

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

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

ORDER

Adopted: July 17, 2020

Released: July 17, 2020

By the Chief, Wireline Competition Bureau:

1. In this Order, the Wireline Competition Bureau (Bureau), on its own motion, grants a limited waiver of the performance testing requirements for recipients of Connect America Fund (CAF) Phase II model-based support (CAF Phase II carriers).¹ Specifically, the Bureau will allow those CAF Phase II carriers that are electing a seventh year of support to extend pre-testing through the third and fourth quarters of 2020, with a waiver of certain sampling requirements, as explained below. Because those carriers electing a seventh year of support² will be able to conduct four quarters of performance measures testing next year and given the continuing challenges posed by the COVID-19 pandemic, we find there is good cause to extend pre-testing to the third and fourth quarters of 2020 for those carriers that will be able to conduct testing throughout 2021.

2. *Background.* 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. The testing is necessary to protect taxpayers' investment and ensure that carriers receiving this support deploy networks that meet the performance standards they promised to deliver to rural consumers.³ Carriers failing to meet the required standards will be subject to withholding of universal service support, based on the level of non-compliance.⁴

3. To ensure carriers 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.⁵ The Commission required CAF Phase II carriers to conduct two quarters of pre-testing, i.e., the first and second quarters of 2020, with testing beginning in the third quarter of 2020.⁶ CAF Phase II carriers were

¹ 47 CFR § 54.313(j). See 47 CFR § 1.3 (Commission may waive its rules on its own motion). 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*) and *Connect America Fund*, Order on Reconsideration, WC Docket No. 10-90, 34 FCC Rcd 10109 (2019) (*Performance Measures Reconsideration Order*).

² *Rural Digital Opportunity Fund; Connect America Fund*, WC Docket Nos. 19-126, 10-90, Report and Order, 35 FCC Rcd 686, 740-41, para. 127 (2020).

³ *Performance Measures Reconsideration Order*, 34 FCC Rcd at 10110, para. 2.

⁴ *Id.* at 10133-38, paras. 65-75; *First Performance Measures Order*, 33 FCC Rcd at 6530-33, paras. 56-67.

⁵ *Performance Measures Reconsideration Order*, 34 FCC Rcd at 10139, paras. 78-79.

⁶ *Id.* at 10140, para. 81.

provided only two quarters of pre-testing, rather than the full year provided to other high-cost recipients, because it was unclear when the pre-testing mechanism was adopted if CAF Phase II carriers would be receiving funding for a seventh year.⁷ For both pre-testing and testing, the Commission required that carriers submit speed and latency test results, as well as an annual certification, in a format determined by the Bureau.⁸

4. *Discussion.* On its own motion, the Bureau grants a waiver allowing those CAF Phase II carriers that will be receiving support for a seventh year to extend pre-testing through the third and fourth quarters of 2020. Generally, the Commission's rules may be waived for good cause shown.⁹ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹⁰ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹¹ 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.¹²

5. In the *Performance Measures Reconsideration Order*, the Commission included two quarters of pre-testing for CAF Phase II carriers.¹³ However, the Commission has recognized that installing testing equipment in subscriber homes has been made more difficult by the COVID-19 pandemic.¹⁴ Further, based on the timing of the Rural Digital Opportunity Fund auction, it is likely that most CAF Phase II carriers will elect a seventh year of funding during 2021.¹⁵ These carriers could have a full one-year pre-test period during 2020 and still have a full year of testing prior to the end of their funding terms. Therefore, we allow CAF Phase II carriers that will receive funding for a seventh year to choose to continue pre-testing during the third and fourth quarters of 2020, subject to the sampling requirements outlined below.¹⁶ Any CAF Phase II carrier that will not be electing a seventh year of support must complete testing in the third and fourth quarters of 2020 in accordance with the Commission's rules.¹⁷

6. For pre-testing during the first and second quarters of 2020, the Bureau waived certain subscriber sampling requirements to minimize unnecessary person-to-person contact through installation of equipment needed for testing in subscriber homes and diversion of resources needed to address the

⁷ *Id.*

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

⁹ 47 CFR § 1.3.

¹⁰ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

¹¹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

¹² *Northeast Cellular*, 897 F.2d at 1166.

¹³ *Performance Measures Reconsideration Order*, 34 FCC Rcd at 10140, para. 81.

¹⁴ *Connect America Fund*, Order, WC Docket No. 10-90, 35 FCC Rcd 3015 (WCB 2020) (*Subscriber Waiver Order*).

¹⁵ See *Rural Digital Opportunity Fund, Connect America Fund*, Report and Order, WC Docket Nos. 19-126, 10-90, 35 FCC Rcd 686, 740-41, para. 127 (2020); *Comment Sought on Competitive Bidding Procedures and Certain Program Requirements for the Rural Digital Opportunity Fund Auction (Auction 904)*, Public Notice, AU Docket No. 20-34, WC Docket No. 19-126, WC Docket No. 10-90, 35 FCC Rcd 2295, 2296, para. 1 (2020).

¹⁶ The Universal Service Administrative Company (USAC) will provide CAF Phase II carriers with instructions regarding how to notify USAC that these carriers will continue pre-testing during the third and fourth quarters of 2020.

¹⁷ A CAF Phase II carrier that must test during the third and fourth quarters will be expected to comply with all of the testing rules regarding a random sample of subscribers selected by USAC. In the event that a carrier cannot comply with these requirements, it will need to seek a waiver.

increased network demands as a result of the COVID-19 pandemic.¹⁸ The Bureau stated that carriers using either a random USAC-selected sample or self-selected sample of subscribers were only required to conduct testing based on the number of subscribers in each area (up to the required sample size) that already have the necessary equipment installed as of the date of the waiver.¹⁹ Although first quarter pre-testing results show that most carriers made sincere efforts to pre-test as many subscribers as possible, some carriers made little to no effort to test subscribers after the Bureau's waiver was adopted. A primary purpose of pre-testing was to allow carriers to gain experience with the testing requirements and procedures so that they would be fully prepared for testing before carriers are subject to the withholding of support for failure to meet the required performance standards.²⁰ That objective cannot be achieved if carriers are not pre-testing any subscribers or are testing only a very small number of subscribers.

7. To ensure that carriers that continue pre-testing in 2020 are prepared to begin testing in 2021, we require any carrier that tests less than 70% of its USAC-selected sample to file results for a carrier-selected sample in addition to the USAC-selected sample to ensure that it completes testing of its full sample size. For example, if a carrier is required to have 50 subscribers in a state but has only 20 USAC-selected subscribers, it will be required to file results for the 20 USAC-selected subscribers plus results for 30 subscribers from a carrier-selected sample. Once the carrier has reached 70% of its USAC-selected subscribers, it will no longer be required to file the carrier-selected sample. For example, once the carrier above is able to test at least 35 USAC-selected subscribers, it will no longer be required to file any carrier-selected subscriber results. However, all CAF Phase II carriers, including those pre-testing carrier-selected samples, must be prepared to begin testing all of the subscribers in the USAC-selected sample in the first quarter of 2021.

8. 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 CAF Phase II Speed and Latency Testing Template requirements ARE WAIVED to the extent described above.

9. 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

¹⁸ *Subscriber Waiver Order*.

¹⁹ *Id.* at 3016, para. 5.

²⁰ *Performance Measures Reconsideration Order*, 34 FCC Rcd at 10139-40, para. 79-80.