

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

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

**INFORMAL REQUEST FOR COMMISSION ACTION**

*Ensuring RDOF Integrity Coalition*

February 25, 2021

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## EXECUTIVE SUMMARY

The Ensuring RDOF Integrity Coalition (“ERIC”) is deeply concerned that (1) certain winning bidders in the Rural Digital Opportunity Fund (“RDOF”) Auction, Auction 904, lack the technical and financial ability to meet their performance obligations and (2) the Commission lacks the ability to fully vet these bidders’ qualifications. In reviewing auction results, ERIC has determined that certain bidders have over-promised services based on presently unproven technologies, at unfeasibly low costs, to the deleterious effect of harming rural Americans who desperately need advanced broadband services.

In addition, the Commission did not take appropriate steps to ensure all parties had appropriate broadband mapping information heading into the Rural Digital Opportunity Fund Auction, Auction 904. As a result, certain Auction 904 bidders either did not receive an accurate picture of the service areas available for bidding, or erroneously bid on, and in some cases won bids for, unpopulated areas.

To ensure that rural Americans receive the quality of broadband service promised by the RDOF auction and under the timeframe promised by the auction, ERIC asks the Commission to in certain limited instances allow interested stakeholders the opportunity to review Auction 904 information under a Protective Order, and that the Commission allow for a process to correct winning bids based on erroneous broadband mapping data to prevent wasteful spending of critical broadband funds.

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**INFORMAL REQUEST FOR COMMISSION ACTION**

The Ensuring RDOF Integrity Coalition (“ERIC”), by its counsel and pursuant to Section 1.41 of the Federal Communications Commission’s (“FCC” or “Commission”) rules,<sup>1</sup> files this Informal Request for Commission Action (“Informal Request”) in connection with the Rural Digital Opportunity Fund (“RDOF”) Phase I auction (“Auction 904”).<sup>2</sup> ERIC is a coalition consisting of rural broadband providers who have a long history of providing telecommunications and broadband services to rural Americans and are members of NTCA – The Rural Broadband Association, WTA-Advocates of Rural Broadband, the Rural Wireless Association and/or the Competitive Carrier Association, as well as rural Americans and local government officials who are concerned that the FCC’s RDOF proceeding as presently constituted will not result in timely broadband service to rural America.

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<sup>1</sup> 47 CFR § 1.41.

<sup>2</sup> *Rural Digital Opportunity Fund Phase I Auction Scheduled for October 29, 2020, Notice and Filing Requirements and Other Procedures for Auction 904*, Public Notice, 35 FCC Rcd 6077 (2020) (*RDOF Procedures Public Notice*).

Based on a review of Auction 904 data made available by the Commission, and other red flags raised by members of Congress,<sup>3</sup> NTCA – The Rural Broadband Association,<sup>4</sup> National Rural Electric Cooperative Association,<sup>5</sup> the National Association of Regulatory Commissioners (“NARUC”),<sup>6</sup> CoBank,<sup>7</sup> and others in the communications industry,<sup>8</sup> ERIC has determined that certain winning bidders will not be able to provide the requisite broadband service with the support won at auction, and requests that the Commission not only thoroughly vet the technical and financial feasibility of each such winning bidder’s network design, but, consistent with Commission precedent, also make certain information submitted by such winning bidders in their long form applications available for review and comment by interested parties and stakeholders pursuant to a protective order. The need for this third party review and comment process arose from new facts and information that came to light after the quiet period ended on January 29, 2021. Moreover, inaccurate FCC mapping data raise concerns that Auction 904 bidders cannot be certain they will actually be serving *populated* rural areas as

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<sup>3</sup> Letter from Senators Amy Klobuchar and John Thune and Representatives James E. Clyburn and Tim Walberg et al. to Former Chairman Ajit Pai, FCC (Jan. 19, 2021) (“Bipartisan RDOF Letter from Congress to FCC”).

<sup>4</sup> *Rural Digital Opportunity Fund, Connect America Fund, Auction 904*, WC Docket No. 19-126, WC Docket No. 10-90, AU Docket No. 20-34, Ex Parte Letter (February 1, 2021); “Evaluating the Capabilities of Fixed Wireless Technology to Deliver Gigabit Performance in Rural Markets,” White Paper, Vantage Point (February 2021); “The Rural Digital Opportunity Fund: Rural America’s Broadband Hopes at Risk,” White Paper, NRECA and NRTC (February 1, 2021); *Rural Digital Opportunity Fund, Connect America Fund, Auction 904*, WC Docket No. 19-126, WC Docket No. 10-90, AU Docket No. 20-34, Ex Parte Letter (February 5, 2021); *Rural Digital Opportunity Fund, Auction 904*, WC Docket No. 19-126, AU Docket No. 20-34, Ex Parte Letter (February 8, 2021); “Starlink RDOF Assessment: Final Report,” Cartesian, Prepared for Fiber Broadband Association and NTCA – The Rural Broadband Association (February 8, 2021).

<sup>5</sup> Cite to NRCECA filing or joint filing

<sup>6</sup> [Resolution on the Federal Communications Commission’s Review of Rural Digital Opportunity Fund Auction Bidders Long Forms](#), National Association of Regulatory Utility Commissioners (February 11, 2021).

<sup>7</sup> [“RDOF Broadband Results Raise Concerns About Execution, Financial Risk,”](#) Jeff Johnston, Lead Economist, Communications, CoBank (January 2021).

<sup>8</sup> [“RDOF Analysis Reveals Surprises and Growing Controversy,”](#) Bernie Arnason, Telecompetitor (December 11, 2020); “Hill Pushes Back on RDOF; Opens Door to Long-Form Rejections,” Blair Levin, New Street (January 24, 2021); [“Rural Electric Co-ops Question Viability of Winning RDOF Bids, Worry RDOF May Have Opposite Effect of Intention,”](#) Joan Engebretson, Telecompetitor (February 4, 2021); “A Challenge to SpaceX Receiving RDOF Funding,” Blair Levin, New Street (February 21, 2021).

intended,<sup>9</sup> absent the Commission instituting a correction process for bids based on inaccurate mapping data.

