. Given that such waiver requests are one-time and temporary in nature, the withholding itself would be temporary even in the absence of a waiver. The relatively small amount of support—5% of the carrier’s total high-cost support—further militates against a finding of hardship for carriers requesting a waiver.

8. Moreover, the rationale for pre-testing does not suggest that waivers should be readily granted. In adopting the pre-testing requirement, the Commission expressed that pre-testing would “ensure that carriers are familiar with the required testing and how to properly measure the speed and

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Performance Testing Schedule, Allamakee-Clayton Electric Cooperative, WC Docket No. 10-90 (filed Apr. 7, 2021); Bijou Telephone Cooperative Association, Inc. Petition for Limited Waiver of Broadband Performance Testing Requirements, WC Docket No. 10-90 (filed Mar. 31, 2021); Letter from Bret Cook, Bloomingdale Home Telephone Company, to Federal Communications Commission, WC Docket No. 10-90 (filed Apr. 5, 2021); Citizens Telephone Company of Hammond, New York, Inc. Emergency Petition for Waiver of First Quarter 2021 Broadband Performance Testing Requirements, WC Docket No. 10-90 (filed Mar. 29, 2021); Amendment to Citizens Telephone Company of Hammond, New York, Inc., Emergency Petition for Waiver of Broadband Testing Requirements, WC Docket No. 10-90 (filed July 9, 2021); Georgetown Telephone Company Emergency Petition for Waiver of First Quarter 2021 Broadband Performance Testing Requirements, WC Docket No. 10-90 (filed Mar. 26, 2021); Hopi Telecommunications, Inc. Emergency Petition for Waiver for First and Second Quarters 2021 Broadband Performance Testing Requirements, WC Docket No. 10-90 (filed Mar. 26, 2021); Martelle Cooperative Telephone Association Emergency Petition for Waiver of First Quarter 2021 Broadband Performance Testing Requirements, WC Docket No. 10-90 (filed Apr. 7, 2021); Mechanicsville Telephone Company Emergency Petition for Waiver of First Quarter 2021 Broadband Performance Testing Requirements, WC Docket No. 10-90 (filed Apr. 7, 2021); Carr Telephone Company Emergency Petition for Waiver of First Quarter 2021 Broadband Performance Testing Requirements, WC Docket No. 10-90 (filed Mar. 29, 2021); Chazy & Westport Telephone Company Emergency Petition for Waiver of First Quarter 2021 Broadband Performance Testing Requirements, WC Docket No. 10-90 (filed Mar. 29, 2021); Delta Communications, L.L.C. d/b/a Clearwave, Petition for Waiver, WC Docket No. 10-90 (filed Apr. 8, 2021); Larson Utilities, Inc. Emergency Petition for Waiver of First Quarter 2021 Broadband Performance Testing Requirements, WC Docket No. 10-90 (filed Apr. 7, 2021); and Petition for Waiver of Informal Performance Testing Schedule, Northeast Rural Services, WC Docket No. 10-90 (filed Apr. 6, 2021).

¹⁷ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

¹⁸ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

¹⁹ *Northeast Cellular*, 897 F.2d at 1166.

latency of their networks,” and allow carriers to adjust to the new testing regime.²⁰ Granting waivers to carriers that have not made reasonable efforts to complete pre-testing fosters a risk that the same carriers will later request waiver of the testing requirements because they are unprepared.

9. We reiterate our emphasis above that no carrier will permanently forego any support as a result of its failure to complete the pre-testing by the deadline or of our denial of its waiver request, so long as it corrects its non-compliance. For all carriers, it is imperative to continue to put testing capabilities into place, so that they are able to correctly perform the necessary testing in 2023, when they must demonstrate that they have met the required performance goals, and so they have time to correct if their pre-testing does not show expected performance.

A. Grants and Partial Grants

10. *Castleberry Telephone Company, Inc. (Castleberry)*.²¹ Castleberry, a CAF BLS company, claims it requires a waiver of the first two quarters of pre-testing in 2022 because of supply chain issues.²² Castleberry states that it ordered testing equipment in June 2021 but did not receive the main router required for testing until March 2022 because of supply chain issues.²³ Upon receiving this router, Castleberry then determined it needed additional equipment.²⁴ To assist in completing testing and submission of the data, Castleberry contracted with a vendor to ensure “a smooth transition in reporting the data to USAC.”²⁵ In support of its claims, Castleberry provided the dated order form for its equipment, the invoice for its vendor, and an affidavit attesting to these facts signed by the Secretary of the company.²⁶ We find that Castleberry’s efforts represent a reasonable attempt to complete the required testing on a timely basis, and therefore grant a waiver of the first and second quarter 2022 pre-testing requirements.

