



March 8, 2024

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

RE: *Rural Digital Opportunity Fund (Auction 904), AU Docket No. 20-34; Connect America Fund Phase II Auction, AU Docket No. 17-182; Rural Digital Opportunity Fund, WC Docket No. 19-126; Connect America Fund, WC Docket No. 10-90*

Dear Ms. Dortch:

By this letter, NTCA–The Rural Broadband Association (“NTCA”) responds to several recent submissions and releases in the above-referenced proceedings regarding the potential abandonment of certain locations that had been awarded in the Rural Digital Opportunity Fund (“RDOF”) and/or Connect America Fund (“CAF”) Phase II auctions. These proposals are couched in the interest of promoting service to these locations instead through the Broadband Equity, Access, and Deployment (“BEAD”) or other grant programs. As explained herein, while NTCA supports the objective of ensuring that every American will be connected to robust, reliable, and affordable broadband as soon as possible, if the Federal Communications Commission (the “Commission”) gives such requests any weight, a straightforward grant of “amnesty” for RDOF or CAF Phase II support recipients without any conditions or consequences would put at risk what the auction programs could still achieve, result in an inefficient allocation of valuable broadband funding resources, and create perverse incentives that reward gaming in the form of attempts to “hop” between funding programs.

To address such concerns, as NTCA explains further below, the Commission should at the very least impose two specific conditions upon the grant of any waiver that would permit surrender of RDOF or CAF Phase II locations: (1) payment in the form of an “early buyout” of default liability for the abandoned locations; and (2) a bar upon the same party or its affiliates or subsidiaries seeking grant funding thereafter to serve those same locations. The Commission should also ensure that any such waiver is subject to proper public review and opportunity for comment in lieu of granting relief in summary fashion via a Public Notice.

As background, on February 28, 2024, the Federal Communications Commission (the “Commission”) posted submissions in several of the above-referenced proceedings on behalf of two providers indicating an intent to surrender certain locations in a series of census block groups that had been awarded in the RDOF and/or Connect America Fund CAF Phase II auctions.¹

¹ Letter from Sean A. Stokes, Keller & Heckman, LLP, to Trent Harkrader, Chief, Wireline Competition Bureau (dated Feb. 4, 2024); Letter from Keith Swisher, President, BARC Electric Cooperative, to Trent Harkrader, Chief, Wireline Competition Bureau (dated Jan. 17, 2024).

Shortly thereafter, a letter from a collection of broadband service providers, trade associations, state and local officials, and other groups (the “Group Letter”) appeared in several of these same dockets, advocating for “a brief amnesty period” that would allow abandonment of awarded locations “without having to bear the full weight of penalties” associated with doing so, under the rationale that this would enable those locations to be eligible for awards instead through the BEAD program.²

Finally, soon after the Group Letter posted, a Public Notice was released that same day in the above-referenced proceedings acknowledging the submissions of the two providers noted above and indicating that the relevant locations would be deemed eligible for BEAD or other broadband grant programs. The Public Notice further indicated that RDOF and/or CAF Phase II auction support, as applicable, would cease to be provided for the locations in question and that the providers would “remain subject to penalties” for the census block groups subject to the default.³

NTCA supports the effective coordination of funding programs to realize the objectives of universal connectivity and ongoing service delivery. NTCA further supports reasonable steps to avoid the potential that some consumers might face a lingering lack of connectivity where providers leveraging CAF Phase II or RDOF auction funds have shown no activity or commitment toward meeting their obligations in certain areas. Indeed, if such areas are more likely to become served via BEAD or another program given a provider’s unfortunate inactivity or patent disinterest, it could make sense to release them from the auction programs and enable delivery of service to them through the newer initiatives.

For these reasons, as a general matter, NTCA supports providing a pathway for parties to surrender some of the locations that they were awarded in the CAF Phase II or RDOF auctions while they recommit to serve the remainder. ***It is essential, however, that any such pathway to relief must not provide “amnesty” in the form of a “get out of jail free card” for those that choose it.*** An open-ended grant of amnesty with no consequence: (a) could put at risk what the RDOF and CAF Phase II auctions were supposed to – and could still – achieve; (b) could result in an inefficient allocation of valuable resources to support broadband availability; and (c) would create perverse incentives that reward parties who “bid low” in one program (and thus precluded others from serving certain areas) by allowing those same parties now to “hop” to a different program based upon perceived better terms and economics, even while committing to deliver nothing better in doing so.