## I. BACKGROUND

To ensure continued and rapid deployment of broadband service to unserved areas, the Commission in 2020 established the RDOF, committing up to \$20.4 billion over the next decade to support up to one gigabit speed broadband networks in rural America. The Commission adopted rules to allocate RDOF support through a multi-round, reverse, descending clock auction that would favor faster services with lower latency.<sup>10</sup> The Commission also “encourage[d] intermodal competition in order to ensure that the greatest possible number of Americans will be connected to the best possible networks, all at a competitive cost.”<sup>11</sup> RDOF funding was divided into two phases: (i) Phase I to target areas that current data (i.e., FCC Form 477 data) indicates are wholly unserved; and (ii) Phase II to target unserved locations within areas that data from the Commission’s new Digital Opportunity Data Collection demonstrates are only partially served, as well as any areas not won in Phase I.<sup>12</sup>

In February 2020, Commissioner (now Acting Chairwoman) Jessica Rosenworcel warned of the consequences of the Commission pushing ahead with Auction 904 without first acquiring better and more accurate broadband data:

But this Rural Digital Opportunity Fund looks more like publicity stunt than policy. That’s because we are spending billions of dollars without the facts we need. We have not done a single thing to fix our dubious broadband data or address our

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<sup>9</sup> See, e.g., Karl Bode, Motherboard – Tech by Vice, [America is Finally Fixing its Crappy Broadband Availability Maps](#) (stating “Government broadband data is provided by ISPs with a vested interest in downplaying obvious sector shortcomings.”); Cf., e.g., Press Release, Sen. Joe Manchin, Manchin: FCC Broadband Data Taskforce First Step in Fixing Incorrect Coverage Maps (Feb. 17, 2021), <https://www.manchin.senate.gov/newsroom/press-releases/manchin-fcc-broadband-data-task-force-first-step-in-fixing-incorrect-coverage-maps> (stating “incorrect broadband coverage maps . . . have hindered broadband expansion across West Virginia.”).

<sup>10</sup> *Rural Digital Opportunity Fund*, Report and Order, 35 FCC Rcd 686, 688, para. 5 (2020) (*RDOF Order*).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at para. 9.

inaccurate broadband maps. Those are the maps that have been panned by Congress, cabinet secretaries, and consumers. They're not accurate. Worse, for everyone who our maps erroneously suggest is served by broadband when they are not, moving ahead here means it could be ten years before this agency is able to offer any further assistance. For too many people in too many places like the ones I visited in West Virginia, New York, and New Mexico that means our digital divide will turn into a yawning chasm. This is not right. *To do this right, we need maps before money and data before deployment.*<sup>13</sup>

For Auction 904 for Phase I support, the Commission adopted the following performance tiers, latency measures, and bidding weights:

**Performance Tiers, Latency, and Weights**

<b>Minimum</b>	≥ 25/3 Mbps	≥ 250 GB or U.S. average, whichever is higher	50
<b>Baseline</b>	≥ 50/5 Mbps	≥ 250 GB or U.S. average, whichever is higher	35
<b>Above Baseline</b>	≥ 100/20 Mbps	≥ 2 TB	20
<b>Gigabit</b>	≥ 1 Gbps/500 Mbps	≥ 2 TB	0

<b>Low Latency</b>	≤ 100 ms	0
<b>High Latency</b>	≤ 750 ms & MOS ≥ 4	40

Though RDOF support is disbursed over a 10-year period, the Commission adopted a six-year window for a winning bidder to construct its supported network and meet interim performance benchmarks. Specifically, the Commission requires winning bidders to provide voice and broadband service to 40% of required locations by the end of year three, and then to an

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<sup>13</sup> *Comment Sought on Competitive Bidding Procedures and Certain Program Requirements for the Rural Digital Opportunity Fund Auction (Auction 904)*, Public Notice, 35 FCC Rcd 2295, 2390 (Commissioner Rosenworcel Statement).

additional 20% of required locations each year thereafter, reaching 100% of such locations by year six.

In its June 2020 Procedures Public Notice, the Commission subsequently determined that “the only applicants that can make a case to bid in the Gigabit performance tier are those applicants proposing to use a technology: (1) that has a proven track record of offering mass market voice and broadband services directly to residential consumers; and (2) where there are concrete examples of such technology being used to offer service at speeds that would meet the requirements for the higher speed tiers or at low latency.” Recognizing that satellite technology is unable to meet Gigabit performance specifications, the Commission categorically excluded any “applicant that intends to use any form of satellite technology, whether geostationary, high earth orbit, medium earth orbit, or low earth orbit” from selecting the Gigabit performance tier.<sup>14</sup> Recognizing that fixed wireless and DSL service may have difficulty meeting Gigabit performance specifications, the Commission afforded applicants proposing to use fixed wireless or DSL the opportunity to demonstrate in their short-form applications the extent to which they are “reasonably capable of offering service meeting the Gigabit performance tier public interest obligations” even if they have not previously reported offering Gigabit broadband service.<sup>15</sup>

Additionally, in furtherance of its goal to ensure that universal service support is awarded in an efficient and cost-effective manner and will not go toward overbuilding areas that already have service, the Commission limited RDOF area eligibility by excluding census blocks that had been identified as having been awarded funding through the U.S. Department of Agriculture’s ReConnect Program (“ReConnect”), or awarded funding through other similar federal or state broadband subsidy programs to provide 25/3 Mbps or better service.

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<sup>14</sup> *RDOF Procedures Public Notice*, 35 FCC Rcd at 2322, para. 99.

<sup>15</sup> *Id.* at para. 100.



