



June 15, 2021

VIA ECFS

The Honorable Jessica Rosenworcel
Acting Chairwoman
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

RE: *Rural Digital Opportunity Fund, WC Docket No. 19-126; Connect America Fund, WC Docket No. 10-90; Auction 904, AU Docket No. 20-34*

Dear Acting Chairwoman Rosenworcel:

By this letter, NTCA–The Rural Broadband Association (“NTCA”) responds to correspondence submitted by the Wireless Internet Service Providers Association (“WISPA”) in the above-referenced proceedings objecting to reasonable transparency and accountability measures in connection with review of long-form applications for billions of dollars of universal service fund resources under the Rural Digital Opportunity Fund (“RDOF”) program. WISPA’s attempts to quash calls for greater visibility into the standards by which the Federal Communications Commission (the “Commission”) is reviewing long-form applications and greater stakeholder input miss the mark and ultimately rely upon a fundamental misunderstanding of the proposals put forward and the record in these proceedings to date.

By way of background, NTCA several months ago proposed three narrowly defined measures aimed at bringing greater transparency and accountability to the RDOF long-form application review process,¹ consistent with the calls of more than one-third of the members of Congress who had asked the Commission to “validate that that each provider in fact has the technical, financial, managerial, operational skills, capabilities, and resources to deliver the services that they have pledged for every American” and “to make as public as possible the status of its review and consider opportunities for public input on the applications.”² NTCA explained that its process recommendations were necessary and appropriate given fundamental changes in RDOF as compared to the Connect America Fund (“CAF”) Phase II Auction in 2018.

¹ *Ex Parte* Letter from Michael R. Romano, Sr. Vice President, NTCA, to Acting Chairwoman Jessica Rosenworcel, Commission, WC Docket No. 19-126, *et al.* (filed Feb. 5, 2021).

² Letter from Reps. James E. Clyburn and Tim Walberg, Sens. John Thune and Amy Klobuchar, and 156 other Members of Congress to Chairman Ajit Pai (dated Jan. 19, 2021).

Specifically, in the CAF Phase II auction, the Commission had helped to ensure both transparency and accountability through a data-driven “bright-line” bidding qualification rule that permitted entities to bid at performance levels based upon actual commercially available offerings as indicated by providers’ own claims.³ As NTCA’s letter observed, however, the RDOF auction inexplicably departed from this precedent, rendering this bright-line rule a mere presumption that individual firms could overcome through confidential filings asserting the ability to deliver higher levels of performance than they offer today using certain technologies or than are otherwise generally seen in the broadband marketplace.⁴ Unfortunately, neither the standards for review of such confidential requests for special treatment nor any decisions made upon such review were published. Furthermore, the Commission provided neither notice of nor opportunity for public comment with respect to any such confidential requests for special treatment.

To remedy this blurring of the prior bright-line rule and to restore greater confidence and certainty in the process for review of long-form applications in lieu of continued closed-door review of confidential materials pursuant to unidentified standards, NTCA provided three specific and narrowly tailored recommendations:

- (1) Publish objective technical standards for all technologies (but tailored of course for each technology) by which long-form applications will be evaluated;
- (2) Permit expedited third party review and comment on all long-form applications pursuant to protective order procedures; and
- (3) Publish the rationales for the ultimate determinations made with respect to each long-form application.

WISPA has since submitted a few filings in response to NTCA’s proposals (and the calls from many other stakeholders as well for more robust review of long-form applications).⁵ In its responses, however, WISPA appears not to understand the extent of NTCA’s proposals or the record in this proceeding; WISPA also rattles sabers related to the legal effects of potential changes to procedure, but in doing so takes selective aim in its procedural arguments that obfuscate the stages of application review. None of WISPA’s arguments provides sound basis to decline to provide greater transparency into the review process or to deny public input consistent with the calls of 160 members of Congress.

³ *Connect America Fund Phase II Auction Scheduled for July 24, 2018 Notice and Filing Requirements and Other Procedures for Auction 903*, AU Docket No. 17-182, WC Docket No. 10-90, 33 FCC Rcd 1428, 1468 (2018), at ¶¶ 103-104.

