

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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|--------------------------------------|---|-------------------------|
| PETITION FOR RULEMAKING AND |) | |
| PETITION FOR WAIVER OF THE |) | Docket No. 10-90 |
| CONNECT AMERICA FUND PHASE II |) | RM-11853 |
| COALITION |) | |

**COMMENTS OF
NTCA-THE RURAL BROADBAND ASSOCIATION**

To the Commission:

I. INTRODUCTION

NTCA-The Rural Broadband Association (NTCA)¹ hereby submits these comments in support of the *Request for Waiver* and *Petition for Rulemaking* (collectively, petitions) submitted in the above-captioned docket by the Connect America Fund Phase II Coalition (Coalition).² The Coalition requests the Commission to waive 47 C.F.R. § 54.315(c) and to instead permit recipients of Connect America Fund Phase II (CAF II) support to comply with 47 C.F.R. § 54.805(c), the rule adopted for Rural Digital Opportunity Fund (RDOF) participants. The latter rule was formulated based upon “lessons learned” by CAF II providers and transmitted to the Commission in the RDOF rulemaking proceeding. The Coalition requests the Commission to

¹ NTCA represents approximately 850 independent, community-based telecommunications companies and cooperatives and more than 400 other firms that support or are themselves engaged in the provision of communications services in the most rural portions of America. All NTCA service provider members are full service rural local exchange carriers and broadband providers, and many provide fixed and mobile wireless, video, satellite and other competitive services in rural America as well.

² See, “Wireline Competition Bureau Seeks Comment on Petition for Rulemaking and Petition for Waiver Filed by the Connect America Fund Phase II Coalition Regarding Connect America Fund Phase II Letter of Credit Rules,” Public Notice, DA 20-270, Docket Nos. 10-90, RM-11853 (Mar. 13, 2020).

revise the CAF II obligations to reflect the adjustments that were made for the subsequently promulgated RDOF rules. As discussed herein, NTCA supports the relief requested by the petitioners.

II. DISCUSSION

A. HIGH-COST FUNDS CAN BE SECURED WITH LESS-COSTLY MECHANISMS

The Commission has the authority to grant the relief requested by the petitioners. With regard to the *Petition for Waiver*, the Commission may waive a rule upon request or its own motion if such grant “would not undermine the policy objective of the rule in question and would otherwise serve the public interest,” or where compliance with the rule would “make strict compliance inconsistent with the public interest.”³ In the instant proceeding, both standards for the waiver are met. The Commission adopted LOC requirements for CAF II because

[l]etters of credit permit the Commission to immediately reclaim support that has been provided in the event the recipient is not furthering the objectives of universal service by complying with the Commission’s rules or requirements. They also have the added advantage of minimizing the possibility that the support becomes property of a recipient’s bankruptcy estate for an extended period of time, thereby preventing the funds from being used promptly to accomplish our goals.⁴

The Commission referenced the CAF II Order (and also cited the paragraph quoted above) when it adopted LOC requirements in the RDOF proceeding to “provide appropriate protection” for

³ 47 U.S.C. § 1.3.

⁴ *Connect America Fund, ETC Annual Reports and Certifications, Rural Broadband Experiments: Report and Order and Further Notice of Proposed Rulemaking*, Docket Nos. 10-90, 14-58, 14-259, at para. 120 (2016) (CAF II Order).

RDOF support.⁵ This evidences that the same policy considerations were in play in the two proceedings.

Accordingly, and as explained more fully below, amendment of the CAF II LOC obligations to mirror the RDOF standards would not undermine the policy objective of the rule since the *same* policy objective undergirds both rules. Moreover, and as explained below, inasmuch as the RDOF implicates magnitudes more money than CAF II, it stands to reason *a priori* that the smaller will be protected by standards the Commission deemed acceptable to protect the larger. Regarding the *Petition for Rulemaking*, good cause exists to therefore extend permanently the RDOF standards to the CAF II program. These, as well, are enumerated below.