## II. DISCUSSION

Because the Commission excluded only satellite providers from seeking RDOF support in the Gigabit performance tier, many winning bidders were wireless Internet service providers (“WISPs”) that placed bids committing themselves to building networks with speeds of  $\geq 1$  Gbps download / 500 Mbps upload using lower cost wireless technology and infrastructure, despite there being no concrete examples of such technology being used to offer Gigabit speed service. The following WISPs raise particular red flags about their ability to meet those commitments due to the number of locations and amount of funding won: LTD Broadband LLC, AMG Technology Investment Group dba Nextlink, Resound Networks, LLC, and Connect Everyone LLC. SpaceX is also of concern due to its promised delivery of Above Baseline (100/20 Mbps) broadband with low latency to locations in 35 states using unproven technology.<sup>16</sup> Charter Fiber Link (Charter), Time Warner Cable and Information Services (Time Warner) (collectively Spectrum) and Frontier Communications et al.<sup>17</sup> are also problematic due to extremely low bids in areas that extend well beyond their current operations that will be extremely difficult to serve for the amount of funds won for those locations. Given the broad geographic area covered by these highly ambitious buildout commitments and the precious broadband funding at stake, the Commission is taking a great risk by authorizing such funding, effectively gambling with much of rural America’s broadband future for the next 6-10 years.

While the WISPs are relying on unproven technology, both Frontier and Charter Fiberlink appear to have utilized a strategy that calls into question a true desire to build out gigabit broadband

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<sup>16</sup> See *Petition of Starlink Services, LLC for Designation as an Eligible Telecommunications Carrier*, WCDocket No. 09-197, Petition (February 3, 2021) (seeking ETC designation in Alabama, Connecticut, New Hampshire, New York, Tennessee, Virginia and West Virginia, where the FCC has primary jurisdiction and describing its network architecture as low Earth orbit satellite fleet).

<sup>17</sup> The Frontier Communications group of companies includes long-form applicants whose winning bids are tied to short-form applicants Frontier Communications Corporation, DIP and Frontier Communications Northwest, LLC.

speeds. Specifically, Frontier and Charter Fiberlink have bid and won areas, possibly with the intent to protect territory and hold competition at bay, perhaps viewing the payment of default penalties several years from now as a fair price to pay for warding off competition and keeping other providers from gaining access to funding to serve areas in need. Frontier poses the added concern of being in Chapter 11 bankruptcy bringing into question its financial viability to deliver on its commitments.<sup>18</sup> ERIC further notes that the list of winning bidders identified above may not be exhaustive. ERIC also has concerns regarding winning bidders that allegedly (1) placed low bids primarily to undercut competition and without regard to actual buildout costs, and/or (2) indicated to government officials their intent to default in the future. Sadly, for rural Americans living and working in these locations, without additional information capable of being provided by third parties with localized knowledge to assess the capability of these winning bidders to provide the requisite service at the costs agreed to, the FCC will be unable to confirm the inability of these bidders to meet their commitments until defaults occur in the future.<sup>19</sup>

In addition, the data for some “serviceable” locations made available for bidding in Auction 904 is proving to be inaccurate and there is newfound concern that RDOF support may be getting disbursed to winning bidders to provide service to locations that in fact may not be serviceable. Indeed, Hughes Network Systems, LLC (“Hughes”) has indicated to the

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<sup>18</sup> ERIC notes that Frontier is not expected to emerge from Chapter 11 bankruptcy until later this year. ERIC has concerns that Frontier may not be adequately positioned financially to take on its RDOF build out based on the amount won and the number of locations it is required to serve. See [Letter from Senator Shelley Moore Capito to Chairman Ajit Pai](#), FCC (December 9, 2020).

<sup>19</sup> Moreover, the realities of financing as well as the evaluation criteria established by the Commission mean that suspect applicants are unlikely to obtain the financing needed to meet their buildout and performance obligations. The FCC has stated that it “will rely on an eligible bank’s willingness to issue the applicant a letter of credit to determine whether an applicant is reasonably capable of meeting” its obligations. *RDOF Procedures Public Notice*, 35 FCC Rcd at 6098, para. 64. If banks are unable to view information concerning the technical and financial capability of these bidders, they are unlikely to be willing to extend the letters of credit necessary for the Commission to make a favorable assessment of an applicant’s qualifications.

Commission that “it may have inadvertently bid on [Census Block Groups (“CBGs”)] where publicly available data indicates that there are no visible structures or other signs of serviceable locations... [and] that other bidders may have been awarded CBGs with no serviceable locations in them.”<sup>20</sup> When it instituted a challenge process for the Digital Opportunity Data Collection (“DODC”), the Commission recognized that there is no substitute for first-hand verification of broadband service and availability claims, and it allowed a process to correct erroneous provider claims.<sup>21</sup> ERIC requests that the Commission allow a correction process in the instant context to ensure that it does not distribute funding to areas where there are no actual locations to serve (e.g, playgrounds, propane tanks, large hedges, parking lots, etc.).

Industry stakeholders and lawmakers have recognized these problems and are calling for immediate intervention along the lines of what ERIC is herein requesting. Indeed, a January 19, 2021 bipartisan letter from members of Congress to then-Chairman Ajit Pai urged the FCC to take the following actions: “As responsible stewards of USF funds, we ask that the FCC *redouble its efforts to review the long-form applications* that will now be submitted. We urge the FCC to validate 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 they plan to serve regardless of the technology they use. We also strongly encourage the FCC to make *as public as possible* the status of its review and consider opportunities for *public input on the applications*. Such transparency and accountability will be essential to ensure the success of this program and to minimize any opportunities for fraud or abuse” (emphasis added).<sup>22</sup>

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<sup>20</sup> Letter from Jennifer A. Manner, Senior Vice President, Regulatory Affairs, Hughes Network Systems, LLC to Marlene H. Dortch, Secretary, Federal Communications Commission, AU Docket No. 20-34; WC Docket Nos. 19-126, 10-90 (February 1, 2021).

<sup>21</sup> See generally, e.g., *Establishing the Digital Opportunity Data Collection*, WC Docket 19-195, Third Report and Order, FCC 21-20 (Jan. 19, 2021) (establishing a fixed and mobile challenge process for broadband availability data submitted by providers).

<sup>22</sup> See Bipartisan RDOF Letter from Congress to FCC.

