

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

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

**COMMENTS  
OF  
WTA – ADVOCATES FOR RURAL BROADBAND**

WTA – Advocates for Rural Broadband (“WTA”) hereby submits its comments opposing the “brief amnesty period” requested in the letter, dated February 28, 2024, from “69 Internet Service Providers, Trade Associations, State and Local Officials, School Districts, Unions, and Civil Society Organizations” for which the Wireline Competition Bureau (“WCB”) sought comment in its *Public Notice*, DA 24-202, released March 5, 2024.

The requested “brief amnesty period” would permit Rural Digital Opportunity Fund (“RDOF”) and Connect America Fund Phase II (“CAF Phase II”) reverse auction “winners” that “cannot or will not deploy” the networks that they committed to construct and operate in return for their reverse auction awards to default and relinquish those awards and commitments without having to bear the “full weight” of the penalties prescribed by the Commission’s auction rules for such defaults.

WTA recognizes and sympathizes with the broadband service needs of residents of the affected areas. However, it believes that the Commission and the National Telecommunications and Information Administration’s (“NTIA’s”) Broadband Equity, Access and Deployment

(“BEAD”) Program can address and meet these needs without setting a disruptive and destructive precedent that would bail out entities that gamed or otherwise bid recklessly or irresponsibly to “win” reverse auctions by waiving the default penalties that they were informed would apply and/or by waiving recovery of the reverse auction support that they already have received.

**A Brief Amnesty Period or Other Default Penalty Waiver Would Establish a Terrible Precedent Undermining the Reverse Auction Process**

WTA has never been a proponent of reverse auctions. However, if the Commission intends to retain the option to continue to employ reverse auctions as a device to determine and distribute Universal Service Fund (“USF”) support in certain areas, it must strictly enforce all of its Auction 903 and 904 rules, terms and conditions in order to prevent the creation of precedents that would make it much more difficult to prevent future reverse auctions from being abused, distorted and undermined by various gaming and reckless bidding tactics.

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, the Commission made it absolutely clear that “Each 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.” *Public Notice* at para. 128. The Commission continued its due diligence warning by indicating that “Applicants 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.” *Public Notice*, para. 131.

The Commission implemented these due diligence responsibilities by requiring all Auction 904 applicants to make the following certification under penalty of perjury, *Public Notice, 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.

This certification and associated due diligence requirements need to be strictly enforced in order to preserve the integrity of Auction 904 and any future USF reverse auctions.

During the RDOF reverse auction, a number of entities focused much more upon "winning" federal support dollars for contested service areas than upon providing quality and reliable broadband services to such areas over the long term. They did so by placing unreasonably low bids in the range of 10-to-30 percent of the reserve prices deemed by the Commission's cost model to be needed to construct and operate broadband networks therein. The result of this "race to the bottom" was that "auction winners" frequently "underbid" more responsible rural local exchange carriers ("RLECs") and other service providers who were ready, willing, and able to extend their existing broadband networks into adjacent areas for a reasonable and economical level of RDOF support. To the extent that these very low bidders have now found that they "cannot" afford to build and operate the broadband networks they proposed for the support amounts they bid in order to "win" the reverse auction,<sup>1</sup> or that they no longer wish to do so, their actions have deprived residents of the affected areas of needed broadband service or unduly delayed the

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<sup>1</sup> WTA notes that its members and other RLECs have been able to continue to extend and upgrade their networks since the CAF Phase II reverse auction ended on August 21, 2018 and since the RDOF reverse auction ended on November 25, 2020. Whereas both the equipment and labor costs of deploying broadband have increased significantly during that period (as well as the wait times for equipment and contractors), the increased costs and lead times have not been so "skyrocketing," "crippling" and "unanticipated" as to prevent broadband deployment like some "winning bidders" would have the Commission believe.

deployment of such service. This is exactly the type of the gaming and/or irresponsible behavior that the Commission’s default penalties and support recovery rules were intended to deter and punish.

Granting the requested “brief amnesty period” would set a terrible precedent that would make it extremely difficult or impossible for the Commission to employ default penalties as a credible deterrent to prevent dishonest gaming and irresponsible bidding in any future reverse auctions it might hold. In addition, it would give rise to requests or lawsuits by the many CAF Phase II and RDOF bidders that have previously been assessed and paid default penalties for remission of the penalties which they have paid. The Commission’s Enforcement Bureau has previously issued at least three Notices of Apparent Liability imposing over \$35 million in default penalties against RDOF auction “winners” who were unwilling or unable to meet their RDOF commitments [FCC 22-59, released July 22, 2022 (\$4,353,773.87 in default penalties against 73 applicants); FCC 23-33, released May 1, 2023 (\$8,778,527.39 in default penalties against 22 applicants); and FCC 23-104, released December 5, 2023 (\$22,446,000.00 in default penalties against 2 applicants)]. Finally, given that the BEAD grant distribution processes being developed by many states are likely to favor the lowest bid for each area, a Commission default penalty waiver precedent is likely to encourage some entities to employ “race to the bottom” tactics in state BEAD proceedings in the hope that they can convince their state agencies to follow the Commission precedent if they later determine that the low bids they used to “win” BEAD grants were not enough to justify the deployment of the broadband facilities and services they promised.

WTA notes that reverse auction “winners” that have been receiving RDOF or CAF Phase II auction support but now have decided that they “cannot or will not deploy” their proposed

networks are also subject to the support recovery provisions of Section 54.806 [particularly Section 54.806(c)(2)] and Section 54.320 [particularly Section 54.320(d)(2)] of the Commission’s Rules.

