

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

In the Matter of)
ACS Petition for Waiver of Sections 54.312(b)(2))
and (3) of the Commission's Rules)
Connect America Fund) WC Docket No. 10-90
High-Cost Universal Service Support) WC Docket No. 05-337

ORDER

Adopted: June 17, 2016

Released: June 17, 2016

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau (Bureau) denies a petition filed by ACS of Anchorage, ACS of Northland, ACS of Fairbanks, and ACS of Alaska (collectively, ACS) for waiver of the requirement that a carrier accepting Connect America Phase I incremental support deploy 4 Mbps downstream/1 Mbps upstream service to one unserved location for every \$775 in support accepted.

II. BACKGROUND

A. Connect America Phase I and the Buildout Requirements of Section 54.312(b)

2. In the first round of Connect America Phase I, the Commission made \$300 million in incremental support available to price cap carriers to spur the deployment of broadband capable-networks to unserved consumers.

1 ACS Petition for Waiver of Sections 54.312(b)(2) and (b)(3) of the Commission's Rules, WC Docket Nos. 10-90, 05-337 (Sept. 26, 2012) (ACS Petition); 47 CFR §§ 54.313(j), 54.314(d)(1).

2 See 47 CFR § 54.312(b)(2).

3 See Connect America Fund et al., WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17712, 17673, para. 128 (2011) (USF/ICC Transformation Order), aff'd sub nom., In re: FCC 11-161, 753 F.3d 1015 (10th Cir. 2014).

4 Id. at 17717, para. 138. See also 47 CFR § 54.312(b)(2).

kbps downstream and 200 kbps upstream and that, to the best of the carrier's knowledge, the locations are not in fact served.⁵

B. ACS's Petition for Waiver

3. On July 24, 2012, ACS accepted \$4,185,103 in Connect America Phase I support.⁶ This obligated ACS to deploy 4 Mbps downstream/1 Mbps upstream service to 5,401 unserved locations.⁷ In its acceptance, ACS identified the census blocks where it intended to deploy.⁸ However, ACS alleges that information later emerged that made it unable to meet the requirements.⁹

4. First, ACS claims that at the time it accepted Phase I funds, it had not yet completed a full market analysis of the areas where it planned to deploy in order to meet its Phase I buildout obligations.¹⁰ According to ACS, once completed, the full market analysis showed that the return on investment was insufficient to justify deploying service to these locations.¹¹

5. Second, when deciding which unserved locations it would deploy to under Phase I, ACS overlooked the presence of wireless Internet service providers (WISPs).¹² Upon reviewing the list of census blocks where ACS planned to deploy, the Bureau informed ACS that hundreds of its listed census blocks were shown as served on the then-current National Broadband Map.¹³ ACS notes that this rendered nearly half its planned locations ineligible under Phase I.¹⁴

6. ACS asserts that due to these circumstances, it cannot use the entire amount of Phase I support it accepted absent a waiver. ACS maintains that it had already identified the lowest cost locations in its original submission, and the subsequent revelation that many of those locations were either economically infeasible to build or already shown as served would leave only 2,163 locations under the requirement to deploy to one location for every \$775 in support accepted.¹⁵ In order to meet its remaining obligation to deploy to 3,238 locations, ACS seeks a waiver of the requirements contained in section 54.312(b)(2) of the Commission's rules.¹⁶ ACS identifies three potential alternative forms of waiver that would allow it to partially or completely satisfy its outstanding obligation.

7. First, ACS requests a waiver of the requirement to deploy 4 Mbps downstream/1 Mbps service to one location for every \$775 in support accepted.¹⁷ Specifically, ACS requests a higher dollar figure be used in place of \$775. ACS notes that if the support level were set at \$5,000 per location it could deploy to an additional 115 locations, satisfying the buildout obligation for \$575,000 of the support

⁵ See 47 CFR § 54.312(b)(3).

⁶ ACS Petition at 3. See also Acceptance of Connect America Fund Phase I Support on Behalf of Incumbent Local Exchange Carrier Affiliates of Alaska Communications Systems Group, Inc., WC Docket Nos. 10-90, 05-337 (July 24, 2012) (ACS Acceptance).

⁷ ACS Petition at 3. See also ACS Acceptance at 1.