As previously urged by NTCA – The Rural Broadband Association (“NTCA”), ERIC requests that the Commission: (1) adopt objective technical standards for review of certain long-form RDOF applications; (2) permit third-party review and comment on these applications subject to a protective order; and (3) publish the rationales for the agency’s final determinations with respect to each application.<sup>23</sup> The Commission should adopt a process making technical information submitted by certain winning bidders available for review by interested parties pursuant to a protective order. The Commission’s review would benefit from a “second set of eyes” by third-party engineers and other industry technical resources on issues relating to potential service delivery issues.<sup>24</sup>

Specifically, ERIC implores the Commission to heed the advice of Congress and industry stakeholders by taking early measures before a single RDOF dollar has been authorized. The Commission should immediately adopt a protective order mechanism consistent with Commission precedent that would permit the public and industry stakeholders to gain protected and limited access to technical and other confidential sections of certain RDOF winning bidder long-form applications and short-form applications. In particular, with respect to certain suspect long-form applicants and/or winning bidders identified herein as well as any additional entities hereinafter identified based on factual evidence that calls into question such entity’s qualifications,<sup>25</sup> ERIC requests access to (1) long-form application response information (including any applicable coverage maps) falling within the categories of technical information

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<sup>23</sup> See NTCA Ex Parte Letter to Acting Chairwoman Jessica Rosenworcel, FCC, AU Docket No. 20-34; WC Docket Nos. 19-126, 10-90 (February 5, 2021). An important distinction, however, is that while NTCA seeks a review process applicable to *all* winning bidders, ERIC’s request is far more limited.

<sup>24</sup> *Id.*

<sup>25</sup> At this time, such entities include LTD Broadband LLC, AMG Technology Investment Group dba Nextlink, Resound Networks, LLC, Connect Everyone LLC, SpaceX, Charter, Time Warner, and the Frontier Communications companies associated with Frontier Communications Corporation, DIP and Frontier Communications Northwest, LLC. Other suspect applicants and winning bidders may be further identified as the record develops.

that are outlined in the optional “Rural Development Opportunity Fund Auction 904 Long-Form Stage II Detailed Technical Submission Template” issued on January 13, 2021,<sup>26</sup> (2) the Project Funding Descriptions of long-form applications, and (3) short-form application information responsive to Appendix A of the RDOF Procedures Public Notice entitled “Auction 904 Short-Form Application Operational Questions.”<sup>27</sup> ERIC and its members would agree to any and all access restrictions deemed appropriate pursuant to Commission precedent, including restricting access to certain types of commercially sensitive and proprietary information to third-party consultants, engineers, and counsel. To the extent a winning bidder deems certain information highly confidential rather than confidential, a protective order for highly confidential information could also be utilized.

The Commission has well-established procedures across Commission bureaus and offices to permit third parties to access and analyze confidential and highly confidential information submitted by parties within a variety of proceedings involving technical, financial, and competitively sensitive network data.<sup>28</sup> Protective orders also have been issued and implemented routinely in conjunction with the Commission’s collection of financial and operations information from eligible telecommunications carriers—including via FCC Form 481. The Form

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<sup>26</sup> See Rural Development Opportunity Fund Auction 904 Long-Form Stage II Detailed Technical Submission Template.

<sup>27</sup> See RDOF Procedures Public Notice at Appendix A.

<sup>28</sup> See, e.g., *Establishing a 5G Fund for Rural America*, GN Docket No. 20-32, Protective Order, DA 20-474 (rel. May 1, 2020) (pertaining to the review of datasets containing non-public information that include (1) aggregated and anonymized county-level cell site data for nationwide providers AT&T, Verizon, Sprint, and T-Mobile, as derived from their Business Data Services Data Collection responses; and (2) anonymized subscriber counts of wireless telecommunications carriers derived from Number Resource Utilization Forecast reports). See also *AT&T CORP., AT&T SERVICES, INC., AND MCI COMMUNICATIONS SERVICES LLC, Complainant, v. WIDE VOICE, LLC, Defendant*, Proceeding Number 20-362, Bureau ID Number EB-20-MD-005, Protective Order, (rel. November 6, 2020); Applications of HDC Alpha, LLC; HDC Beta, LLC; HDC Gamma, LLC; HDC Delta, LLC; HDC Epsilon, LLC, For Interconnected Voice over Internet Protocol Number Authorization Pursuant to Section 52.15(g)(3) of the Commission’s Rules, WC Docket Nos. 19-313, 19-314, 19-315, 19-316, 19-317, Protective Order, DA 21-105 (rel. February 1, 2021); *Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services*, WC Docket No. 19-308, Protective Order, DA 20-180 (rel. February 20, 2021).

481 protective order restricts access to confidential information to persons not involved in competitive decision-making (e.g., outside consultants or counsel).<sup>29</sup> In the Eligible Locations Adjustment Process (“ELAP”) proceeding that followed the Connect America Fund Phase II reverse auction (“Auction 903”), the Wireline Competition Bureau (“Bureau”) adopted a similarly restrictive protective order limiting access to individuals not involved in competitive decision-making.<sup>30</sup> There, the Bureau concluded that adopting such procedures “will give stakeholders appropriate access to participant information while protecting competitively sensitive information from improper disclosure” and “that disclosure pursuant to the Protective Order thereby serves the public interest.”<sup>31</sup> A draft Protective Order is attached.

ERIC members would agree to comply with such restrictions in order to protect information that is confidential, highly confidential, proprietary and/or commercially sensitive. ERIC members also would agree to other restrictions to ensure the safeguarding of information while minimizing any delay in the processing of RDOF long-form applications.<sup>32</sup>

Such a process would not only enable the Commission to comply with its statutory universal service mandates, it would more importantly help the Commission identify many instances of fraud or misrepresentation underlying the Auction 904 bidding and take appropriate corrective measures. With such a process in place, the Commission could prevent valuable

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<sup>29</sup> See *Connect America Fund, ETC Annual Reports and Certifications*, WC Docket No. 10-90, WC Docket No. 14-58, Protective Order, DA 16-296 (rel. March 22, 2016). See also *Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing a Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform—Mobility Fund, ETC Annual Reports and Certifications*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10-208, WC Docket No. 14-58, Protective Order, DA 15-712 (rel. June 17, 2015).