11. *Ringsted Telephone Company (Ringsted)*.²⁷ Ringsted requests a waiver because it ordered testing equipment in April 2021 but as a result of supply chain delays did not receive the equipment until February 2022.²⁸ In support of this claim, Ringsted provides a dated purchase order

²⁰ *Performance Measures Reconsideration Order*, 34 FCC Rcd at 10135, para. 68.

²¹ Castleberry Waiver Petition.

²² *Id.* at 1.

²³ *Id.* at 4.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* Exhs. A, B, C.

²⁷ Ringsted Waiver Petition. Ringsted requests “waiver of the FCC’s rules such that Ringsted is permitted to report only fourth quarter 2022 pretesting results in the HUBB.” *Id.* at 1. Ringsted argues that, “it will take time for Ringsted to map all of its locations, enter them into the spreadsheet provided by USAC, and submit them for randomization.” *Id.* at 7. Ringsted’s claim that it must “use the HUBB” (*Id.* at 4) to get its randomized sample for testing is incorrect. CAF BLS carriers, like Ringsted, that were fully deployed prior to 2016 do not have to enter these locations into the HUBB. *Id.* Exh. B at 2; *Wireline Competition Bureau Announces Deadline of March 1, 2021 for Certain Rate-of-Return Carriers Receiving Connect America Fund Broadband Loop Support (CAF-BLS) to Report Broadband Location Information for Pre-Existing Deployment*, Public Notice, 35 FCC Rcd 459 (2020). In fact, locations deployed prior to 2016 cannot be entered into the HUBB. Universal Service Administrative Company, Submit Data in the HUBB, <https://www.usac.org/high-cost/annual-requirements/submit-data-in-the-hubb/>. Rather, all Ringsted must do is submit a list of broadband subscribers to USAC and assign a unique identification number to each subscriber and USAC will provide Ringsted with a randomized sample. Universal Service Administrative Company, Submit Data in the HUBB, <https://www.usac.org/high-cost/annual-requirements/submit-data-in-the-hubb/>. Therefore, Ringsted’s claim regarding the HUBB provides not basis for granting a waiver.

²⁸ Ringsted Waiver Petition at 11.

form, an email from its equipment provider acknowledging the delay in delivery, and an affidavit from its Manager and Chief Executive Officer.²⁹ We find that Ringsted made reasonable efforts to obtain the necessary testing equipment and that the receipt of testing equipment in February 2022 would make it difficult to install such equipment and complete testing in the first and second quarters of 2022. We therefore grant a waiver to Ringsted so that it does not have to pre-test during the first two quarters of 2022. However, we deny Ringsted's request for a waiver of pre-testing during the third quarter of 2022. The third quarter begins in September which provides Ringsted with seven months, which based on our observations of the industry's experience, is enough time to install the equipment and complete testing so no waiver of third quarter 2022 pre-testing is warranted.

B. Denial

12. *Venus Telephone Corporation (Venus)*.³⁰ Venus, a carrier receiving A-CAM II support, requests a waiver of pre-testing during the first quarter of 2022. Venus claims that “[d]uring 2021 and early 2022, the Company identified two vendors that offered services suitable for network performance testing In the past several weeks, these two vendors each notified the Company that they would not be able to provide the equipment and service.”³¹ Venus states that it “moved quickly to identify alternatives and in less than two weeks selected a vendor and received hardware to be used for pre-testing.”³² Venus provides a declaration in support of its petition, but no dated order form.³³ Unlike the waiver requests we grant today, Venus does not state or provide evidence that it ordered equipment for speed and latency testing in preparation for pre-testing but instead waited until the first quarter of 2022 when pre-testing should already have started. We find merely identifying possible vendors does not warrant waiver of this requirement. We find that Venus has not demonstrated that it made a reasonable effort to complete pre-testing in a timely manner, and therefore deny its petition for waiver.

IV. ORDERING CLAUSES

13. 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 Temporary Waiver for first and second quarter 2022 performance pre-testing requirements filed by Castleberry Telephone Company, Inc. IS GRANTED to the extent described above.

14. IT IS FURTHER 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 Temporary Waiver of the Commission's first, second, and third quarter 2022 performance pre-testing requirements filed by Ringsted Telephone Company IS GRANTED as to the first and second quarters of 2022 and DENIED as to the third quarter of 2022 to the extent described above.

15. IT IS FURTHER 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 first quarter 2022 performance pre-testing requirements filed by Venus Telephone Company is DENIED.

²⁹ *Id.* Exhs. C, F.

³⁰ Venus Waiver Petition.

³¹ *Id.* at 2.

³² *Id.* at 2 (footnote omitted).

³³ Declaration of D. Groft, Attach. to Venus Waiver Petition at 6.

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

Trent B. Harkrader
Chief
Wireline Competition Bureau