⁸ ACS Acceptance at Attachment.

⁹ See ACS Petition at 3.

¹⁰ See *id.* at 5.

¹¹ See *id.* at 3-5.

¹² See *id.* at 15.

¹³ See *id.* at 5.

¹⁴ See *id.*

¹⁵ See *id.* at 6.

¹⁶ See *id.*

¹⁷ *Id.* at 8.

it accepted.¹⁸ ACS proposes that it could fulfill the obligation accompanying the remaining \$1,933,778 of its support by deploying 4 Mbps downstream/1 Mbps upstream service to 248 additional locations at a support level of \$7,800 per location.¹⁹

8. Second, ACS requests a waiver of the definition used to determine eligible locations.²⁰ Under the rules for the first round of Phase I incremental support, a location is considered served if it has access to fixed terrestrial Internet access service at speeds at or above 768 kbps downstream and 200 kbps upstream.²¹ ACS requests that it be allowed to treat as unserved its own locations that have speeds at or above 768 kbps/200 kbps but below 1.5 Mbps downstream.²² According to ACS, this would allow it to upgrade 3,238 locations to speeds in line with the Commission's broadband benchmarks,²³ thereby fulfilling ACS's entire buildout obligation at a rate of \$775 per location.²⁴

9. Third, ACS requests a waiver of the definition of unserved. Specifically, ACS requests that the locations that are served only by a WISP should be deemed unserved.²⁵ ACS alleges that the service offered by WISPs suffers from technological shortcomings that a wireline provider such as ACS does not contend with.²⁶ While these WISPs have service areas covering a large number of locations, ACS claims that only a small fraction of those locations are actual customers of the WISPs.²⁷ Furthermore, ACS argues that because WISPs are not regulated as telecommunications entities, they cannot be relied on to provide a dependable and stable source of broadband.²⁸ ACS claims that if the locations in the service territory of these WISPs were treated as unserved, ACS could deploy 4 Mbps downstream/1 Mbps upstream to an additional 567 locations.²⁹

10. Several commenters opposed ACS's position on these points. AlasConnect submitted comments contradicting ACS's contentions, noting specifically that AlasConnect does provide service to residential customers.³⁰ Other commenters challenged ACS's assertions that WISPs provide inferior service, arguing that ACS relies on inaccurate information or faulty assumptions in making its arguments.³¹ For example, SPITSwSPOTS noted in its opposition that capacity constraints are overcome

¹⁸ *See id.*

¹⁹ *Id.*

²⁰ *Id.* at 9.

²¹ *See USF/ICC Transformation Order*, 26 FCC Rcd at 17720, para. 146.

²² *See* ACS Petition at 10.

²³ The broadband public interest obligation at the time was 4 Mbps downstream/1 Mbps upstream. The Commission subsequently increased the minimum requirement for Phase II of the Connect America Fund to 10 Mbps downstream/1 Mbps upstream. *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, 29 FCC Rcd 15644, 15649, para. 15 (2014).

²⁴ *See* ACS Petition at 10.

²⁵ *See id.* at 11-12.

²⁶ *See id.* at 12, 16.

²⁷ *See id.* at 17-19.

²⁸ *See id.* at 16-17.

²⁹ *Id.* at 12.

³⁰ *See* Comments of AlasConnect on ACS' Petition for Waiver, WC Docket Nos. 10-90, 05-337, at 4 (Oct. 11, 2012).

³¹ *See* Opposition of the Wireless Internet Service Providers Association to Petition for Waiver, WC Docket Nos. 10-90, 05-337, at 13-16 (Oct. 12, 2012); *see also* Opposition of SPITwSPOTS Inc. to Petition for Waiver, WC Docket Nos. 10-90, 05-337, at 6-8 (Oct. 12, 2012).

through using different spectrum, adding access points, and employing other design and operational techniques.³²

11. ACS argues that special circumstances justify the grant of this waiver. In addition to the results of the market analysis and the unanticipated presence of WISPs, ACS claims that the unique conditions in Alaska, such as a short construction season and higher costs of deploying infrastructure, place ACS in a unique position relative to other carriers.³³ Additionally, ACS argues that granting the waiver would serve the public interest by allowing ACS to use its currently allocated funds to reach the greatest number of unserved locations as possible, even if that number is less than the originally anticipated 5,401.³⁴

III. DISCUSSION

12. The Bureau denies ACS's petition for waiver.³⁵ Based on the information before us, the Bureau concludes that the special circumstances alleged by ACS are insufficient to justify a waiver, and that grant of a waiver would not be in the public interest.