<sup>30</sup> See *Connect America Fund*, Order, 34 FCC Rcd 10395, 10399, para. 9 (WCB 2019).

<sup>31</sup> *Id.* at 10413, para. 51.

<sup>32</sup> For example, such delays could be limited to a brief window allowing RDOF applicants to clearly stamp and label confidential materials or redacted materials, or a limited 60-day period for third-party review and comment.

federal broadband funding from being tied up for years, avoiding the need to wait Godot-like for a buildout that will never come to large areas of rural America. Without such a process in place, many RDOF-funded areas will most likely become ineligible for funding from other federal broadband programs such as ReConnect because the locations in those RDOF areas will appear to be getting service that in reality will never be deployed at the promised speeds. Yes, there are default penalties and enforcement actions that bad actors will face down the road, but these penalties come at the expense of many rural Americans who will still lack broadband coverage as their communities die.

It is unsurprising that WISPs are on record as opposing “changes in the standards and process for staff review” of long-form applications out of concern over delays in support authorization and incentivizing Auction 904 applicants to “nit-pick applications and file petitions and objections if only for the nuisance and hold-up value they would gain by delaying funding.”<sup>33</sup> However, the remedial actions sought here by ERIC are meant to be a scalpel and not a machete as they are based solely on new and discrete factual developments arising directly from Auction 904 itself. The overwhelming majority of Auction 904 winners whose performance tier commitments are predicated on realistic technology capabilities and reasonably fall within the scope of their intended buildout plans conveyed in their short-form applications should not be subject to processing delays. Only a narrow set of bidders whose winning bid commitments have raised reasonable suspicion (specifically, those winning bidders identified in this request and already raised on the record)<sup>34</sup> as determined ultimately by the Commission or Commission staff based on their review of the record should be subject to a more heavily scrutinized review

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<sup>33</sup> *Rural Digital Opportunity Fund*, AU Docket No. 20-34 and WC Docket Nos. 10-90 & 19-126, Ex Parte Communication of WISPA, 1 & 7 (February 22, 2021).

<sup>34</sup> See, e.g., [Letter from Senator Shelley Moore Capito to Chairman Ajit Pai](#), FCC (December 9, 2020) (raising concerns about the ability of Frontier Communications to meet its RDOF obligations as a gigabit tier provider).

process.<sup>35</sup> The process would be limited in scope so as to not cause delay to a much broader set of winning bidders. The process also would ensure through well-established protective order procedures the continued safeguarding of confidential information. Indeed, the risk of delayed support authorization to a small handful of RDOF applicants by a matter of weeks or months is greatly outweighed by the risk (and harm to the public) of RDOF winners possibly squandering valuable broadband funding that would only end up clawed back by the Commission following an eventual default after several years.

Acting Chairwoman Rosenworcel recently provided some assurance that the Commission is using “finely toothed combs and regulatory review right now to assess the financial capabilities of [Auction 904 winning initial bidders], the technical and engineering capabilities of those bidders, and the operational capabilities of those bidders. That is a process that is careful, because we want to make sure that if they are awarded these funds, they truly can deliver those services to the rural communities that stand to benefit.”<sup>36</sup> She further noted that the Commission “will, at the end of that process, assess how we proceed with the second phase.”<sup>37</sup> With RDOF Phase II and critical future federal broadband funds at stake, now is the time for the FCC to adopt transparent processes to ensure the maximally efficient and cost-effective awarding and use of RDOF support and allow those who live and work in these rural communities to come forward and work hand in hand with the FCC to provide an additional layer of scrutiny to the information filed in the long form applications – all subject to a protective order.

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<sup>35</sup> As noted above, it is possible that additional suspect entities could be identified as the record continues to develop.

<sup>36</sup> “[Acting FCC chair on next steps for tech liability shield review, net neutrality](#),” Casey Egan, S&P Global (February 17, 2021).

<sup>37</sup> Communications Daily, Meeting Notebook, (February 18, 2021).



### III. CONCLUSION

RDOF is off to an inauspicious start with the almost immediate appearance of questionable bid commitments and questionable location data. By letting the chips fall where they may, the FCC stands to watch the slow motion collapse of RDOF in the form of one default after another over several years. Not only would this render Americans in many rural areas unserved, but it also may rob these rural Americans of the opportunity to benefit from alternate broadband funding. To help steer clear of this worst-case scenario, the Commission should promote transparency for RDOF by adopting its familiar mechanism of a protective order regime to allow third parties the opportunity to review and comment on RDOF applications. Failing to do so will harm many rural Americans and prevent other forms of federal, local and state funding from being accessible to providers to serve these rural areas. In addition, the FCC must ensure that funding does not go to unserviceable locations such as parking lots, playgrounds, shrubbery, rusted-out propane tanks and the like.

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Dated: February 25, 2021

**Draft Protective Order**

**Before the  
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**PROTECTIVE ORDER**

**Adopted:** []

**Released:** []

By the Chiefs, Office of Economics and Analytics and Wireline Competition Bureau:

1. The Office of Economics and Analytics and Wireline Competition Bureau (Bureaus) hereby adopt a Protective Order governing access to technical and financial information filed by certain FCC Form 183 short-form applicants and/or FCC Form 683 long-form applicants in the Rural Digital Opportunity Fund (RDOF) Phase I auction (Auction 904) pursuant to Section 54.804 of the Commission’s rules,<sup>1</sup> as identified herein. The RDOF Auction 904 applicants include [list of applicants whose information is subject to this Protective Order].

