

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Rural Digital Opportunity Fund Auction (Auction 904)) AU Docket No. 20-34
)
Rural Digital Opportunity Fund) WC Docket No. 19-126
)
Connect America Fund) WC Docket No. 10-90
)

**OPPOSITION
TO
EMERGENCY PETITION
OF
THE COALITION OF RDOF WINNERS**

WTA – Advocates for Rural Broadband (“WTA”) opposes the “Emergency Petition” by The Coalition of RDOF Winners (“Coalition”) for waiver and “emergency relief” from the rules and procedures governing the Rural Digital Opportunity Fund Auction I (“RDOF Auction”).

The principal issue herein is the preservation of the integrity of the RDOF Auction as well as the protection of the integrity and viability of any future Commission reverse auctions.¹ In addition, the Coalition has not met its burdens of proving that special circumstances warrant waiver of the Commission’s reverse auction rules or that its proposed deviations from various rules will serve the public interest. Rather, the Coalition – whose members are not identified in its petition – has not shown that such members heeded the Commission’s due diligence requirements or that the inflation and supply chain bottlenecks of which it complains were unforeseeable at the time of the RDOF Auction or that they constituted *force majeure* conditions.

¹ WTA is not a proponent of reverse auctions. However, if the Commission employs reverse auctions to determine and distribute Universal Service Fund (“USF”) support in certain areas, it must strictly enforce its auction rules, terms and conditions and deny retroactive waivers thereof in order to prevent the integrity of such reverse auctions and their intended service goals from being subverted by either reckless and irresponsible bidding or deliberate gaming tactics.

**Preservation of the Integrity of Reverse Auctions
Prohibits Retroactive Increases in Support Amounts or
Relaxation of Other Service Obligations and Auction Requirements**

Rather than “protecting the integrity of the RDOF program” as the Coalition asserts (Coalition Petition, p. 2), grant of the retroactive “supplementary funding” and other relief requested by the Coalition would harm the public interest by disregarding and undermining the rationale, procedures and results of the RDOF Auction while rendering it virtually impossible for the Commission to conduct credible and reliable reverse auctions in the future.

The key and crucial factor in the RDOF Auction as well as any future Commission reverse auction for high-cost support is the amount of the lowest bid that determines the winner of support for the market and the amount of support the winner will receive.² If entities are permitted to place the lowest bids needed to win reverse auctions for various markets and then are allowed later to request and receive additional “supplementary funding” that increases their high-cost support above the amount that they had bid and agreed to accept during the auction (and likely above the amounts that the second lowest and losing bidders were willing to accept), the rationale, reliability and integrity of such retroactively revised “reverse auctions” will be destroyed.

For example, suppose a common and likely situation where RDOF Auction Bidder A and Bidder B competed round-by-round for weeks for the same census block group until Bidder B finally dropped out after Round X by declining to reduce further its bid for support in the amount of 30 percent of the market’s reserve price and that Bidder A then won the market during the next Round X+1 with a bid in the amount of 20 percent of the reserve price. What is the impact upon

² Performance tiers (speeds and monthly usage allowances) and latency requirements are also important, but during a reverse auction function primarily to determine the weighting and comparison of each participant’s bid prices. While not at issue in this proceeding at this time, the performance tiers and latency obligations proposed by auction winners must also be strictly enforced and not waived or otherwise retroactively modified subsequent to a reverse auction. Prohibition of such retroactive waivers prevents reduction of the quality and costs of the service obligations accepted by winning bidders as the essential conditions for receiving their winning support amounts.

the integrity of the RDOF Auction if Bidder A subsequently seeks and obtains a waiver that gives it additional “supplementary funding” in an amount that effectively increases its “winning” support bid for the market above the “30 percent of reserve price” that Bidder B was willing to accept? Does the Commission instead offer or award the market to Bidder B? Does Bidder B have the right to seek Commission reconsideration or rerun of the affected RDOF Auction rounds, or to seek judicial or legislative review and relief? Do a potentially large number of waiver requests and disputes render the RDOF Auction “results” questionable and uncertain, and complicate the Commission’s coordination of its broadband deployment and support programs with those of other federal and state agencies?

Moreover, in light of established administrative law regarding waivers, if the Commission retroactively waives its applicable rules and procedures for the RDOF Auction, the impact will not be confined solely to the RDOF Auction. Rather, under the principles established in Basic Media, Ltd. v. F.C.C., 559 F.2d 830 (D.C. Cir. 1977), the Commission will be required to consider seriously requests for retroactive waivers in any and all future reverse auctions.