13. The factors cited by ACS do not amount to special circumstances. Two of the purported special circumstances cited by ACS—its market analysis revealing that the buildout was not economically feasible, and the discovery that many of the planned locations were already served by WISPs—were created entirely by ACS's actions. ACS chose to accept Connect America funds without having completed its market analysis, even though there was clearly the possibility that the analysis would lead to a conclusion that the areas were uneconomical to build with the amount of support provided. ACS nonetheless decided to accept the full amount of funding. Simply put, buyer's remorse is not grounds for a waiver. Similarly, the discovery that many of the locations believed to be unserved were in fact served was not caused by some external force or condition, such as an error in the National Broadband Map that subsequently corrected by a third party. Instead, it was the result of ACS neglecting to check the map for fixed wireless service. Failure of ACS to exercise due diligence before accepting the allocated funds does not constitute special circumstances.

14. ACS further argues that the conditions in Alaska, as compared to the contiguous United States, give rise to special circumstances. ACS asserts that \$775 is an inadequate subsidy to connect to an unserved location, given Alaska's increased labor costs, short building season, and additional infrastructure needs.³⁶ However, this argument fails on two grounds. First, the costs and constraints of building a telecommunications network in Alaska were presumably known to ACS at the time it accepted funding; if these factors made accepting \$775 per location untenable, ACS should have taken such information into consideration when it decided to accept all of its allocated funding and obligate itself to deploying to 5,401 unserved locations. Second, while ACS claims that it is in a unique situation due to the costs associated with deploying broadband to locations in Alaska, its arguments are substantially

³² See Opposition of SPITwSPOTS Inc. to Petition for Waiver at 7.

³³ See ACS Petition at 20-21.

³⁴ See *id.* at 26.

³⁵ Generally, the Commission's rules may be waived if good cause is shown. 47 CFR § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *Northeast Cellular*, 897 F.2d at 1166. The party seeking a waiver faces a high hurdle to demonstrate these two elements and obtain the relief it requests. See *WAIT Radio*, 418 F.2d at 1157.

³⁶ See ACS Petition at 21-23.

similar to those the Commission has previously rejected in Phase I. Other carriers filed petitions for reconsideration claiming that the costs of connecting to unserved locations in their territories were substantially higher than the costs faced by other carriers.³⁷ However, the Commission ultimately rejected this line of argument for Phase I, refusing to adopt a carrier-specific cost metric.³⁸ ACS offers no persuasive reason to deviate from this precedent. For these reasons, the alleged additional costs of building in Alaska do not constitute special circumstances justifying a waiver.³⁹

15. We also are not persuaded by ACS's assertion that the public interest is served by allowing ACS to meet relaxed deployment requirements with its accepted Phase I incremental support.⁴⁰ The goal of Phase I was to "spur immediate broadband deployment to as many unserved locations as possible;"⁴¹ it was not to ensure that carriers spent all allocated funds.⁴² Merely spending the allocated funds for the sake of spending is not in the public interest. Indeed, the Commission recognized that some allocated funds might not be claimed in Phase I.⁴³ The *USF/ICC Transformation Order* provided that remaining funds could be used in other ways to advance the Commission's broadband objectives.⁴⁴

16. We do not agree with ACS that it should be allowed to upgrade infrastructure to locations it currently serves with lower speed Internet access, bringing those locations up to the Commission's 4/1 Mbps standard for Phase I.⁴⁵ While providing faster service to those who already have access to some level of service is a valuable and laudable objective, it was not the goal of Connect America Phase I. The Commission clearly articulated that the goal of Phase I was to provide broadband-capable networks to those who lacked access to any broadband at all.⁴⁶ This position was further reinforced in the *Second Order on Reconsideration*, where the Commission stated, "[T]he Commission's focus in CAF Phase I was to spur broadband deployment to consumers who lack access to broadband, not to improve service for those who already have access to some form of high-speed Internet access."⁴⁷