2. In this Protective Order, we set forth procedures to (i) limit access to proprietary or confidential information filed in this proceeding, and (ii) more strictly limit access to certain particularly competitively sensitive information, which, if released to competitors or those with whom the Submitting Party or a Third-Party Interest Holder does business, would allow those persons to gain a significant competitive advantage or an advantage in negotiations. While we are mindful of the sensitive nature of some of the information involved, we are also mindful of the general right of the public, and our desire for the public, to participate in this proceeding in a meaningful way. We find that allowing limited access to competitively sensitive materials pursuant to the procedures set forth in this Protective Order allows the public (through appropriate representatives) to do so while also protecting competitively sensitive information from improper disclosure and use. Accordingly, sensibly balancing the public and private interests involved, we conclude that these procedures serve the public interest and adopting them “best conduce[s] to the proper dispatch of the Commission’s business and to the ends of justice.”<sup>2</sup>

3. *Definitions.* As used herein, capitalized terms not otherwise defined in this Protective Order shall have the following meanings:

“Acknowledgment” means the Acknowledgment of Confidentiality attached as Appendix A hereto.

“Competitive Decision-Making” means a person’s activities, association, or relationship with any

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<sup>1</sup> 47 C.F.R. § 54.804.

<sup>2</sup> 47 U.S.C. § 154(j).

of his clients involving advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of the client in competition with or in a business relationship with the Submitting Party or with a Third-Party Interest Holder.

“Confidential Information” means information that is required to be filed with an FCC Form 183 or FCC Form 683 application pursuant to Section 54.804 of the Commission’s rules, 47 C.F.R. § 54.804; that is not otherwise available from publicly available sources; that the Submitting Party has kept strictly confidential and that is subject to protection under FOIA and the Commission’s implementing rules.

“Counsel” means In-House Counsel and Outside Counsel of Record.

“Document” means any written, recorded, electronically stored, or graphic material, whether produced or created by the Submitting Party or another person.

“In-House Counsel” means an attorney employed by a Participant in these proceedings or employed by an affiliated entity and who is actively engaged in the conduct of these proceedings, provided that such attorney is not involved in Competitive Decision-Making. In this regard, an In-House Counsel’s employer is considered his or her client.

“Outside Counsel of Record” or “Outside Counsel” means the attorney(s), firm(s) of attorneys, or sole practitioner(s), as the case may be, retained by a Participant in these proceedings, provided that such attorneys are not involved in Competitive Decision-Making. The term “Outside Counsel of Record” includes any attorney employed by a non-commercial Participant in these proceedings, provided that such attorney is not involved in Competitive Decision-Making.

“Outside Consultant” means a consultant or expert retained for the purpose of assisting Outside Counsel or a Participant in these proceedings, provided that such consultant or expert is not involved in Competitive Decision-Making. The term “Outside Consultant” includes any consultant or expert employed by a non-commercial Participant in these proceedings, provided that such consultant or expert is not involved in Competitive Decision-Making.

“Outside Firm” means a firm, whether organized as a partnership, limited partnership, limited liability partnership, limited liability company, corporation or otherwise, of Outside Counsel or Outside Consultants.

“Participant” means a person or entity that has filed, or has a good faith intention to file, material comments in these proceedings.

“Redacted Confidential Document” means a copy of a Stamped/Confidential Document where the Confidential Information has been redacted.

“Reviewing Party” means a person who has obtained access to Confidential Information (including Stamped/Confidential Documents) pursuant to paragraphs 7 or 11 of this Protective Order.

“Stamped/Confidential Document” means any information submitted as part of FCC Form 183 or FCC Form 683, including any attachments, or any part thereof, that contains Confidential Information and that may bear the legend (or which otherwise shall have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) “CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER BEFORE THE FEDERAL COMMUNICATIONS COMMISSION,” unless the Commission determines, *sua sponte* or by request pursuant to paragraph 4 of this Protective Order or sections 0.459 or 0.461 of its rules,<sup>3</sup> that any such document is not entitled to confidential treatment. By designating a document a “Stamped/Confidential Document,” a Submitting Party signifies and represents

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<sup>3</sup> 47 C.F.R. §§ 0.459, 0.461.

that it contains Confidential Information.

“Submitting Party” means a person or entity who submits a Stamped/Confidential Document.

“Support Personnel” means employees of a Reviewing Party’s Outside Firm and third-party contractors and employees of third-party contractors who are assisting in these proceedings, provided such persons are involved solely in performing clerical or ministerial functions with regard to documents and information connected with these proceedings, including performing one or more aspects of organizing, filing, coding, converting, storing, or retrieving documents or data or designing programs for handling data connected with these proceedings.

“Third-Party Interest Holder” means a person who is not a Submitting Party who has a confidentiality interest in Confidential Information that is submitted under this Protective Order.

4. *Challenge to Designation.* Any person wishing to challenge the designation of a document, portion of a document or information as confidential must file such a challenge at the Commission and serve it on the Submitting Party and any known Third-Party Interest Holders. The Submitting Party and any Third-Party Interest Holders must file any reply within five business days, and include a justification for treating the information as Confidential. The documents and information challenged will continue to be accorded confidential treatment until the Commission acts on the request and any timely motion for a judicial stay has been acted upon.<sup>4</sup> Any decision on whether the materials should be accorded confidential treatment does not constitute a resolution of the merits concerning whether such information would be released publicly by the Commission upon an appropriate request under our rules implementing FOIA.<sup>5</sup>

5. *Submission of Stamped/Confidential Documents.* A Submitting Party shall ensure that each page of the Stamped/Confidential Document shall be stamped “CONFIDENTIAL INFORMATION — SUBJECT TO PROTECTIVE ORDER BEFORE THE FEDERAL COMMUNICATIONS COMMISSION.” Redacted versions of Stamped/Confidential Documents must be stamped “REDACTED – FOR PUBLIC INSPECTION.” To the extent that any page of the filing contains both Confidential Information and non-confidential information, only the Confidential Information may be redacted and the page of the unredacted filing shall clearly distinguish between the Confidential Information and the non-confidential information.

6. *Copying Sensitive Documents.* If, in the reasonable judgment of the Submitting Party, a Confidential Document contains information so sensitive that copying of it should be restricted, the Submitting Party may mark the document with the legend “Additional Copying Restricted.” Each Outside Firm shall receive only one copy of the document and no more than two additional copies, in any form, shall be made. Application for relief from this restriction against further copying may be made to the Commission, with notice to Counsel of Record for the Submitting Party, which will be granted only for cause.

