



February 5, 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”) recommends three specific transparency and accountability measures for use by the Federal Communications Commission (the “Commission” or “FCC”) in the process of reviewing long-form applications for the Rural Digital Opportunity Fund (“RDOF”) to help ensure that consumers in eligible areas receive the levels of voice and broadband services promised and that billions of dollars of federal ratepayer resources will not be wasted.

When it conducted the Connect America Fund (“CAF”) Phase II Auction in 2018, the Commission helped 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.¹ The RDOF auction, however, 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.² Although these filings seeking special dispensation were subject to Commission review and approval, neither the standards for such review 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.

¹ *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.

² *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”).

This departure from the bright-line rule employed in the CAF Phase II auction, paired with the lack of transparency into how this presumption was overridden (or upheld) in the context of the individual applications, has generated significant questions related to the RDOF auction. Indeed, calls for greater transparency and accountability have only grown in the wake of the RDOF auction, with nearly one-third of Congress signing onto a letter asking 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.”³ Similar questions and concerns have been raised by experienced and reputable service providers.⁴

This “smudging” of the bright-line rule is of even greater concern in light of the fact that the Commission declined NTCA’s repeated requests to gather more information from would-be bidders of all kinds upfront⁵ and instead reserved “more detailed information requests for the long-form application” because they would “be more useful once it is known where an applicant will be providing service and how many locations it will serve.”⁶ Since the Commission declined to gather more detailed information from bidders upfront on the grounds that it could not discern whether a party could in fact achieve a given level of performance until specific service areas were known, this begs the question of how informed decisions could have been made with respect to any one party’s request for special dispensation prior to the auction.⁷

³ 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).

⁴ *Ex Parte* Letter from Skyler Ditchfield, Chief Executive Officer, to Chairman Ajit Pai, *et al.*, WC Docket No. 19-126 (dated Jan. 14, 2021), at 1-3. (“Unfortunately, the results of the Phase I auction suggest that many other RDOF bidders lacked this experience with wireless broadband and submitted bids that are far from feasible in reality. . . . Do not grant any waivers of the technology and system design requirements (FCC 20- 77, paras. 306-311), and carefully scrutinize all long-form applications to ensure that all technical parameters of the proposed system are fully documented and present a feasible plan.”)

⁵ *See, e.g., Ex Parte* Letter from Michael R. Romano, Sr. Vice President, NTCA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 19-126, *et al.* (filed June 2, 2020), at 3; Comments of NTCA, WC Docket No. 19-126, *et al.* (filed Mar. 27, 2020), at 4-17.

⁶ *RDOF Procedures Public Notice*, 35 FCC Rcd at 6102, n. 144.

⁷ If the Commission were to conduct future auctions of this kind in unserved areas, much of the confusion and concern arising here could be avoided simply by adhering once again to a bright-line bidding qualification rule based upon real-world offerings and market conditions in lieu of permitting parties to seek “one-off” confidential approvals of the ability to bid at differing performance tiers. At a minimum, if the Commission were to decide yet again in the context of any future auctions to allow parties to seek special dispensation to bid at higher levels of performance than are generally available in rural markets, as a matter of transparent process, the Commission should prior to the auction being conducted: (a) publicly identify each bidder that seeks special dispensation to bid at higher tiers than otherwise would have been permitted by the bright-line rule; and (b) publish the basis for any grant of such special dispensation.

Fortunately, the Commission has an opportunity to ensure that shortcomings in the process to date – particularly the failure to adhere to the bright-line rule from the CAF Phase II auction and the review and approval of confidential short-form proposals to bid at higher levels of performance based upon limited information and unclear standards – will not result in consumers failing to receive service or in support wasted. Specifically, to promote a more transparent and accountable process and to assist the Commission in verifying that a winning bidder can in fact can meet the RDOF public interest obligations, NTCA recommends that the Commission adopt the following three measures and apply them to *all* long-form applications, regardless of technology:⁸

- (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.

1. Conduct Long-Form Application Review Pursuant to Published Objective Technical Standards Supported by Sound Engineering Principles and Real-World Experience.