In Basic Media, the court held that judicial scrutiny of a particular rule will be much greater when an agency has granted waiver of the rule than when it has never done so. It stated:

. . . When an agency begins to grant exceptions in certain cases, however, interests represented in other cases can ask a court to review the denial of an exception as arbitrary in light of the agency's past practice. A different case is presented where an agency has made a general rule from which it has *never* deviated. Preserving the integrity of a general rule then takes on increased importance, if only because the certainty and administrative ease that accompany consistent application increase with each additional instance. . . .

When an agency decides to make an exception to the general rule, it is also subjecting itself to careful scrutiny by a reviewing court, and will be required to have stated the reasons for the exception clearly on the record. “[W]hile administrative agencies can . . . fashion exceptions and qualifications, they must explain departures from agency policies or rules apparently dispositive of a case.” *Brennan v. Gilles Cotting, Inc.*, [504 F.2d 1255, 1264](#) (4th Cir. 1974). “[A]dministrative agencies should be bound by their own rules and regulations, so that an agency's power to suspend its own rules . . . must be closely scrutinized especially

where the substantive rights of a party in the administrative process may be adversely affected." *Safety-Kleen Corp. v. Dresser Industries, Inc.*, [518 F.2d 1399, 1403](#) (Cust. Pat. App. 1975). Further, granting exceptions can lead to a claim of vested interest, potentially applicable at a later time, *cf. WAIT Radio v. FCC*, [148 U.S.App.D.C. 179, 185, 459 F.2d 1203, 1209](#), *cert. denied*, 409 U.S. 1027, 93 S.Ct. 461, 34 L.Ed.2d 321 (1972). Hence, if an agency wishes to apply a general rule in a perfectly consistent manner, it must be admitted that such conduct alone automatically presents a number of good reasons to recommend it. 559 F.2d at 833.

Certainty and consistent application of reverse auction rules and procedures are especially important for the protection and preservation of the integrity of such reverse auctions. Hence, waivers and retroactive increases in RDOF support amounts and/or relaxation of other RDOF procedures and conditions not only will undermine the integrity of the RDOF Auction but also will hamper the ability of the Commission to conduct fair and equitable reverse auctions in the future. Among other things, waivers will encourage participants in any future reverse auctions – either carelessly or recklessly or as part of deliberate gaming strategies – to bid unreasonably low support amounts in order to “win” the right to get high-cost support in certain desired markets in the hope that they can later obtain the additional “supplementary funding” that is actually needed to meet the service obligations they agreed to accept.³

**The Coalition Has Not Met Its Burden of Demonstrating the
Special Circumstances or Public Interest Considerations
Necessary for Grant of its Requested Waivers**

Section 1.3 of the Commission’s Rules permits rules and rulings to be waived for good cause shown. The Commission may exercise this discretion where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990). In addition, the Commission may take into account considerations of

³ See Letter from Derrick B. Owens and Gerard J. Duffy of WTA – Advocates for Rural Broadband to Marlene H. Dortch, Secretary in AU Docket No. 20-34 and WC Docket Nos. 19-126 and 10-90 (dated July 28, 2023).

hardship, equity, and the effective implementation of public policy on an individual basis. WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

The Coalition has not met its burden of proof for any of its requested waivers, and particularly for the unspecified amount of additional “supplementary funding” that it seeks in order to increase the actual RDOF support to be distributed to its unidentified members above the amounts of their “winning” reverse auction bids. It has not proven its assertions that “unforeseeable *force majeure* circumstances” involving “unprecedented” construction cost increases due to the COVID-19 pandemic and new federal broadband funding programs “could never have been anticipated by the Commission or the RDOF Winners.” Petition, pp. 1-5.

In its Public Notice (*Rural Digital Opportunity Fund Phase I Auction Scheduled for October 29, 2020; Notice and Filing Requirements and Other Procedures for Auction 904*), FCC 20-77, released June 11, 2020 (“*RDOF Procedures Public Notice*”), the Commission made it clear that “[e]ach applicant has the sole responsibility for investigating and evaluating all technical and marketplace factors that may have a bearing on the level of [RDOF] support for which it will seek to bid in Auction 904.” *Id.* at para. 128. The Commission continued its due diligence warning by indicating that “[a]pplicants are solely responsible for identifying associated risks and for investigating and evaluating the degree to which such matters may affect their ability to bid on or otherwise receive [RDOF] support” and are “responsible for undertaking research to ensure that any support won in this auction will be suitable for its business plans and needs.” *Id.* at para. 131.