To this end, if the Commission permits providers such as those that were the subject of the recent Public Notice to “return” locations within certain census block groups as part of CAF Phase II or RDOF auction awards, any such relief must at the very least be subject to two specific and explicit conditions:

² *Ex Parte* Letter from Clay Stribling, President & CEO, Amarillo Area Foundation, *et al.*, to Chairwoman Jessica Rosenworcel, AU Docket No. 20-34, *et al.* (filed Feb. 28, 2024).

³ *Wireline Competition Bureau Announces Certain RDOF and CAF II Auction Census Block Groups are Eligible for Other Funding Programs*, AU Docket No. 20-34, *et al.*, Public Notice (rel. Feb. 28, 2024).

1. Rather than a grant of amnesty without consequence, providers wishing to make a partial surrender of their RDOF or CAF Phase II awards in a manner not contemplated by the initial auction rules should be granted such relief only if they pay a pro-rated portion of the liability that is equal to the full amount that otherwise would have applied had they been in default at the end of the term for the locations in question. **Put another way, such a waiver should effectively be conditioned upon the payment of an “early buyout” of full default liability for the specifically affected locations by the otherwise-defaulting party.**

This first condition would be consistent with the observation in the Public Notice that parties abandoning certain locations will “remain subject to penalties” for default, and it would strike a reasonable balance by providing a pathway to turn locations in while promoting accountability. More specifically, it would confer tangible benefits on the recipient of such relief (and thus perhaps encourage parties to seek such relief) by avoiding the “overhang” of potential future default liability and lingering default status that could complicate that party’s participation in other broadband funding programs. At the same time, however, this condition would maintain the integrity of the auction programs that enabled these providers to win in the first instance over other bidders who would have lived up to their auction deployment commitments at funding levels that are likely less than what will be awarded subsequently through grant programs for those same locations.

2. **A party seeking such a waiver must be precluded, along with its affiliates and subsidiaries (whether owned in full or in part), from seeking funding for deployment at those same locations through federal or state grant programs.** Clearly, the Commission cannot set rules for participation in other agencies’ programs. But it can set rules for its own programs that specify whether and to what degree recipients of universal service support may participate in other programs. Indeed, the Commission did precisely this in the enhanced Alternative Connect America Cost Model (“ACAM”) program by specifying that recipients could not seek grant funding for deployment to the same locations for which enhanced ACAM support is received.⁴ Here, to the extent that a party would continue to receive CAF Phase II or RDOF auction support for the remaining locations it wishes to serve, the Commission should condition any waiver and such ongoing provision of support upon an express commitment *not* to seek grant funding for the abandoned locations.

Absent this second condition, the Commission would create perverse incentives for parties – and their affiliates or subsidiaries, in the case of creative corporate structuring – to escape from RDOF or CAF Phase II obligations in pursuit of more favorable economics under another program. This would in turn come at a greater cost to American taxpayers than what American ratepayers would likely have borne under the Commission’s universal service programs for the same level of performance. To be clear, this condition would not preclude parties from participating otherwise generally in BEAD or any other funding program; it would merely prevent a party that affirmatively chose to default on its obligations under the Commission’s programs from seeking funding to serve *those same locations* through such other programs.

⁴ *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order, Notice of Proposed Rulemaking, and Notice of Inquiry (rel. July 24, 2023), at ¶ 53.

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In closing, NTCA reiterates support for effective coordination among agencies to ensure that every American is served. In doing so, however, it is important that the Commission avoid undermining the integrity of its own universal service programs or creating the incentive and ability for providers to “game the system” by jumping from one program to the next simply to deliver the same levels of broadband as initially promised for more money. As a related matter, in assessing any request for such a waiver, the Commission must evaluate the extent to which the party is seeking to turn back in only the relatively highest-cost portions of its RDOF and CAF 2 awards while retaining the relatively lower-cost remainder. Such proposals could inadvertently place *greater* pressure on BEAD and other funding programs, and such considerations are a critical component of determining whether the public interest in fact justifies such a waiver. Relatedly, rather than summarily granting any such waivers via a Public Notice in the future, the Commission should promote transparency and ensure that proper procedures are followed to facilitate public review and input on requests for such relief through a reasonable comment period. Indeed, in addition to permitting appropriate review and input by other stakeholders, such a process would be essential to allow states themselves – those that would administer potentially (re)awarding these locations through the BEAD program – to weigh in and raise any concerns regarding how adding these locations to their BEAD eligibility maps might enhance or undermine their ability to achieve “Internet for all.”

Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the Commission’s rules, a copy of this letter is being filed via ECFS.

Sincerely,

/s/ Michael Romano

Michael Romano

Executive Vice President

cc: Elizabeth Cuttner
Lauren Garry
Justin Faulb
Marco Peraza
Hayley Steffen
Trent Harkrader
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