Prior experience makes clear that, when it comes to claims of broadband capability, common standards based upon realistic assessments are essential to create an accurate picture of where broadband can and cannot be delivered. Indeed, inaccuracies in broadband availability mapping have been cited for years as one of the most frustrating aspects of broadband policy and decision-making. Efforts such as the Mobility Fund and 5G Fund have been derailed and/or delayed by imprecise and unreliable information. It would be an unfortunate mistake to “double down” on such problems in the context of the RDOF auction by failing to define publicly objective standards by which providers’ claims of ability to serve will be evaluated. Indeed, in this case the harm that will ensue from a lack of common standards would be even worse than in the context of broadband mapping; a lack of clearly stated technical standards here would not only deny service to those lacking broadband now based upon imprecise or even false claims of ability to serve, but it would *reward* those making such claims by distributing funds to them until such time as it is found they perhaps cannot perform after all. For these reasons, the Commission should publish, and then conduct review of the long-form applications pursuant to, objective technical standards tailored for each technology and supported by sound engineering practices and real-world experience. Examples of such technical standards can be found in recent filings in these proceedings.⁹

⁸ NTCA further recommends that these same three principles and processes apply in the context of *any* distribution mechanism that uses competitive bidding structures to award deployment or support funds. As an initial matter, such mechanisms should (and logically can) only be used to distribute funds in unserved areas, and measures such as these (and others such as those described in the preceding footnote) should be employed to ensure transparency and accountability in any such distribution initiatives.

⁹ See, e.g., *Ex Parte* Letter from Michael R. Romano, Sr. Vice President, NTCA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 19-126, *et al.* (filed Feb. 1, 2021) (attaching a whitepaper identifying technical standards for evaluation of claims with respect to the capability to offer Gigabit-level services in rural areas using fixed wireless technologies).

2. Permit Expedited Third Party Review and Comment of Long-Form Applications Pursuant to Standard Commission Protective Order Processes.

To promote greater transparency and enable a more well-rounded assessment of long-form applications, standard protective order processes should be used to enable third party review and comment upon all such applications. In particular, such review and comment could be permitted on a relatively expedited basis to solicit input from parties such as outside engineers with field experience in network design and deployment and from state and local stakeholders most familiar with the areas to be served and the claims and planned service offerings of providers in specific markets. NTCA recognizes that certain information contained within long-form applications will be confidential and/or proprietary and that public review of commercially sensitive data could have competitive implications. At the same time, this concern arises frequently in Commission proceedings and provides no reason to deny third party review of such information altogether. To the contrary, the Commission's time-tested protective order processes provide an effective and readily available vehicle to enable such review while protecting sensitive data.¹⁰

Thus, in lieu of invoking the confidentiality of information as cause to preclude any third party review of and input on long-form RDOF applications, the Commission should simply establish a protective order to facilitate such review and input. Upon adopting such an order, to ensure that any such process does not delay progress in the review and approval (or rejection) of any applications, the Commission should establish a relatively brief 60-day period for review and comment by third parties on any long-form application subject to the terms of that protective order.¹¹

¹⁰ For examples of the dozens of proceedings in which these processes have been employed, see "Protective Order Content" (available at: <https://www.fcc.gov/documents/protective-order>).

¹¹ It is also worth noting that, despite certain providers having been granted special dispensation to bid (and ultimately win) at higher performance tiers, there may be cases in which some of these providers subsequently indicate in state eligible telecommunications carrier ("ETC") designation proceedings more limited plans to offer service at these tiers or providers may submit other proposals in state ETC proceedings that are inconsistent with pledges or commitments made as part of the RDOF program at the federal level. Such evidence, as it becomes available in state proceedings or identified elsewhere in the marketplace, will be essential to consider as part of this public input process, and states and other stakeholders should be invited to provide their input on applications precisely reasons like these. It is also possible that winning bidders may attempt to "switch" technologies between what was initially identified in their short-form applications and what they plan to use as stated in their long-form applications, and such information too should be publicly identified and subject to third party review and input. Finally, it is important to recall that technical showings in the long-form applications should include evidence of how the bidder intends to provide standalone voice telephony service, including the provision of back-up power at user locations and other related performance requirements under Commission rules associated with such services.

3. ***Publish the Rationales for Concluding that a Long-Form Applicant Has the Managerial, Financial, and Operational Capabilities to Perform and that its Specific Deployment is in Fact Technically Capable of Delivering the Promised Service in the Area(s) at Issue.***

Finally, the Commission should publish the rationales for its ultimate determinations with respect to each long-form application. In particular, the Commission's notices approving long-form applications and authorizing distribution of funds should include, at a minimum, a written explanation as to why it found each applicant to possess the managerial, financial, and operational qualifications necessary to perform as promised, along with the basis for the conclusion that its proposed deployment satisfies objective technical standards previously articulated and will thus be capable of delivering the required performance. Such transparency is important to instill confidence with respect to distribution of funds and to minimize concerns that predictive judgments regarding a provider's operations or the performance of a given technology will not come true.

Thank you for your attention to this correspondence. NTCA and its members share the Commission's commitment to universal service, and it is particularly important to note that the recommendations contained herein would apply with equal force to all provisionally winning bidders. We hope that these recommendations will help promote achievement of the mandate for the availability of reasonably comparable broadband and voice services at reasonably comparable rates in rural and urban America alike based upon proven track records, real-world experience, objective standards, and transparent processes.

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
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