**Alternatives to a Brief Amnesty Period or Other Waiver of Default Penalties**

Rather than embroiling itself in the dangerous precedent, unfavorable publicity and likely litigation that a reversal of its default penalty and/or support recovery rules would entail, there are less disruptive and more equitable ways that the Commission can address and resolve the problem of enabling the affected areas to obtain the BEAD or USF funded broadband networks they need.

One alternative would be to use the “downward adjustment factors” and “upward adjustment factors” of Table 3 of Section 1.80(b)(11) of the Commission’s rules to give those reverse auction winners that have determined that they “cannot” or “no longer wish” to meet their broadband deployment obligations an increased incentive to give notice of default at an early date in order to allow the affected areas to qualify for BEAD or other broadband funding. For example, the Commission could specify a date certain -- for example, July 1, 2024 – by which an RDOF (or CAF Phase II) winner that cannot or will not meet its deployment commitment could voluntarily default and have its default penalty reduced by a downward adjustment for “good faith or voluntary disclosure” in consideration for its willingness to come forward voluntarily and allow the subject default areas to be removed from the Broadband Funding Map and become eligible for funding from the BEAD or other programs. RDOF and CAF Phase II winners accepting this option would still be subject to a default penalty and to repayment of RDOF/CAF Phase II support previously received; however, their otherwise applicable default penalty would be reduced by a downward adjustment comprised of a reasonable percentage reduction (for example, 10 percent) determined by the Commission to be an equitable incentive for coming forward by the specified date. Those

RDOF and CAF Phase II winners that do not take the early default option and that later default without making significant efforts and progress toward meeting their RDOF/CAF Phase II deployment and service obligations should have their default penalties increased significantly by the upward adjustment factor of “substantial harm” (in addition to being required to repay the RDOF/CAF Phase II support previously received) due to the substantial harm their default will impose upon customers who otherwise could have gotten broadband service funded by BEAD or other federal and state broadband programs.

A second alternative would be for the Commission to consider whether lagging or inactive deployment by an RDOF or CAF Phase II “winner” constitutes an “enforceable commitment.” To the best of WTA’s information and belief, the concept of “enforceable commitment” is an NTIA or general statutory term that the Commission has not yet examined, defined or clarified in the RDOF or CAF Phase II context. Does an “enforceable commitment” exist where an RDOF (or CAF Phase II<sup>2</sup>) auction winner has not deployed to any or many of its required locations and/or has not yet entered into contracts to obtain the equipment and/or labor necessary for substantial deployment. Whereas many RDOF winners have not yet reached their third-year interim deployment report deadline and required 40 percent threshold, they are nonetheless required to file annual location deployment reports in the High-Cost Universal Broadband (“HUBB”) portal. If its HUBB reports as of March 1, 2024 do not show significant deployment in an RDOF grant area (for example, deployment to at least 20 percent of its required locations – that is, half of the upcoming 40 percent threshold requirement), an RDOF winner can and should be required to show that it is making significant progress toward satisfying its RDOF commitment – for example, by

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<sup>2</sup> CAF Phase II auction winners should be sufficiently far along on their deployment and threshold reporting schedules that the Commission should be readily able to determine whether they are likely to meet their “enforceable commitments” or to default.

producing completed and executed contracts for the necessary equipment and contractor services. If an RDOF winner has not reported a sufficient number of deployed locations in the HUBB (and particularly if it has not yet deployed any locations) and if it has not yet entered into specific contracts for the equipment and contractor services needed to meet its RDOF deployment obligations, the Commission can and should make a public interest determination that there is not a reasonable, sufficient and predictable “enforceable RDOF commitment” to provide 100/20 Mbps or better broadband service to an area, and notify NTIA and state BEAD administration agencies accordingly while changing the National Broadband Funding map to indicate that RDOF-funded deployment to the area is uncertain or unlikely. State BEAD administration agencies would then be able to move forward with the consideration of BEAD grant proposals for such areas.

In addition, should the Commission grant a defaulting RDOF or CAF Phase II “winner” a downward adjustment of its default penalty or hold that a RDOF/CAF Phase II “winner’s” lagging or inactive deployment does not constitute an “enforceable commitment” for BEAD or other federal or state grant purposes or grant any other relief to non-performing RDOF/CAF Phase II “winners,” the Commission should condition such relief upon a certification under penalty of perjury that neither the RDOF/CAF Phase II “winner” nor an entity with 10 percent or greater common ownership and/or management will apply for or accept BEAD or other federal or state funding to construct or operate broadband facilities and services in any of the RDOF/CAF Phase II census blocks for which RDOF/CAF Phase II “auction winner” received relief. This condition is necessary to prevent RDOF and CAF Phase II “winners” from gaming the process by defaulting upon or otherwise declining to meet their RDOF/CAF Phase II deployment obligations in order to seek more lucrative BEAD and other federal and state grants to provide broadband to the same areas.

## Conclusion

The foregoing alternatives constitute options for enabling areas that are not likely to be served by certain RDOF and CAF Phase II auction “winners” to become eligible for BEAD or other federal or state broadband funding without resorting to the dangerous and inequitable “brief amnesty period” that would allow RDOF and CAF Phase II auction “winners” that “cannot or will not deploy” their proposed networks to relinquish their reverse auction awards while escaping all default penalties and/or support recovery repayments. WTA urges the Commission to consider these or other alternatives while rejecting outright any proposals that would result in the waiver of default penalties or otherwise provide post-auction relief that undercuts and destroys the integrity of Auctions 904, 903 and any future USF reverse auctions.

Respectfully submitted,  
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