In the underlying record, NTCA supported the Commission's interest in ensuring that RDOF applicants are both financially and technically qualified to provide service.⁶ Toward these ends, and as evidenced by NTCA's recent comments on the RDOF auction procedures, NTCA has consistently urged the Commission to enact consistent and exacting standards aimed at ensuring an applicant's technical abilities to provide the services for whose support the applicant bids.⁷ At the same time, NTCA shares the Commission's interest in ensuring that applicants possess the requisite financial capability to provide service.⁸ No greater loss to confidence in the Commission's high-cost programs would be occasioned than by the disbursement of support to

⁵ *Rural Digital Opportunity Fund, Connect America Fund: Report and Order*, Docket Nos. 19-126, 10-90, FCC 20-5 (2020), at para. 96 (RDOF Order), *citing* CAF II Order at paras. 119-121.

⁶ *Rural Digital Opportunity Fund, Connect America Fund: Reply Comments of NTCA-The Rural Broadband Association*, Docket Nos. 19-126, 10-90, at 26-28 (Oct. 21, 2009).

⁷ *See, Rural Digital Opportunity Fund Auction (Auction 904), Rural Digital Opportunity Fund, Connect America Fund: Comments of NTCA-The Rural Broadband Association*, Docket Nos. 2-34, 19-126, 10-90, at 4-6, 8-14 (Mar. 27, 2020).

⁸ *See, Rural Digital Opportunity Fund, Connect America Fund: Comments of NTCA-The Rural Broadband Association*, Docket Nos. 19-126, 10-90 at 25, 26, n.44 (Sep. 20, 2019).

entities whose solvency may evaporate without appropriate recourse. Nevertheless, while measures intended to prevent this should be firm, they must also be fair. Accordingly, and recognizing the need for proper assurances, NTCA recommended that RDOF recipients be required to obtain a performance bond as a means of guaranteeing payment in the event of a default. This would be as effective as a letter of credit (LOC) but without the attendant costs.⁹ NTCA subsequently joined a multi-association letter that similarly urged the Commission to “enable the widest participation” of firms in the RDOF and to “modify[] the LOC requirement to minimize the direct and indirect costs associated with obtaining and maintaining LOCs.”¹⁰

The final RDOF regulations, as promulgated by the Commission, acknowledged the concerns of many commenters in the proceeding. These included not only the high cost of obtaining the LOCs, but also the opportunity costs suffered when resources better directed toward network deployment were redirected to LOCs (estimated to be between five and ten percent of the awarded funds). Moreover, inasmuch as a LOC creates a contingent liability, the mere existence of the LOC would make the provider less attractive to private lenders, compounding the diminishment of deployment abilities caused by the LOC.

2. THE COMMISSION PRUDENTLY TOOK ACCOUNT OF CAF II EXPERIENCES TO CREATE REVISED RULES FOR THE RDOF

In the RDOF Order,¹¹ the Commission heeded not only the opinions of many commenters, but also their respective and collective experiences. The Commission relied not on predictive judgment but rather upon the *actual outcomes* of commenters who reported-out their

⁹ *Rural Digital Opportunity Fund, Connect America Fund: Reply Comments of NTCA-The Rural Broadband Association*, Docket Nos. 19-126, 10-90, at 26-28 (Oct. 21, 2009).

¹⁰ *Rural Digitation Opportunity Fund, Connect America Fund: Ex Parte Presentation of NTCA-The Rural Broadband Association, et. al.*, Docket Nos. 19-126, 10-90 (Jan. 16, 2020).

¹¹ RDOF Order at paras. 46, 47.

experiences complying with the CAF II LOC requirements. In this sense, the Commission seized the benefit of assessing the efficacy and impact of the CAF II LOC requirements and then promulgated adjustments that as effectively meet the Commission goals, while reducing costs and burdens for award recipients.

The Commission reduced the LOC requirements for RDOF awards. The changes reduced the annual value increases required in an LOC by adding only 50% of the value of support scheduled for years 2 and 3, and capping the total amount required for an LOC at three years.