The Commission implemented these due diligence responsibilities by requiring all RDOF Auction applicants to make the following certification under penalty of perjury, *Id.* at para. 133:

The applicant acknowledges that it has sole responsibility for investigating and evaluating all technical and marketplace factors that may have a bearing on the level of [RDOF] support it submits as a bid, and that if the applicant wins support, it will be able to build

and operate facilities in accordance with the [RDOF] obligations and the Commission's rules generally.

Potential inflation and supply chain bottlenecks were one of the most significant technical and marketplace factors bearing on RDOF support that the Commission made very clear that Coalition members and other prospective bidders had a due diligence obligation to investigate and evaluate in connection with their participation in the RDOF Auction.

WTA does not deny the existence of recent inflation or that its members have been adversely impacted since 2020 by general inflation, broadband construction cost increases, and broadband equipment supply chain bottlenecks. However, the relevant question herein is not whether there has been recent inflation affecting broadband construction costs, but rather whether such inflation and other future economic conditions should have been considered by RDOF Auction bidders when they determined the amounts of their bids and whether such conditions constitute good cause for substantial retroactive revision of reverse auction bid prices or service obligations. WTA members were well aware of existing and potential future broadband price increases and supply chain delays during the October 29 to November 25, 2020 period when the RDOF Auction was conducted, and factored these technical and market factors and risks into their RDOF Auction participation and bidding strategies.

Contrary to the Coalition's implications, the COVID-19 pandemic and quarantines were not so recent that RDOF Auction bidding had to be based upon "pre-pandemic expectations" (Coalition Petition, p. 1). The first laboratory-confirmed case in the United States of what was later named COVID-19 occurred as early as January 20, 2020, and the U.S. Centers for Disease Control and Prevention ("CDC") activated its Emergency Operations Center on that date. The CDC began shipping laboratory test kits in early February 2020, the Trump Administration declared a national COVID-19 emergency on March 13, 2020, states began to implement

quarantine and shutdown requirements and procedures on March 15, 2020, and the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act was signed into law on March 27, 2020.⁴ Put very simply, the nature and scope of the COVID-19 pandemic was well known at least three (3) months before the Commission’s *RDOF Procedures Public Notice* was issued on June 11, 2020, over seven (7) months before RDOF Auction bidding began on October 29, 2020, and over eight (8) months before bidding ended on November 25, 2020.

The economic and other impacts of the COVID-19 pandemic not only were able to be foreseen and anticipated at the time of the RDOF Auction, but they also did not constitute a *force majeure* event. *Force majeure* is limited to much more unpredictable and uncontrollable events such as fires, floods, storm, war and labor disputes, and does not include economic downturns and similar economic hardships. As one reliable legal source describes it:

Force majeure is a provision in a [contract](#) that frees both parties from obligation if an extraordinary event directly prevents one or both parties from performing. A non-performing party may use a force majeure clause as excuse for non-performance for circumstances beyond the party's control and not due to any fault or negligence by the non-performing party. However, mere impracticality or unanticipated difficulty is not enough to excuse performance. Indeed, courts generally do not recognize economic downturn as a force majeure event. This is because economic hardships occur regularly in [business](#), and as a result, may be appropriately and preemptively dealt with by allocating its risk through the terms of the contract. As such, force majeure events are often labeled as "[acts of god](#)" and include both natural and man-made events like fires, floods, storms, war, and labor disputes.⁵

As indicated above, WTA recognizes that general inflation, broadband construction cost increases, and broadband equipment supply chain bottlenecks have occurred during recent years. However, the Coalition’s asserted “range” of “a minimum of 30 percent, but some by 100 to 300 percent” (Coalition Petition, p. 4) is not supported by substantive evidence of increased broadband

⁴ The CDC Museum COVID-19 Timeline is located at <https://www.cdc.gov/museum/history/our-story.html> (visited August 24, 2025).

⁵ https://www.law.cornell.edu/wex/force_majeure (visited August 24, 2023).

deployment costs. Likewise, its litany of anecdotal examples from unidentified Coalition members (*Id.*) does not constitute the type of evidence necessary to meet the burden of proof necessary for grant of a waiver (and particularly a waiver that changes the results of a reverse auction).