17. ACS also argues that the fact that approximately 60 percent of Phase I incremental support money was declined by carriers in the first round constitutes changed circumstances under which the Commission should reexamine its prior decisions regarding underserved locations.⁴⁸ However, as noted above, the goal of Phase I was not to ensure that all \$300 million in allocated Phase I incremental

³⁷ See *Frontier Communications Corp. and Windstream Communications, Inc.*, WC Docket No. 10-90 et al., Petition for Reconsideration and/or Clarification, at 12-20 (Dec. 29, 2011); *United States Telecom Association*, WC Docket No. 10-90 et al., Petition for Reconsideration, at 3-5 (Dec. 29, 2011).

³⁸ See *Connect America Fund et al.*, WC Docket 10-90 et al., Second Order on Reconsideration, 27 FCC Rcd 4648, 4656-57, paras. 22-26 (2012) (*Second Order on Reconsideration*).

³⁹ We note that ACS is proposing to spend an average of \$6,900 per location to deploy 4 Mbps downstream/1 Mbps upstream to the additional 363 locations. This is nearly nine times the standard Phase I incremental support amount.

⁴⁰ ACS Petition at 26.

⁴¹ *USF/ICC Transformation Order*, 26 FCC Rcd at 17718, para. 139.

⁴² See *Second Order on Reconsideration*, 27 FCC Rcd at 4654, para. 20.

⁴³ See *id.*

⁴⁴ See *USF/ICC Transformation Order*, 26 FCC Rcd 17717-18, para. 138 n.221.

⁴⁵ See ACS Petition at 10.

⁴⁶ *USF/ICC Transformation Order*, 26 FCC Rcd at 17712, para. 127 ("As a first step to delivering robust, scalable broadband to these *unserved* areas, the first phase of the CAF will provide the opportunity for price cap carriers to begin extending broadband service to hundreds of thousands of *unserved* locations in their territories." (emphasis added)).

⁴⁷ *Second Order on Reconsideration*, 27 FCC Rcd at 4654, para. 21.

⁴⁸ See ACS Petition at 10.

support was accepted. Rather, the goal of Phase I was provide an “immediate boost to broadband deployment in areas that are unserved by any broadband provider.”⁴⁹ Moreover, the fact that the Commission subsequently made some adjustments to its requirements before offering a second round of Phase I incremental support does not mean that a waiver should be granted here.

18. Finally, we conclude that ACS’s arguments regarding WISPs fail to justify a waiver of the Commission’s requirement that there be no fixed terrestrial provider on the then-current National Broadband in order for a census block to be eligible.⁵⁰ The definition of “unsubsidized competitor” adopted by the Commission in 2011 clearly encompassed voice and broadband provided by fixed, terrestrial providers, such as WISPs.⁵¹ Had the Commission intended to exclude WISPs from the definition, it would have done so.⁵²

IV. CONCLUSION

19. Having considered ACS’s arguments, the Bureau concludes that the conditions highlighted by ACS do not constitute special circumstances justifying the grant of a waiver, nor is the public interest served by such a grant. For these reasons, the Bureau denies ACS’s petition for waiver. Consistent with the Commission’s decision, USAC shall recover support as necessary.⁵³

V. ORDERING CLAUSES

20. 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 by ACS for waiver of section 54.312(b) of the Commission’s rules, 47 CFR § 54.312(b), IS DENIED.

21. 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

Matthew S. DelNero
Chief
Wireline Competition Bureau

⁴⁹ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17717, para. 137; see also *Second Order on Reconsideration*, 27 FCC Rcd at 4654, para. 21.

⁵⁰ See ACS Petition at 11-12.

⁵¹ See 47 CFR § 54.5 (defining “unsubsidized competitor”); *USF/ICC Transformation Order*, 26 FCC Rcd at 17701, paras. 103-104.

⁵² See *USF/ICC Transformation Order*, 26 FCC Rcd at 17701, para. 104 (excluding satellite and mobile providers from definition of unsubsidized competitor).

⁵³ *USF/ICC Transformation Order*, 26 FCC Rcd at 17721, para. 147 (specifying the carriers that fail to meet Phase I deployment obligations will be required to return that support).