7. *Procedure for Obtaining Access to Confidential Information.* Any person other than Support Personnel seeking access to Confidential Information subject to this Protective Order shall sign and date the Acknowledgment agreeing to be bound by the terms and conditions of this Protective Order, and file the Acknowledgment with the Commission. A copy of the Acknowledgment also shall be delivered to the relevant Submitting Party through its Counsel of Record and any known Third-Party Interest Holders through counsel so that it is received at least five business days prior to such person’s reviewing or having access to the Submitting Party’s Confidential Information. Where there are multiple Submitting Parties or Third-Party Interest Holders, a copy of the Acknowledgment must be served on each within the time period stated above.

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<sup>4</sup> Cf. 47 C.F.R. §§ 0.459(g), 0.461(i).

<sup>5</sup> See 47 C.F.R. §§ 0.459(h), 0.461.

8. *Procedure for Objecting to the Disclosure of Confidential Information to a Potential Reviewing Party.* Each Submitting Party and Third-Party Interest Holder shall have an opportunity to object to the disclosure of its Confidential Information or to a person seeking to review that information pursuant to this Protective Order. A Submitting Party or Third-Party Interest Holder must file any such objection at the Commission and serve it on counsel for the person seeking access within three business days after receiving a copy of that person's Acknowledgment. Persons filing Acknowledgments shall not have access to Confidential Information before the period for filing objections has passed, unless both the Submitting Party and any known Third-Party Interest Holders waive this requirement. If a Submitting Party files additional documents containing Confidential Information, the Submitting Party shall notify any known Third-Party Interest Holders who have a confidentiality interest in the information before filing the additional documents. The Submitting Party shall file any objection to the disclosure of that additional Confidential Information to any Reviewing Party before or contemporaneous with the filing, and any Third-Party Interest Holder shall file such any objection as promptly as practicable. Until any timely objection is resolved by the Commission in favor of the person seeking access and, if a motion for a judicial stay is timely filed, until such a motion is acted upon, a person subject to an objection shall not have access to the relevant Confidential Information.<sup>6</sup> If an objection is not timely filed with the Commission, the Commission will nonetheless consider the objection and retains its discretion to prohibit further access to Confidential by the Reviewing Party until the objection is resolved.

9. *Review of Stamped/Confidential Documents.* A Submitting Party shall make available for review the Stamped/Confidential Documents of such party at the offices of the party's Outside Counsel of Record. Subject to the provisions of paragraph 6, a Reviewing Party shall be provided the following alternatives: (1) a Reviewing Party shall be provided adequate opportunity to inspect the documents on site; (2) a Reviewing Party may inspect the documents on site with the ability to request copies, at cost, of some or all of the documents; or (3) a Reviewing Party may request a complete set of the documents at cost, allowing two business days after the request is made for receipt of the copies. If a Reviewing Party plans on requesting a complete set of documents, it is encouraged to make such a request at the time it submits the Acknowledgment to allow it the opportunity to begin reviewing the documents at the end of the five-day period referred to in paragraph 7. All copies of documents that are removed from the Submitting Party's office must be returned or destroyed in accordance with the terms of paragraph 20.

10. *Use of Confidential Information.* Persons obtaining access to Confidential Information under this Protective Order shall use the information solely for the preparation and conduct of these proceedings before the Commission and any subsequent judicial proceeding arising directly from these proceedings and, except as provided herein, shall not use such documents or information for any other purpose, including without limitation business, governmental, or commercial purposes, or in any other administrative, regulatory or judicial proceedings. Should the Commission rely upon or otherwise make reference to any Confidential Information in its orders in these proceedings, it will do so by redacting any Confidential Information from the public version of the order and by making the unredacted version of the order available only to a court and to those persons entitled to access to Confidential Information under this Protective Order, as appropriate.

11. *Permissible Disclosure.* A Reviewing Party may discuss and share the contents of Confidential Information with another Reviewing Party, with Support Personnel, as appropriate, and with the Commission and its staff. A Submitting Party's Confidential Information may be disclosed to employees and Counsel of the Submitting Party, and a Third-Party Interest Holder's Confidential Information may be disclosed to employees and Counsel of the Third-Party Interest Holder.

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<sup>6</sup> An objection ordinarily will first be ruled upon by the Bureau. If the Bureau rejects the objection, the objecting party will be provided 10 business days to file an Application for Review with the Commission; if an Application for Review is not filed within that time, the Confidential Information shall be made available to the Reviewing Party. If an Application for Review is timely filed and is denied by the Commission, the objecting party will be provided 10 business days to seek a judicial stay of the Commission's Order; if a motion for stay is not filed within that time, the Confidential Information shall be made available to the Reviewing Party.

12. *Filings with the Commission.* A party making a filing in these proceedings that contains Confidential Information shall submit to the Secretary's Office one copy of the filing containing the Confidential Information (the "Confidential Filing") and an accompanying cover letter. The cover or first page of the Confidential Filing and each page of the Confidential Filing that contains or discloses only Confidential Information shall be clearly marked "CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER BEFORE THE FEDERAL COMMUNICATIONS COMMISSION." The accompanying cover letter shall also contain the appropriate legend. The Confidential Filing shall be made under seal, and will not be placed in the Commission's public file. The party shall submit a copy of the filing in redacted form, *i.e.*, containing no Confidential Information (the "Redacted Confidential Filing") to the Commission via ECFS.<sup>7</sup> The Redacted Confidential Filing and the accompanying cover letter shall be Stamped "REDACTED – FOR PUBLIC INSPECTION." The cover letter accompanying the Redacted Confidential Filing shall state that the party is filing a redacted version of the filing. Each Redacted Confidential Filing shall have the same pagination as the Confidential Filing from which it is derived. To the extent that any page of the Confidential Filing contains any Confidential Information, only the Confidential Information may be redacted and the page of the unredacted Confidential Filing shall clearly distinguish among the Confidential Information and the non-confidential information.