⁴ *Rural Digital Opportunity Fund Auction Scheduled for October 29, 2020 Notice and Filing Requirements and Other Procedures for Auction 904*, AU Docket No. 20-34, WC Docket Nos. 19-126 and 10-90, 35 FCC Rcd 6077, 6113-16 (2020), at ¶¶ 99-108 (“*RDOF Procedures Public Notice*”).

⁵ *Ex Parte* Letter from Claude Aiken, President & CEO, WISPA, to Acting Chairwoman Jessica Rosenworcel, Commission, WC Docket No. 19-126, *et al.* (filed Feb. 22, 2021) (“February WISPA Letter”); *Ex Parte* Letter from Louis Peraertz, Vice President of Policy, WISPA, to Acting Chairwoman Jessica Rosenworcel, Commission, WC Docket No. 19-126, *et al.* (filed June 8, 2021) (“June WISPA Letter”).

Publication of Technical Standards for Long-Form Application Review

As an initial matter, WISPA objects to NTCA's straightforward suggestion that the Commission publish the standards by which long-form applications will be reviewed. But in a theme that permeates its arguments, WISPA oddly conflates the Commission's prior pronouncements with respect to *short-form* applications in arguing against the publication of the standards by which the Commission is evaluating *long-form* applications. Specifically, WISPA points to the following language from the *RDOF Procedures Public Notice* to argue that the Commission has already rejected NTCA's arguments and thus cannot now publish the standards it is employing to review long-form applications:

we are confident that Commission staff will be able to review technologies consistently on a case-by-case basis without having to adopt additional standards and rebuttable presumptions or invite comment on applicants' proposals. *Adopting generally-applicable standards and assumptions for the review that have been suggested in the record beyond those we have already adopted would be time-consuming and difficult given the fact-intensive nature of the review. Moreover, inviting comment on proposals would lead to delays in the review and the potential benefits of eliciting additional information that would be helpful for the review would be outweighed by the burdens of the process, particularly if entities that have a competitive interest in having certain entities excluded from the auction comment solely to prevent such entities' participation.* Instead, we will implement the Commission's ordinary procedures for reviewing auction applications to help ensure that eligibility determinations are made consistently across all applications by, among other things, leveraging the expertise of engineers and/or other subject matter experts.⁶

What WISPA ignores or buries, however, is that the quote above and the surrounding discussion it cites relate to a prior NTCA proposal that the Commission establish standards for review of *short-form* applications. This material does not address the question of whether the Commission would articulate the standards by which it will judge *long-form* applications. No petition for reconsideration or other challenge was or is required here because no one is seeking to go back and re-address the short-form application process, and there is certainly no procedural bar to the Commission deciding simply to identify the standards by which it is determining in the long-form stage that billions of dollars of federal ratepayer resources should be distributed to firms promising to deliver broadband. If anything, it flies in the face of transparent procedure and the expressed expectations of Congress to decline merely to publish the standards that are presumably being employed right now to validate whether provisionally winning bidders can reasonably be expected to perform as promised. No confidential information or business plans would be unearthed through such disclosure; to the contrary, the mere publication of standards would define the commonly applied metrics by which each application is being judged and nothing more. The public interest weighs heavily in favor of such publication and, if anything, the failure to publish such standards raises the risk that any decisions might be challengeable in the future as arbitrary and capricious in the absence of any clear and objective standards for reaching them.

⁶ February WISPA Letter at 4 (quoting *RDOF Procedures Public Notice* at 6125, ¶ 126 (emphasis added by WISPA)).