The comparative requirements are illustrated in the table below:

| YEAR | CAF II (47 CFR § 54.315(c)) | RDOF (47 CFR 54.805(c)) |
|---------------------------|--|---|
| 1 | Equal to at least one-year support | Equal to at least one-year support |
| 2 | Equal to two-years support | Equal to at least 18 months support |
| 3 | Equal to three-years support | Equal to at least two-years support |
| Special conditions | Value of LOC can be reduced to 90 percent of support already disbursed plus the amount that will be disbursed in the coming year when the 60 percent milestone is reached. | Value of LOC can be reduced if 20 percent of locations are built within two years; the value of the LOC increases if milestones are missed; the value of the LOC never exceeds three years of support |

These favorable RDOF outcomes reflect the Commission’s prescient commentary in the RDOF NPRM that CAF II “provides a basis for lessons learned that can inform the letter of credit requirements” for RDOF.¹² Moreover, the Commission noticed specifically the same issues NTCA and others identify, to wit, the high cost of obtaining and maintaining LOCs and the unnecessary “consum[ption]” of funds that could otherwise be directed to network

¹² *Rural Digital Opportunity Fund, Connect America Fund: Notice of Proposed Rulemaking*, Docket Nos. 19-126, 10-90, FCC 19-77 (2019), at para. 84 (2019) (RDOF NPRM).

deployment.¹³ And, the Commission even floated the idea of eliminating fully the need for an LOC for RDOF awardees.¹⁴

To be sure, while many commenters supported eliminating the LOC requirement altogether,¹⁵ those commenters also recognized the likelihood that the Commission would retain an LOC requirement, and accordingly recommended alternatives to the CAF II LOC requirements. These included reducing the value of the LOCs, a feature that is ultimately reflected in the Commission’s RDOF rules.¹⁶ It is this process – of studying the past - and result – of amending the rules for future efforts - that justifies the waiver and ultimate rule amendment sought by the petitioners and supported by NTCA.

3. THE COMMISSION HAS THE OPPORTUNITY TO UNLEASH NEEDED FUNDING FOR CRITICAL BROADBAND DEPLOYMENT

It is rare for an agency to identify an opportunity to effectuate the equivalent of a “regulatory do-over.” Regulatory processes generally stand the test of time until market conditions or other forces generate a need for change. In this instance, however, the Commission enjoys the remarkable benefit of undertaking two substantively similar auctions within a relatively short period of time. And, to the Commission’s credit, the Commission approached the newest auction with the stated understanding that no process was sacred and that the experiences of current CAF II participants would be drawn upon to determine whether various future RDOF elements would be subject to revision or even elimination. The ultimate adjustments implemented by the Commission demonstrate clearly the Commission’s recognition that the

¹³ RDOF NPRM at para. 89.

¹⁴ RDOF NPRM at para. 89.

¹⁵ *See*, RDOF Order at para. 111, fn. 303.

¹⁶ *See*, 47 C.F.R. § 54.804(c).

regulations warranted adjustment. That adjustment is warranted not only for the prospective RDOF awards but retrospectively for the CAF II awards, as well. The two programs are substantively similar: participants can be expected to be drawn from the same corporate populations; the same interests of the Commission (to encourage and ensure the fulfillment of deployment milestones) attends both auctions; and the expenses occasioned by costly LOCs diminish resources for network investments for both cohorts.

And, yet, in adopting the revisions for RDOF, the Commission explained that different treatment was warranted because the RDOF will “award up to almost 15 times the amount of funding as the CAF Phase II auction, [and] we acknowledge that a one-size-fits-all approach to letter of credit requires may not properly reflect the realities of particular auction.”¹⁷ In many instances, NTCA has drawn upon a similar philosophy, namely, that one-size-fits-all regulatory processes should be avoided in order to accommodate the varied needs of entities with various characteristics. The instant situation, however, does not invoke that principle. Notwithstanding that the *total* amount of the RDOF is multiples larger than the CAF II, the *individual* awards harbor no expectation to be substantially greater than those of the CAF II, and accordingly implicate no greater concern of ensuring *individual* milestone achievements than the CAF II. And, if the Commission were to believe instead that RDOF awards *could* be substantially larger than those in CAF II, then there would be no reason to apply a less restrictive LOC requirement to the larger RDOF awards while applying a more stringent requirement to smaller awards in the CAF II auction. Therefore, there is no discernible reason why the lessons learned at the initial phases of CAF II should not be extended beyond RDOF and back into the CAF II arena. Moreover, standards that are acceptable for a \$20.4 billion program should be acceptable for a

¹⁷ RDOF Order at paras. 46, 46.