13. *Non-Disclosure of Confidential Information.* Except with the prior written consent of the Submitting Party or as provided under this Protective Order, Confidential Information shall not be disclosed further.

14. *Protection of Stamped/Confidential Documents.* A Reviewing Party shall have the obligation to ensure that access to Confidential Information (including Stamped/Confidential Documents) is strictly limited as prescribed in this Protective Order. A Reviewing Party shall have the further obligation to ensure that Confidential Information is used only as provided in this Protective Order.

15. *Requests for Additional Disclosure.* If any person requests disclosure of Confidential Information outside the terms of this Protective Order, such a request will be treated in accordance with sections 0.442 and 0.461 of the Commission's rules.

16. *Client Consultation.* Nothing in this Protective Order shall prevent or otherwise restrict Counsel from rendering advice to their clients relating to the conduct of these proceedings and any subsequent judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of Confidential Information to which they have access under this Protective Order; *provided, however*, that in rendering such advice and otherwise communicating with such clients, Counsel shall not disclose Confidential Information.

17. *No Waiver of Confidentiality.* Disclosure of Confidential Information as provided herein by any person shall not be deemed a waiver by any Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing this material, agree: (1) not to assert any such waiver; (2) not to use Confidential Information to seek disclosure in any other proceeding; and (3) that accidental disclosure of Confidential Information by a Submitting Party to a Reviewing Party shall not be deemed a waiver of any privilege or entitlement provided that the Submitting Party takes prompt remedial action.

18. *Subpoena by Courts, Departments, or Agencies.* If a court, or a federal or state department or agency issues a subpoena for or orders the production of Stamped/Confidential Documents or Confidential Information that a party has obtained under the terms of this Protective Order, such party shall promptly notify each relevant Submitting Party and each known Third-Party Interest Holder of the pendency of such subpoena or order. Consistent with the independent authority of any court, department or agency, such notification must be accomplished such that each Submitting Party and Third-Party Interest Holder has sufficient opportunity to oppose such production prior to the production or disclosure

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<sup>7</sup> If a party is not able to submit a copy of the Redacted Confidential Filing via ECFS, it must file two copies of the Redacted Confidential Filing with the Secretary's Office along with the appropriately stamped cover letter, as described in this paragraph.

of any Stamped/Confidential Document or Confidential Information.

19. *Violations of the Protective Order.* Should a Reviewing Party violate any of the terms of this Protective Order, such Reviewing Party shall immediately convey that fact to the Commission and to the relevant Submitting Parties and known Third-Party Interest Holders. Further, should such violation consist of improper disclosure of Confidential Information, the violating person shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of Counsel or Consultants from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party or any Third-Party Interest Holder at law or in equity against any person using Confidential Information in a manner not authorized by this Protective Order.

20. *Termination of Proceeding.* The provisions of this Protective Order shall not terminate at the conclusion of these proceedings. Within two weeks after conclusion of the last of these proceedings and any administrative or judicial review, Reviewing Parties shall destroy or return to the Submitting Party Stamped/Confidential Documents and all copies of the same. No material whatsoever containing or derived from Confidential Information may be retained by any person having access thereto, except Outside Counsel and Outside Consultants may retain, under the continuing strictures of this Protective Order, two copies of pleadings (one of which may be in electronic format) prepared in whole or in part by that party that contain Confidential Information, and one copy of orders issued by the Commission or Bureau that contain Confidential Information. All Reviewing Parties shall certify compliance with these terms and shall deliver such certification to Counsel for the Submitting Party and file such certification with the Commission not more than three weeks after conclusion of the last of these proceedings. Such certification shall be made pursuant to 28 U.S.C. section 1746 and is subject to 18 U.S.C. section 1001. The provisions of this paragraph regarding retention of Stamped/Confidential Documents and copies of the same and Confidential Information shall not be construed to apply to the Commission or its staff.

21. *Questions.* Questions concerning this Protective Order should be addressed to [].

22. *Authority.* This Order is issued pursuant to Sections 1, 2, 4(j), 5, 10, 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, 403, 405, and 503 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151, 152, 154(j), 155, 160, 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, 403, 405, 503, 1302, Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and authority delegated under Sections 0.271 and 0.291 of the Commission's rules, 47 CFR § 0.271, 0.291, and is effective upon its adoption.

## FEDERAL COMMUNICATIONS COMMISSION

Giulia McHenry  
Chief, Office of Economics and Analytics

Kris Monteith  
Chief, Wireline Competition Bureau

**APPENDIX A**

**Acknowledgment of Confidentiality**

**AU Docket No. 20-34, WC Docket Nos. 19-126 & WC Docket No. 10-90**

I hereby acknowledge that I have received and read a copy of the foregoing Protective Order in the above-captioned proceeding, and I understand it.

I agree that I am bound by the Protective Order and that I shall not disclose or use Stamped/Confidential Documents or Confidential Information except as allowed by the Protective Order.

I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission (Commission). I further acknowledge that the Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of Counsel or Consultants from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding.

I acknowledge that nothing in the Protective Order limits any other rights and remedies available to a Submitting Party at law or in equity against me if I use Confidential Information in a manner not authorized by this Protective Order.

I certify that I am not involved in Competitive Decision-Making.

Without limiting the foregoing, to the extent that I have any employment, affiliation, or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or advocacy organization), I acknowledge specifically that my access to any information obtained as a result of the Protective Order is due solely to my capacity as Counsel or Outside Consultant to a party or as an employee of Counsel, Outside Consultant, or Outside Firm, and I agree that I will not use such information in any other capacity.

I acknowledge that it is my obligation to ensure that Stamped/Confidential Documents are not duplicated except as specifically permitted by the terms of the Protective Order and to ensure that there is no disclosure of Confidential Information in my possession, in the possession of those who work for me or in the possession of other Support Personnel, except as provided in the Protective Order.

I certify that I have verified that there are in place procedures at my firm or office to prevent unauthorized disclosure of Confidential Information.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Protective Order.

Executed this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

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[Name]  
[Position]  
[Firm]  
[Telephone]  
[Party]