Third-Party Review of and Comment Upon Long-Form Applications

WISPA has also objected repeatedly to NTCA’s proposal to enable third-party review and comment upon long-form applications, subject to reasonable protections such as standard protective order procedures. Most recently, in the June WISPA letter, WISPA contends that the *RDOF Procedures Public Notice* conclusively rejected such requests and thus the Commission is “legally barred from allowing third-party review of long-form applications.”⁷ In particular, WISPA quotes the following from the *RDOF Procedures Public Notice* to assert that it would be procedurally improper for the Commission now to accept public comment on pending long-form applications:

inviting comment on proposals would lead to delays in the review and the potential benefits of eliciting additional information that would be helpful for the review would be outweighed by the burdens of the process, particularly if entities that have a competitive interest in having certain entities excluded from the auction comment solely to prevent such entities’ participation.⁸

Here again, WISPA plays loosely and fast with what was actually argued and decided before, taking arguments made and decisions reached with respect to the *short-form* application stage and characterizing them as if they were made with respect to and thus govern the *long-form* application stage as well. But the excerpt above, just as in the case of that in the preceding discussion, relates to the *short-form* application review process and evaluations of whether parties might be eligible to bid in any given performance or latency tier. It was not a conclusion as to any steps that might subsequently be necessary at the long-form stage of review. Appearing to recognize that this proposal does not suffer from the “fatal procedural defect” it claims,⁹ WISPA further contends that allowing third-party review would be bad policy by creating unnecessary delay and challenges – invoking a parade of procedural horrors and even rattling the saber of potential litigation should a party’s long-form application be rejected following a process for public input.¹⁰ This transparent process need not be as involved or complicated, however, as WISPA attempts to make it in a transparent attempt to avoid it. Rather, as NTCA has explained previously, there is no reason to believe a brief and self-contained 60-day filing window announced by Public Notice and governed by well-established protective order procedures will result in any meaningful or material delay, especially as it would occur in parallel with the Commission’s own robust review of the long-form applications.¹¹

⁷ June WISPA Letter at 2.

⁸ *Id.* (quoting *RDOF Procedures Public Notice* at 6125, ¶ 126).

⁹ June WISPA Letter at 2.

¹⁰ *Id.* at 2-3 (citing Letter from Patrick R. Halley, Sr. Vice President, USTelecom, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 19-126, *et al.* (filed March 15, 2021)).

¹¹ *See Ex Parte* Letter from Michael R. Romano, Sr. Vice President, NTCA, to Acting Chairwoman Jessica Rosenworcel, Commission, WC Docket No. 19-126, *et al.* (filed March 11, 2021).

Publishing the Rationales for Decisions on Long-Form Applications

Finally, NTCA previously asked the Commission to publish the rationales for its determinations with respect to each long-form application. While WISPA has objected to this proposal on the ground that it “would provide yet another opportunity for unsuccessful applicants to challenge the Commission’s decision to authorize support,”¹² WISPA fails to recognize that *the absence of any explanation* is more likely to foment potential challenges as parties seek explanation of the bases for approval or denial of any given long-form application. Indeed, it defies logic to believe that a lack of transparency and reasonable explanation will somehow result in fewer questions being raised about any given decision.

NTCA and its members share the Commission’s commitment to universal service, and it should be noted that these process recommendations would apply with equal force to all provisionally winning bidders – whether members of NTCA, WISPA, or any other organization. A reasonable but robust process for examining long-form applications in a transparent manner, paired with disciplined adherence to the legal constructs surrounding designation of eligible telecommunications carriers to confirm they are offering supported telecommunications services, is critical to achieving the statutory mandate for the availability of reasonably comparable broadband and voice services at reasonably comparable rates in rural and urban America alike.

Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the Commission’s rules, this letter is being filed in ECFS in the above-referenced proceedings.

Sincerely,

/s/ Michael R. Romano

Michael R. Romano

Senior Vice President –

Industry Affairs & Business Development

NTCA–The Rural Broadband Association

cc: The Honorable Brendan Carr
The Honorable Geoffrey Starks
The Honorable Nathan Simington
Travis Litman
Ramesh Nagarajan
Danielle Thumann
Greg Watson
Austin Bonner
Carolyn Roddy
Kris Monteith
Michael Janson
Kirk Burgee
Jonathan McCormack
Audra Hale-Maddox

¹² February WISPA Letter at 7.