The Coalition cannot reasonably and accurately blame what it calls “pandemic-prompted federal funding programs” – such as the Infrastructure Investment and Jobs Act (“IIJA”) – for what it calls the “skyrocketing” broadband deployment costs that its members are claimed to be encountering. WTA has serious concerns that the large-scale broadband deployment contemplated by the Broadband Equity, Access and Deployment (“BEAD”) program and other IIJA programs can result in major broadband construction cost increases and supply chain bottlenecks, particularly if many large projects are funded and required to be completed during the same time periods. However, at this time, such minimal BEAD and other IIJA funding has been distributed that it cannot reasonably be identified as a cause for the Coalition’s alleged “skyrocketing” broadband deployment costs.

The Coalition also cannot blame the CostQuest RDOF Phase I cost models for the alleged broadband deployment cost problems of its members (Coalition Petition, p. 2), or reasonably request a retroactive rerun of the Commission’s CostQuest cost model (*Id.*, p. 13). It is not the reserve prices determined by the CostQuest model that are responsible for the alleged problems of the Coalition’s members; rather, it is the fact that they submitted bids to accept only a small fraction (likely 20-to-30 percent) of such reserve prices as their RDOF support.

Finally, the Coalition’s claim that its members were somehow forced to rely upon research conducted and bid estimates prepared during the second and third quarters of 2020 for the bids they placed during the RDOF Auction (Coalition Petition, p. 3) does not comport with the experience of the majority of RDOF Auction participants. Most RDOF bidders began with a

general plan as to which census block groups that wanted and how much RDOF support they needed to deploy their specified performance tier and latency therein. However, once the clearing round was passed and the clock price was reduced to a smaller and smaller fraction of the reserve price, many general plans were jettisoned and competitive instincts took over. There were generally multiple daily conference calls after round results were announced, with decisions made during each call whether to bid the next lower amount in the following round or to drop out. Very few, if any, of the remaining RDOF Auction bidders made these round-to-round decisions in mid-to-late November on the basis of the research they conducted or bid estimates they prepared during the second and third quarters of the year.

Conclusions on Requested Relief

The Commission should not provide any of the retroactive “supplementary funding” requested by the Coalition for its unidentified members. Retroactive support increases would violate the very basic principles and rules of reverse auctions, violate the rights and expectations of competing bidders, and impair the ability of the Commission to conduct credible reverse auctions in the future. Moreover, the Coalition has wholly failed to show that its unidentified “members” heeded the Commission’s due diligence requirements, that the inflation and supply chain bottlenecks of which it complains were unforeseeable at the time of the RDOF Auction, that such conditions constituted *force majeure*, or that there is otherwise good cause for the waiver requested.

WTA does not have a substantial interest in whether the Coalition members should be afforded a “short amnesty period” during which they would be permitted to relinquish some or all of the RDOF areas that they “won” without forfeitures or other penalties. Such an amnesty period could remove current “enforceable [RDOF] commitments” that may preclude BEAD grant funding

that could enable the affected areas to receive high-speed broadband at an earlier date. However, such an amnesty would also render uncertain a primary deterrent to reckless and irresponsible bidding in future reverse auctions. It would also be likely to generate requests or appeals seeking retroactive equal treatment and refunds from RDOF “winners” that have previously paid default penalties for relinquishing their RDOF areas or otherwise becoming unable to meet their broadband deployment obligations therein.

Finally, WTA members sympathize with the Coalition regarding the very high cost of the letters of credit required by the Commission as well as the major difficulties encountered by small companies in order to negotiate and obtain the requisite letters of credit from most banks that are acceptable to the Commission. WTA continues to believe that letter of credit requirements render it unduly difficult and expensive for small companies to participate in the auctions and other Commission proceedings where such letters are required. At the same time, in light of the Coalition’s assertions regarding the inadequacy of RDOF support to meet the service obligations of its unidentified members, it is difficult to ask the Commission to give up or reduce its ability to recover RDOF support that it has distributed to Coalition members if some or all of them fail to meet their build-out obligations.

Respectfully submitted,
WTA – ADVOCATES FOR RURAL BROADBAND

/s/ Derrick B. Owens
Senior Vice President of Government and Industry Affairs

/s/ Gerard J. Duffy
Regulatory Counsel

400 Seventh Street NW, Suite 406
Washington, D.C. 20004
Tel: (202) 548-0202

Dated: August 30, 2023