\$1.98 billion program. Finally, and from an administrative standpoint, precedent for such corrective action exists: the petitioners note the Commission’s recognition to change pole attachment rates, terms and conditions in an effort to speed broadband deployment.¹⁸

Amending the CAF II rules to comport to the RDOF requirements will extend the reasoned benefits of the RDOF requirements to CAF II recipients. Accordingly, CAF II recipients will be relieved of burdens that the Commission has found unnecessary inasmuch as alternative requirements serve the intended goals. Moreover, the savings realized by modifying CAF II LOC requirements can be redirected to the purposes for which high-cost support is intended, namely, the further deployment and maintenance of critical communications infrastructure in rural areas.

The past several weeks have informed national understanding of the importance of broadband networks. Previously, undertakings such as telemedicine, distance education and remote work had been perceived and proven empirically to produce positive results.¹⁹ Now, however, perceptions and data are reinforced by experience – the collective experience of patients, students and workers throughout the Nation. Broadband has also been demonstrated to play a key role in mitigating the challenges of senior isolation, affirming concepts proposed by the rural broadband industry a half-decade ago.²⁰ With an estimated 95% of the U.S. population

¹⁸ *Petition for Waiver* at 13 (internal citation omitted).

¹⁹ See, i.e., “*Anticipating Economic Returns of Rural Telehealth*,” Rick Schadelbauer, Smart Rural Community (2017) (https://www.ntca.org/sites/default/files/documents/2017-12/SRC_whitepaper_anticipatingeconomicreturns.pdf); “*Rural Broadband and the Next Generation of American Jobs*,” Joshua Seidemann, Smart Rural Community (2019) (<https://www.ntca.org/sites/default/files/documents/2019-04/SRC%20Middle%20Skills%20Web%20Version.pdf>).

²⁰ See, “*Aging in Place and the Role of Broadband*,” Rachel Brown, Foundation for Rural Service (2016), and “What People are Doing to Help Homebound Seniors,” Julie Jargon, Wall Street Journal (Mar. 31, 2020).

subject to “stay at home” orders,²¹ more people than ever before are relying on broadband as an indispensable tool for school, work, business and mundane yet necessary tasks such as grocery shopping. The value of broadband is recognized increasingly as an elemental part of daily life. Measures such as conforming CAF II LOC requirements to RDOF standards can enable rural providers to reallocate resources to broadband network deployment at no cost to assuring the Commission’s other goals. This is not an ephemeral ideal: adjusting CAF II LOC requirements could unshackle approximately \$9 million for broadband deployment.

Amending the CAF II obligations also increases opportunities for CAF II awardees to participate in the RDOF. Currently, CAF II participants are saddled with LOC requirements that the Commission has found to be so burdensome as to not apply them to RDOF. The CAF II obligations create unnecessary costs that in turn reduce the financial ability of those providers to extend service to more locations and limit their ability to leverage RDOF with other resources to expand their networks. Accordingly, amending the CAF II obligations would not only “free up” actual cash resources, but would also enable experienced providers to leverage those resources alongside RDOF funding to generate a beneficial multiplier effect for broadband buildout. Finally, and as noted by the petitioners, the ever-increasing costs associated with a CAF II LOC increase the specter of potential difficulties should a CAF II recipient be unable to obtain an LOC. The manifold benefits and avoided costs of amending the CAF II LOC requirements to mirror the RDOF standards support the relief sought by the petitioners.

²¹ “See Which States and Cities Have Told Residents to Stay at Home,” Sarah Mervosh, Denise Lu and Vanessa Swales, New York Times (Apr. 7, 2020) (<https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>) (accessed Apr. 13, 2020).

III. CONCLUSION

The Commission bears a responsibility to implement reasoned measures to ensure the security of high-cost funds. After evaluating the costs and experiences of CAF II recipients, the Commission prudently created revised requirements for the RDOF that provide comparable security while reducing unnecessary expenses. Inasmuch as the Commission found those measures satisfactorily secure for the \$20.4 billion RDOF, NTCA supports amendment of the CAF II rules to rely similarly upon the less-costly yet equivalently secure standards of the RDOF. Doing so will enable CAF II recipients to direct millions of dollars toward necessary broadband infrastructure.

WHEREFORE the reasons set forth herein and above NTCA supports grant of the *Petition for Waiver* and the *Petition for Rulemaking*.

Respectfully submitted,

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