

**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 )

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

WTA – Advocates for Rural Broadband (“WTA”) hereby submits its reply 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.

WTA continues to urge the Commission to deny any and all proposals that would waive default penalties or otherwise provide post-auction relief that undercuts and destroys the integrity of Auctions 904, 903 and any future USF reverse auctions. Rather, as an alternative to waivers, the Commission could 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 and effective incentive to give notice of default at an early date in order to allow the affected areas to qualify for Broadband Equity, Access and Deployment (“BEAD”) or other broadband funding. As a second alternative, the Commission and the National

Telecommunications and Information Administration (“NTIA”) could determine whether an “enforceable commitment” (an NTIA concept) exists where an Auction 904 or 903 winner has not yet deployed to a specified minimum percentage of its required locations and/or has not yet entered into contracts to obtain the equipment and/or labor necessary for substantial deployment. Finally, the Commission should condition any such adjustment or other relief upon a certification under penalty of perjury that neither the reverse auction “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 census blocks for which the reverse auction “winner” received relief. This condition is necessary to prevent entities from gaming the process by defaulting upon or otherwise declining to meet their Auction 904 or 903 deployment obligations in order to seek more lucrative BEAD and other federal and state grants to provide broadband to the same areas.

WTA notes that it is in significant agreement with the comments of the American Association for Public Broadband (“AAPB”), one of signatories to the February 28, 2024 letter. Specifically, WTA agrees with AAPB that the Commission can “craft relief that incentivizes [Rural Digital Opportunity Fund (“RDOF”)] and CAF Phase II awardees who cannot or will not build their networks to relinquish those awards and quickly.”<sup>1</sup> However, rather than establishing the precarious precedent of a default penalty waiver, the Commission can accomplish AAPB’s desired incentives and goal by use of the downward adjustment factors (*e.g.*, “good faith” or “voluntary disclosure”) and upward adjustment factors (*e.g.*, “substantial harm”) in Section 1.80(b)(11) of the Commission’s Rules to adjust default penalties and consequences that cannot and should not be waived or otherwise substantially or wholly eliminated.

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<sup>1</sup> Letter dated March 26, 2024 from Gigi Sohn, Executive Director, American Association for Public Broadband to Ms. Marlene Dortch, Secretary, AU Docket No. 20-34 and WC Docket Nos. 19-126 and 10-90, at p. 2.

WTA further agrees with AAPB that “any RDOF or CAF Phase II awardee that seeks to take advantage of any relief the Commission might offer should not then be eligible to apply for BEAD money for the same location.” *Id.* The Commission has the authority to condition any relief on the reverse auction “winner’s” pledge not to apply (or have an affiliate with 10% or greater common ownership apply) for BEAD funding for the same locations.

A waiver of the Commission’s default penalty rules constitutes a precarious precedent because its impact will not be confined solely to Auctions 903 and 904. 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 waivers of its default penalties 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, default penalty waivers and/or relaxation of other Auction 903 and 904 procedures and conditions not only will undermine the integrity of those auctions but also will hamper the ability of the Commission to conduct fair and equitable reverse auctions in the future.

Finally, WTA notes that the Coalition of RDOF Winners (“Coalition” whose identities remain undisclosed – at least publicly) continues to advance the specious claim that waiver relief will “protect” rather than undermine the integrity of the RDOF Auction. It once again claims that the impacts of COVID, new federal broadband funding programs and rampant inflation have resulted in massive, unprecedented and skyrocketing broadband construction costs that could not have been foreseen by RDOF auction participants.<sup>2</sup>

WTA has previously responded to the Coalition’s arguments. See WTA’s “Opposition to Emergency Petition of The Coalition of RDOF Winners,” AU Docket No. 20-34 and WC Docket Nos. 19-126 and 10-90 (dated August 30, 2023). Among other things, WTA has shown: (1) that potential inflation and supply chain bottlenecks constituted significant technical and marketplace factors that prospective RDOF bidders were required to investigate and evaluate as part of their due diligence obligation; (2) that the disruptions of the COVID-19 pandemic and quarantines were well known during the January to March 2020 period -- over seven months prior to the October 29 to November 25, 2020 RDOF auction; (3) that only a very small portion of BEAD and other Infrastructure Investment and Jobs Act (“IIJA”) broadband funding has been distributed to date and hence is unlikely to be causing the “skyrocketing” broadband construction costs alleged by

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<sup>2</sup> Letter dated March 22, 2024 from Philip J. Macres to Marlene H. Dortch, Secretary, AU Docket No. 20-34 and WC Docket Nos. 19-126 and 10-90, at pp. 2 and 5.

the Coalition; and (4) that it was certain participants electing recklessly to bid a very small fraction of the reserve prices determined by the CostQuest cost model, and not the reserve prices or the CostQuest cost model themselves, that were the actual cause of the alleged problems of which the Coalition complains.

### **Conclusion**

WTA continues to urge the Commission to consider alternatives such as the Section 1.80(b)(11) penalty adjustment factors or clarification of the “enforceable commitment” standard to clear the way for BEAD funding for locations that will not be served by those who won them in the RDOF and CAF Phase II reverse auctions. These alternatives are far preferable to waivers of default penalties or other post-auction changes in agreed-upon auction terms and conditions that will undercut and destroy the integrity of Auctions 903 and 904 and any future Universal Service Fund reverse auctions. Finally, as a condition of any default penalty adjustment or other relief, the recipient should be required to certify under penalty of perjury that neither it nor any 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 affected census blocks.

Respectfully submitted,  
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